

**THE RHETORIC OF RECONCILIATION:
EVIDENCE AND JUDICIAL SUBJECTIVITY IN
*CUBILLO v COMMONWEALTH***

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SUMMARY OF THESIS

In August 2000, Justice O'Loughlin of the Federal Court of Australia handed down the decision in *Cubillo v Commonwealth* in which Lorna Cubillo and Peter Gunner took action against the Commonwealth Government, arguing that it was vicariously liable for their removal from their families and communities as children and subsequent detentions in the Northern Territory during the 1940s and 1950s. The case is the landmark decision in relation to legal action taken by members of the Stolen Generations.

Using the decision in *Cubillo* as a key site of contestation, my thesis provides a critique of legal positivism as the dominant jurisprudential discourse operating within the Anglo-Australian legal system. I argue that the function of legal positivism as the principal paradigm and source of authority for the decision serves to ensure that the debate concerning reconciliation in Australia operates rhetorically to maintain whiteness at the centre of political and discursive power. Specifically concerned with the performative function of legal discourse, the thesis is an interrogation of the interface of law and language, of rhetoric, and the semiotics of legal discourse.

The dominant theory of evidence law is a rationalist and empiricist epistemology in which oral testimony and documentary evidence are regarded as mediating the relationship between proof and truth. I argue that by attributing primacy to principles of rationality, objectivity and narrative coherence, and by privileging that which is visually represented, the decision serves an ideological purpose which diminishes the significance of race in the construction of knowledge.

Legal positivism identifies the knowing subject and the object of knowledge as discrete entities. However, I argue that in *Cubillo*, Justice O'Loughlin inscribes himself into the text of the judgment and in doing so, reveals the way in which textual and corporeal specificities undermine the pretence of objective judgment and therefore the source of judicial authority.

STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis for any other degree or diploma.

No other person's work has been used without due acknowledgment in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

The interviews reported in this thesis were approved by the La Trobe University Human Ethics Committee.

Signature:

Date:

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I am a non-Indigenous white Australian. I first pay my respects to the traditional owners and custodians of the land on which this research was formally conducted, the Wurundjeri people of the Kulin Nations.

This thesis has been written over a period of nearly six years and during that time many people have helped sustain me—intellectually, emotionally and materially. Professor Margaret Thornton provided expert supervision, intellectual stimulation, mentoring and just the right balance of discipline and encouragement. When I reflect on the times, particularly at the beginning, when I felt uncertain about navigating the theoretical terrain, I now realise that her subtle steering served me well. It has been a tumultuous time in what was, when I began my candidature, the School of Law and Legal Studies, and I am immensely grateful that she remained there, at least until I finished!

I must also thank the individuals with whom I conducted interviews, particularly the two litigants in the case, Lorna Cubillo, who so generously trusted me with her memories, and Kwementyay Gunner, who sadly passed away in April 2005. He was a man of courage and dignity, whose struggle, along with Lorna, in seeking justice for members of the Stolen Generations has been of great significance in Australia's history. I also thank Professor Ann McGrath and Dr John Morton, who were both expert witnesses, and Koulla Roussos, solicitor at the Stolen Generations Litigation Unit throughout the trial. I am indebted to Sharon Payne, Director of the North Australian Aboriginal Legal Aid Service in Darwin for facilitating my access to the enormous archive of court documents, and for providing space and office resources. I am very grateful also to Louise Anderson at the Federal Court for facilitating my access to the transcript of trial and Kay van Brederode at the Darwin registry of the court for providing me with a copy of the exhibit contained in Appendix 2.

I have been sustained intellectually by members of the student group of the Institute of Postcolonial Studies over a number of years and particularly thank Claire Loughlin, Juliet Rogers, Sandra Rudland and Anna Szorenyi for theoretical engagement over wine and pizza. I also thank members of the Postgraduate Association of Law and Legal Studies at La Trobe University for collegiality, particularly at a time when conducting theoretically informed research in the discipline of law appears to be diminishing. I have found my regular attendance at conferences organised by the Australian Critical Race

and Whiteness Studies Association and the Law and Literature Association of Australia to always be encouraging and inspiring. I am very grateful to the Victorian Law Reform Commission for providing me with extended leave from my position in order to work on the thesis full-time for two years. It was during this time that I was able to do the bulk of the writing.

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CHAPTER 1

READING LAW: CRITICAL INTERDISCIPLINARITY IN THE STUDY OF TEXTS AND CONTEXTS

...I think that the developments in 'critical legal studies' ... are today ... among the most fertile and the most necessary. They respond ... to the most radical programs of a deconstruction that would like, in order to be consistent with itself, not to remain enclosed in purely speculative, theoretical, academic discourses but rather ... to aspire to something more consequential, to change ... things and to intervene in an efficient and responsible, though always, of course, very mediated way, not only in the profession but in what one calls the cité, the polis and more generally the world.¹

INTRODUCTION

On 11 August 2000, Justice Maurice O'Loughlin of the Federal Court of Australia handed down the decision in the case of *Lorna Cubillo and Peter Gunner v The Commonwealth of Australia*,² in which Mrs Lorna Cubillo and Mr Peter Gunner took civil action against the Commonwealth Government, arguing that it was vicariously liable for their removals from their families and communities as children and their subsequent detentions, respectively, in the Retta Dixon Home and St Mary's Hostel in the Northern Territory during the 1940s and 1950s. The case is the landmark decision in relation to legal action taken by members of the Stolen Generations³ and is one of only three claims heard to date by courts in Australia.⁴ The failure of Cubillo and Gunner's claim at

¹ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, New York, 1992) 3–67, 8–9.

² *Cubillo v Commonwealth* [2000] FCA 1084 (Action Nos 14 and 21 of 1996), 174 ALR 97 (hereafter *Cubillo*). Throughout this thesis, I have chosen to use a medium neutral citation style; all references to the *Cubillo* decision are to paragraphs numbers. The decision is available in electronic form from the Australasian Legal Information Institute (AustLII) <www.austlii.edu.au>.

³ Throughout the thesis, I have used the term 'Stolen Generations' to refer to the thousands of Indigenous Australians who have been forcibly removed from their families, community, culture and country over two centuries of colonial occupation. I have chosen to capitalise the term, as a 'proper noun', as do some other writers, in recognition of its collective historical significance. Similarly, as a number of people have pointed out, the removal of children over multiple generations, and the intergenerational ramifications of unknown racial identity necessitate the use of the plural form. This first published use of this term is attributed to historian, Peter Read, *The Stolen Generation: The Removal of Aboriginal Children in New South Wales 1883–1969* (New South Wales, Ministry of Aboriginal Affairs, Occasional Paper No. 1, 1982).

⁴ The only other two cases are the High Court of Australia decision in *Alec Kruger & Ors v The Commonwealth of Australia*; *George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 190 CLR 1 (discussed in Chapter 2) and the decision in *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86; [2000] Aust Torts Reports P81-578, 64,136 (see Chapter 2, note 197 for further details). All claims to date have been unsuccessful. Another claim is being pursued by Bruce Trevorrow against the

trial, and subsequent appeals, has established a precedent which effectively precludes the possibility of any further claims being made by members of the Stolen Generations against the Commonwealth.

The proceedings in the trial of *Cubillo* extended over three years, with 109 days of hearings held across five states.⁵ Over 50 witnesses gave evidence and estimates of the total costs range from \$15–20 million.⁶ Justice O’Loughlin’s decision is nearly 500 pages long; it is poorly structured, difficult to navigate and at times inconsistent. As with a limited number of other Federal Court cases considered to be of particular community interest, a summary of the judgment was broadcast on national television on 11 August 2000. An unsuccessful appeal to the Full Bench of the Federal Court was heard in 2001 and in the following year an application for special leave to appeal to the High Court was also refused.⁷

There were four causes of action: wrongful imprisonment and deprivation of liberty, breach of fiduciary duty, breach of statutory duty and breach of duty of care.⁸ Cubillo and Gunner claimed that the Commonwealth was vicariously liable for ‘the acts and omissions of its employees and officers’. They argued that there was ‘a chain of command flowing from the Minister in Canberra through the Administrator of the Northern Territory to the Director of Native Affairs and later to the Director of Welfare’ under the legislative regime in force at the time of their removals, namely the *Aboriginals Ordinance 1918* (NT) and the *Welfare Ordinance 1953* (NT), which resulted in the Commonwealth controlling the administration of Aboriginal affairs in the Northern Territory.⁹ Cubillo and Gunner claimed damages for loss of cultural and other aspects of Aboriginal life, in addition to loss of rights under the *Aboriginal Land Rights (Northern*

State of South Australia. A series of actions have been heard in the Supreme Court of South Australia concerning the plaintiff’s right to access documents which the respondent has argued are subject to legal professional privilege and public interest immunity. Most recently, the Full Court of the Supreme Court of South Australia upheld the trial judge’s decision that the documents to be tendered in an action against the State of South Australia by Bruce Trevorrow are not subject to confidentiality: *Trevorrow v State of South Australia* (No 4) [2006] SASC 42 (16 February 2006).

⁵ The trial commenced on 3 August 1998 and final submissions were concluded on 31 March 2000. Hearings were conducted in Perth, Townsville, Darwin, Tennant Creek, Melbourne and Adelaide.

⁶ This estimate is cited by counsel for the applicants: John T Rush QC, ‘Righting the Wrong: Achieving reparations for the Stolen Generations’ (December 2002) 27(6) *Alternative Law Journal* 257–61.

⁷ *Cubillo v The Commonwealth* [2001] FCA 1213 (31 August 2001) (Sackville, Weinberg and Hely JJ); High Court Application for Special Leave to Appeal, 3 May 2002.

⁸ While the action taken by Cubillo and Gunner differed somewhat as a result of different legislative provisions being in force, specifically the application of the *Welfare Ordinance 1953* in respect of Gunner, O’Loughlin considered it appropriate to join the actions and to consider the causes of action simultaneously in his judgment: para 1076.

⁹ *Cubillo* para 1083.

Territory) Act 1976 (Cth). They also claimed exemplary and aggravated damages as a result of the Commonwealth's 'conscious and contumelious disregard for' and 'wanton cruel and reckless indifference to' their welfare and rights.¹⁰

The Commonwealth denied liability, arguing that the removals of Lorna Cubillo and Peter Gunner were performed within the law, under provisions of the *Aboriginals Ordinance 1918* (NT) and the *Welfare Ordinance 1953* (NT). It argued that the Ordinances were a constitutional exercise of power and that 'there is no basis in law for a court to go behind those ordinances'¹¹ The Commonwealth also maintained that the laws did allow for the removal of children from their parents, but that this could be performed within the law, and was a welfare measure.¹²

Cubillo and Gunner acknowledged that the Director had the power of removal but argued that the relevant Directors had not acted in their interests as children and therefore that their removals and detentions constituted wrongful imprisonment and deprivation of liberty. They argued that during this time, the Commonwealth implemented a general policy of forcible removal of 'part-Aboriginal' children from their families, without regard to the welfare or individual circumstances of the children. The Commonwealth denied that it had, or had implemented a general policy of removal and also denied that the Director had applied or acted pursuant to any such policy.

Justice O'Loughlin found that the Commonwealth was not vicariously liable on the grounds that section 6 of the *Aboriginals Ordinance 1918* (NT) gave the Director of Native Affairs the power to undertake the care, custody and control of a 'part-Aboriginal' child if, in the Director's opinion, it was necessary or desirable, in the interests of the child, and that section 17 of the *Welfare Ordinance 1953* (NT) gave the Director of Welfare the power to take a 'ward' into custody and to order that he or she be removed to and kept within a reserve or institution. This finding of an absence of vicarious liability was subsequently applied in detail to each of the four causes of action.

Justice O'Loughlin held that there was neither enough evidence to support a finding of a general policy of removal of 'part-Aboriginal' children, and that 'if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a

¹⁰ See Appendix 1 for a summary of the case, including a more detailed account of the causes of action brought under the claim.

¹¹ Transcript, Opening address for the respondent, 1 March 1999, p 194.

¹² Ibid 198.

finding that it was ever implemented as a matter of course in respect of these applicants.¹³ He found that there was a *prima facie* case of wrongful imprisonment of Lorna Cubillo, but that the Commonwealth was not liable because the burden of proof had not been satisfied, highlighting the incompleteness of the history and the lack of documentary evidence. In the case of Peter Gunner, however, O’Loughlin found that there were several pieces of documentary evidence which ‘pointed strongly to the Director, through his officers, having given close consideration to the welfare of the young Peter’.¹⁴ In particular, O’Loughlin identified a form of consent with the purported thumbprint of his mother, Topsy Kundrilba, which he interpreted as a request that Peter be removed to St Mary’s Hostel.

The decision in *Cubillo* relies on an interpretation of the legislative provisions in force at the time giving the Director the power to undertake the care, custody or control of ‘part-Aboriginal’ children as having been based on benevolent intention and ‘benignly applied in the best interests of the child’.¹⁵ It draws on the previous High Court decision in *Kruger v Commonwealth*,¹⁶ where the *Aboriginals Ordinance 1918* (NT) was viewed as ‘serving a welfare purpose’,¹⁷ ‘to assist survival rather than destruction’, despite the finding by Justice Gummow that judged by current standards, this ‘now may appear entirely outmoded and unacceptable’.¹⁸

In *Cubillo*, O’Loughlin concluded that the actions of those responsible for removing Gunner and Cubillo were based on a ‘form of paternalism’¹⁹ which would not be accepted today, that many people would regard them as ‘badly misguided politicians and bureaucrats’, and that ‘subsequent events have shown that they were wrong’.²⁰ However he said that he was not prepared to ‘impute improper motives to the Commonwealth’.²¹ O’Loughlin accepted that the applicants had been removed and that they had suffered psychiatric illnesses as a result of their removals and detention, in addition to physical and sexual assault, but determined that they had failed to prove ‘actionable negligence’ on the part of any of the servants of the Commonwealth, concluding that ‘[i]t was the

¹³ *Cubillo* para 1160.

¹⁴ *Cubillo*, Summary of Reasons for Judgment, para 11.

¹⁵ *Cubillo* para 166.

¹⁶ *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 190 CLR 1 (hereafter *Kruger*).

¹⁷ *Cubillo* para 97, citing *Kruger*, at pages 76 and 85 (Toohey J).

¹⁸ *Cubillo* para 98, citing *Kruger*, at pages 158 (Gummow J).

¹⁹ *Cubillo* para 1561.

²⁰ *Cubillo* para 1562.

²¹ *Cubillo* para 1557.

removal and detention as distinct from the manner of the removal and the manner of the detention that were the causes of the injuries that each of them suffered'.²²

John Rush QC, who appeared for the applicants in the trial, argues that 'the critical factor in the loss of each applicant's claim was the statute of limitations.'²³ He said that while each of the applicants met the threshold test, the discretion to extend time was not exercised in their favour and that the reason given by O'Loughlin was that the effluxion of time had so prejudiced the defence of the Commonwealth that it could not obtain a fair trial. Rush said that there was a positive finding of fact in relation to much of the applicants' claims, but that the 'fundamental basis for the defeat of the applicants' claims was the statute of limitations.'²⁴ Similarly, Jennifer Clarke argues that the case 'turns, perhaps more than anything, on the "overwhelming prejudice" to the Commonwealth of claims being brought more than 30 years out of time when relevant records have disappeared and witnesses have died.'²⁵

In this thesis, I provide a textual analysis of the decision and transcript of trial in *Cubillo v The Commonwealth*, focusing specifically on the treatment of evidence and testimony and on the construction of judicial subjectivity. Using the decision as an example of a key site of contestation, my argument centres on a critique of legal positivism as the dominant jurisprudential discourse operating within the Anglo-Australian legal system. Legal positivism is a philosophy which asserts that law is a system of pre-existing rules and conventions which are derived from observable facts and other empirical sources—an autonomous phenomenon, exclusive of other areas of knowledge. Fundamental to the perspective of legal positivism is the belief that the social validity of a law must be strictly separated from questions of ethics and morality.²⁶ As critics have pointed out, such attempts to separate law from other areas of social activity serves an ideological purpose, to sustain law's normative power and bolster its resistance to critique and challenge.²⁷

²² *Cubillo* para 1563.

²³ John T Rush QC, 'Righting the Wrong: Achieving reparations for the Stolen Generations', (December 2002) 27(6) *Alternative Law Journal* 257, 260.

²⁴ *Ibid.*

²⁵ Jennifer Clarke, 'Case Note: *Cubillo v Commonwealth*', (2001) 25 *Melbourne University Law Review* 218, 225.

²⁶ That in order to be a valid law, a rule must be derived from a fact is sometimes referred to as the 'pedigree thesis' and that law must be separate to questions of morality is sometimes referred to as the 'separability thesis'.

²⁷ See, for example, Valerie Kerruish, *Jurisprudence as Ideology* (Routledge, London, 1991).

I will argue that in *Cubillo* the function of legal positivism as the principal paradigm and source of authority serves to ensure that the debate concerning reconciliation in Australia operates rhetorically to maintain whiteness at the centre of political and discursive power. Specifically concerned with the performative function of legal discourse, my work attempts to uncover and reveal the manifold and subtle ways in which whiteness, as racial inscription, circulates and functions as hegemonic power, as an ‘organising grammar’²⁸ and as a privileged signifier. It is an interrogation of the interface of law and language, of rhetoric, and the semiotics of legal-juridico discourse. While an interest in the development of critical legal theory as a fruitful and interdisciplinary approach is emerging—albeit at the margins of scholarship—there has been limited scholarly attention to the use of these interdisciplinary approaches in critiques of evidence law.²⁹ The question of judicial subjectivity, the constitution of the embodiment of law—a seemingly ripe area for analysis—has similarly received minimal attention to date.³⁰

In Chapter 2, I will examine the discursive context, both social and legal, in which the *Cubillo* decision was brought down—a discourse which I refer to as the rhetoric of reconciliation. I argue that the decision displays complicity with a form of ‘postcolonial amnesia’, a will-to-forget the colonial past, and reveals an ambivalent and contradictory rhetoric.³¹ Drawing on a range of critical theoretical frameworks, I argue that reconciliation, as a rhetorical construction, is characterised by the trope of absence, of willed forgetting and silence. In the decision in *Cubillo*, Justice O’Loughlin cites the precedent of *Kruger* in place of the purported evidentiary void. In *Kruger*, a majority of High Court judges drew on the concept of ‘the best interests of the child’ to find the question of genocide ‘unnecessary to answer’. I argue that by invoking the common law,

²⁸ Gillian Whitlock, ‘In the Second Person: Narrative Transactions in Stolen Generations Testimony’, (Winter 2001) 24(1) *Biography* 197, 199.

²⁹ See, however, the work of Piyel Haldar, ‘The Evidencer’s Eye: Representations of Truth in the Laws of Evidence’, (1991) II(2) *Law and Critique* 171; ‘The Return of the Evidencer’s Eye: Rhetoric and the Visual Technologies of Proof’ (1999) 8(1) *Griffith Law Review* 86. The principal interrogations of evidence theory using an interdisciplinary and critical approach have been conducted by feminists: see, for example, Kathy Mack, ‘Gender and Race in the Evidence Policy: An Australian Perspective on Feminism, Race and Evidence’ (1999) 28 *Southwestern University Law Review* 367 and Aviva Orenstein, ‘“My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule’ (1997) 85 *California Law Review* 159; ‘Gender and Race in the Evidence Policy: Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where you would Least Expect It’ (1999) 28 *Southwestern University Law Review* 221.

³⁰ In Australia, Sandra Berns has made a critical intervention in this area in *To Speak as a Judge: Difference, Voice and Power* (Ashgate Dartmouth, Aldershot, 1999).

³¹ I will draw here on the work of Leela Ghandi, *Postcolonial Theory: A Critical Introduction* (Allen & Unwin, St Leonards, NSW, 1998) and Homi Bhabha, ‘The Other Question: Stereotype, discrimination and the discourse of colonialism’, *The Location of Culture* (Routledge, London, 1994).

these decisions demonstrate the law's rhetorical power to write not only law, but also history; in effect to authorise legal and historical amnesia.

Oral testimony is seen to provide access to the truth through the eyewitness observation, recollection and narration by witnesses to events which occurred in the past. Historically, oral testimony shares a legacy with the study of rhetoric and the art of persuasion, and may therefore be associated with the humanities. However, the overriding dominance of the 'rationalist tradition of evidence scholarship'³² pervading legal positivism has resulted in preoccupation with the verifiability of testimony, the principle of adversarialism, and recourse to rules governing legal procedure as avenues for the pursuit of truth. It is an empirical model of knowledge which assumes the existence of objective, observable facts, separate from subjective locations. In Chapter 3, I will critique this paradigm of oral testimony through an interrogation of key sites of testimony given by Lorna Cubillo and other witnesses in support of her claim. I will argue that by attributing primacy to principles of rationality, objectivity and narrative coherence, the decision serves to efface other forms of knowledge, such as affectivity. It fails to take account of the specificities of subjectivity and serves an ideological purpose which diminishes the significance of race and gender in the construction of knowledge.

In Chapter 4, I develop my argument in relation to oral evidence, drawing on a theorisation of the testimonial form known as *testimonio*.³³ To testify is an illocutionary speech act, the performance of which has the power to interpellate subjects within discourse and ideology.³⁴ I argue that an examination of Cubillo's testimonial account of her memory of being named a 'half-caste' by the law reveals the function of whiteness as a signifying system and the power of language to violently inaugurate racialised subjectivity. The truth of Cubillo's testimony lies not in her ability to provide an objective account of events which occurred over 50 years ago, but rather, in her authority to tell the story, in its representationality, and in her embodied survival as the narrator.

Another fruitful site for an interrogation of the epistemological effects of oral testimony can be found in an examination of the role of expert witnesses, particularly those

³² William Twining, *Rethinking Evidence: Exploratory Essays* (Basil Blackwell, London, 1990) 4.

³³ John Beverley provides a key account of *testimonio* in *Testimonio: On the Politics of Truth* (University of Minnesota Press, Minneapolis, 2004).

³⁴ I will draw here on the work of Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, Stanford, 1997).

emanating from the humanities and social sciences, such as history and anthropology. Despite the fact that approaches to evidence in law and history are closely connected, in cases where the historical archive is perceived to be lacking, historians are finding the law unreceptive to their discipline's interpretative accounts. In Chapter 5, I examine the court's reception of the evidence of the historian and anthropologists as expert witnesses in *Cubillo*. I argue that while the evidence of anthropologists has generally been accepted by the law, because its empirical methodology readily fits the paradigm for expert evidence, courts have displayed a level of 'jurisprudential ambivalence'³⁵ towards history, largely because it regards interpretation of the past as an area in which it is already well versed. Critiques of anthropology have highlighted the way the discipline contributes to the construction of 'Aboriginality' itself, particularly the distinction made between 'traditional' and 'non-traditional' and I will examine the presence of this discourse within the *Cubillo* decision.

In law, documentary evidence functions to verify the facts to be proven in a trial as a result of its observable, material status. In *Cubillo*, O'Loughlin repeatedly highlighted the overriding difficulties the case presented due to the 'incompleteness' of the history and the lack of documentary evidence. Despite the fact that over 2000 pages of archival documents were tendered by the applicants, he determined that this evidence did not support a finding that there was a general policy of forcible removal of 'part Aboriginal' children from their families. In Chapter 6, I interrogate the reception of this evidence, arguing that O'Loughlin's interpretative strategy is imbued with the logic, or 'jurisgenesis',³⁶ of assimilation. Rather than acknowledging the specifically racist basis to the policies which facilitated the removal of Indigenous³⁷ children, O'Loughlin's interpretation of this evidence inscribes it with the discourse of humanitarian benevolence, thus assimilating the contested historical rhetoric of Indigenous/white relations.

³⁵ I have derived this term from Ann Curthoys and Ann Genovese, 'Evidence and Narrative: History and Law' in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, Canberra, 2003).

³⁶ This theorisation was developed by Robert Cover; see 'Nomos and Narrative' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (The University of Michigan Press, Ann Arbor, 1993).

³⁷ I am aware that the use of the term 'Indigenous' fails to reflect the multiple and diverse national identities of the Aboriginal peoples of Australia, tending to convey the sense of pan-Indigeneity, and that as a descriptive term it is a product of the binary discursive structures of colonialism. However, as there does not appear to be an alternative term, I will use the term 'Indigenous' in reference to individual people and 'Indigenous peoples' when discussing diverse national groups. I have capitalised the term in an attempt to convey the specificity of its meaning to the indigenous peoples of Australia.

While O'Loughlin determined that there was no documentary evidence specifically relevant to the claim of Lorna Cubillo, in relation to Peter Gunner, he found that there were a number of documents concerning his removal—in particular, a form of consent with the purported thumbprint of his mother, Topsy Kundrilba, which O'Loughlin read as a request that Gunner be removed to St Mary's Hostel. In Chapter 7, I provide a deconstructive reading of the form of consent, raising a series of questions in relation to the document and its reception by the court. Drawing on a semiotic framework, I investigate the significance of the concepts of intention and iterability to the interpretation of the document.³⁸ I argue that the thumbprint cannot be read as a signature; it does not function as a sign of individualised identity, but rather signifies membership of an illiterate group and the lack of nominal status. Justice O'Loughlin's interpretation of the form of consent as evidence of Kundrilba's intention fails to take account of the contingency of meaning and of the significance of context in the reading of texts.

Legal positivism identifies the knowing subject and the object of knowledge as discrete entities, serving to erase the question of judicial subjectivity. However, I will argue that in *Cubillo*, Justice O'Loughlin inscribes himself into the text of the judgment and in so doing, reveals the way in which textual and corporeal specificities undermine the pretence of objective judgment and therefore the source of judicial authority. In Chapter 8, I develop a theorisation of judicial subjectivity, drawing on the performative force of law within the 'juridical field'.³⁹ It is the power 'to speak as a judge'⁴⁰ which functions as the mechanism for the interpellation of subjects, including the judicial subject. I will argue that in *Cubillo*, the rationale used in the decision locates law *in the place of* the absent white father, acting *in loco parentis*, thus replicating the logic of colonialism.

THE METHODOLOGY OF CRITICAL THEORY

I see the research and investigation represented by this thesis as part of the burgeoning field of critical legal theory which seeks to interrogate the relationship between law and other discourses of knowledge. Law has somewhat belatedly come under investigation from critical and philosophic inquiry. Perhaps not surprisingly, given its 'solipsistic state

³⁸ I will draw here on the work of Jacques Derrida, 'Signature Event Context' (trans with additional notes Alan Bass) *Margins of Philosophy* (The University of Chicago Press, Chicago, 1982).

³⁹ As developed by Pierre Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal* 805.

⁴⁰ Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate Dartmouth, Aldershot, 1999).

of training',⁴¹ it has managed until relatively recently to remain immune to the significant interrogations conducted by critical philosophic theory in other fields. As Pheng Cheah et al suggest, this may well be because the 'epistemological and ontological frameworks of legal knowledge largely remain structured around obsolete forms of philosophical understandings, particularly that of rationalist positivism which dogmatically assumes that the methods of legal reasoning are unquestionable because the law is a function of enlightened reason.'⁴² The dominant conceptualisation of law, in the form of legal positivism, is a product of post-enlightenment philosophic modernism in which subjects are regarded as unified, sovereign, autonomous, self-determining and rational beings. Within this paradigm, law is based on a set of abstract rational principles which function across time and are regarded as characterising absolute and universal truth. I believe that contemporary critical theory, including that which draws on postmodernism, poststructuralist literary theory, deconstruction and psychoanalysis, is able to challenge this rationalist positivism and critique law's status as *nomos*. Within these approaches, law is regarded as discursive, imbued with manifestations of power and subjectivity, and meaning is heterogeneous and produced with attention to context and contingency.

I have come to think of my work as a form of critical hermeneutics, motivated by a feminist-inspired challenge to investigate the function of whiteness, characterised by deconstructive readings, drawing on the postmodern, poststructuralist, postcolonial canon of theory, located in critical legal theory and associated with the law and literature movement. In this thesis, I draw on a range of contemporary critical theoretical frameworks as I find them useful to the task at hand. I do not propose to provide a comprehensive or indebted account of the work of any individual theorist, nor do I profess to have a thorough knowledge of any discrete body of work. I do not limit myself to postmodern frameworks but also draw on sociological and Marxist-inspired theories, and assert the importance of historical specificity and the social, political and economic situatedness of discursive regimes. I draw on a range of frameworks, perhaps somewhat eclectically, as I see fit, when they appear usefully to provide theoretical tools which facilitate the questioning, interrogation and revelation of the law's constructed nature. I do, however, take as my starting point, both politically and theoretically, the position of feminist, in that I believe the type of questioning and challenging which

⁴¹ David Fraser, Pheng Cheah and Judith Grbich (eds), 'Introduction', *Thinking Through the Body of the Law* (Allen & Unwin, St Leonards, NSW, 1996) xi.

⁴² Ibid.

feminist activists and theorists engage in, in all our diversity, provide the most effective critiques of constructions of knowledge, universal truth claims and the operation of power, through attention to the particular function of gender. However, as will be discussed further below, it is the critique of white western feminism's race blindness, that is, our own process of legitimating knowledge, which served as a catalyst for my interest in investigating the construction and function of whiteness.

Postmodern approaches commonly involve questioning the assumptions inherent to disciplinary premises and are characterised, in particular, by attention to 'discourse, interpretation and linguistic undecidability'⁴³ and to questions of subjectivity. My research shares these particular preoccupations and I believe that postmodern thinking is useful because, as Margaret Davies explains, it is 'about meaning, power, and the relation of individuals to systems, but also because it is about boundaries, limits, insides and outsides.'⁴⁴ As Davies elaborates, feminist approaches share with postmodernism interest in the relationship between power and truth, in critiques of dominant modes of western thought, be they patriarchy and/or logocentricity, and in constructions of essentialised subjectivities.⁴⁵ Psychoanalysis also offers significant methodological tools in analyses of subjectivity and there appears currently to be a burgeoning interest in the deployment of the work of Jacques Lacan in critical legal theory, particularly at the intersection of law and literature.⁴⁶

CRITICAL INTERDISCIPLINARITY

Like much contemporary work in critical theory, my methodology is distinctly interdisciplinary, located in legal studies, but drawing on linguistics, literary and cultural theory, history, philosophy and sociology. Interdisciplinarity has been characteristic of contemporary critical theory since at least the 1970s, when the 'blurring' of the disciplinary boundaries⁴⁷ as a result of the loss of faith in metanarratives⁴⁸ threw into

⁴³ Ibid xvi.

⁴⁴ Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Lawbook Company, Pymont, NSW, 2nd ed, 2002a) 296.

⁴⁵ Ibid 252–6.

⁴⁶ See, for example, David Caudill, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory* (Humanities Press, New Jersey, 1997). The 12th International Conference of the Law & Literature Association of Australia, 'Traumas of Law', held at the Socio-Legal Research Centre, Griffith University, Brisbane, 9–11 July 2004, provided a forum in which psychoanalysis and legal theory were explored in many papers and included keynote addresses by Renata Salecl, David Carlson and Jeanne Schroeder, legal scholars who draw substantially on Lacanian theory.

⁴⁷ This expression is attributed to Clifford Geertz, 'Blurred Genres: The Refiguration of Social Thought', (1980) 49(2) *American Scholar* 165.

question traditionally discipline-specific methodological approaches. I believe that interdisciplinarity is essential in challenging the positivist and rationalist premises of law because it acts as a counter to the assertion that law should be distinguished from other fields of knowledge. Much of the important work conducted in the form of interdisciplinarity with law—initially conceptualised as the field of socio-legal studies—has highlighted the political, social and historical contexts which define law’s operations and revealed the interconnectedness of disciplines of knowledge. Law’s attempt to police the boundaries of its truth claims in the name of maintaining integrity of the field is seriously contested by much of the critical theoretical work conducted in this area, and in the resistance within the academy to critical and interdisciplinary approaches.⁴⁹

Interdisciplinarity has become an increasingly important methodological approach in both the humanities and social sciences in contexts where law and history interface in the courtroom. In Australia, this has been particularly focussed around claims by Indigenous peoples in land rights and native title, disputes over issues of cultural heritage, and in claims for compensation by victims of child removal policies. The relationships between proof, truth, memory, history, narrative, and law and legal processes are receiving some long-overdue critical attention both within the academy and in legal and juridical arenas.⁵⁰

Some of the most contentious issues in these debates revolve around the concept, nature and status of ‘truth’ in different disciplines and subject to different theoretical approaches. In law, truth about events which happened in the past must be demonstrated with regard to another contentious notion, namely ‘proof’, and together

⁴⁸ Perhaps the first influential work to challenge discipline specific knowledge bases was Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, Minneapolis, 1984).

⁴⁹ When I made the decision to pursue postgraduate study, I specifically chose to enrol at the School of Law and Legal Studies at La Trobe University—which necessitated my moving interstate—because of its well-known reputation as the home of socio-legal and critical legal studies in Australia. Within a year of beginning my studies, the school underwent a radical change in direction towards a more conventional positivist legal education, resulting in the departure of the majority of the feminist and critical legal scholars. This also meant that the majority of postgraduate students engaging in critical theoretical studies transferred to other institutions. Fortunately, for me at least, my supervisor, one of the leading feminist socio-legal scholars in Australia, remained in the school.

⁵⁰ For example, in 2003, a conference organised by the Australian Academy of the Humanities focussed on the different ways in which lawyers, historians, anthropologists and literary scholars engage with the concepts of evidence, proof and truth and the issues facing humanists as expert witnesses: Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, Canberra, 2003). The significance of these issues to the tasks of lawyers and judges was discussed by Justice Michael Kirby of the High Court of Australia, with specific reference to this conference, in his annual speech, together with Dr Lowitja O’Donoghue, as patrons of the Institute of Postcolonial Studies, entitled ‘Other Sources, Other Traditions’, North Melbourne, 30 April 2004.

they are regarded as the basis of the all-important concept of ‘knowledge’. In this way, law presumes to maintain its veil of objectivity, rationality and impartiality, from which it is seen to derive authority. However in other disciplines, such as history, questions of objectivity have been destabilised through the impact of theoretical developments during the twentieth century, including Marxism, feminism, poststructuralism, postmodernism and postcolonialism, which have ‘emphasised the role of interpretation, point of view, language and narrative, in arriving at judgements about what happened in the past’⁵¹ and have generated a profound interest in historiography. If developments in the legal academy and in the courts in Australia are indicative, law, on the other hand, appears to be moving further towards a positivist, black-letter enterprise. Law’s seemingly intransigent attachment to its self-image as fixed and immutable is frequently evinced, ironically, in the common law, precisely where one might hold out most hope for its capacity to change.

If, however, as Ian Duncanson suggests, we acknowledge that ‘law may be “made” whenever subjects navigate the contingencies of the social order’,⁵²—that law is not conceived exclusively by lawyers—then a form of multidisciplinary emerges. This approach provides a methodology for interrogating legal discourse as a plurality of meanings and subjectivities, ‘as a series of narratives which explain themselves and the events which they narrate in terms of yet other narratives’.⁵³ As Duncanson points out, such an approach allows for ‘the possibility of re-examining the discipline’s truths from different sites of knowing’.⁵⁴ It is *critical* interdisciplinarity—that which ‘signifies a new way of knowing’⁵⁵—which I am interested in exploring.

FEMINIST THEORY AS EPISTEMOLOGICAL CRITIQUE

Feminist theory has made some of the most important insights into the critique of conventional approaches to disciplinarity. Feminist theoretical approaches are commonly interdisciplinary, drawing attention to the way in which patriarchal and

⁵¹ Ann Curthoys and Ann Genovese, ‘Evidence and Narrative: History and Law’ in McCalman and McGrath (eds), *ibid.*

⁵² Ian Duncanson, ‘Degrees of Law: Interdisciplinarity in the Law Discipline’ (1996) 5 *Griffith Law Review* 77, 80. See also Ian Duncanson, ‘Writing and Praxis: Law, History and the Postcolonial’ (2003) 7 *Law Text Culture* 9 for a discussion of ‘strategic interdisciplinarity’ as a way of dissolving the rigidities in the discipline of law and the usefulness of postmodern feminist and postcolonial theory as a liberating study of law.

⁵³ Duncanson (1996) 78.

⁵⁴ *Ibid* 81.

⁵⁵ Julie Thompson Klein, *Interdisciplinarity: History, Theory, and Practice* (Wayne State University Press, Detroit, 1990) 96.

masculinist ideology is perpetrated and highlighting the consistency with which values associated with the masculine are privileged across disciplines. Critical feminist scholarship often involves the production of new and subjugated knowledges through interrogations of, interventions in and challenges to the orthodoxy of traditional disciplines, and may actually be unassimilable by them.⁵⁶ According to Davies, feminist critiques of legal discourse offer a challenge to the basic structure of law, ‘to the substantive law, to the ordering concepts of the law, ... to the liberal ideology of the law, as well as its conceptual self-image’.⁵⁷

Feminist interrogations of epistemology have often been concerned with the way knowledge has been linked to quests for (objective) truth, or truth effects, where knowledge is regarded as that which is institutionally and disciplinarily validated. Feminist critiques, of different persuasions, have highlighted how truth claims are premised on the construction of a masculine speaking subject and rely on forms of reasoning which privilege characteristics associated with the masculine, such as rationality, objectivity and neutrality. Concomitantly, feminist theorisations work to reveal the connections between the valorisation of such forms of knowledge and the operations of power, particularly in its gendered formations. Much of this work has accentuated how women are associated with the other side of the binary construction to that of reason and objectivity—namely emotion, subjectivity and irrationality.

As Genevieve Lloyd has demonstrated, constructions of reason in western thought are gendered. In a landmark feminist analysis, Lloyd traces, within the western philosophic tradition, the symbolic association of conceptualisations of rationality and masculinity.⁵⁸ However, constructions of knowledge are also racialised. Critiques of feminism’s failure to acknowledge and account for racial difference, its ‘white solipsism’,⁵⁹ have drawn attention to the way feminist critiques of western epistemology which reflect white, western and largely Eurocentric cultural values, without acknowledgment or self-reflection. Aileen Moreton-Robinson, for example, has provided an interrogation of

⁵⁶ Marjorie Pryse, ‘Critical Interdisciplinarity, Women’s Studies, and Cross Cultural Insight’, (Spring 1998) 10(1) *NWSA Journal* 1, 3.

⁵⁷ Davies (2002a) 203.

⁵⁸ Genevieve Lloyd, *The Man of Reason: ‘Male’ and ‘Female’ in Western Philosophy* (Routledge, London, 2nd ed, 1993).

⁵⁹ This term was used by Adrienne Rich in ‘Disloyal to Civilisation: Feminism, Racism, Gynophobia’, *On Lies, Secrets and Silence: Selected Prose 1966–1978* (W W Norton & Company, New York, 1979) 299 and is discussed by Aileen Moreton-Robinson, *Talkin’ Up To the White Woman: Indigenous Women and Feminism* (University of Queensland Press, St Lucia, Qld, 2000) xix, 42, 70–1.

white Australian feminism as it is taught in the academy,⁶⁰ pointing to how it is premised on a white middle-class woman subject, where whiteness remains the ‘invisible omnipresent norm’.⁶¹ Her research indicates that white women academics have themselves appropriated the subject position ‘rational knower’, while at the same time perpetuating the invisibility of their white race.⁶² In many ways, I feel that Moreton-Robinson’s critique identifies the most imperative challenge facing those of us who identify as feminists in Australia today and exposure to her work served as a catalyst for my interest in investigating the function of whiteness in my own research.

My intention in this thesis is to draw on the insights of Moreton-Robinson and others⁶³ into the function of hegemonic whiteness in a critique of truth claims within law. In particular, I have focussed on evidence law, arguing that it functions as an epistemology where whiteness is a signifying practice. Given the importance of subjectivity to epistemological claims in western theory, not the least of which is represented in law, I also attempt to interrogate the construction of the white masculine judicial subject as that which is seen to speak the truth.

In an article concerned specifically with methodology in legal research, Davies affirms the importance of the claim that the attitude of the *critical* researcher (as opposed to the traditional researcher) ‘lies in the conviction that the theorist-researcher is no mere observer or discoverer of knowledge, but is herself embedded in the social, historical, political context in which knowledge is formed.’⁶⁴ She argues that the question of research methodology cannot be separated from who we are, that methods are necessarily plural and that the critical scholar, rather than falling into the false dichotomy of inside or outside the tradition, is better defined as working on the margins, ‘neither inside nor outside’, with a focus on ‘frontiers and their uncertainties’.⁶⁵ The importance, she claims, of critical theory is its capacity to be reflective about the positions of subjects in the construction of knowledge, arguing that it is this *self-*

⁶⁰ Moreton-Robinson (2000) *ibid*, especially Chapter 5.

⁶¹ *Ibid* xix.

⁶² Aileen Moreton-Robinson, ‘Troubling Business: Difference and Whiteness Within Feminism’ (2000) 15(33) *Australian Feminist Studies* 343.

⁶³ Another text which was instrumental in my decision to investigate the function of whiteness in Australia is Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Pluto Press, Annandale, NSW, 1998).

⁶⁴ Margaret Davies, ‘Ethics and Methodology in Legal Theory: A (personal) research anti-manifesto’ (2002b) 6 *Law Text Culture* 7, 7. Davies attributes this point to Max Horkheimer, ‘Traditional and Critical Theory’, *Critical Theory: Selected Essays* (Continuum, New York, 1968).

⁶⁵ *Ibid* 16. Geopolitical metaphors appear to infuse discussions of interdisciplinarity.

reflection in theoretical work which defines it as a form of critical *politics*. The importance of positioning the subject of research within the frame is an important methodological insight of feminist approaches. In line with Davies argument, I will now attempt to trace the trajectory of my research methodology by identifying the range of personal, political and theoretical influences on my work.

DISQUIETUDE TO DISQUISITION

The motivation for my research emerged out of a sense of disquiet about the reconciliation movement and an ambivalent relationship to its rhetoric. I had been living out of Australia during the early 1990s; I was away when the *Mabo* decision⁶⁶ was brought down, when Keating made his Redfern Park speech,⁶⁷ when the Council for Aboriginal Reconciliation was established and when reconciliation groups began to proliferate across the country. I returned after a few years to a significantly more conservative political landscape. Prior to leaving Australia, I had been a political activist and had worked in a number of feminist and left-wing community-based organisations, struggles and campaigns. I remember while living overseas hearing about the High Court decision in *Mabo*, but was not really aware of its political or legal implications. I did, however, know that some saw it as a key moment in the history of Australia's race relations. Whilst scepticism was commonly regarded as the most appropriate *modus operandi* of the political activist, there was a degree of optimism, particularly among people who had worked in association with the struggle for land rights.

When I returned to Australia the reconciliation movement appeared to provide a context for the urgently needed 'conversation' between Indigenous and non-Indigenous Australians, yet I increasingly became uncomfortable and disconcerted with its rhetoric. While it was attracting significant support and was increasingly being represented by the media as the shorthand descriptor for all Indigenous 'issues', there was very little interrogation of the concept of 'reconciliation'—the question of who was expected to reconcile to or with what. The debate concerning reconciliation appeared to be being driven principally by white Australians and was being constructed as the key to a

⁶⁶ *Mabo and Others v The State of Queensland No. 2* (1992) 175 CLR 1 (hereafter *Mabo*).

⁶⁷ The text of then Prime Minister Paul Keating's speech is reproduced in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (Black Inc, Melbourne, 2000) 60–4. It is considered a landmark political speech, delivered on 10 December 1992, in the wake of the *Mabo* decision. Keating delivered the speech at the launch of the celebration of the 1993 International Year of the World's Indigenous People, in Redfern, an inner-city suburb of Sydney with a large Indigenous population. I have discussed the speech in more detail in Chapter 2.

national identity. However, there were questions I felt were not being asked, and these began to form the basis of my impetus for research: What is called for when non-Indigenous Australians are asked to examine our position of privilege? In what ways does the reconciliation movement reproduce the white subject position and how is this position connected to the ongoing exercise of dispossession and injustice towards Indigenous peoples? Are white Australians capable of hearing and acknowledging the memories and lived realities of oppression and genocide and if so, in what way can we support and address the ‘unfinished business’⁶⁸ of reconciliation? In many ways, my disquiet about the reconciliation movement is encapsulated in the point made by Fiona Nicoll that there is semantic ambiguity invoked in the verb ‘to reconcile’—a significant difference between the notions of ‘reconcile to’ and ‘reconcile with’.⁶⁹

I was working at the Federal Court of Australia, in the Strategic Communications Branch, when Justice O’Loughlin handed down the decision in *Cubillo*. As with other key decisions of community interest, there was a televised broadcast of a summary of the judgment read out by the judge in the trial. A number of staff from the Executive Branch of the Court congregated in the office of the Registrar to watch the broadcast and I distinctly remember the unstated, but palpable, sense of anticipation that this was to be a key moment in the court’s history, and indeed, one in which we, an all-white staff, might be associated with an important moment in Australia’s sporadic gestures towards reconciliation. Deflation quickly set in as Justice O’Loughlin proceeded to read from his summary, referring to the ‘incomplete’ history, the ‘huge void’ and the form of consent with the purported thumbprint of Peter Gunner’s mother. I distinctly remember one colleague’s quip that the Federal Court clearly did not deal with human rights, despite the fact that this was indeed part of its jurisdiction. I was also intrigued when later, in an informal conversation with another member of staff, I was told that Justice O’Loughlin had himself expressed disappointment, that he felt he had *had* to bring down this decision, suggesting that the law had in some way prescribed the determination, and as I was later to begin to theorise, that as the judge he had himself been caught in the snare of legal positivism.

⁶⁸ Patrick Dodson, ‘Lingiari: Until the Chains are Broken’, in *ibid* 266.

⁶⁹ Fiona Nicoll, *From Diggers to Drag Queens: Configurations of Australian National Identity* (Pluto Press, Annandale, NSW, 2001) 154. Nicoll has developed this point further in relation to the assumption of white Australian perspective and the ongoing failure to recognise Indigenous sovereignty in ‘Reconciliation in and out of Perspective’ in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, Canberra, 2004).

It was around this time that I decided to take an opportunity to formally pursue a long-standing interest in a more intellectually-based approach to political concerns. My interests had always circulated around language, linguistics, literature and law. As an undergraduate student, I had majored in linguistics and have continued to pursue an interest and intermittent studies in critical feminist and poststructuralist theories, and in semiotics and literary theory. I had for a long time been working at the intersections of law and language, variously as an editor, community-educator, researcher, author and librarian. Having initially been tertiary educated during the late 1970s, interdisciplinarity has always seemed to me the most perspicuous approach and so I decided to attempt to bring these interests together in a theoretically-informed project. I was motivated by a desire to re-engage with theory,⁷⁰ but to attempt to do so as a form of feminist practice, in a manner espoused by feminist theorists such as Chris Weedon,⁷¹ whose work I had read in the late 1980s, and tentatively attempting to pick up the mantle I felt Aileen Moreton-Robinson⁷² had thrown down. Margaret Davies' work⁷³ provided a useful point of entry into jurisprudential theory from a critical feminist perspective, particularly given my lack of undergraduate study in this area. I chose to locate myself within the field of legal studies in the hope that its association with the discipline of law might facilitate a level of impact from critique and go some way towards penetrating its 'solipsistic state'.⁷⁴

REVEALING HEGEMONIC WHITENESS

Critical theory is characterised by an investigation of the nature and operation of power and a concern to reveal and highlight it as a matrix of multiple, diffuse and interdependent forms of domination. Underlying a critical theoretical approach is the concept of power as hegemonic, in the sense elaborated by Antonio Gramsci, as one which is legitimated through its depiction as natural and inevitable.⁷⁵ Of course, constructions of race are one site of the operation of hegemonic power. Over the past few decades, political theorists and activists have begun to investigate the social and historical formations of race and ethnicity in discourse. Critical race theory recognises

⁷⁰ I should point out that in reflecting on my desire to consume theory and engage in theorisation, and particularly in light of Foucauldian theorisation of epistemological claims, I am aware of the will to truth inherent in my will to theory.

⁷¹ Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Basil Blackwell, Oxford, 1987).

⁷² Moreton-Robinson (2000).

⁷³ Davies (2002a).

⁷⁴ Fraser, Cheah and Grbich (eds), (1996) xi.

⁷⁵ Antonio Gramsci (eds and trans Quintin Hoare and Geoffrey Nowell Smith), *Selections from the Prison Notebooks of Antonio Gramsci* (Lawrence and Wishart, London, 1971).

that race is not a fixed term, but a social construction. Ian F Haney Lopez, for example, argues that '[r]ace can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.'⁷⁶

Investigations of race within western thought have, until recently, focussed exclusively on non-white subjects. However, the study of whiteness has emerged as a new site of inquiry within a range of disciplines, including legal studies, literature, visual arts and cinema, sociology and postcolonial studies.⁷⁷ Whiteness studies involves interrogating the way the effacement of whiteness as race serves to affirm it as the human norm against which all other racialised positions are examined. Theorisations from the Australian context have tended to focus on Indigenous/white settler relations, particularly in cultural theory and from feminist perspectives.⁷⁸ Debates around reconciliation, multiculturalism and immigration indicate that race is a salient feature of contemporary Australian life. Nevertheless, the category of 'race' is consistently reserved for those designated 'other': whiteness as a racial category remains invisible—to whites, that is.

⁷⁶ Ian F Haney Lopez, *White by Law: The Legal Construction of Race* (New York University Press, New York, c1996) 14.

⁷⁷ Franz Fanon's *Black Skin, White Masks* (Paladin, London, 1970) and James Baldwin's *Notes from a Native Son* (M Joseph, London, 1964) are often cited as seminal texts in the area which is now referred to as whiteness studies. Some of the most significant and early contributions to a critique of whiteness have been made by writers such as J M Coetzee, *White Writing: On the Culture of Letters in South Africa* (Yale University Press, New Haven, c1988) and Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* (Harvard University, Cambridge, Mass., 1992) who have focussed on whiteness within the literary imagination. Ruth Frankenberg, *White Women Race Matters: The Social Construction of Whiteness* (University of Minnesota Press, Minneapolis, 1993) and Richard Dyer, *White* (Routledge, London, 1997) are regarded as key contributions from the United States and United Kingdom, respectively. Critical race theory has been associated with critical legal studies in the United States. For a collection of important contributions, see Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (The New Press, New York, 1995). Other collections in the field include Mike Hill (ed), *Whiteness: A Critical Reader* (New York University Press, New York, c1997); Ruth Frankenberg (ed), *Displacing Whiteness: Essays in Social and Cultural Criticism* (Duke University Press, Durham, 1997); Richard Delgado and Jean Stefancic (eds), *Critical White Studies: Looking Behind the Mirror* (Temple University Press, Philadelphia, 1997); Michelle Fine, Lois Weis, Linda Powell and L Mun Wong (eds), *Off White: Readings on Race, Power, and Society* (Routledge, New York, 1997). See below for Australian contributions.

⁷⁸ See, for example, (2001) 16(34) *Australian Feminist Studies* which contains a special section entitled 'Whiteness' with contributions from some of the key theorists in the area, including Aileen Moreton-Robinson, Fiona Nicoll, Jane Haggis and Susanne Schech. More recently, a collection of Australian work has been published, edited by Aileen Moreton-Robinson, *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, Canberra, 2004). A series of biannual conferences have also been held: Unmasking Whiteness: Race Relations and Reconciliation, Queensland Studies Centre, Griffith University, 17–18 September 1998; Critical Contexts and Crucial Conversations: Whiteness and Race, Coolangatta, 3–5 April 2002; Placing Race and Localising Whiteness, Flinders University, Adelaide, 1–3 October 2003; Whiteness and the Horizons of Race Conference, Australian Studies Centre, University of Queensland, 7–9 December 2005. An association, the Australian Critical Race and Whiteness Studies Association (ACRAWSA), has been formed, publishing the online *ACRAWSA Journal* <www.acrawsa.org.au>.

Use of the term 'white', like the term 'race', is not unproblematic. While the term is most commonly used to denote the construction of an Anglo-Celtic ethnicity and cultural heritage, and a position of cultural, political and economic privilege, whiteness is not a racially fixed identity. Any singular racial categorisation both effaces the lived reality of multiple ethnicities and denies the way other social identities, particularly gender, class and sexuality, intersect with racial identities. Whiteness is also contingent to history, location and situation, to the extent that who or what groups of people may be identified as white at one particular historic moment will be different to those identified at another.⁷⁹

For these reasons, much of the work on whiteness focuses not on whiteness as skin colour or as an essentialist racial identity, but as ideology. The strategies employed are often deconstructive and are intended to undermine the popular belief in the given, essential and biological nature of race. Theorising whiteness is concerned with locating sites of power and privilege. Whiteness can be conceptualised as the invisible, unmarked, unnamed normative category of privilege. Due to its invisible status, whiteness is equated with universality and normality. Whiteness is about maintaining a position of cultural and political power while also erasing its own existence.

Because of the invisibility of whiteness, western intellectual discourse which attempts to theorise race relations has historically focussed on the Other, on dispossession and disadvantage. Nevertheless, much of this work has been done by members of the ruling elite of the white academy. Investigating whiteness as a site of identity is an attempt to reverse this situation and to return the gaze to that of the privileged site of power. It is an attempt to make whiteness visible. The invisibility of whiteness enables those of us whose identity falls under the signifier 'white' to maintain positions of power. Exposing the way whiteness circulates and permeates through discourses, social and cultural practices and lived materiality is, I believe, an essential part of any anti-racist project.

As discussed earlier, Moreton-Robinson is one of the key Australian theorists to provide an analysis of the hegemony of whiteness, which she does from her standpoint as a Goori Jondal, an Indigenous woman. She argues that the hegemony of whiteness exists at the site of subjectivity and at the site of institutional practice, that whiteness confers

⁷⁹ See, for example, interesting work on the shifting identity of the Irish and Jews in the United States by Noel Ignatiev, *How the Irish Became White* (Routledge, New York, 1995) and Karen Brodtkin, *How Jews Became White Folks and What that Says about Race in America* (Rutgers University Press, New Brunswick, NJ, c1998).

both dominance and privilege for white people and is embedded in institutional and social practices. Moreton-Robinson argues that '[i]n order to reverse such representations and resist the hegemony of whiteness, there is a need to deconstruct and racialise whiteness to offer useful insight about power relations in Australian society which can inform practice and theory'.⁸⁰

I have chosen to locate this attempt to deconstruct and racialise hegemonic whiteness as it operates in juridical discourse, where, I believe, it largely maintains unquestioned legitimacy. My interrogation involves locating and revealing the specific ways that whiteness functions to obscure its own operation as a signifying practice, as a result of its apparent naturalness. Throughout the *Cubillo* trial, the benchmark used for the establishment of credibility in evidence and testimony reflects forms of knowledge which are privileged in white western epistemology, namely that which is seen to be scientific, rational and visual. This is apparent, for example, in the preference for documentary evidence over oral testimony, in the way rationalist conceptions of knowledge as facts are seen as more reliable than other forms of knowledge, such as affectivity, and in the way white identity is regarded as normative and Indigenous identity as deviant.

In my analysis of the judicial subject in Anglo-Australian law, I draw on Pierre Bourdieu's concept of the juridical field and Ghassan Hage's theorisation of the field of whiteness in Australia to interrogate how the juridical field generates and reproduces whiteness. I argue that whilst projecting the rhetoric of neutrality and impartiality, the judicial subject in this case, Justice O'Loughlin, universalises a normative white identity. Through the identification of a series of discursive locations where racial identification is used as an element of reasoning in the decision, I attempt to reveal the inscription of race as essential to the performative function of the judgment. I argue that this serves to reaffirm the logic of colonial representations and that notions of paternity and legality ultimately efface the overriding significance of race in the decision.

DECONSTRUCTING TEXTUAL CLAIMS TO AUTHORITY

According to Kincheloe and McLaren, the most important point(s) at which the *critical* aspect of the 'critical theory-informed research' occurs is the 'moment(s) of

⁸⁰ Aileen Moreton-Robinson, 'Unmasking Whiteness: A Goori Jondal's Look at some Duggai Business' in Belinda McKay (ed), *Unmasking Whiteness: Race Relations and Reconciliation* (The Queensland Studies Centre, Griffith University, Brisbane, 1999) 35. This paper first appeared in (1999) 6(1) *Queensland Review* 1.

interpretation'.⁸¹ In particular, they point out that work conducted in the field of critical hermeneutics has drawn on theories of interpretation and poststructuralist critique to interrogate 'textual claims to authority'.⁸² Positioning my research within this understanding of the paradigm of a critical approach to hermeneutics, I draw on both critical and radical hermeneutics,⁸³ focussing in particular on constructions of signification in the law and offer a critique of legal positivism as the privileged jurisprudential discourse.

I draw on the model of textuality commonly deployed in critical theory and cultural studies, not as an entity grounded in a single site of inscription, but as a site of interdiscursive 'practices, institutional structures and the complex forms of agency they entail, legal, political, and financial conditions of existence, and particular flows of power and knowledge, as well as a particular multilayered semantic organization'.⁸⁴ Using this model involves situating my analysis of the decision in *Cubillo* within, and as part of, an interdiscursive domain which involves attention to a range of heterogeneous and sometimes contradictory forces, including the interconnectedness of historical, political, economic, cultural and social context; the relationship between these forces and the operation of power within the legal-juridical field; the subjectivity of the players specifically located within this field, including judges, lawyers, plaintiffs, respondents, witnesses, etc (here I focus in particular on the judicial subject); the construction of knowledge within legal discourse (in this area, I focus on the epistemology of evidence in law); and the significance of rhetorical forms to legal discourse.

⁸¹ Joe L Kincheloe and Peter McLaren, 'Rethinking Critical Theory and Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications Inc, Thousand Oaks, London, 2nd ed, c2000) 285.

⁸² Ibid 286.

⁸³ As is often the case in attempts to apply descriptive terms to methodological approaches, there is not a clear consensus in the literature as to whether such an approach to hermeneutics might be called critical, radical or post-hermeneutics, the latter two descriptions generally being seen as concerned with critiques of more conventional hermeneutical approaches, particularly those which profess to locate the singular truth of a text. See John Caputo, *Radical Hermeneutics: Repetition, Deconstruction and the Hermeneutic Project* (Indiana University Press, Bloomington, 1987), regarded as the first work to attempt to radicalise hermeneutics and Roy Martinex (ed), *The Very Idea of Radical Hermeneutics* (Humanities Press, New Jersey, 1997) for a collection of pieces responding to Caputo's text. See also Caputo's second contribution to the field: John D Caputo, *More Radical Hermeneutics: On Not Knowing Who We Are* (Indiana University Press, Bloomington, 2000) and Gayle L Ormiston and Alan D Schrift (eds), *Transforming the Hermeneutic Context: From Nietzsche to Nancy* (State University of New York Press, Albany, 1990) and *The Hermeneutic Tradition: From Ast to Ricoeur* (State University of New York Press, Albany, 1990) for collections of important contributions to the field.

⁸⁴ John Frow and Meaghan Morris, Chapter 11, 'Cultural Studies' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (Sage Publications Inc, Thousand Oaks, London, 2nd ed, c2000) 328.

My understanding of hermeneutics is premised on the notion of the primacy of interpretation to all forms of meaning and perception. Interpretation is the way we make sense of our experiences, indeed, it is only as a result of the mediation of language that we have experiences which we can interpret meaningfully. It is also the basis of judicial decision making and therefore the common law. I take up the poststructuralist dismissal of the notion of a singular truth or facts existing outside interpretation and instead draw on an approach to hermeneutics which recognises that while there may be more than one incorrect interpretations of a text, there is also the possibility of more than one truth. In critical hermeneutics, the importance of reading, of contextualisation, and understanding a text as always exceeding the author's intentions, is emphasised. Such an approach uses Hans-Georg Gadamer's concept of the hermeneutic circle as a way of conceiving a process whereby readers project meanings onto texts, which in turn confirm or resist these readings. The meanings projected by readers are the product of historical, subjective and linguistic presuppositions and understandings, or 'horizons'. A successful interpretation involves a fusion of the horizons of reader and text. While in this approach to hermeneutics there is the possibility of good interpretation, this does not mean that there is a single, correct meaning which awaits discovery—different horizons will potentially produce different interpretations.⁸⁵

Radical hermeneutics is regarded as offering a critique of conventional hermeneutics, particularly any attempt to identify a singular truth of a text. It draws on poststructuralist and postmodern frameworks, and in particular on deconstruction, Derrida's 'radical questioning of the classical, metaphysical presuppositions about meaning and truth, about origin and destiny'.⁸⁶ Derrida rejects the suggestion that deconstruction can be defined as or reduced to an analysis, critique or methodology for reading and interpreting texts, because to do so suggests that these concepts, in addition to deconstruction itself, cannot themselves be submitted to a deconstructive questioning.⁸⁷ Nevertheless, deconstruction can be characterised as being concerned with interpretation, in particular, with assumptions of pre-existing stable, centred structures of meaning. Derrida highlights the discursive and rhetorical construction of the

⁸⁵ Some of the information in this section has been drawn from *Applied Hermeneutics: A website devoted to interpretational applications across disciplines* <www.philosophy.ucf.edu/ahnf.html>.

⁸⁶ John Caputo and Roy Martínez, 'A Philosophical Propaedeutic: on the Very Idea of Radical Hermeneutics' in Roy Martinex (ed), *The Very Idea of Radical Hermeneutics* (Humanities Press, New Jersey, 1997) 18.

⁸⁷ Jacques Derrida, 'Letter to a Japanese Friend' in David Wood and Robert Bernasconi (eds) *Derrida and Difference* (Parousia Press, Warwick, 1985) 3.

‘conceptual corpus of so-called “western” metaphysics’⁸⁸ through his exposure of its reliance on literary tropes such as metaphor, metonymy and metalepsis, arguing that attempts at interpretation always involve supplementation and deferral, resulting in chains of differential signifiers. Deconstruction involves close and attentive reading of texts, an opening up of the reading of texts, an ‘undoing, decomposing, and desedimenting of structures’, not with the intention of destroying, but as a way of understanding ‘how an “ensemble” was constituted’.⁸⁹

Given its attention to texts and interpretation, deconstruction lends itself well to interrogations of the common law, and in particular to the function of law as a metadiscourse in which truth is seen as stable and immutable, the product of pre-existing meaning. However, truth claims in law commonly deploy particular rhetorical strategies to privilege certain forms of interpretation and to exclude the possibility of contested meanings. In this thesis, I attempt to deconstruct textual claims to authority in *Cubillo* through attention to the function of context, contingency and narrative coherence as determinants of the perception of truth. In particular, this involves identifying particular binary constructions, such as rationality/affectivity, which are characteristic of positivist frameworks privileging scientific knowledge, and serving to efface other forms of knowledge.

GAPS IN THE EVIDENCE

Evidence law operates on the basis of a series of rules which are said to guide the trial judge when making decisions as to the admissibility of information presented by either party to a dispute. While ‘the test of relevance is the threshold consideration’,⁹⁰ evidentiary rules, which courts have both discretionary and mandatory powers to apply, are largely formulated around the notion of exclusion.⁹¹ In both civil and criminal law, the trial court is considered the ‘tribunal of fact’ and the court is expected to determine a matter exclusively on the basis of evidence presented. Evidence law is therefore of

⁸⁸ Ibid 1.

⁸⁹ Ibid 3.

⁹⁰ Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005) 553. There is a general discretion available to a court to admit evidence which is relevant and to exclude that which is not relevant.

⁹¹ The rule against the admissibility of hearsay evidence is a well-known, and contentious example; however, there are many other rules which determine what evidence may be presented in a trial, including the rule against the admissibility of evidence, the probative value of which is outweighed by the danger that it may be unfairly prejudicial to a party, misleading or confusing or an undue waste of time: *Evidence Act 1995* (Cth) s 135.

paramount importance in law's operation, yet often functions as an unstated paradigm, not commonly subject to substantial critique.

My own experience of efforts to obtain access to the transcript of trial for *Cubillo*—the key archival source of evidence for any legal dispute—is testament to the law's failure, indeed resistance, to critical appraisal of evidentiary matters. My initial request for permission to access the transcript of some 7000 pages was granted by Justice O'Loughlin. However, neither the Darwin nor Melbourne registries of the Federal Court claimed to have a copy of the document. I was referred to transcription services Auscript, and Spark and Cannon, which, I was informed, owned copyright. It is important to point out that while transcription services had previously been part of the public sector, in many jurisdictions, this essential aspect of legal proceeding is now in private hands. When I enquired as to the cost of obtaining a copy of the transcript from these services based in Darwin and South Australia, I was quoted between \$6.89–8.50 per page, which would have resulted in a cost of over \$50,000! As it eventuated, a hard copy of the document was located in the Melbourne registry and, most fortunately, my perseverance with previous colleagues at the court eventually resulted in my obtaining an electronic copy of the entire transcript, free of charge.⁹² My analysis of the transcript of trial underwrites the thesis overall, and is the primary source for my critique of the reception of oral testimony, contained in Chapters 3, 4 and 5.

However, the transcript of trial is simply a record of what was said in court and does not contain copies of documentary evidence tendered. In September 2004, I therefore travelled to Darwin, where the North Australian Aboriginal Legal Aid Service (NAALAS) had given me permission to access the court documents and other evidentiary material for my research.⁹³ Here, I was able to access the exhibits tendered by the applicants in the trial.⁹⁴ This research formed the basis of my analysis of the documentary evidence contained in Chapters 5, 6 and 7.

During this trip, I also conduct interviews with Lorna Cubillo, in Darwin, and Peter Gunner, at Utopia Community, approximately 300 kilometres north-east of Alice

⁹² The process of obtaining access to the primary source for my analysis took over four months in total. I have acknowledged those who provided assistance in the preliminary pages of the thesis.

⁹³ NAALAS is the organisation under which the Stolen Generations Litigation Unit, representing Lorna Cubillo and Peter Gunner, had been auspiced.

⁹⁴ The Federal Court List of Exhibits identified 110 numbered exhibits tendered by the applicants in the trial, some of which included multiple volumes.

Springs.⁹⁵ Subsequently, I travelled to Canberra to interview expert witnesses, historian Ann McGrath⁹⁶ and in Melbourne, anthropologist John Morton and the solicitor who was, at the time, responsible for co-ordinating the action at the Stolen Generations Litigation Unit at the Northern Australian Aboriginal Legal Aid Service, Koulla Roussos.⁹⁷ The interviews with the Cubillo, Gunner, McGrath and Morton afforded me an opportunity to hear the voices of the witnesses and a chance to ask questions about their experiences of giving evidence in the trial.

In my interrogation of the utilisation of evidence law in the decision, I attempt to reveal the way law legitimises its claims to knowledge through the use of evidentiary techniques which require propositions to be susceptible to proof derived from ‘facts’ and other observable phenomena. However, one of the key paradigms for the evaluation of evidence is narrative coherence where an assessment is made on the basis of the formulation of a story which best concords with the evidence presented. Through an analysis of a series of sites of the treatment of evidence in *Cubillo*, I attempt to highlight how law’s regard for truth is seen to authorise its claim to knowledge.

Legal positivism identifies the judicial subject as a disembodied medium through which the law, the canon of authority, passes. However, I argue that the performative function of judicial speech serves to interpellate the judicial subject such that to speak as a judge is to embody the law. Drawing on theories of the formation of subjectivity, in addition to the concept of the juridical field,⁹⁸ I attempt to reveal the significance of the metaphorical function of the figure of the white father and of the law to claims of judicial authority.

LAW AS RHETORIC

To insist on the importance of law as a ‘profession of rhetoric’, but also to acknowledge that the rhetoric of law involves its own disavowal, appears, according to Austin Sarat

⁹⁵ Interview with Lorna Cubillo conducted on 25 September 2004 at the Stolen Generations Aboriginal Corporation, Darwin. Interview with Peter Gunner conducted on 28 September 2004 at his home at Utopia community, Northern Territory.

⁹⁶ Interview with Ann McGrath conducted on 22 November 2004, at the Australian National University, Canberra. Interview with John Morton conducted on 29 October 2004 at La Trobe University, Melbourne.

⁹⁷ Interview with Koulla Roussos conducted on 17 November 2004 in Melbourne.

⁹⁸ Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805.

and Thomas R Kearns, to 'highlight an opposition with law's conception of itself'.⁹⁹ Legal discourse appears particularly adept at acknowledging, even celebrating, the rhetorical quality of legal argumentation, polemical disputation and judicial interpretation while at the same time denying its contingency, its social and historical contextualisation, and asserting its legitimacy as objective and rational. As Peter Goodrich and others have pointed out, we must constantly be alerted to the 'compositional, stylistic and semantic mechanisms', the 'silences, absences and empirical potential of the legal text',¹⁰⁰ for it is the rhetorical quality of law which facilitates this deception.

The power of law lies not only in its capacity to sanction, but also in the means by which it does so, through language. The rules of evidence prescribe what can be said and how it is articulated in law. As Goodrich suggests:

The critical force of rhetoric is epistemological and semiotic. The study of legal rhetoric is most incisive, powerful, and historically appropriate where it discerns behind the self-conscious use of tropes and figures of speech the unconscious structures of institutional reason, the norms and the antagonisms, the dogmas and the polemical forces, whereby subjectivity is successfully captured by the value of law.¹⁰¹

I believe that Goodrich's conviction as to the critical use of the study of legal rhetoric provides an approach whereby we might begin to attempt to uncover how legal discourse is founded in structures of institutional reason which privilege pervasive and hegemonic whiteness. It is not only those more discernible and overt forms of violence, oppression, discrimination and privileged subjectivity which crucially necessitate attention and remedy, but also the repressed narrative structures of doctrine and polemic, of power and privilege, and of desire and denial, which may reveal themselves through careful and close readings of law's discursive forms, of text and context.

⁹⁹ Austin Sarat and Thomas R Kearns (eds), 'Editorial Introduction' in *The Rhetoric of Law* (The University of Michigan Press, Ann Arbor, 1994) 2.

¹⁰⁰ Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (New York, St. Martin's, 1987) 204.

¹⁰¹ Peter Goodrich, 'Antirrhesis: Polemical Structures of Common Law Thought' in Austin Sarat and Thomas R Kearns (eds) *The Rhetoric of Law* (The University of Michigan Press, Ann Arbor, 1994) 60.

CHAPTER 2

‘POSTCOLONISING’ AMNESIA IN THE DISCOURSE OF RECONCILIATION: THE EVIDENTIARY VOID AND THE USE OF PRECEDENT¹⁰²

*Even if judging was understood to primarily involve memory in the sense of recollection of precedent, memory itself can never just capture the past. The judge can never be reduced to the instrument of the system who simply recollects precedent ... Her subjective role is not merely the passive one of recollecting what is there in the origin ... She is responsible for her memory and the future which she promotes in the act of remembrance itself.*¹⁰³

INTRODUCTION

During the 1990s, the discourse of reconciliation emerged in the Australian rhetorical landscape, figuring significantly in the media and in political debates and took pride of place as a project directly linked to the celebration of the centenary of the federation of the nation.¹⁰⁴ While ostensibly the most recent in a series of official government policies for Australian Aboriginal and Torres Strait Islander peoples, reconciliation represented much more than previous programs imposed on Indigenous citizens by the state. In the wake of the High Court’s recognition of Indigenous rights to land ownership,¹⁰⁵ reconciliation was used to evoke the notion of ‘coming to terms with’ the traumatic history of colonialism and signified the possibility of a reconfiguration of race relations at a time when the relationship between white settler and Indigenous citizens was being increasingly viewed as the key to national identity.

In this chapter, I will draw on postcolonial theory, together with critical historiography, psychoanalysis and critical legal theory, as frameworks for interrogating the law’s response to claims made by members of the Stolen Generations. Deploying Leela

¹⁰² A shorter version of this chapter was published as “‘Postcolonising’ Amnesia in the Discourse of Reconciliation: The Void in the Law’s Response to the Stolen Generations’ (2005) 22 *Australian Feminist Law Journal* 67–88.

¹⁰³ Drucilla Cornell, *The Philosophy of the Limit* (Routledge, New York, 1992) 148.

¹⁰⁴ For a research paper which provides a summary of federal government policies in relation to Aboriginal people in Australia, which takes a similar approach to mine in attempting to ‘trace the rhetorical road’, see John Gandiner-Garden, *From Dispossession to Reconciliation*, Research Paper 27 1998–99 (Parliament of Australia, Parliamentary Library, 29 June 1999).

¹⁰⁵ *Mabo and Others v The State of Queensland No. 2* (1992) 175 CLR 1.

Ghandi's notion of 'postcolonial amnesia',¹⁰⁶ I will argue that reconciliation, as a rhetorical construction, is characterised by the trope of absence, of willed forgetting and silence, functioning as a 'failed historicity'.¹⁰⁷ What has been the law's response to the silence at the heart of the white nation? Resonating with the function of *terra nullius*, in the only two legal actions taken by members of the Stolen Generations against the Commonwealth government, the law revealed itself to be a site of memory, and of trauma. In *Kruger & Ors v Commonwealth*,¹⁰⁸ four of six High Court judges drew on the rhetoric of 'the best interests of the child' to find the question of genocide 'unnecessary to answer'. Two years later, in the trial decision in *Cubillo v Commonwealth*,¹⁰⁹ Justice O'Loughlin of the Federal Court drew on the decision in *Kruger*, in place of the purported evidentiary void. I will argue that by invoking the common law, these decisions demonstrate the law's rhetorical power to write not only law, but also history; in effect, to authorise and reinscribe legal and historical amnesia.

The 27th of May 1997 marked the occasion of the 30th anniversary of the referendum in which white Australians voted to give the Commonwealth power to legislate for Aboriginal peoples, and was the day chosen to hold the inaugural Australian Reconciliation Convention, 'Renewal of the Nation', at which some 1800 Indigenous and non-Indigenous participants were brought together by the Council for Aboriginal Reconciliation 'to be involved in shaping a more confident, mature and harmonious nation for the centenary of Federation in 2001'.¹¹⁰ On this day at the convention the Human Rights and Equal Opportunity Commission launched its report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home*, tracing the history of practices of forcible removal of Indigenous children under assimilation policies since colonisation up to the present day. The inquiry received over 700 submissions and conducted hearings across the country, producing a detailed report which made recommendations 'directed to healing and

¹⁰⁶ Leela Ghandi, *Postcolonial Theory: A Critical Introduction* (Allen & Unwin, St Leonards, NSW, 1998) 4. The notion of amnesia and denial of the past has been deployed in a number of critiques of Australian national and cultural identity, dating back at least as far as the late 1960s when Professor W E H Stanner delivered his Boyer Lecture, 'After the Dreaming' (Australian Broadcasting Commission, Sydney, 1969). In this chapter, I am developing this notion specifically in relation to the law.

¹⁰⁷ Sara Ahmed, *Strange Encounters: Embodied Others in Post-coloniality* (Routledge, London, 2000) 10.

¹⁰⁸ *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 190 CLR 1 (hereafter *Kruger*).

¹⁰⁹ *Cubillo v Commonwealth* [2000] FCA 1084 (hereafter *Cubillo*).

¹¹⁰ 'Introduction' Australian Reconciliation Convention—An Overview, <www.austlii.edu.au/au/other/IndigLRes/car/1997/3/book1/intro.htm>.

reconciliation for the benefit of all Australians’,¹¹¹ including reparations to all Indigenous people affected by policies of forcible removal in the form of acknowledgment and apology, guarantees against repetition, measures of restitution and rehabilitation, and monetary compensation.¹¹² The report recommended the establishment of a National Compensation Fund to provide lump sum payments to individuals who had been removed as children and further compensation for those who could prove specific harm resulting from removal.¹¹³

It was at the Reconciliation Convention that the Prime Minister, John Howard, whom many had hoped would use the opportunity to offer a formal apology to members of the Stolen Generations, instead expressed his ‘deep personal sorrow for those of my fellow Australians who have suffered injustices under the practices of past generations towards indigenous people’ and for ‘the hurt and trauma many people may continue to feel as a consequence of those practices’, but nevertheless stated that ‘Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control’.¹¹⁴ The Commonwealth Government has maintained its opposition to the establishment of a reparations tribunal and to the payment of compensation to members of the Stolen Generations.

Two years after the launch of the report at the convention, the Northern Australian Aboriginal Legal Aid Service took action in the Federal Court of Australia on behalf of Lorna Cubillo and Peter Gunner, members of the Stolen Generations, in a landmark case against the Commonwealth Government, claiming that it, through its servants and agents, was the party responsible for their unlawful removal and detention from their families and communities as children during the 1940s and 50s. The trial judge, Justice O’Loughlin, rejected the Commonwealth’s argument, in an attempt to strike out the claim, that ‘so much time has now elapsed, so many witnesses are now dead and the memories of those living are now so impaired that it would be manifestly unfair to the Commonwealth’. Justice O’Loughlin stated in his interlocutory judgment that:

¹¹¹ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997) 4 (hereafter *Bringing Them Home*).

¹¹² Ibid 651.

¹¹³ Ibid 654, Recommendation 18.

¹¹⁴ Text as appears in John Howard, ‘Practical Reconciliation’ in Michelle Grattan (ed), *Essays on Australian Reconciliation* (Black Inc., Melbourne, 2000) 88, 90.

It seems to me, with respect, that these cases are of such importance—not only to the individual applicants and to the larger Aboriginal community, but also to the Nation as a whole—that nothing short of a determination on the merits with respect to the competing issues of hardship is warranted.¹¹⁵

When, in August 2000, the long anticipated judgment was handed down in the Darwin courtroom, many, including counsel for the applicants,¹¹⁶ were optimistic that it would inaugurate restitution not only to Lorna Cubillo and Peter Gunner, but also potentially to thousands of other members of the Stolen Generations and their families and communities. In a live telecast of a summary of his reasons for the decision broadcast on national television, Justice O’Loughlin stated:

The applicants, Mrs Lorna Cubillo and Mr Peter Gunner, are said to be members of ‘the Stolen Generation’. Neither the evidence in this trial, nor the reasons for judgment, deny the existence of ‘the Stolen Generation’. Numerous writings tell tragically of a distressing past. But this trial has focussed primarily on the personal histories of two people.¹¹⁷

It could be argued that if there were to be a context in which Australia might be able to begin to conceptualise itself as a potentially ‘postcolonial’ nation, this would be represented by the project of reconciliation. I will argue, however, that the project of reconciliation manifests as something more closely connected to a form of what Leela Ghandi has referred to as ‘postcolonial amnesia’¹¹⁸—the desire to erase the memory of the violence of colonial relations in order to institute a new beginning for the nation. The law is instrumental in supporting this will-to-forget. In the decision in *Cubillo*, a form of ‘postcolonial amnesia’ can be evinced through the treatment of evidence and testimony. While not denying the existence of the Stolen Generations, Justice O’Loughlin crucially identified the ‘huge void’ created by ‘incomplete’ history and the absence of documentary evidence as the explanation for the law’s failure to offer restitution to Lorna Cubillo and Peter Gunner.

THE DISCOURSE OF RECONCILIATION IN ‘POSTCOLONISING’ AUSTRALIA

The discourse of reconciliation did not emerge out of a vacuum. For decades, Indigenous political leaders and activists have attempted to expose the foundational myth of Australia’s ‘discovery’ by European explorers and to highlight the impact of

¹¹⁵ *Cubillo v Commonwealth of Australia* [1999] FCA 518 (30 April 1999).

¹¹⁶ Koulla Roussos, solicitor for the applicants, Stolen Generations Litigation Unit, North Australian Aboriginal Legal Aid Service, personal communication, 25 October 2004.

¹¹⁷ *Cubillo*, Summary of Reasons for Judgment, para 1.

¹¹⁸ Ghandi (1998) 4.

colonialism on the Aboriginal population in the form of dispossession, attempted genocide, violence and racism. Reconciliation can be seen to have its roots in the movement of the late 1970s when the Aboriginal Treaty Committee and the National Aboriginal Conference called for a treaty, or Makarrata, between the Commonwealth and Aborigines.¹¹⁹ This movement emerged partly in response to unsuccessful attempts by Aboriginal people in pursuing claims to ownership of land through the courts.¹²⁰

The significant work of critical historians has also been crucial in correcting and rewriting some of the foundational myths of Australian history and exposing the extent to which it had been silent about the impact of colonialism on Indigenous Australians. In 1988, the celebration of the national bicentenary provided a focus for debate over representations of European arrival as ‘settlement’ or ‘invasion’. During the 1970–80s, there was also increasing contact between Indigenous peoples throughout the world leading to the development of an international Indigenous peoples’ rights movement which began to acquire recognition at multinational forums such as the United Nations.

The attention drawn by activists and political organisations to the poor living conditions and health standards and high incarceration rates of Aboriginal and Torres Strait Islander peoples resulted in a series of inquiries conducted by Australian and international human rights organisations. In 1992, the Royal Commission into Aboriginal Deaths in Custody released its final report which revealed the very high mortality rate of Aboriginal people in the criminal and juvenile justice systems, attributing this to the disadvantage brought about principally by the history of colonisation. The official project of reconciliation is said to have emerged out of the Commission’s recommendation:

That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bipartisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.¹²¹

¹¹⁹ See Stewart Harris, *It’s Coming Yet: An Aboriginal Treaty within Australia between Australians*, for the Aboriginal Treaty Committee (Canberra, Aboriginal Treaty Committee, 1979) and Judith Wright, *We Call for a Treaty* (Collins/Fontana, Sydney, 1985).

¹²⁰ In particular, *Milirrpum and Others v Nabalco Pty Ltd* (1971) 17 FLR 141 and *Coe v Commonwealth of Australia and Another* (1979) 24 ALR 118.

¹²¹ *Royal Commission into Aboriginal Deaths in Custody*, Final Report, Recommendation 339, <www.austlii.edu.au/au/other/IndigLRes/rciadic/index.html>. One of the members of the Commission

In the same year, a majority of five judges of the High Court brought down the *Mabo* decision, exposing the legal fiction of *terra nullius* which had been the foundational cornerstone of the colonisation of Australia and establishing the doctrine of native title as part of the common law. The *Mabo* decision gave rise to highly charged debates in the media and in political forums on the relationship between Indigenous and non-Indigenous Australians. It provoked acute anxiety in the non-Indigenous community about the legal right to land tenure, a right which is regarded as fundamental to Anglo-Australian law. In his judgment, Chief Justice Brennan described the dispossession, degradation and devastation of Aboriginal people as ‘a national legacy of unutterable shame’¹²² and identified the ‘acts and events by which that dispossession in legal theory was carried into practical effect’ as ‘the darkest aspect of the history of this nation’, stating that the ‘nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices’.¹²³

In the wake of the *Mabo* decision, the Prime Minister Paul Keating delivered his famous ‘Redfern Park speech’ to celebrate the Year of the World’s Indigenous People, calling for recognition on the part of non-Aboriginal Australians of the impact of colonisation and affirming the significance of Aboriginal Australia to national identity. Using a register which assumed a white settler national audience, Keating called for non-Indigenous Australians to recognise our inseparable identity with Aboriginal and Torres Strait Islander people, as a ‘fundamental test of our social goals and our national will’,¹²⁴ the starting point for which, he claimed, begins with the act of recognition that:

... it was we who did the dispossessing. We took the traditional lands and smashed the traditional life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us.¹²⁵

Keating invoked the necessity of empathy on the part of settler Australians as the means of fostering reconciliation. Together with shame, this proved to be one of the defining tropes of the discourse of reconciliation. In calling for recognition that white Australia’s

was Patrick Dodson, later to be the first chairman of the Council for Reconciliation and commonly referred to as the ‘father of reconciliation’.

¹²² *Mabo* para 50.

¹²³ *Mabo* para 56.

¹²⁴ The text of the speech is reproduced in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (Black Inc, Melbourne, 2000) 60. Keating’s speech writer at the time was Don Watson, an historian.

¹²⁵ *Ibid* 61.

identity ‘cannot be separated from Aboriginal Australia’, that ‘they are part of us and that we cannot give indigenous Australians up without giving up many of our own most deeply held values, much of our own identity—and our own humanity’,¹²⁶ he evoked the possibility of a ‘postcolonial’ national identity.¹²⁷

As Keating said, 1992 was an important year in Australia’s history. Subsequent to the *Mabo* decision and his articulation of a vision of a reconciled postcolonial Australia, the Council for Aboriginal Reconciliation was established as the vehicle from which a national program of local community-based consultation and education between Indigenous and non-Indigenous Australians would be developed. The council was specifically given the task of consulting with Aborigines and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document of reconciliation. The *Council for Aboriginal Reconciliation Act 1991* (Cth) was the legislative foundation for the process, the objective of which was:

to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia, and by means that include the fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.¹²⁸

The project involved a ten-year history of debate and community consultation and resulted in a *Document for Reconciliation* incorporating a Declaration for Reconciliation and a set of National Strategies to Advance Reconciliation. The time frame for the culmination of this process was specifically designed to coincide with the Centenary of Federation, officially regarded as the celebration of the ‘birth of the nation’, in 2001. It also coincided with Australia’s hosting of the Olympic Games, towards the end of 2000, arguably the highest profile celebration of nationalism in the international arena.

National identity figures significantly in the discourse of reconciliation. It is the nation which is characterised as in need of ‘healing’ in order to meet the responsibilities of a reconciled identity. Commonly, discourses of reconciliation employ the metaphor of the

¹²⁶ Ibid.

¹²⁷ More recently, Germaine Greer has also argued that Australia must become an Aboriginal country in order to become a truly postcolonial nation. Identifying a number of ways in which non-Aboriginal Australian culture already demonstrates Aboriginality, she claims that Aboriginality is ‘a characteristic of the continent itself’: ‘Whitefella Jump Up: The Shortest Way to Nationhood’ (2003) 11 *Quarterly Essay* 72.

¹²⁸ Available from <www.austlii.edu.au/au/legis/cth/consol_act/cfara1991338/s5.html>.

body to promote the notion of national healing and reparation. Using the South African experience of the Truth and Reconciliation Commission, Scott Veitch argues that the role of law in processes of reconciliation is in seeking the immortality of the nation, through:

... acknowledgement and forgiveness on the route to an atonement, and in this process it is not only the victims of oppression whose lives or memory are seen in need of reparation, but also the nation itself that is in need of healing. The stakes of reconciliation are firmly tied to the health of the nation, to its recovery, to its salvation.¹²⁹

The discourse of reconciliation can be seen to have emerged out of a desire on the part of white settler Australia to redeem itself from the damaging and shameful history of colonialism, offering the potential for a 'postcolonial' national identity. In its most overt form, this desire for a new beginning can be seen in the way in which the process of reconciliation was given a timeframe to coincide with the celebration of the centenary of federation in 2001. This deadline was a key element to the reconciliation project¹³⁰ and many hoped that it would coincide with a referendum in which Australians would declare their commitment to becoming a republic, thereby shaking off the final vestiges of the history of the colonial relationship with Britain. This prospective move towards becoming a 'postcolonial' nation was linked to Australia's increasing economic and political relationship with Asia and the Pacific. The need for reconciliation was connected to Australia's reputation in the international arena, as, according to Prime Minister Paul Keating, a 'fundamental test to our social goals and our national will' asserting that '[t]here should be no mistake about this—our success in resolving these issues will have significant bearing on our standing in the world.'¹³¹

Reconciliation is strongly imbued with tropes of movement through time, a journey in which the present is reconciled with the past, and the colonial gives way to the potential for the 'postcolonial'. It is described as a process through which the nation walks, advancing towards an imagined future state. These perambulatory tropes are most apparent in the literature published by the Council for Aboriginal Reconciliation, which proposed two reconciliation documents: *Corroboree 2000—Towards Reconciliation*,

¹²⁹ Scott Veitch, 'Pro Patria Mori: Law, Reconciliation and the Nation' in Desmond Manderson (ed), *Courting Death: The Law of Mortality* (Pluto Press, London, 1999) 150.

¹³⁰ This deadline was fixed to the extent that the legislation enacted to create the Council ceased to be in force on 1 January 2001.

¹³¹ Paul Keating, 'The Redfern Park Speech' in Michelle Grattan (ed) *Reconciliation: Essays on Australian Reconciliation* (Black Inc, Sydney, 2000) 61.

including the Declaration, ‘the start of our Reconciliation journey’ and the *Roadmap for Reconciliation*, representing the Council’s ‘considered view on the key actions for going forward’.¹³² The event with the greatest symbolic value, the People’s Walk for Reconciliation, held in cities and towns across the country during Corroboree 2000 and National Reconciliation Week, where possible utilising bridges to represent movement and transition, were reported in the newsletter of the Council, *Walking Together* as one of the ‘most significant mobilisations of people in Australian history’, where hundreds of thousands of people voted ‘with their feet’.¹³³ And, in 2004, footballer and Indigenous leader, Michael Long, launched The Long Walk campaign by staging a symbolic walk from Melbourne to Canberra to meet with the Prime Minister, John Howard, to discuss chronic Indigenous disadvantage.¹³⁴

The rhetoric of national shame articulated by Justice Brennan in the *Mabo* decision was intensified with the release of the *Bringing Them Home* report, documenting the history of forcible removal of Indigenous children from their families. Making over 50 recommendations, ‘directed to healing and reconciliation for the benefit of all Australians’,¹³⁵ the report significantly defined the process of forcible removal as an act of genocide, as defined by the United Nations 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.¹³⁶ In documenting the impact of the laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander Children from their families, the *Bringing Them Home* report begins with the reminder that:

In no sense has the Inquiry been ‘raking over the past’ for its own sake. The truth is that the past is very much with us today, in the continuing devastation of the lives of Indigenous Australians. That devastation cannot be addressed unless the whole community listens with an open heart and mind to the stories of what has happened in the past and, having listened and understood, commits itself to reconciliation.¹³⁷

It is the affective dimension of the discourse of reconciliation which defines it rhetorically. In particular, the function of ‘national shame’ which resonates through

¹³² Produced by the Council for Aboriginal Reconciliation.

¹³³ *Walking Together*, Number 29, August 2000, 3.

¹³⁴ Subsequently, in May 2006, The Long Walk for Change campaign was launched with ‘Dreamtime at the G’, held at the Melbourne Cricket Ground: <www.thelongwalk.com.au>.

¹³⁵ Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal Children from their Families* (Commonwealth of Australia, 1997) 4.

¹³⁶ *Convention on the Prevention and Punishment of the Crime of Genocide* Article II <www.austlii.edu.au/au/other/dfat/treaties/1951/2.html> ratified by Australia on 8 July 1949.

¹³⁷ *Ibid* 3.

many of the documents and speeches circulated in the public domain, mainly as the response of white settler Australians to the testimony of members of the Stolen Generations. Sara Ahmed argues that in the discourse of reconciliation, ‘declarations of shame can work to bring “the nation” into existence as a felt community,’¹³⁸ claiming that ‘national shame functions to reconcile white Australia to itself, such that ‘the “wrong” that is committed provides the grounds for claiming a national identity, for restoring a pride that is threatened in the moment of recognition, and then regained in the capacity to bear witness.’¹³⁹ What this means, she argues, is that:

Shame ‘makes’ the nation in the witnessing of past injustice, a witnessing that involves feeling shame, as it exposes the failure of the nation to live up to its ideals. But this exposure is temporary, and becomes the ground for a narrative of national recovery. *By witnessing what is shameful about the past, the nation can ‘live up to’ the ideals that secure its identity or being in the present.* In other words, our shame *means that we mean well*, and can work to reproduce the nation as an ideal.¹⁴⁰

However, Ahmed also points out the contradictory and ambivalent nature of the politics of shame, which both ‘exposes the nation, and what it has covered over and covered up in its pride in itself, but at the same time *it involves a narrative of recovery as the re-covering of the nation.*’¹⁴¹ The ambiguity and duality expressed in the notion of a nation ‘re-covering’ (from) the shame of colonial relations—to pursue a process of healing the wounds of the past¹⁴² while also engaging in a wilful erasure is a position which can only be occupied by a white national subject. Ultimately, I would argue, the discourse of reconciliation privileges the efficacy of white shame over Indigenous pain¹⁴³ and in doing so reinstitutes the paradigm of colonial relations.

One of the key recommendations arising from the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was that all Australian parliaments, police forces, churches and other non-government organisations officially acknowledge the responsibility of their predecessors for the laws, policies and practices

¹³⁸ Sara Ahmed, ‘The Politics of Bad Feeling’ (2005) 1(1) *Australian Critical Race and Whiteness Studies Journal* 72, 72.

¹³⁹ Sara Ahmed, *The Cultural Politics of Emotion* (Routledge, New York, 2004) 109 (italics in original).

¹⁴⁰ Ibid. Elspeth Probyn has also discussed ‘Shame on the Nation’ in *Blush: Faces of Shame* (UNSW Press, Sydney, 2005).

¹⁴¹ Ahmed (2004) 112.

¹⁴² One of the 11 points listed in the Australian Declaration Towards Reconciliation is: ‘Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.’ The document is reproduced in [2001] *Australian Indigenous Law Reporter* 7.

¹⁴³ Link-Up (NSW) Aboriginal Corporation and Tikka Jan Wilson, *In the Best Interest of the Child? Stolen Children: Aboriginal pain/White shame*, Aboriginal History Monograph No 4 (Link-Up (NSW) Aboriginal Corporation and Aboriginal History Inc, NSW, 1997)

of forcible removal and make formal apologies. It also recommended a national 'Sorry Day' be celebrated each year to commemorate the history of forcible removals and its effects.¹⁴⁴

The apology acquired significant symbolic value and power within the discourse of reconciliation. It is presented as an essential element of any process of reconciliation intended to resolve conflict and remove the harmful effect of past actions. Again deploying the metaphor of walking, the Draft Declaration for Reconciliation articulated the apology as the performativity of reconciliation:

And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.¹⁴⁵

Haydie Gooder and Jane Jacobs argue that postcolonising trends such as the apology work to restructure settler national subjectivity, where 'some settlers become afflicted with a form of postcolonial "bad conscience" or shame and imagine themselves as improper national subjects',¹⁴⁶ experiencing a kind of dispossession. They suggest that 'guilt-afflicted settler Australians ... begin to experience a form of settler melancholia' and argue that for these 'sorry people' 'the apology becomes a lifeline through which a legitimate sense of belonging in the nation may be restored'.¹⁴⁷ They conclude, however, by asking whether, in signalling the potential for co-existence through reconciliation, the white settler is rather engaged in a process of colonial forgetting.

Lest we imagine the settler apology brings us into a fully postcolonial moment, let us revisit the terms within which this apology is constituted. First, let us recall that the settler apology comes out of a sense of melancholia. Melancholia is itself a form of resistance to change in that it emerges when there is a refusal to accept the lost object/ideal. In short, the

¹⁴⁴Human Rights and Equal Opportunity Commission, *Bringing Them Home, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendations 5a, 5b, 6 and 7, (Commonwealth of Australia, 1997) 652. The first National Sorry Day was held on 26 May 1998, a year after the tabling in Federal Parliament of the *Bringing Them Home* report. Thousands of people signed and wrote in Sorry Books and participated in ceremonies across the country. In 1999, the Journey of Healing was launched by the National Sorry Day Committee and each year, Sorry Day is held on 26 May in commemoration of the tens of thousands of Indigenous children who were forcibly removed from their families. Ex-Prime Minister, Malcolm Fraser, is the patron of the National Sorry Day Committee. See <<http://home.alphalink.com.au/~rez/Journey/>>.

¹⁴⁵ This was the draft document, made available for extensive public consultation during 1999, available from <www.austlii.edu.au/au/orgs/car/docrec/draft/>.

¹⁴⁶ Haydie Gooder and Jane M Jacobs, "'On the Border of the Unsayable": The Apology in Postcolonizing Australia' (2000) 2(2) *Interventions* 229.

¹⁴⁷ Ibid.

settler apology carries with it a resistance to the new state of the social world created by postcolonising events.¹⁴⁸

I would argue that by focussing on the performativity of the apology, and by positing the possibility of a redeemed white national subject, the discourse of reconciliation reveals the extent to which it is structured around a Judeo-Christian model of penitence in which contrition and repentance disposes the settler-Australian to atonement and salvation. The possibility that the apology may provide the mechanism to ‘forgive and forget’ directs us to the meaning of reconciliation as amnesty, the offering of a legal pardon with guarantee of immunity and protection, overlooking events of the past—an officially authorised and sanctioned national amnesia.¹⁴⁹

RECONCILIATION AS A ‘POSTCOLONIAL’ DISCOURSE

Much has been written about the troubled relationship between colonialism and the possibility, or otherwise, of its ‘post’,¹⁵⁰ and in using this term, I am acutely aware of its problematic status. As there is a tendency in postcolonial studies to impose homogenising theories on historically, culturally and geographically divergent locations, it is crucial to recognise the specificity of the Australian context. One of the key elements of this formation for the purposes of a discussion of reconciliation is the need to distinguish the postcolonial relation between white Australia and Britain from the ongoing colonial relationship between Indigenous and settler/invaser Australia. I would argue that the discourse of reconciliation conflates these two distinct conditions, contributing to its contradictory and ambivalent rhetoric. It is therefore important to point out that in describing the discourse of reconciliation as a ‘postcolonial’ discourse, I am not denying the lived reality of neocolonial relations. On the contrary, I am suggesting that the political project of reconciliation relies on the rhetoric of nation-building through the transformation of Indigenous–non-Indigenous relations while at

¹⁴⁸ Ibid 244.

¹⁴⁹ Peter Burke points to the etymological connection between amnesty and amnesia (through the Greek *amnēstia*) in ‘History as Social Memory’ in Thomas Butler (ed), *Memory: History, Culture and the Mind* (Basil Blackwell, Oxford, 1989) 108.

¹⁵⁰ See, for example, Stuart Hall, ‘When was “the post-colonial”? Thinking at the Limits’ in Iain Chambers Iain and Lidia Curti (eds) *The Post-Colonial Question: Common Skies, Divided Horizons* (Routledge, London 1996) 242; Ruth Frankenberg and Lata Mani, ‘Crosscurrents, Crosstalk: Race, “Postcoloniality” and the Politics of Location’ (1993) 7(2) *Cultural Studies* 292; Anne McClintock, *Imperial Leather: Race, Gender and Sexualities in the Colonial Context* (Routledge New York 1995), particularly the Introduction for a specific discussion of the ‘Pitfalls of the Postcolonial’.

the same time, political, social and, most relevantly for my purposes, legal institutions use physical and discursive power which re-inscribes the violence of colonial relations.¹⁵¹

Largely, criticism of postcolonialism has centred around the suggestion inherent in the use of the prefix 'post-' of a 'diachronic sequence of periods in which each one is clearly identifiable',¹⁵² or even more problematically, 'the ... sense of a state where the process of colonisation has reached its goal of fully neutralising the colonised'.¹⁵³ Of course, neither suggestion can be contemplated to apply to the Australian context at the end of the 20th century. Nevertheless, I think it is possible to draw productively on some of the intellectual currents propelled by postcolonial theory, as much as that generated out of its critiques. It may then be possible to see such interventions as forms of anti-colonialism, as politically-motivated strategies for countering the pervasive amnesia of the current political and legal climate in Australia.

Ken Gelder and Jane Jacobs argue that it is the movement between different categories of national identity, '[t]he impulse ... towards reconciliation at one moment, and division at another; 'one nation' and a 'divided nation' ... the ceaseless movement back and forth between these two positions which is precisely postcolonial'.¹⁵⁴ In an examination of the function of the 'uncanny' and of discourses of the Aboriginal sacred in Australia, they argue that 'Australia has become postcolonial because the claims Aboriginal people make on Australia work themselves out first and foremost in the political sphere'.¹⁵⁵ Gelder and Jacobs suggest that the value in the psychoanalytic concept of the 'uncanny', as that which is both 'in place' and 'out of place' simultaneously, is the way it 'refuses the usual binary structure upon which much commentary on Aboriginal and non-Aboriginal relations is based'. They argue that:

¹⁵¹ Chris Cunneen, for example, advocates the use of the term 'neocolonialism' in relation to policing in Aboriginal communities, 'as way of bringing together both the continuities of policing in the colonial period with an understanding of the political changes which have occurred in the legal context of citizenship, equality and the rule of law'. He argues that current levels of criminalisation and the role of police can be understood as an historical moment in neocolonial relations, noting that criminalisation permits an historical and political amnesia in relation to prior ownership of land, contemporary land rights and rights to self-determination: Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, Crows Nest, NSW, 2001) 8.

¹⁵² Jean-François Lyotard, *The Postmodern Explained to Children: Correspondence 1982–1985* (Power Publications, Sydney, 1992) 90.

¹⁵³ Ghassan Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society* (Pluto Press, Annandale, NSW, 2003) 96.

¹⁵⁴ Ken Gelder and Jane Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (Melbourne University Press, Melbourne, 1998) 22.

¹⁵⁵ Ibid 13.

In postcolonial Australia, however, it may well be that both of these positions are inhabited at the same time: one is innocent ('out of place') and guilty ('in place') simultaneously. And this is entirely consistent with postcoloniality as a contemporary moment, where one remains within the structures of colonialism even as one is somehow located beyond them or 'after' them.¹⁵⁶

This is an interesting and thought-provoking analysis and one which is refreshing in its specific focus on Australia in postcolonial studies. I find appealing Gelder and Jacobs' suggestion that reconciliation is a never 'fully realisable category', but one which generates an unstable dynamic of 'unsettlement' which may in fact be productive. It appears compatible with Ruth Frankenberg and Lata Mani's argument that the utility of the term 'postcolonial' is in signalling a 'political, economic and discursive shift',¹⁵⁷ but one which must be attentive to the specific historical formations of the various manifestations of domination and resistance to describe 'moments, social formations, subject positions and practices which arise out of an unfolding axis of colonization/decolonization, interwoven with the unfolding of other axes, in *uneven, unequal* relations with one another.'¹⁵⁸ As they point out, the value in the concept of the 'postcolonial' is its usefulness to questions of subject formation, highlighting the function of discourses to interpellate subjects, such that, for example, 'white Western "postcolonial" subjects are still interpellated by classical colonialism itself.'¹⁵⁹

However, I also think Jacobs and Gelder's use of the concept of postcolonial to describe the interpellation of subjects in reconciling Australia points us to its problematic status: it is white settler Australians who are both at home and out of place, innocent and guilty, within the structures of colonialism while at the same time beyond them. Their proposal for the use of the concept of the postcolonial in relation to reconciliation is a subject position occupied by white settler subjects. While it may be true that some claims made by Aboriginal people have been worked out at the level of the political, as Jacobs and Gelder suggest, this has not resulted in their occupation of a space which can be described as 'postcolonial'. The decision in *Cubillo v Commonwealth* provides but one example of this crucial point. Having encountered political opposition,

¹⁵⁶ Ibid 24.

¹⁵⁷ Ruth Frankenberg and Lata Mani, 'Crosscurrents, Crosstalk: Race, "Postcoloniality" and the Politics of Location' (1993) 7(2) *Cultural Studies* 292, 300.

¹⁵⁸ Ibid 307.

¹⁵⁹ Ibid 299.

indeed denial,¹⁶⁰ in response to the recommendations of the *Bringing Them Home* report, and unable to pursue claims of compensation for injuries suffered as the result of colonial violence in any other forum, the plaintiffs took legal action against the Commonwealth, the authorised representative of colonial power. Their claim was unsuccessful, however, because, according to Justice O’Loughlin, history failed to reveal itself to the required standard of proof; the *burden* of proof was not satisfied.

As Aileen Moreton-Robinson points out, in Australia, as in other contexts in which there is a dominant white settler population, “‘postcolonial’ remains based on whiteness’.”¹⁶¹ She argues that:

Indigenous and non-Indigenous peoples are situated in relation to (post)colonization in radically different ways—ways that cannot be made into sameness. There may well be spaces in Australia that could be described as postcolonial but these are not spaces inhabited by Indigenous people.¹⁶²

Moreton-Robinson makes the important point that the discourse of postcolonialism interpellates subjects in different ways, that it is not a function of national identity, nor even of historical specificity, but of the fundamental incommensurability of Indigenous and non-Indigenous subjectivities. She suggests the use of the term ‘postcolonising’, rather than ‘postcolonial’, as a way of conceptualising Australia’s contemporary landscape, as an ‘ongoing process’, but one where she points out ‘Indigenous belonging challenges the assumption that Australia is postcolonial because our relationship to land ... is omnipresent, and continues to unsettle non-Indigenous belonging based on illegal dispossession.’¹⁶³ The fundamental incontestability of Indigenous sovereignty, the reality of Indigenous people being ‘in place’, but never ‘out of place’, points to the inappropriateness of the use of the notion of the uncanny to describe Indigenous subjective locations.

¹⁶⁰ The Federal Government’s response to the recommendations of the HREOC report, formalised in its submission to the Senate Legal and Constitutional References Committee’s Report on the Inquiry was characterised by denial that there ever was a ‘generation’ of stolen children, arguing that the proportion of children removed was never more than 10 percent. John Cash makes the insightful point that embedded in ‘the very repetition of that phrase “no more than 10 percent”, we see figured the whole idea of decimation—a decimation that cannot and will not recognise itself even as it unwittingly declares its very presence, contained within the literal meaning of the denial’: John Cash, ‘The Political/Cultural Unconscious and the Process of Reconciliation’ (2004) 7(2) *Postcolonial Studies* 165, 173.

¹⁶¹ Aileen Moreton-Robinson, ‘I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonizing Society’ in Sara Ahmed, Claudia Castañeda, Anne-Marie Fortier and Mimi Sheller (eds) *Uprootings/Regroundings: Questions of Home and Migration* (Berg, Oxford, 2003) 23, 30.

¹⁶² *Ibid.*

¹⁶³ *Ibid.* 24.

Sara Ahmed proposes postcolonialism as a ‘failed historicity: a historicity that admits of its own failure in grasping that which has been, as the impossibility of grasping the present.’¹⁶⁴ She suggests that postcolonialism is useful for ‘rethinking how colonialism operated in different times in ways that permeate all aspects of social life, in the colonised and colonising nations’, ‘re-examining the centrality of colonialism to a past that henceforth cannot be understood as a totality, or as a shared history’.¹⁶⁵ Ahmed’s proposal resonates with Stuart Hall’s argument for the use of the concept of the ‘post-colonial’ deconstructively, ‘as if the concept is under erasure’,¹⁶⁶ to characterise a ‘double inscription’, breaking down the ‘inside/outside’, then and now, here and there construction of the colonial system, ‘obliging us to re-read the very binary form in which the colonial encounter has for so long itself been represented’.¹⁶⁷ Hall points to ‘colonialism’ as referring not only to a specific historical moment, but also as ‘a way of staging or narrating a history’ and the way in which the discursive analysis positions subjects ‘irrevocably within a power-knowledge field of force.’¹⁶⁸

In positing the potential for renewal of the nation through the reconfiguration of relations between Indigenous and non-Indigenous Australians, the discourse of reconciliation speaks to the possibility of alternatives to histories of colonial encounters. It reminds us of the failure of historical narratives, of historicity, to account for the foundation of the nation, and of the essential ‘forgetting’ described by Ernest Renan over 100 years ago, in the creation of a nation.¹⁶⁹ There is a paradox at the heart of the discourse of reconciliation, for while it articulates a project of national unity, it also illuminates the illegitimacy of the nation in the face of the incontestability of Indigenous sovereignties.

‘POSTCOLONIAL AMNESIA’ IN THE WHITE NATION

In attempting to interrogate the complex terrain of postcolonial studies, Leela Ghandi distinguishes the *theory* of postcolonialism, which she advocates as ‘a disciplinary project devoted to the academic task of revisiting, remembering and, crucially, interrogating the

¹⁶⁴ Sara Ahmed, *The Cultural Politics of Emotion* (Routledge, New York, 2004) 10.

¹⁶⁵ Ibid 11.

¹⁶⁶ Stuart Hall, ‘A Conversation with Stuart Hall’ (2002) 7(1) *The Journal of the International Institute* <www.umich.edu/~iinet/journal/vol7no1/Hall.htm>.

¹⁶⁷ Stuart Hall, ‘When was “the post-colonial”? Thinking at the Limits’ in Iain Chambers Iain and Lidia Curti (eds) *The Post-Colonial Question: Common Skies, Divided Horizons* (Routledge, London 1996) 247.

¹⁶⁸ Ibid 253.

¹⁶⁹ Ernest Renan, ‘What is a Nation?’, reproduced in Homi Bhabha (ed), *Nation and Narration* (Routledge, London, 1990) 11.

colonial past',¹⁷⁰ from the *condition* of postcoloniality, a condition often accompanied by a desire to forget the colonial past:

This 'will-to-forget' takes a number of historical forms, and is impelled by a variety of cultural and political motivations. Principally, postcolonial amnesia is symptomatic of the urge for historical self-invention or the need to make a new start—to erase painful memories of colonial subordination. ... In response, postcolonialism can be seen as a theoretical resistance to the mystifying amnesia of the colonial aftermath.¹⁷¹

Ghandi draws on the postcolonial critic Homi Bhabha's account of the relationship between colonialism and cultural identity, and an understanding of the psychoanalytic process, to identify two types of amnesia for the development of her theoretical approach: the common experience of neurotic repression of memory, *Verdrängung* (repression), and the more devastating experience of psychotic repudiation or foreclosure, *Verwerfung* (repudiation). She argues that the colonial aftermath is characterised by both these conditions and that the process of 'theoretical re-membering' of the colonial condition is therefore required to fulfil two functions: firstly, the disinterment of unpalatable memories through the uncovering of the violence of colonisation and secondly, the more reconciliatory attempt to make the hostile past more familiar.¹⁷²

Using Ghandi's framework, we may view the significant work of critical historians to uncovering, revealing and popularly disseminating the history of the colonisation of Australia and to rewriting some of Australia's foundational myths as a form of theoretical re-membering, an attempt to 'uncover the overwhelming and lasting violence of colonisation'.¹⁷³ This work has revealed dispossession, massacres, genocide, kidnapping and effective enslavement of Indigenous people at levels which had not previously been acknowledged in Australia's canonical history. For many non-

¹⁷⁰ Leela Ghandi, *Postcolonial Theory: A Critical Introduction* (Allen & Unwin, St Leonards, NSW, 1998) 4.

¹⁷¹ Ibid. It is important to point out that Ghandi does not focus her theoretical framework on the context of Australian Indigenous and settler/colonial relations. Nevertheless, I would argue that if we are to attempt to engage with a questioning of postcolonising Australia, we can take Ghandi's conceptualisation as a starting point.

¹⁷² Ibid 10. Ghandi highlights the point made by Jean-François Lyotard that the diachronic marking of periods such that a new period (he is discussing postmodernism) is seen to supersede another 'is in fact a way of forgetting or repressing the past, that is to say, repeating it and not surpassing it': Jean-François Lyotard, *The Postmodern Explained to Children: Correspondence 1982–1985* (Power Publications, Sydney, 1992) 90.

¹⁷³ There are many critical historians and other scholars contributing work in this area, including Bain Attwood, Larissa Behrendt, Tony Birch, Deborah Bird-Rose, Ann Curthoys, John Docker, Mick Dodson, Anna Haebich, Rosanne Kennedy, Marcia Langton, Robert Manne, Ann McGrath, Stuart Macintyre, Peter Read, Henry Reynolds, Lyndall Ryan, Irene Watson and Patrick Wolfe.

Indigenous people, the exposure and elaboration of the history of colonialism, together with legal recognition of native title, has resulted in a serious reconsideration of their position in relation to the nation. The revision of Australian history destabilises the premise of historical truth and confronts white settler Australians with a dilemma in the appropriation of national memory. It necessitates the question of responsibility, both for the present and the past.

However, there has been a concerted effort on the part of conservative historians and columnists, particularly emanating from the journal *Quadrant*, to discredit this work and to present it as a deceptive and fabricated version of history.¹⁷⁴ Much of this debate has resulted in reductive empiricist arguments about the death toll in frontier conflicts and massacres. These debates have come to be known as ‘history wars’ or ‘memory wars’, resulting in a rush of new history publications and have featured prominently in the media, public political debates and literary festivals. Critical revisionist historians have been labelled ‘black-armband’ by conservatives, including the Prime Minister John Howard.¹⁷⁵ They have been accused of dangerously dividing and undermining national cohesion and of being driven by ideological rather than historical perspectives. Such responses reveal acute anxiety about the need to retain a sense of national identity based on a belief in Australian history which represses the ‘memory of the history of race and racism’.¹⁷⁶

¹⁷⁴ The journal *Quadrant* has served as a key forum for right-wing commentators who vociferously opposed the revisionist historical work, including David Bennett, Ron Brunton, Michael Duffy, Paddy McGuinness (ed), Kenneth Maddock, Les Murray, Christopher Pearson, Imre Salusinszky and Keith Windshuttle. Some commentators, including Piers Ackerman, Andrew Bolt and Frank Devine, write regularly as columnists for the daily press. The magazine has been particularly trenchant in attempting to discredit the *Bringing Them Home* report and the actions taken by member of the Stolen Generations. On 9 September 2000, *Quadrant* organised a conference, entitled Truth and Sentimentality, which ‘celebrated the failure’ of the action taken by Cubillo and Gunner: Stuart Macintyre and Ann Clarke, *The History Wars* (Melbourne University Press, Melbourne, 2003) 147. The opening address was given by Douglas Meagher QC, counsel for the Commonwealth in the *Cubillo* trial. Some of the conference papers were subsequently published, for example, Ron Brunton, ‘Justice O’Loughlin and Bringing Them Home: A Challenge to the Faith’ *Quadrant* (December 2000) 37 and David Bennett, ‘The Cubillo and Gunner Cases’ *Quadrant* (November 2000) 35. The Prime Minister, John Howard, has been reported as describing *Quadrant* as his favourite magazine.

¹⁷⁵ This term was first used in 1993 by historian Geoffrey Blainey when he delivered the John Latham Memorial Lecture to describe what he saw as an overemphasis by younger historians on past wrongs in reaction to an earlier ‘three cheers’ view which celebrated Australian history. Blainey attempted to draw up a balance sheet of Australian history including economic performance, ecology, democracy and the treatment of Aboriginals: Macintyre and Clarke (2003) *ibid* 128–9.

¹⁷⁶ Homi Bhabha, *The Location of Culture* (Routledge, London, 1994) 63.

Mark McKenna has recently argued that since the invocation of the metaphor of the ‘great Australian silence’ by WEH Stanner in his 1968 Boyer Lecture,¹⁷⁷ there has been nearly 40 years of historical scholarship, such that ‘it’s now no longer correct to speak, at least on a national scale, of frontier history as being repressed’.¹⁷⁸ He claims that metaphors such as this have given rise to clichés about confronting the past and ‘moving on’, suggesting that ‘moving on may only be a journey to a new kind of forgetting’. Nevertheless, McKenna acknowledges that while the presence of ‘Aboriginal history’ is no longer silent, it has an ‘uncomfortable presence’.¹⁷⁹

Despite the significance attributed to the *Bringing Them Home* report for the reconciliation project, its publication resulted in a profound rebuttal from conservative historians and commentators, denying the existence of the Stolen Generations and in particular objecting to the use in the report of the term ‘genocide’ to describe the impact of the policies of forcible removal.¹⁸⁰ Robert Manne, previous editor of *Quadrant*, began to write prolifically on the issue of the Stolen Generations. He argued that there has been a concerted campaign on the part of the right, in collusion with the federal government, and indeed significantly aided by Douglas Meagher QC as counsel for the Commonwealth in the *Cubillo* trial, to deny the history revealed by the *Bringing Them Home* report.¹⁸¹

Kay Schaffer argues that the nature of the debate itself, in which white Australians have positioned themselves on one side or the other renders ‘those whose lives, histories, and identities are at stake ... in the category of otherness, as “evidence”.’¹⁸² Schaffer highlights the function of the debate about Australia’s history to itself interpellate subjects in a way which constitutes the ‘nation’s hegemonic boundaries’, where the

¹⁷⁷ Professor W E H Stanner, *After the Dreaming*, 1968 Boyer Lecturer (The Australian Broadcasting Commission, Sydney, 1969).

¹⁷⁸ Mark McKenna, ‘Writing the Past: History, Literature and the Public Sphere in Australia’, public lecture sponsored by the Humanities Writing Project, held at Queensland College of Art, Brisbane, 1 December 2005.

¹⁷⁹ Ibid.

¹⁸⁰ In its report HREOC stated that: ‘The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law’: *Bringing Them Home* 266.

¹⁸¹ Robert Manne, ‘In Denial: The Stolen Generations and the Right’ (2001) 1 *The Australian Quarterly Essay*. Manne claims that his resignation from *Quadrant* was the ‘consequence of the bad blood caused by articles and editorials written in 1996 and 1997 by myself and a close friend, Raimond Gaita, on Aboriginal politics in general and the question of genocide and the stolen generations in particular’: 57. Manne has subsequently written regularly for *The Age* newspaper, particularly at that time on the Stolen Generations.

¹⁸² Kay Schaffer, ‘Manne’s Generation: White Nation Responses to the Stolen Generation Report’ (June 2001) *Australian Humanities Review* <www.lib.latrobe.edu.au/AHR/archive/Issue-June-2001/schaffer.html>.

‘white nation ... comes to stand in for the whole.’¹⁸³ The synecdochical function of whiteness eclipses the heterogeneity of national subjects, and the contested claims to sovereignty, positioning Indigenous peoples as the supplement to the nation, and their interests as marginal to those of ‘ordinary Australians’.¹⁸⁴

Pointing out that the stories of the Stolen Generations were not themselves new, but that the testimonies had not previously had ‘efficacy within the public domain, no legitimacy within official discourses of the nation’, Schaffer suggests that:

the silence that marks the trauma to the nation that accompanied the release of *Bringing Them Home* has less to do with the testimonies of the victims, or even the ‘facts’ of history, and more to do with what lies beyond the words themselves: what “we”, on an ontological level of national selfhood, cannot afford to know, to see, to hear or to speak of. We turn away, uncomprehending, not from the words but from the recognition they threaten to provoke of a nation and its people, a recognition so remote from the myths of nation that fuel our perceptions of ourselves as Australian so as to be unrecognisable. ... And so we engage in an active, willed forgetting.¹⁸⁵

Like the whiteness at the heart of the nation, the trauma which has characterised the response to the testimonies of the Stolen Generations eclipses the pain of the Indigenous Other, appropriating the discourse of trauma and inducing ‘the comfort of selective amnesia’.¹⁸⁶ What role does the law play in this willed forgetting? In the second part of this chapter, I will examine the law’s response to the two claims made to date by members of the Stolen Generations against the Commonwealth, with particular attention to the function of memory, and forgetting, in legal discourse.

SPECTRES OF GENOCIDE

The use of psychoanalytic models in the discourse of reconciliation has not been limited to intellectual discussions. On the contrary, particularly in the wake of the testimonies of members of the Stolen Generations resulting in the *Bringing Them Home* report—arguably the discursive height of the reconciliation debate—the media, political, literary and cultural commentary were replete with therapeutic metaphors in discussions of Australia’s colonial history. But there is an important point to be made here in relation

¹⁸³ Ibid.

¹⁸⁴ Tony Birch points to the way Aboriginal people who pursue their rights through the legal system in relation to their removal from families, or who discuss this issue in any way, are characterised as ‘un-Australian’: Tony Birch, ‘The Last Refuge of the Un-Australian’ (2001) 7(1) *UTS Review* 17, 20.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid 17.

to the use of a therapeutic model for 'postcolonising' Australia, namely, it is the *victim* of violence who experiences the symptoms of the trauma which results in the will-to-forget.

As David Lloyd points out, in a critique of Ghandi's work, 'the deliberate infliction of a pain demands not just an amnesic response but actually denies the very existence of a subject that could remember.'¹⁸⁷ Significantly, he goes on to argue that 'what this means, however, is that the trauma persists in and as a differential relation of power between the perpetrator and the victim. The perpetrator, no less than the victim, insists on the condition of silence.'¹⁸⁸ Lloyd argues that one of the ways in which this silencing can occur is through the use of physical and discursive power to control the means of 'making sense of the traumatizing event outside the terms that constitute the common sense of hegemony.'¹⁸⁹

What part does the law play in this power to control the means of making sense of trauma, to silence the victims, indeed to deny the existence of subjects who can remember? And what role does the law have in the process of remembering, revealing, and even writing histories? What *is* the relationship between law and history? Like Austin Sarat and Thomas Kearns, I see the law as 'an active participant in the process through which history is written and memory constructed'¹⁹⁰ and I read the law and the way history and memory are represented in law as a critical hermeneutic practice which has the potential to reveal much about the interconnections, and discontinuities between institutional practices and collective memories. 'Law' and 'History' are proper nouns in western knowledge, but the law tends to regard itself *as* history. Such disciplinary colonisation has highly significant consequences for our knowledge of, and the way we conceptualise our relationship to, the present and the past. As Kearns and Sarat explain: 'Law writes the past, not just its own past, but the past for those over whom law seeks to exercise its domination. Law constructs a history that it wants to present as authoritative ... And law uses history to tell us who we are.'¹⁹¹

¹⁸⁷ David Lloyd, 'Colonial Trauma/Postcolonial Recovery?' (2002) 2(2) *Interventions* 212, 214.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid 215–6.

¹⁹⁰ Austin Sarat and Thomas Kearns, 'Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction' in Austin Sarat and Thomas Kearns (eds) *History, Memory, and the Law* (The University of Michigan Press, Ann Arbor, 1999) 2.

¹⁹¹ Ibid 3.

When Lorna Cubillo and Peter Gunner brought legal action against the Commonwealth Government, they presented a serious challenge to the collective memory of the white nation. In seeking compensation for the emotional and cultural losses, violence and dispossession they experienced under assimilation policies authorised by the colonial state, Cubillo and Gunner put into effect the question of culpability in the present for the actions of the past. Their claim went to the heart of the project of reconciliation because they not only presented evidence of the practice of child theft authorised by the state—as had many of those who provided testimony for the HREOC inquiry—but also claimed compensation for the trauma, loss and violence they had experienced as a result of the policies.

Cubillo and Gunner asked for more than an apology. They challenged the state to justify the racist practices—already described and documented in detail in the *Bringing Them Home* report released only two years earlier—by presenting their own memories of the experiences of having been taken away from their families and placed in institutions, and required the law to *respond*. Their claim was a call for justice, brought at a time when the project of reconciliation had been the officially-endorsed discourse used to describe all aspects of the relationship between Indigenous and non-Indigenous citizens for close to a decade. Cubillo and Gunner tested one important avenue of the limits of reconciliation, where the law was required to pass judgment on the validity of racist colonial practices conducted under its jurisdiction. It was a crucial decision for the project of reconciliation, when the proposal for the establishment of a compensation tribunal as recommended in the *Bringing Them Home* report had already been rejected by the federal government,¹⁹² leaving those who had suffered as a result of this widespread practice and who wanted to pursue claims with no alternative but to do so in the juridical arena. The legal action bravely taken by Cubillo and Gunner against the

¹⁹² Subsequent to the limited response to the *Bringing Them Home* report from the Commonwealth Government, the Public Interest Advocacy Centre (PIAC), the National Sorry Day Committee, the Human Rights and Equal Opportunity Commission and the Aboriginal and Torres Strait Islander Commission developed a project, entitled ‘Moving Forward—Achieving Reparations’, which consulted with members of the Stolen Generations and their communities across the country to give their responses to the proposal for a Reparations Tribunal, based on a proposal made by PIAC to the inquiry, as an alternative to the difficulties and obstacles faced in costly and protracted court proceedings. The proposal was supported by the Australian Labor Party and Australian Democrat members of the Senate Inquiry into the Stolen Generations in 2000. The final report of the project recommended that ‘State, territory and federal governments, in co-operation with the churches, establish a tribunal to make full and just reparations for forcible removal policies’ based on the principles of acknowledgement, self-determination, access to redress and prevention: Amanda Cornwall, *Restoring Identity: Final Report of the Moving Forward Consultation Project* (Public Interest Advocacy Centre, Sydney, August 2002) ix.

Commonwealth government had immense personal and symbolic significance. It was, as Robert van Krieken puts it,

an important watershed in the way the arenas of law, politics and society might relate to each other in addressing the ethical questions surrounding the current reassessment of Aboriginal child removal in particular, assimilation in general, as well as the pathways which relations between Indigenous and non-Indigenous Australians might take in the future.¹⁹³

Shoshana Felman argues that landmark trials are themselves sites of memories, and of traumas, in the law's history, because the verdicts in landmark trials are decisions about 'what to admit into and what to transmit of collective memory', but that 'law relates to history through trauma', and that what should be remembered is not only the trial but the trauma that makes the trial necessary. She points out, however, that the trauma cannot be remembered when it is not recognised, and that rather than compelling a remembering, a traumatic re-enactment occurs.¹⁹⁴ According to Felman, when a court confronts the trauma, it is often inflicted with a particular 'judicial blindness that unwittingly reflects and duplicates the constitutional blindness of culture and of consciousness towards the trauma', revealing the way in which the law has its own unconscious.¹⁹⁵ She argues that '[w]hat has to be heard in court is precisely what cannot be articulated in legal language.'¹⁹⁶

Cubillo v Commonwealth was a landmark trial because it involved the presentation of evidence of the systemic nature of policies and practices of forcible child removal for a period of over 50 years,¹⁹⁷ and because it was regarded as a litmus test of the Anglo-Australian legal system's reception of claims for compensation by members of the Stolen Generations. But it was not the first case brought before a court in the federal jurisdiction concerning the state-authorised kidnapping of Aboriginal children. One year prior to the action taken by Cubillo and Gunner, in the only other claim to date made by members of the Stolen Generations against the Commonwealth, *Kruger & Ors v Commonwealth*,¹⁹⁸ nine plaintiffs challenged the constitutional validity of the *Aboriginals*

¹⁹³ Robert van Krieken, 'Is Assimilation Justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' (2001) 23(2) *The Sydney Law Review* 239, 239.

¹⁹⁴ Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press, Cambridge Massachusetts, 2002) 84.

¹⁹⁵ Ibid 5.

¹⁹⁶ Ibid 4.

¹⁹⁷ Over 2000 pages of evidence were presented of documents relating to the policy and practice between 1911–67, the period relevant to the claim.

¹⁹⁸ *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 190 CLR 1. The solicitors instructing counsel for both the *Kruger* and *Cubillo* actions were

Ordinance 1918 (NT), claiming damages for false imprisonment and deprivation of liberty, arguing that they had been forcibly removed from their families in the Northern Territory between 1925–49 and had been institutionalised, for periods the last of which ended in 1960.¹⁹⁹ The plaintiffs claimed that the *Aboriginals Ordinance 1918* (NT)²⁰⁰ was constitutionally invalid, on a number of grounds, including, importantly, that it authorised acts of genocide.²⁰¹ They argued that the Ordinance was contrary to an implied constitutional right to freedom from laws which authorised the crime against humanity of genocide. Australia is a signatory to the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*, under which genocide is defined to include the ‘removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group’s physical destruction’.²⁰²

In *Kruger*, the plaintiffs raised the spectre of genocide in questioning the constitutional foundations of the nation. Their claim went to the heart of that question which had remained unanswered in the project of reconciliation, namely, on what grounds was the colonial state founded, if not on the basis of ‘genocidal intent’? As Irene Watson points out:

... for millions of Indigenous peoples globally, the struggle for recognition of minimum human rights standards and the recognition of self-determination has been hailed as being fundamental to the survival of Indigenous peoples. Without recognition, Indigenous peoples will continue to be vulnerable to the genocidal policies of the various states in which they live. ... Australia presents an extreme example of genocide, where the Aboriginal population has been reduced to less than 2% of the general Australian population. What is behind this marginalisation of a population

the North Australian Aboriginal Legal Aid Service, in the latter case, under the auspices of the Stolen Generations Litigation Unit. The only other case concerning civil claims made by members of the Stolen Generations has been that of Joy Williams: *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86; [2000] Aust Torts Reports P81-578, 64,136. Williams, represented by the Kingsford Legal Centre, took action against the New South Wales State Government, arguing that, having been placed in the care of the Aborigines Welfare Board shortly after her birth, she had suffered abuse and mistreatment by the staff of institutions, as a result of the negligence, breach of statutory duty and breach of fiduciary duty of the Board. In the trial, Justice Abadee found against Williams, determining that she had not met the burden of proof.

¹⁹⁹ Having initially been heard by Chief Justice Brennan, the actions were reserved for consideration of a full bench of the High Court for determination of questions of law, before any questions of fact were to be considered. There were two actions which were joined together with a total of nine plaintiffs, eight of whom were removed as children and the ninth the mother of a child who was removed.

²⁰⁰ And as amended in 1953.

²⁰¹ The claim was made on the grounds that it was not a law which could apply to a territory; that there was an implied constitutional immunity from removal and subsequent detention without due process of law; that it was contrary to an implied constitutional principle of legal equality, and rights to freedom of movement and association, and religion; and that it authorised acts of genocide.

²⁰² *Convention on the Prevention and Punishment of the Crime of Genocide* Article II <www.austlii.edu.au/au/other/dfat/treaties/1951/2.html> ratified by Australia on 8 July 1949.

which just over 200 years ago was 100% of the population, if not genocide?²⁰³

In *Kruger*, a majority of four of the six Justices did not find the Ordinance constitutionally invalid, thus determining the question of genocide ‘unnecessary to answer’.²⁰⁴ In considering the validity of the legislation in terms of the potential for it to authorise acts of genocide, all six judges of the High Court drew on the requirement that removals be conducted in the interests of the children, and could not therefore be held to have authorised acts of genocide. It was, as Valerie Kerruish has pointed out, for each of them ‘an easy case of statutory interpretation’,²⁰⁵ exemplary in its application of the principles of legal positivism. When the Justices of the High Court applied their judicial consideration to the Aboriginals Ordinance, they invoked the discourse of ‘best interests’. Justice Dawson asserted the legislative expression of ‘best interests’ as that which makes the claim of genocide invalid, stating that ‘it is to my mind not possible to conceive of any acceptable definition of genocide which would embrace the actions authorised by the 1918 Ordinance, given that they were required to be performed in the best interests of the Aboriginals concerned or of the Aboriginal population’.²⁰⁶ Acknowledging that ‘the Ordinance authorised the forcible transfer of Aboriginal children from their racial group’, Justice Gaudron nevertheless concluded that ‘the settled principles of statutory construction ... compel the conclusion that it did not authorise persons to remove those children “with intent to destroy, in whole or in part, ... [their] racial ... group, as such”’.²⁰⁷

In rejecting the claim of genocide, the High Court drew on the language of another international instrument, the United Nations *Convention on the Rights of the Child*,²⁰⁸ which

²⁰³ Irene Watson, ‘Settled and Unsettled Spaces: Are We Free to Roam?’ (2005) 1(1) *Australian Critical Race and Whiteness Studies Association Journal* 45 <www.acrawsa.org.au/journal/issue1.htm>.

²⁰⁴ Chief Justice Brennan and Dawson, McHugh and Gummow JJ. Justice Gaudron found s 6, so far as it conferred authority to take people into custody, and ss 16 and 67(1)(c) of the *Aboriginals Ordinance 1918* (NT) invalid on the grounds that they restricted the implied constitutional rights to freedom of movement and association. Justice Toohey, while acknowledging the restrictions imposed on the legislation by the implied rights to freedom of movement and association, and the principle of legal equality, concluded that ‘it is not possible, at this stage of the proceedings, to say whether the Ordinance or any of its provisions was thereby invalid’: 182.

²⁰⁵ Valerie Kerruish, ‘Responding to Kruger: The Constitutionality of Genocide’, (1998) 11 *Australian Feminist Law Journal* 65, 69. See also Larissa Behrendt, ‘Genocide: The Distance between Law and Life’ (2001) 25 *Aboriginal History* 132 for an interesting discussion of the Australian jurisprudence of genocide, including *Kruger*, which resonates with my argument.

²⁰⁶ At 161–2 (Dawson J).

²⁰⁷ At 188 (Gaudron J).

²⁰⁸ Australia ratified the *Convention on the Rights of the Child* in December 1990, but has provided only limited incorporation in domestic law, by listing it as an international instrument under the *Human Rights and Equal Opportunity Act 1986* (Cth).

sets out general principles regarding the legal rights of children, and acknowledges that parents or guardians have the primary responsibility for protecting the interests of their children, with the state becoming involved only where the child's interests are at risk. Under the convention, state parties are required to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'.²⁰⁹

The central principles relating to children in contemporary Australian family law draw on the convention, where the term 'best interests' was expressly incorporated into the *Family Law Act 1975* under amendments in 1995, with a list of factors which may be taken into account by the Family Court when ruling in relation to children in marital breakdown, including the child's wishes, the child's relationship with each parent or other people, and the effect of change on the child, including separation from parents or other people.²¹⁰

But this is not the discourse of colonial relations in which the Aboriginals Ordinance operated. The term 'best interests' does not exist in the Ordinance and did not appear until 1957, when the Welfare Ordinance replaced the Aboriginals Ordinance, providing for the declaration of an Aboriginal person as a ward.²¹¹ The concept of 'best interests' of the child does not exist in the Aboriginals Ordinance, expressly or otherwise. Rather, the Ordinance provides the legislative framework for the project of assimilation where Aboriginal children of mixed descent were kidnapped from their families and taken to an institution in order to be inculcated in white social behaviour and Christian religious practices, a project of 'civilising and Christianising',²¹² and to create a servile labour force.

²⁰⁹ *Convention on the Rights of the Child* Article 9, (New York, 20 November 1989), entry into force for Australia 16 January 1991, <www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>.

²¹⁰ *Family Law Act 1975* (Cth) s 68F. Importantly, under this section, the Act also specifies the need to take into account Aboriginal and Torres Strait Islander children's need to maintain connection with their lifestyle, culture and traditions.

²¹¹ *Welfare Ordinance 1957* s 17(1): 'Where the Director considers that it is in the best interests of a ward, he may:

- (a) take the ward into his custody;
- (b) authorise a person to take the ward into custody on behalf of the Director;
- (c) order that the ward be removed to, and kept within, a reserve or institution;
- (d) order that the ward be kept within a reserve or institution; and
- (e) order that the ward be removed from one reserve or institution to another reserve or institution.'

²¹² Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Arts Centre Press, Fremantle, 2000) 178.

In her detailed historical account of the colonial policies and destructive practices of forced removal of Aboriginal children over 200 years, Anna Haebich describes the *Aboriginals Ordinance 1918* as embodying ‘a policy of segregation and control under the guise of protection’, where ‘the Aboriginals Department purposefully acted to limit the “half-caste” population through strict controls over the women’s sexual contacts and by removing and institutionalising their children’.²¹³ The Ordinance provides the Director of Aboriginal Affairs with the power, ‘at any time’, to ‘enter any premises’ and take an ‘aboriginal or half-caste’ ‘into his custody’.²¹⁴ Under the Ordinance, the Chief Protector was the guardian of ‘every aboriginal and of every half-caste’ up to the age of 18, ‘notwithstanding that the child has a parent or other relative living’ and may cause that child ‘to be kept within the boundaries of any reserve or aboriginal institution’.²¹⁵

Similarly, Barbara Cummings, who had herself been an inmate of the Retta Dixon Home and her mother before her in the Kahlin Compound, said that while the role of the Aborigines Inland Mission (AIM) which ran the institutions was both ‘secular and spiritual’, the principal aim was to convert children ‘because it was believed that a Christianising influence would eventually result in assimilation’.²¹⁶ She points out that the construction, administration and management of the mission reflected this overriding aim, including the segregation of ‘part-Aboriginal’ children, who were ‘prohibited from contacting or communicating with Aboriginal children of full-descent’, that parents were only permitted to ‘visit’ their children during the day, and that at night, the children were locked up. ‘Any deviation from these rules met with severe chastisement and loss of access between parents and children’.²¹⁷

Robert van Krieken has argued that the contemporary use of the concept of the ‘best interests of the child’ is one of many ‘fictional discursive “nodal points” around which law is organised’.²¹⁸ Tracing the history of the legal concept since its emergence in the 17th century as a standard which until the early 20th century functioned to regulate the rights of fathers as against those of mothers in relation to children, and that in the contemporary era of co-parenting and post-separation families, he argues that the

²¹³ Ibid 18.

²¹⁴ *Aboriginals Ordinance 1918* (NT) s 6(1).

²¹⁵ Section 7(1). As Justice O’Loughlin said in *Cubillo*: ‘The powers of the Director under the 1918 Ordinance were exceptionally wide’: para 144.

²¹⁶ Barbara Cummings, *Take This Child ...: From the Kahlin Compound to the Retta Dixon Home* (Aboriginal Studies Press, Canberra, 1990) 75.

²¹⁷ Ibid.

²¹⁸ Robert van Krieken, ‘The “Best Interests of the Child” and Parental Separation: on the “Civilizing of Parents”’ (2005) 68(1) *Modern Law Review* 25, 26.

concept of the best interests of the child functions as a code in the civilisation of parents.

In using the framework of the best interests of the child, referencing international law as a counter to the claim of genocide, the High Court reinscribes the Ordinance with the discourse of ‘care and protection’ which circulates contemporaneously, while at the same time asserting the necessity to judge the actions authorised by the legislation in accordance with the ‘standards of the time’. Acknowledging that ‘[r]evelation of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation’ and that ‘it may be that in the cases of the plaintiff children, the Chief Protector or Director formed an opinion about their interests which would not be acceptable today as a reasonable opinion having regard to contemporary community standards’,²¹⁹ Chief Justice Brennan nevertheless asserted the necessity of the power being exercised reasonably where ‘[r]easonableness can be determined only by reference to the community standards at the time of the exercise of the discretion’.²²⁰ But the hermeneutic framework from which the judges of the High Court nevertheless drew on their understanding of the principles of ‘best interests’ is not that of colonial relations; it is rather the contemporary discourse of family law and children’s rights. In an adroit sleight of hand, the court deployed the rhetoric of human rights to effectively slough off the plaintiff’s claim of genocidal intention.

That genocidal intention may have been authorised by legislation implicates law and reveals its complicity in the violence of the foundation of the nation, yet four of six Justices of the High Court found the claim ‘unnecessary to answer’. While not unanimous, the decision of the High Court in *Kruger* serves to write law and history, acting as an agent of disavowal and repudiation in the memory of the white nation, authorising an official amnesia about the history of race and racism. It reveals the law’s rhetorical power to write history and its complicity, in the present, in the wilful forgetting of the violence of colonial relations.

LEGAL VOID IN *CUBILLO V COMMONWEALTH*

When, a year later, Lorna Cubillo and Peter Gunner took action in the Federal Court against the Commonwealth Government, they did not challenge the decision in *Kruger*. They did not claim that the statutory powers in the legislation under which they were

²¹⁹ *Kruger* (1997) 190 CLR 1 at 36 (Brennan CJ).

²²⁰ At 36 (Brennan CJ).

removed and detained were invalid. They argued, however, that those acting under the Director's authority were bound to exercise those powers in the best interests of the child, but had failed to do so, and therefore that their removals and detention constituted wrongful imprisonment and deprivation of liberty. In his decision, O'Loughlin determined that Lorna Cubillo failed in her attempt to convince the court that the Commonwealth had not acted in her best interests largely because her history was 'incomplete', she was unable to 'find any documents that dealt with the reasons for the removal', concluding that 'there is a huge void' as to why she was removed.²²¹ On the basis of evidence of his mother's purported thumbprint on a form of consent, he concluded that Peter Gunner was removed at his mother's request.

The decision in *Cubillo* follows *Kruger*. In a section devoted to a discussion of the issue of forcible removal of Aboriginal children from their families, Justice O'Loughlin cites Chief Justice Brennan's judgment in *Kruger* that 'it would be erroneous ... to hold that a step taken in purported exercise of a statutory discretionary power was taken unreasonably ... if the unreasonableness appears only from a change in community standards.'²²² Justice O'Loughlin stated that 'this beneficial interpretation of the legislation must remain paramount', highlighting the existence of a 'school of thought prevailing at the time' at the forefront of which 'was the belief that it was in the best interests of part Aboriginal children to assimilate them into the European mainstream'.²²³

Precedent is the law's own history, and memory. In the common law, the past is used to determine the present. Precedent serves as the narrative of law's history, called up as the law's authoritative source, presenting the illusion, retrospectively, of coherence and continuity. As Austin Sarat points out, '[t]he law uses and writes history'; it 'deploys a particular hermeneutics to represent history and memory' and 'constructs and uses history to authorize itself and to justify its decisions'.²²⁴

Law looks to the past as it speaks to present needs. In the adjudication of every dispute, law traffics in the slippery terrain of memory as different versions of past events are presented for authoritative judgment. Moreover, in the production of supposedly definitive statements of what the law is in

²²¹ *Cubillo* Summary of Reasons for Judgment para 9.

²²² *Cubillo* para 96 citing *Kruger* at 36–7.

²²³ *Cubillo* para 1562.

²²⁴ Austin Sarat, 'History and Memory in Legal Decisions and Legal Practices: Toward an Agenda for New Scholarship' in *Law, Memory & Literature* (Australian Legal Philosophy Students Association, 2004 Annual Publication, Vanguard, St Lucia, Qld) 86, 86.

the form of judicial opinions law reconstructs its own past, tracing out lines of precedent to their ‘compelling’ conclusion.²²⁵

What is achieved in the use of *Kruger* as precedent for the decision in *Cubillo*? When doing so, Justice O’Loughlin highlights one of the anomalies in the principle of authority accorded to the doctrine of precedent, citing from Justice Toohey’s *dissenting* judgment that ‘even though the Ordinance must be assessed by reference to what was reasonably capable of being seen by the legislature at the time as a rational and relevant means of protecting Aboriginal people against the inroads of European settlement “no such basis would survive analysis today”, that ““judged by current standards”, the involuntary detention of an Aborigine would now most likely be considered invalid”’.²²⁶ In the trial in *Cubillo*, the invocation of *Kruger* as precedent functions as the law’s supplement; it is invoked in the place of the purported evidentiary void, called up as the source of authority for the decision.

Yet both *Cubillo* and *Kruger* are contemporary cases in which the law is asked to judge the past in the present. The judicial authority accorded the decision in *Kruger* does not bear the weight of history; in both cases the past is remade in the present. As legal method, the approach taken in both decisions suggests the notion of ‘time out of mind’, a time described by Peter Goodrich and Yifat Hachamovitch as ‘a time unbound to any life or object, free of any specific temporality, a time of repetition and so a thoughtless time’, but a repetition that is ‘always and already difference, and loss’—a form of institutional hallucination.²²⁷

In *Cubillo*, the Commonwealth argued that it did not participate in the removals or detention and did not engage in a defence of the policies. It also argued, however, that whether the Director did act in accordance with any such policy ‘must be determined by reference to standards, attitudes, opinions and beliefs prevailing at the time of its exercise.’²²⁸ In obiter dicta, however, Justice O’Loughlin suggested that there might be a larger answer to the question. ‘Is there, for example’ he asks:

... a case for the Commonwealth that its policies were grounded upon the belief that, in some circumstances, it was better to remove a child from its

²²⁵ Ibid 87.

²²⁶ *Cubillo* para 97.

²²⁷ Peter Goodrich and Yifat Hachamovitch, ‘Time out of Mind: An Introduction to the Semiotics of Common Law’ in Peter Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Pluto Press, London, 1991) 159, 174.

²²⁸ Commonwealth plea subpar 31(c) of its defence to Mrs Cubillo’s claim, cited in *Cubillo* para 84.

environment than to leave him or her there, notwithstanding the emotional and psychological trauma that may be occasioned to both child and parent? It could not be seriously questioned that trauma was likely to be occasioned, irrespective of whether the removal was, or was not, against the parents' will but, could it be argued that welfare schemes that separated a child from its parent were designed to protect and assist the child, placing its interests first, even though there may have been a significant risk of pain and trauma at the partings?²²⁹

It is important to remember that the legislation in question in the trial, the *Aboriginals Ordinance 1918* (NT) and the *Welfare Ordinance 1953* (NT), applied exclusively to Indigenous people and were not general welfare policies. Jennifer Clarke argues that the reading of 'Aboriginal "protection" and "welfare" laws as having been benign in their intent'²³⁰ was consistent with a number of other recent decisions and has resulted in a form of 'fiat history' where an historical conclusion is reinforced via the doctrine of precedent.²³¹ As she points out, there were many other provisions under the legislation which restricted the behaviour of Indigenous people, including those relating to paid and unpaid Aboriginal labour, use of space, including towns, miscegenation and drinking.²³²

Memory, and its lack, figures significantly in the decision. Some witnesses' memories were said to have 'faded', were 'confused' or 'poor', or there was 'loss of memory' making their evidence 'unreliable'.²³³ Not surprisingly, however, Lorna Cubillo provided a clear account of the day she and 16 other children were taken away from the Phillip Creek settlement on the back of a green Bedford truck. There is no question that Lorna Cubillo was taken from her family and community. She, along with other children removed at the time, gave evidence that they were taken forcibly. She has not forgotten; it is within living memory and her testimony was supported by that of other witnesses. This is oral testimony from eyewitness accounts—the law's favoured form of evidence—and Justice O'Loughlin had no difficulty in accepting it. Nevertheless, he concluded that in very many important areas, the history of Mrs Cubillo's removal from Phillip Creek was 'incomplete', that 'there was no evidence relating to the circumstances preceding her removal', that 'we do not know why the Director decided to place her in

²²⁹ *Cubillo* para 107.

²³⁰ Jennifer Clarke 'Case Note: *Cubillo v Commonwealth*', (2001) 25 *Melbourne University Law Review* 218, 222.

²³¹ *Ibid* 223.

²³² *Ibid* 223–4.

²³³ *Cubillo* paras 918, 986, 1075, 1246.

the Retta Dixon Home', because key witnesses were dead, concluding that: 'We know that Mrs Cubillo was taken away but we do not know why.'²³⁴

But the evidence presented to the HREOC inquiry, and revealed through established critical historiography indicates that we do know why. The *Bringing Them Home* report documented forcible separation of Indigenous children from their families from the earliest days of settlement, the ultimate purpose of which was 'to control the reproduction of Indigenous people with a view to 'merging' or 'absorbing' them into the non-Indigenous population. It found that children were forcibly removed through compulsion, duress and undue influence, and that the removals often did not need to be justified at the time; that the children's 'Aboriginality would suffice.'²³⁵

Is it not possible that the reason Lorna Cubillo was unable to locate any documents which explained why she was taken is because she was, in fact, stolen? There is no evidence of consent to her removal. On the contrary, her account of the day recalls a tug-of-war over a baby and 'a lot of people crying' and 'hitting themselves with hunting sticks so that blood was pouring down their faces.'²³⁶ Lorna Cubillo failed in her claim because she did not meet the law's impossible burden of proof. Justice O'Loughlin did not read the silences and omissions in the documentary sources for their meanings, he did not read the law for the evidence it undoubtedly provides of Australia's history of racist and violent colonial relations. In doing so, the decision performs a re-enactment of the colonial encounter. Justice O'Loughlin's deference to the intention of the policy of assimilation and selective reading of history displays resistance to the memory of colonial violence and racism. In neglecting to interpret the significance of the power bestowed under the legislation in a fuller context, he negates the importance of race and fails to recognise and affirm the unique subjectivities and specific circumstances of Cubillo and Gunner. As an interpretative strategy, it displays complicity with the ideology on which the legislation was based and defers the question as to whether such actions might be considered just according to contemporary ethical standards.

John Cash argues that the fantasy of *terra nullius* continues to function as a primary psychic structure, persisting 'at the core of Australian nationalism and continues to

²³⁴ *Cubillo*, Summary of Reasons for Judgment, para 9.

²³⁵ *Bringing Them Home* 11.

²³⁶ Evidence of Lorna Cubillo, cited in *Cubillo* para 423.

organise the relations between indigenous and non-indigenous citizens within the discourses and practices of the nation'.²³⁷ Cash argues that:

It condenses into a repressed primal scene of conquest, violence and appropriation a specific mode of thinking, feeling and relating that eclipses the claims to recognition of the indigenous other. This exclusivist mode, with its repertoire of culturally specific othering mechanisms, has encoded itself into the narratives of white settlement and nation-building and continues to disfigure and distort settler-indigenous relations, even in the contemporary period marked by multiculturalism and a contested social project of reconciliation.²³⁸

Is the evidentiary void in *Cubillo* anything like the void of *terra nullius*? Is it the 'Deathspace' conceptualised by Kay Torney Souter to describe the 'post-massacre vacancy' and the cultural anxiety produced by genocide where 'mixed-race babies ... are a sign of transgressive potential for love and adaptation between the races, and must be neutralised'.²³⁹ Is it also the law's version of the postcolonial amnesic response to a 'history of race and racism', the repudiation of evidence of white Australia's attempt to erase the original inhabitants of the land by stealing the children? Justice O'Loughlin himself points to the paradox of the judicial role in legal interpretation, in the following statements in the judgment, located in the midst of his discussion of the decision in *Kruger*. O'Loughlin attempts to distinguish his role as a judge from the question of his opinion on a just response to the Stolen Generations.

It would not be proper for me, as a judge of this Court, to express a personal view about the call for a national apology. I have a view on the subject as, no doubt, most Australians have. However, my view is only that of another member of the community; it may or may not be a view that is shared by other judges of this Court²⁴⁰

...

For many people it is, at least, a matter of regret that, expressed in its most favourable terms, our ancestors might have misguidedly thought that it would be beneficial to the interests of part Aboriginal children to separate them from their families and to remove them into institutions. That, of course, is a matter of social conscience; it still remains to be seen whether that translates into a legal cause of action. Legal disputes must be decided in accordance with the law.²⁴¹

²³⁷ John Cash, 'The Political/Cultural Unconscious and the Process of Reconciliation', (2004) 7(2) *Postcolonial Studies* 165, 165.

²³⁸ Ibid 165.

²³⁹ Kay Torney Souter, 'Babies in the Deathspace: Psychic Identity in Australian Fiction and Autobiography' (1996-7) 56(4) *Southerly* 19, 21. Souter is drawing on the concept of 'Deathspace' as developed by Deborah Bird Rose, *Hidden Histories: Black Stories from Victoria River Downs, Humbert River and Wave Hill Stations* (Aboriginal Studies Press, Canberra, 1991).

²⁴⁰ *Cubillo* para 74.

²⁴¹ *Cubillo* para 79.

Justice O’Loughlin does not articulate his position expressly as a dilemma, but it is clear that here is the paradox, the *aporia* in Jacques Derrida’s definition of justice. In his well-known deconstruction of law and justice, Derrida elaborates the *aporia* as a ‘double movement’, where:

... to be just or unjust and to exercise justice, I must be free and responsible for my actions, my behavior, my thought, my decisions. ... But this freedom or this decision of the just, if it is one, must follow a law or a prescription, a rule. ... To be just, the decision of a judge ... must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reconstituting act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case.²⁴²

In an ethical reading of deconstruction, which she renames ‘the philosophy of the limit’, Drucilla Cornell points out that the judicial invocation of precedent involves more than a simple recollection of the past, but also necessitates law taking responsibility to ‘remember its own exclusions and prejudices’.²⁴³ What future was promoted when Justice O’Loughlin determined that there was insufficient evidence to support a finding that Lorna Cubillo and Peter Gunner had been forcibly removed from their families and communities? Was this the future envisaged by the project of reconciliation, a future in which the nation was called upon to ‘have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves’?²⁴⁴

Rather than remember its own exclusions and prejudices when confronted with the evidence of traumatic colonial encounters, in testimony of memories of child abduction, and in documents which trace a history of policies intended to erase Indigenous peoples, Justice O’Loughlin was blind to the meaning in the void produced in and by colonialism, revealing the law’s power to control the way we make sense of traumatic histories and memories. When Gunner and Cubillo presented their evidence in the Federal Court, the law did not respond to their claim in the context of reconciliation. The potential the law might have offered for a reconceptualisation of relations between Indigenous and non-Indigenous citizens in the present and with a view to the future—a ‘postcolonial’ future perhaps—was, at that moment at least, foreclosed. Like the patient who does not remember what is repressed, the law acts out the memory,

²⁴² Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ in Drucilla Cornell, Michel Rosenfeld and David Grey Carlson (eds) *Deconstruction and the Possibility of Justice* (Routledge, New York, 1992) 3–67, 23.

²⁴³ Drucilla Cornell, *The Philosophy of the Limit* (Routledge, New York, 1992) 149.

²⁴⁴ Australian Declaration Towards Reconciliation, <www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm>.

perpetuating the dynamics of colonial relations. Here is a clear sign that the resistance to remembering is acute, for as Freud tells us, ‘the greater the resistance, the more extensively will acting out (repetition) replace remembering.’²⁴⁵

CONCLUSION

In contrast, when I met with Lorna Cubillo in 2004, she explained that she and some of the other surviving members of the group of children who were taken from Phillip Creek Mission took a significant step in collectively returning to Manga Manda, the site of their kidnapping, as a ceremonial act of healing. Cubillo said that whenever she goes back there, she spends her time crying because it reminds her of the occasion of her removal. She said that she remembers this day clearly, that she detaches herself and vividly recalls her relatives hitting themselves ‘with their hunting sticks, where they pounded their heads, blood coming down their faces’.²⁴⁶ Cubillo said that the government had remained in denial about a dark period in Australia’s history. Jimmy Anderson, one of the children taken with Cubillo, was reported to have said: ‘You have to keep moving on or else the traumas of the past will eat you up.’²⁴⁷ Through the reinstatement of legal norms without evaluation, the law refuses to bear witness to the traumatic memories of members of the Stolen Generations, revealing its complicity in the ongoing dynamics of colonial relations and its failure in the call to ethical responsibility to judge while remembering the future.²⁴⁸

²⁴⁵ Sigmund Freud (ed and trans James Strachey), ‘Remembering, Repeating and Working-Through’, *The Case of Schreber, Papers on Technique and Other Works*, The Standard Edition of the Complete Psychological Works of Sigmund Freud Vol XII (Hogarth Press and the Institute of Psycho-Analysis, London, 1986) 151.

²⁴⁶ Lorna Cubillo, personal communication, Darwin, 25 September 2004. A radio program was recorded on the occasion of the event and broadcast on ABC Radio National: ‘Return to Manga Manda’, *Away!*, 27 January 2005.

²⁴⁷ Lindsay Murdoch, ‘Stolen Children Decide Time for Apologies is Past’ *The Age* (Melbourne) 4 June 2004, 8.

²⁴⁸ Drucilla Cornell, *The Philosophy of the Limit* (Routledge, New York, 1992) 120.

CHAPTER 3

KNOWING LAW: EVIDENCE LAW AS A THEORY OF KNOWLEDGE

The question of the legitimacy of science has been indissociably linked to that of the legitimization of the legislator since the time of Plato. From this point of view, the right to decide what is true is not independent of the right to decide what is just, even if the statements consigned to these two authorities differ in nature. The point is that there is a strict interlinkage between the kind of language called science and the kind called ethics and politics: they both stem from the same perspective, the same ‘choice’ if you will—the choice called the Occident.²⁴⁹

INTRODUCTION

In an account of the intellectual history of the specialised study of evidence in England and the United States, William Twining notes the remarkable level of homogeneity and continuity across two centuries of scholarship, specifically in relation to basic assumptions ‘about the nature and ends of adjudication, about knowledge or belief about past events and about what is involved in reasoning about disputed questions of fact in forensic contexts.’²⁵⁰ Designating this the ‘rationalist tradition’ of evidence scholarship, Twining points to the pervasive presumption within evidence theory of an adjudicative model which is invariably based on legal positivism.²⁵¹ He argues that the rationalist model for theories of evidence and proof is characterised by certain assumptions, namely, that:

... epistemology is cognitivist rather than sceptical; a correspondence theory of truth is generally preferred to a coherence theory of truth; the mode of decision making is seen as ‘rational’, as contrasted with ‘irrational’ modes ...; the characteristic mode of reasoning is induction; the pursuit of truth as a *means* to justice under the law commands a high, but not necessarily an overriding, priority as a social value.²⁵²

As Twining points out, this model for evidence theory is characteristic of post-enlightenment western thought, where truth is seen to stand in direct relationship with

²⁴⁹ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, Theory and History of Literature, Volume 10 (University of Minnesota Press, Minneapolis, 1979) 8.

²⁵⁰ William Twining, *Rethinking Evidence: Exploratory Essays* (Northwestern University Press, Evanston, Illinois, 1994) 71. Twining’s survey covers the period between 1754 (with the publication of Jeffrey Gilbert’s *The Law’s of Evidence*) and 1943 (the death of John Wigmore).

²⁵¹ Ibid. Specifically, Twining identifies the presupposition of a form of adjudication resembling Bentham’s “rectitude of decisions” as the main objective’: 72.

²⁵² Ibid 74.

reality and human subjects are believed to be able to acquire objective knowledge through processes of reason and empirical observation. Feminist approaches to epistemology have revealed that the normative subject who is able to take this objective stance is inscribed as masculine—‘the all-perceiving, self-purposive subject of Cartesian logic’, a subject posited, as Caroline Williams explains, ‘*a priori* to the world, privileging *sight* as the yardstick to measure practico-empirical claims to truth’.²⁵³

While it has long been recognised that evidence law functions as an epistemology, as a site for theoretical investigation, it has received relatively little critical attention.²⁵⁴ In one of the few deconstructive readings of the epistemology of evidence, Piyel Haldar argues that proof is the performance of the revelation of truth through ‘the perceptual capacity of sight’.²⁵⁵ He points to the function of vision not only to documentary evidence, but also to the assessment of the veracity of oral testimony, the preferred form for the delivery of evidence in trials.²⁵⁶

Paradoxically, the institution and practice of law itself may be regarded as undermining the notion of transcendent truth. This is apparent through the principle of adversarial contestation where legal advocacy involves the positing of conflicting claims to truth and in the significance of negotiation to the lawyer’s role, where a dispute may be settled through agreement. The way appellate courts are able to reverse previously held decisions and the importance of dissenting judgments also highlight how truth is produced in legal discourse.

For in law, truth is accessed through language. Evidence is seen as a way of mediating the relationship between words and truth. In a common law trial, it is oral testimony which provides the primary basis on which truth claims are verified. The assessment of

²⁵³ Caroline Williams, ‘Feminism, Subjectivity and Psychoanalysis: Towards a (Corpo)real Knowledge’ in Kathleen Lennon and Margaret Whitford (eds) *Knowing the Difference: Feminist Perspectives in Epistemology*, (Routledge, London, 1994) 165.

²⁵⁴ See, however, Michael S Pardo, ‘The Field of Evidence and the Field of Knowledge’ (2005) 24 *Law and Philosophy* 321. The *Virginia Law Review* (December 2001) 87(8) also contains a series of articles based on papers given at the Symposium, New Perspectives on Evidence: Experts, Empirical Study and Economics in 23–4 February 2001. However, much of the scholarship currently being produced takes a decidedly conventional legal positivist perspective, drawing, as in this conference on interdisciplinary studies from economics, statistical theory and psychology.

²⁵⁵ Piyel Haldar, ‘The Evidencer’s Eye: Representations of Truth in the Laws of Evidence’ (1991) II(2) *Law and Critique* 171, 172.

²⁵⁶ Piyel Haldar, ‘The Return of the Evidencer’s Eye: Rhetoric and the Visual Technologies of Proof’ (1999) 8(1) *Griffith Law Review* 86, 90. Haldar points to the function of the metaphysics of presence in the traditional preference for testimonial evidence over documentary forms: ‘That the written word consumes pneumatic life was a common place idea in the medieval reception of Roman law where the preference of the oral over the written would be considered to be analogous to the hierarchy of the living over the dead.’: 91.

evidence and its claim to truth is based on notions of narrative coherence and rationality. Evidence which is most readily regarded as veracious is that which is articulated by a sovereign subject. Such a subject is seen to speak the truth, producing truth as an effect of discourse. Yet it is truth which is regarded as the cause of the production of knowledge. If truth is produced in language, then it cannot pre-exist its own articulation; this substitution of effect for cause is therefore a metalepsis.²⁵⁷

Despite the overridingly written basis of the Anglo legal system, in the common law, there is both a preference for oral testimony and the requirement that witnesses testify in their own words. However, oral testimony presented at trial must conform to rigid requirements:²⁵⁸ it should be sworn on oath or affirmation²⁵⁹ must be relevant to the issue in dispute,²⁶⁰ and there are strict rules against hearsay—‘one of the oldest (and most complex) rules of evidence’²⁶¹—and opinion.²⁶² Testimonial evidence must be given in a designated order: examination-in-chief, cross-examination and re-examination.²⁶³ The question and answer format is the principal manner in which evidence is adduced—‘a style of social interaction and information elicitation ... intrinsic to the European intellectual tradition’²⁶⁴—and there are rules against the questioner asking leading questions.²⁶⁵ These principles serve to undermine the potential for witnesses to give evidence in a descriptive, narrative or anecdotal manner.

In the *Cubillo* trial, assessment of the veracity of witnesses’ statements is performed on the basis of observance of their demeanour, manner of responding to questions, and the perceived congruence and credibility of their accounts. Techniques of cross-examination are intended to elicit the truthful, or most convincingly infallible, account of events. The significance of visual perception—that is, witnessing—is itself the basis on which the witness is most commonly accorded the authority to testify in the trial. Witnesses are

²⁵⁷ I have derived my understanding of metalepsis from Gayatri Chakravorty Spivak, who discusses this rhetorical function in relation to the production of subject-effects: Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (Routledge, New York, 1987) 204.

²⁵⁸ The principles I list here are part of the common law and some have been incorporated into statutory provisions under the *Evidence Act 1995* (Cth). As part of the enactment of this legislation, there has been a move towards uniform evidence legislation (known as the uniform Evidence Act) across all jurisdictions.

²⁵⁹ *Evidence Act 1995* (Cth) s 21.

²⁶⁰ *Evidence Act 1995* (Cth) s 55(1) states: ‘The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.’

²⁶¹ Gray, Peter, ‘Do the Walls Have Ears?: Indigenous Title and Courts in Australia’ (2000) 5(1) *Australian Indigenous Law Reporter* 1, 8.

²⁶² *Evidence Act 1995* (Cth) Part 3.2.

²⁶³ *Evidence Act 1995* (Cth) s 28.

²⁶⁴ Gray (2000) 4.

²⁶⁵ *Evidence Act 1995* (Cth) ss 37, 42.

expected to testify to what they have seen or heard and to be able to separate such observation from other forms of perception and sensation.

In this chapter, I will draw on Jean-François Lyotard's well-known account of postmodernism,²⁶⁶ which I believe provides a useful framework for critiquing the primacy attributed to the rationalist model of evidence law. In his analysis of the status of science and technology in western thought, Lyotard distinguishes between two forms of knowledge, scientific knowledge and narrative knowledge. This distinction, Margaret Davies suggests, reflects the two main approaches to the evaluation of evidence—according either to the probability of events or to narrative coherence.²⁶⁷

In my analysis, I will use Lyotard's framework for an interrogation of the reception of key sites of testimonial evidence given by Lorna Cubillo and other witnesses in the trial, focussing on the role of race and gender in the construction of knowledge. In particular, I will argue that Cubillo's testimony reveals the significance of whiteness to the common knowledge she recounts, the truth of which she claims is verified by an oral tradition. However, this truth is effaced in the judgment, which I argue reveals white race blindness within the law. Legal positivism—which in this chapter I critique as a function of the rationalist paradigm for evidence law—also resists knowledge affirmed affectively, relegating it to the sphere of the irrational and deceptive. Nevertheless, affectivity is a dominant feature of *Stolen Generations* narratives and is not readily dismissed. In the second part of the chapter, I examine the reception of Cubillo's testimony concerning her loss of language, focussing on the court's rejection of her evidence on the grounds that it was 'irrational'.

²⁶⁶ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, Theory and History of Literature, Volume 10 (University of Minnesota Press, Minneapolis, 1979).

²⁶⁷ Margaret Davies, *Asking the Law Question* (Law Book Co, 2nd ed, 2002) 301. Davies points out that these two models of evidentiary evaluation are referred to by John Leubsdorf as 'stories and numbers': John Leubsdorf, 'Stories and Numbers' (1991) 13 *Cardozo Law Review* 455. She says that 'On one model, the scientific, evidence is evaluated according to its probability: an argument is composed of several essential components, each of which can be attributed a probability, and which are finally combined in a mathematical formula in order to determine what (according to the probabilities) happened. On the other model, storytelling, the trier of fact, after listening to all the evidence presented, attempts to formulate a sort of narrative which best fits the evidence': 301. Leubsdorf's paper is a response to another by Ronald J Allen, who, in arguing for an approach to evidence for jurors in civil trials which he refers to as the 'equally well specified cases proposal', distinguishes between cardinal and ordinal theories of proof. His use of mathematical terminology is misleading, however, for while the basis of the cardinal theory, the conventional probabilistic approach, requires the 'fact finder to compare the probability of each of the elements to the probability of its negation and to decide for the plaintiff only if the element is more probably true than false' (373) a methodology he compares to that used in physical science, such as in a medical diagnosis, the ordinal theory is compared to that of historiography and requires jurors to 'return a verdict for the party whose episode is more plausible' (409) that is, a narrative approach: Ronald J Allen, 'The Nature of Juridical Proof' (1991) 13 *Cardozo Law Review* 373.

THE EPISTEMOLOGY OF PROOF: SCIENTIFIC VS NARRATIVE KNOWLEDGE

In his influential work, *The Postmodern Condition*, Lyotard uses the term ‘modern’ to designate any science that legitimises itself with reference to a metadiscourse, seeking the truth through ‘an explicit appeal to some grand narrative’.²⁶⁸ Subtitled ‘A Report on Knowledge’,²⁶⁹ the analysis focuses on the status of science and technology within post-industrial, computerised society. Lyotard is concerned with the issue of legitimisation of knowledge, starting with the elementary question as to ‘who decides what knowledge is, and who knows what needs to be decided?’²⁷⁰ Pointing out that ‘scientific knowledge does not represent the totality of knowledge’, Lyotard argues that ‘it has always existed in addition to, and in competition and conflict with, another kind of knowledge’,²⁷¹ which he refers to as narrative knowledge.

There has been a burgeoning interest in the use of narrative analysis in legal theoretical scholarship,²⁷² but as Rosanne Kennedy points out, the contemporary attention to narrative in the field of law and literature tends to focus on what she refers to as the ‘high culture’ end of appellate courts, at the expense of the ‘low culture’ end of trials, where evidence is actually presented and assessed.²⁷³ In this section, I will argue that the relationship between law and narrative is crucial to a critical reading of the trial and judgment in *Cubillo*.²⁷⁴ Drawing on Lyotard’s conceptualisations of scientific and

²⁶⁸ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, Theory and History of Literature, Volume 10 (University of Minnesota Press, Minneapolis, 1979) xxiii. It is in this text that he provides his well-known definition of the postmodern as ‘incredulity towards metanarratives’: xxiv

²⁶⁹ The work, a ‘report on the state of knowledge in the Western world’, was produced at the request of the Conseil des Universités of the government of Quebec, Canada.

²⁷⁰ Lyotard (1979) 9.

²⁷¹ Ibid 7.

²⁷² See, for example, the work of Bernard S Jackson, including *Law, Fact and Narrative Coherence* (Deborah Charles Publications, Merseyside, UK, 1988); David Ray Papke, *Narrative and the Legal Discourse: A Reader in Storytelling and the Law* (Deborah Charles Publications, Liverpool, UK, 1991); Peter Brooks and Paul Gewirtz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, New Haven, 1996); and contributions to Margaret Thornton (ed), *Romancing the Tomes: Popular Culture, Law and Feminism* (Cavendish Publishing, London, 2002).

²⁷³ Rosanne Kennedy, ‘Legal Sensations: Sexuality, Textuality and Evidence in a Victorian Murder Trial’, in Thornton (ed), (2002) *ibid*. Piyel Haldar also highlights this point, remarking that the marginalisation of the trial in both mainstream jurisprudence and critical legal scholarship positions it as adjectival or supplementary to the real issues of law: ‘The Return of the Evidencer’s Eye: Rhetoric and the Visual Technologies of Proof’ (1999) 8(1) *Griffith Law Review* 86.

²⁷⁴ Indeed, the emergence of evidence of the Stolen Generations within white Australian popular discourse generally has contributed to a renewed interest in narrative analyses of testimonial forms. See, for example, Debbie Rodan, ‘Testimony, Narrative, and a Lived Life’ (February 2000) 1(1) *Balayí*; Gillian Whitlock, ‘In the Second Person: Narrative Transactions in Stolen Generations Testimony’ (Winter 2001) 24(1) *Biography* 197; Bain Attwood, ‘“Learning about the Truth” The Stolen Generations Narrative’ in Bain Attwood and Fiona Magowan (eds), *Telling Stories: Indigenous History and Memory in Australia and New Zealand* (Allen & Unwin, 2001); and Rosanne Kennedy and Tikka Jan Wilson, ‘Constructing Shared Histories: Stolen Generations Testimony, Narrative Therapy and Address’ in Jill Bennett and Rosanne Kennedy (eds) *World Memory: Personal Trajectories in Global Time* (Palgrave Macmillan, Hampshire, 2003).

narrative knowledge, and recent theorisations of whiteness and epistemology, I will examine a key site of testimonial evidence given by Cubillo during cross-examination. I will argue that through reliance on legal positivism as the method of judicial interpretation, the decision privileges forms of scientific knowledge which most readily support dominant paradigms of historical truth. At the same time, the significance of narrative knowledge to the arguments presented in the case, particularly that which does not support white cultural memory, is discredited.

Drawing on the concept of *language games* developed by Ludwig Wittgenstein²⁷⁵ to describe different types of utterances or modes of discourse,²⁷⁶ Lyotard proposes to develop a philosophy of language which attempts to take account of the function of power in the production of knowledge. He identifies three examples of types of utterances which make up language games: denotative statements, performative statements and prescriptive statements. Lyotard claims that scientific knowledge includes only denotative statements, where a 'statement's truth-value is the criterion determining its acceptability'.²⁷⁷ He argues that there are two conditions for the acceptability of denotative statements: 'the objects to which they refer must be available for repeated access ... they must be accessible in explicit conditions of observation' and 'it must be possible to decide whether or not a given statement pertains to the language judged relevant by the experts'.²⁷⁸

While Lyotard's analysis is specifically directed to the status of science and technology within modernity, it is not necessary to limit his conceptualisation to these fields, for this is the epistemological paradigm which is dominant in all fields of knowledge in late-capitalist society. Commonly referred to as the 'correspondence theory of truth', where a proposition, in order to be deemed 'true', must be susceptible to demonstrable proof, this model is, as Piyel Haldar explains 'inherently committed to the assumption that the experience of truth is necessarily structured in terms of the relationship between a

²⁷⁵ Ludwig Wittgenstein (trans G E M Anscombe), *Philosophical Investigations* (Macmillan, New York, 1953).

²⁷⁶ Lyotard (1979) 10.

²⁷⁷ Ibid 25.

²⁷⁸ Lyotard (1979) 18. Lyotard's methodological use of linguistic theory recalls the work of JL Austin, whose identification of the function of the 'performative' has become central to recent theorisations of subjectivity, particularly in the work of Judith Butler. See, for example, *Bodies That Matter: On the Discursive Limits of "Sex"* (Routledge, New York, 1993). I draw on Butler's work on performativity in Chapter 8.

subject and its object; in terms of the conformity of a subject's representation/evidence to the givenness of an object represented'.²⁷⁹

Law can also be seen as a form of scientific knowledge within the framework outlined by Lyotard. As Margaret Davies points out, Lyotard's central concern with the legitimisation of knowledge, with the question 'Who proves the proof?' is clearly a legal question because it concerns the justificatory foundations for knowledge and points to its inextricable interconnection with power.²⁸⁰ Such issues are fundamental to postmodern interrogations, which as Lyotard elaborates, can be characterised as providing a challenge to the dominance of metanarratives and the proposal of a more fragmentary and interconnected conceptualisation of knowledge.²⁸¹

Law legitimises its claims to knowledge through the use of evidentiary techniques which require propositions to be susceptible to proof. In particular, in positivist jurisprudence—commonly referred to as a science—laws are derived from 'facts' and other observable phenomena. Within law, the principle of adversarialism, involving contestation between competing claims, is believed to *produce* truth. Rules governing legal procedure are designed to ensure that truth will emerge 'at the end of the day'. Lyotard's analysis of claims to legitimacy highlights the correspondence between science and law and the interrelatedness of these discourses with power and knowledge in western discourse. In particular, he points to the 'strict interlinkage between the kind of language called science and the kind called ethics and politics', pointing out that they both stem from perspective of the Occident.²⁸²

According to Lyotard, in attempting to address the problem of legitimisation, scientific knowledge observes two rules: first, a referent (that which is referred to in a denotative statement such as 'I saw him') is susceptible to proof and can be used as evidence. 'Not: I can prove something because reality is the way I say it is. But: as long as I can produce

²⁷⁹ Piyel Haldar, 'The Evidencer's Eye: Representations of Truth in the Laws of Evidence' (1991) II(2) *Law and Critique* 171, 173.

²⁸⁰ Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Lawbook Co., Sydney, 2nd ed, 2002) 302.

²⁸¹ Michel Foucault is also credited with some of the groundbreaking work in deconstructing the relationship between power and knowledge in relation to concepts of truth. See, for example, *The Archaeology of Knowledge* (Tavistock Publications, London, 1972). I draw on Foucault's genealogical approach to history in Chapter 6.

²⁸² Lyotard (1979) 8.

proof, it is permissible to think that reality is the way I say it is.²⁸³ Secondly, the same referent cannot provide a ‘plurality of contradictory or inconsistent proofs’.²⁸⁴

The dominant paradigm of evidence law can readily be seen to be modelled on the same epistemological foundations as that of scientific knowledge as elaborated by Lyotard, reflecting their shared inheritance of post-enlightenment metanarratives of truth and reason. However, as Donald Nicolson points out, such approaches are based on both epistemological *and* ontological assumptions: that it is possible for human subjects to acquire truth as knowledge which corresponds to reality through reason and empirical observation, and that objective truth exists independently to human subjectivity, such that subjects are able to stand outside their historical, social and geographical context.²⁸⁵

This occidental perspective which Lyotard identifies has recently being interrogated, particularly by feminists, as the site of whiteness, which, while universalising certain forms of knowledge and truth, disguises the racialised position from which it is produced. The invisibility of the whiteness of dominant epistemologies produced in post-enlightenment thought is effectively achieved through the racialisation of its object. As Aileen Moreton-Robinson has elaborated, whiteness functions as an ‘ontological and epistemological *a priori*’,²⁸⁶ constitutive of what can be known and who can know, ‘producing the assumption of a racially neutral mind and an invisible detached white body’.²⁸⁷ She argues that:

Whiteness establishes the limits of what can be known about the other through itself, disappearing beyond or behind the limits of this knowledge it creates in the other’s name. ... In this way whiteness is constitutive of the epistemology of the West; it is an invisible regime of power that secures hegemony through discourse and has material effects in everyday life.²⁸⁸

²⁸³ Ibid 24.

²⁸⁴ Ibid.

²⁸⁵ Donald Nicolson, ‘Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory’ in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (Cavendish Publishing, London, 2000) 22. Nicolson highlights the value of drawing on postmodern feminist approaches to epistemology in evidence theory firstly because the suggestion that truth is best achieved through hearing many voices, especially those of the oppressed, ‘suggests a need to open up fact-finding processes to wider input in terms of both the presentation and evaluation of evidence’, relaxing the evidentiary rules of relevancy and standing and challenges the narrowly defined nature of legal problems without reference to context or needs of the parties. Secondly, he points to the contribution made by feminist perspectives to the dismantling of the myth that adjudicators rely exclusively on logical factual reasoning, but rather, ‘assess facts holistically and through the forms of narratives’: 32–3.

²⁸⁶ Aileen Moreton-Robinson, ‘Whiteness, Epistemology and Indigenous Representation’ in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, Canberra, 2004) 77.

²⁸⁷ Ibid 81.

²⁸⁸ Ibid 75.

Unlike scientific knowledge, Lyotard argues that narrative knowledge involves more than denotative statements and, as such, lends itself to a variety of language games. He points to the importance of the function of what is characterised as ‘know-how’, ‘knowing how to live’, and ‘how to listen’ as forms of knowledge which are inaccessible to scientific discourse because they exceed the ‘simple determination and application of the criterion of truth’. Nevertheless, as he points out, it is this type of knowledge which ultimately determines a subject’s ability to make ‘good’ denotative statements. As such, he claims that the consensus that determines the nature of knowledge—distinguishing who knows from who does not know—is what actually constitutes culture.²⁸⁹

While law, like science, makes its claims to legitimacy through demonstrable proof, I would argue that it must always ultimately seek an appeal to narrative forms of knowledge. Law is a discourse in which the world is presented in a narrativised form, emerging from a desire for order and coherence.²⁹⁰ Chronology is central to legal evaluation, as is concordance between different witnesses’ accounts of the sequence of events. Adjudication specifically entails the choice of one, over another, preferred story performed through rhetorical strategies by legal advocates. One of the key paradigms for the evaluation of evidence is narrative coherence where an assessment is made on the basis of the formulation of a story which best concords with the evidence presented. In the discourse of law, there is the belief in the possibility of the reconstruction of the past through testimony and documents, as if these exist somehow outside language and signification.

The relatively recent proliferation of academic work in the field of law and literature demonstrates the way law lends itself to narrative and rhetorical investigations. While this work appears not to have come as a surprise to the legal establishment²⁹¹—and reflects the shared historical genesis of law and literature in the humanities— it must surely be viewed as a fundamental challenge to principles of legal positivism. There is generally no resistance to the description of litigants and plaintiff’s testimony as narrative, to the legal representatives’ use of rhetoric techniques of advocacy nor to a

²⁸⁹ Lyotard (1979) 19.

²⁹⁰ Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (Routledge, London, 1991) 107.

²⁹¹ Indeed, in some quarters, it appears to be embraced enthusiastically: see, for example, Hon Justice Peter Heerey, ‘Storytelling, Postmodernism and the Law’ (October 2000) 74 *Australian Law Journal* 681. Justice Heerey also gave a keynote address to the 11th International Conference of the Law & Literature Association of Australia, Mediating Law: Theory Production Culture, 29 November–1 December 2002, Melbourne.

view of litigation as courtroom drama, despite the way that, within a positivist framework, such conceptualisations of law as a literary—possibly even fictitious—enterprise must be seen to undermine its claims to objective ‘truth’. Such work is taking many forms and is characteristically interdisciplinary. As Paul Gewirtz points out, ‘both law and literature attempt to shape reality through language, use distinctive methods and forms to do so, and require interpretation’ ... ‘law can be treated “as literature” ... by becoming more self-conscious about the form, structure, and rhetoric of legal texts, legal arguments, and other phenomena of the legal culture.’²⁹²

COMMON KNOWLEDGE AND WHITENESS

An analysis of the treatment of evidence in the *Cubillo* trial highlights how law’s regard for truth is seen to authorise its claim to knowledge. Narrative coherence is fundamental to the evincing of truth through principles of evidence law. One of the ways the desire for narrative coherence is pursued in the trial is through well-established techniques of cross-examination, whereby a witness’ memory of events is ‘tested’. As Jeremy Gans and Andrew Palmer put it: ‘Belief in the ability of cross-examination to expose the truth is one of the foundations of the common law trial.’²⁹³ During the *Cubillo* and *Gunner* trial, the veracity of evidence presented by the applicants was repeatedly, and often exclusively, challenged in terms of its consistency, as presented at different points in the proceedings. This involved intense cross-examination in relation to the specific details of witnesses’ memories of events which occurred up to 50 years ago—events which often do not appear to bear any direct relationship to the issues raised in the trial. The purpose of such questioning is clearly to point to the possibility that the witnesses’ evidence is unreliable; but it also highlights the way certain narratives are considered acceptable in legal discourse because they conform to notions of pre-existent truth.

In the trial, during cross-examination, Lorna Cubillo was questioned in relation to her removal from Banka Banka Station to Seven Mile Creek. This is the first of a number of occasions on which Cubillo claimed she was removed from her family and community

²⁹² Paul Gewirtz, ‘Narrative and Rhetoric in the Law’ in Peter Brooks and Paul Gewirtz (eds) *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, New Haven, 1996) 4.

²⁹³ Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing Limited, London, 2nd ed, 2004) 62–3. Gans and Palmer point out that John Wigmore described cross-examination as ‘beyond any doubt the greatest legal engine ever invented for the discovery of truth’: John Wigmore, *Wigmore on Evidence* (Little, Brown & Co, Boston, 3rd ed, 1940) ¶ 1367.

without warning or permission.²⁹⁴ On this occasion, Cubillo remembers that she was with her grandmother, who hid her when two men approached. She said that the men took her from the care of her grandmother on a horse to Seven Mile Creek. During cross-examination, Cubillo was asked detailed questions about the appearance of the two men, specifically in relation to their height, hair colour and facial hair, and also about how she knew who they were.

Mrs Cubillo, I want to ask you some questions about what you say about your removal from Banka Banka. You've identified two people who you say were involved in your removal, Barney McGuinness and Bill Harney; is that right? --- That's right.

What did Bill Harney look like? --- He was a European man.

Was he tall, was he short? --- He wasn't tall.

Sorry, he wasn't tall? --- He didn't appear to be tall.

Would you say he was taller or shorter than I am? --- He was a medium sized person. Now, I wasn't going to take a - a tape and measure him. I'm just trying to tell you my visions from my childhood.

I'm not asking you to tell me how many inches? --- Well, you're asking me to - - -

I'm just trying to get a sense of what the man looked like, Mrs Cubillo? --- He was a European man.

What was his hair colour? --- As far as I know, he wore a hat.

So you don't know what his hair colour is, is that what you're saying? --- He would be a normal Australian, but he didn't have blonde hair.

Did he have black hair, brown hair? --- Not black hair, probably in between.

In between what? --- Well, it wasn't blonde and wasn't black - in between.

Is it what you've previously described as sandy hair? --- That's a possibility.

You didn't really get a good look at Mr Harney's hair, is that really what you're saying, because he wore this hat? --- I would have had to be very close to the person to really know what he was - he was just a person who removed me and I will just remember him as such.

²⁹⁴ In her Statement of Claim, Cubillo said she believed she was born in 1939 at Banka Banka Station, north of Tennant Creek. When she was approximately five or six, she was taken from there to Seven Mile Creek, where her grandmother and mother then joined her and other relatives. After a time, they were all moved to Six Mile Creek. Later, they were directed to walk to Phillip Creek, a journey she said took some days. At Phillip Creek, Cubillo, together with other children, were separated from their families and lived in dormitories, organized according to whether they were 'half-caste' or 'full-blood'. The children were locked in at night. Their families lived outside the perimeter of the area set out for the school children. About 12 months later, in 1946, Cubillo and 16 other children were taken from Phillip Creek in a truck and transported to the Retta Dixon Home in Darwin, where she remained until 1956: 24 November 1998.

Did he have a moustache? --- He was a European man.

Do you remember whether he had a moustache or not? --- I remember him from the day he removed me.

Do I take it that that's a no, you don't remember whether he had a moustache or not? --- I didn't look at his face; I just knew that he was a white man and that he drove around the community where I lived and I recognised the car.

What do you say he was wearing on the day he came to Banka Banka? --- He wore the same clothes like everybody else - trousers and shirt and a hat.

There was nothing unusual about his clothing? --- I don't think he was in uniform but he wasn't a policeman.

Do you say that you have always known that it was Mr Harney and Mr McGuinness who were involved in your removal? --- My grandmother told me who those people were.

So she was the person who told you it was Harney and McGuinness? --- I mean, she was the adult and I was the child.

You got their names from your grandmother? --- That's a common knowledge in the community.

So it's both your grandmother and common knowledge? --- Everybody in the community knew who these people were.

But there was nobody else present apart from your grandmother and the two men who you've described as Harney and McGuinness on the occasion of your alleged removal from Banka Banka? --- Barney McGuinness was the only half-caste male, when he removed me and I saw him in Phillip Creek, there was nobody else during that time.

Yes. I just want to be certain. This incident you've described, when you and your grandmother were sitting down in the creek, there were no other members of your family with you at that time of your removal, were there? --- We were hiding out away from the main station but still within the bounds.

Yes. But when you say 'we were hiding out', you're just talking about you and your grandmother, is that right? --- That's right.

Yes. And your grandmother, you agree, died before you left Phillip Creek. So you've known for more than 50 years that Mr McGuinness is the man, you say, who was involved in your removal. Is that your evidence? --- I will always remember that, Ms Hollingsworth.

Mm mm. And Mr Harney was involved; you've known that for the last 50 years, haven't you? --- Yes, I do.²⁹⁵

During cross-examination, Cubillo is asked questions about an event which occurred over 50 years ago, when she was probably about six years old.²⁹⁶ By focussing on the

²⁹⁵ Transcript, Lorna Cubillo, cross-examination by Ms Hollingsworth, 13 August 1999, 1324–6.

detail of Cubillo's memory of the event, specifically the identity of the individuals in question, the cross-examiner attempts to elicit evidence which conforms to a model of scientific knowledge where, in order for something to be true, it must be susceptible to proof. The use of a scientific model for proof serves to efface the significance of the effluxion of time to the substance of memory and also fails to take account of the complexities, and significance, of childhood memories. That is, underpinning the logic of cross-examination is the assumption that failure to provide a convincing account of an event or description of the identity of an individual—or inconsistency and contradiction in the recalled memory—provides evidence with the potential to disprove the allegation, on the basis that failure to recall information of one type draws into question the validity of the memory of another. As John Wigmore puts it, in his classic account of the principles of judicial proof:

When the inquiry is as to the identity of persons, the ability of the witness to distinguish and remember faces, forms, and voices is the only faculty in question, and whether or not localities and dates are easily recollected by him is of no consequence whatever. In actual practice, however, the law permits the jury to infer a general want of recollection from a special one, and the cross-examiner to expose defects in memory by testing it with facts of any class that he desires.²⁹⁷

While asking questions about the visible appearance of individuals is standard practice in cross-examination in attempting to establish identity, such forms of interrogation belie the complexities and specificities attendant on the way in which subjects remember events and people.²⁹⁸ To take one simple but fairly obvious point, for example, by asking: 'What did Bill Harney look like?', 'Was he tall or short?', Ms Hollingworth failed to acknowledge that a six-year old child is unlikely to make an assessment of adults on the basis of their height, and that height is invariably a relative phenomena. When, in attempting to answer the question by pointing to this dilemma: 'He didn't appear to be tall' and 'I'm just trying to tell you my visions from my childhood', Cubillo is characterised as an evasive witness, because it is assumed that height is an objective

²⁹⁶ Cubillo does not know her age accurately; she said she was given an age when she arrived in Darwin at the Retta Dixon Home. O'Loughlin accepted that when she was taken from Banka Banka Station to Seven Mile Creek, she would have been approximately five or six years old. She was then moved to Seven Mile Creek and later to Phillip Creek, where she resided for a period of time. Approximately two years later, when she was about seven or eight years old, she was taken from Phillip Creek to the Retta Dixon Home in Darwin.

²⁹⁷ John Henry Wigmore, *The Principles of Judicial Proof as given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials* (Little, Brown, and Company, Boston, 1913) 481–2.

²⁹⁸ This point is not evaded by Wigmore, who devotes some attention to discussion of psychological theories of memory and their application in the testimonial process.

fact—a form of scientific knowledge—and that inability to identify someone on the basis of height indicates an unreliable memory.

However, what the cross-examination does elicit is of far greater relevance to the claim than Harney's height, because significantly, what Cubillo *does* remember is that Harney was a white man. While she is unable to identify the colour of his hair and whether or not he had a moustache, Cubillo poignantly responds to Ms Hollingworth's questions by pointing out that her memory is founded in the occasion being that of her removal from her grandmother. She said she could remember Harney because he was a white man, later pointing out that he was the *only* white man who drove the car in which she was removed. By pointing to the way in which she is able to recall the identity of Harney, Cubillo highlights a key characteristic of which she was not questioned, but which identifies him most effectively. Harney's racial identity would appear to be his distinguishing feature, as the only white man known in the community to drive the car in which Cubillo was taken. Hollingworth's failure to question Cubillo of racial identity is characteristic of the pervasiveness of white race blindness within the law, and hegemonic white culture more generally.

But Cubillo's evidence points to more than Harney's racial identity; for what she highlights is the importance of the racialisation of the context of her removal—the colonialist and assimilationist regimes of power which facilitated her kidnapping. And what an examination of the testimonial process reveals is the way in which these racialised regimes of power and discourse are replicated in the courtroom in which Cubillo is cross-examined. When questioned about how she knew it was Harney, Cubillo said that her grandmother had told her, that it was 'common knowledge' and that '[e]verybody in the community knew who these people were.' During cross-examination, there is a clear attempt to highlight an absence of verification for Cubillo's evidence in the form of 'proof', such as the presence of other witnesses.

Cubillo's evidence, however, clearly identifies the existence of a well-established narrative of Indigenous child removal by white men in her community. Such knowledge does not require recourse to methods of proof; indeed, as 'common knowledge' it cannot be verified in this way. How many witnesses would be required to testify to the existence of 'common knowledge' for the claim to fulfill the requirement of legal proof? Would the presence of another member of the family at the time of the removal provide the verification necessary? Significantly, the eye-witness accounts of other witnesses did

not result in evidence sufficient to convince O'Loughlin of the veracity of her claim. Jimmy Anderson, who lived at Banka Banka as a child and was also removed to Six Mile Creek, gave evidence that it was 'welfare', specifically naming Mr Sweeney and 'old Bill Harney' as the men who removed him.²⁹⁹ Kathleen Napananka, who lived at Banka Banka, also gave evidence that her mother had three children with white fathers, all of whom were removed.³⁰⁰

Describing narration as the 'quintessential form of customary knowledge', Lyotard points to the significance of the speaking subject's position as addressee to the subsequent capacity to speak of the knowledge.³⁰¹ The common knowledge spoken of by Cubillo, the knowledge passed on to her by her grandmother, may be seen as a form of Lyotard's narrative knowledge, which goes beyond the 'simple determination and application of the criterion of truth'³⁰² and where:

[t]here is ... an incommensurability between popular narrative pragmatics, which provides immediate legitimation, and the language game known to the West as the question of legitimacy—or rather, legitimacy as a referent in the game of inquiry. Narratives ... determine criteria of competence and/or illustrate how they are to be applied. They thus define what has the right to be said and done in the culture in question, and since they are themselves a part of that culture, they are legitimated by the simple fact that they do what they do.³⁰³

The question of Cubillo's memory of Harney is discussed by O'Loughlin, who highlights the fact that amendments were made to her statement of claim which called into question whether or not she was able to reliably identify him as one of the two men who removed her on this occasion. While O'Loughlin does not consider there to be anything 'sinister'³⁰⁴ in the occasion of errors, he does see such inconsistency as evidence of the difficulties experienced by witnesses in attempting to remember events which occurred so long ago. However, the unscientific nature of Cubillo's memory is used against her and O'Loughlin rejects her evidence, describing it as an 'exercise of reconstruction'.³⁰⁵ In his decision, he concludes:

²⁹⁹ Transcript, examination of Jimmy Anderson by Mr Dreyfus, 16 August 1999, 1420–1.

³⁰⁰ Transcript, Kathleen Napananka, examination by Mr Dreyfus, Tennant Creek, 26 August 1999, 1864–5. Evidence was given with the assistance of an interpreter.

³⁰¹ Lyotard (1979) 21.

³⁰² Ibid 18.

³⁰³ Ibid 23.

³⁰⁴ *Cubillo* para 405.

³⁰⁵ *Cubillo* para 406.

I cannot accept that Mrs Cubillo has known for the last fifty years or more that Mr Bill Harney was one of the two men who removed her from Banka Banka. Either she has only recently acquired this knowledge or, as is more likely the case, she may have once known his name but forgot it until somehow she was reminded of it as late as April 1999. ... I do not criticise Mrs Cubillo for forgetting Mr Harney or his name; she would have been a small child if she was taken away as she said, and it happened over fifty years ago. ... Perhaps the events, as she described them, did occur and perhaps her grandmother later told her of them; perhaps, over the years, what Mrs Cubillo remembers has become mixed with what she had been told.³⁰⁶

O'Loughlin's appraisal of Cubillo's evidence fails to recognise the significance of the common knowledge of which she speaks so clearly. Contrary to his conclusion, the importance of Cubillo's evidence lies not so much in a claim that she, individually, had 'known for the last fifty years or more' of the identity of the men who removed her—this was, in fact, not her expression, but that of the cross-examiner. The significance of her evidence lies in the importance of racial identity as an aspect of common knowledge, and particularly of white male racial identity as a signifier for the potential danger of theft of children. It is the racialised regime of colonial power and the economy of assimilation which is crucial to her claim, not her individual memory of an event which occurred half a century previously—an event which was not actually contested by the Commonwealth.

While O'Loughlin acknowledges the tenuous nature of memory as knowledge, in requiring evidence to support an 'important finding of fact', he seeks a form of scientific knowledge—knowledge which lacks contradiction and is supported by empirical verification. In requiring evidence which complies with a positivist framework of jurisprudence, O'Loughlin attempts to submit Cubillo's evidence to the rules required to legitimate scientific knowledge. However, as Lyotard points out, it is not possible to 'judge the existence or validity of narrative knowledge on the basis of scientific knowledge' or visa versa, because the relevant criteria are different.³⁰⁷

NARRATIVE KNOWLEDGE AS CULTURAL MEMORY

The judgment in *Cubillo* fails to recognise that the evidence presented identifies a narrative based in cultural and collective memory. Memory, like subjectivity, is produced in discourse and is by its very nature partial, fragmentary and incomplete. Within

³⁰⁶ *Cubillo*, paras 405–6.

³⁰⁷ Lyotard (1979) 26.

theoretical frameworks, the term ‘cultural memory’ is commonly used to indicate that ‘memory can be understood as a cultural phenomenon as well as an individual or social one’, particularly highlighting its usefulness in evoking ‘difficult or tabooed moments of the past’.³⁰⁸

Bain Attwood has argued that stories of the Stolen Generations, once ‘only told in Aboriginal communities and scarcely known beyond this domain’ have, since the early 1980s, undergone a process of ‘narrative accrual’ or ‘narrative coalescence’³⁰⁹ whereby they have come to take on a more symbolic meaning. Extensively citing mediums in which the stories of members of the Stolen Generations have been represented, Attwood identifies what he sees as a series of key stages in the evolution of a specific narrative. He argues that during the early 1980s, stories of the Stolen Generations had been the product of collaboration between informants and historians, involving ‘a conjunction of memory- and history-work’, but that contemporary accounts are more the result of ‘memory and other discursive and textual practices’, and are increasingly ‘symbolic in nature’.³¹⁰

As part of this narrative accrual, Attwood argues that both the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families and several legal cases, including *Cubillo*, impacted on the narrative and the nature of its truth claims to make it more ‘singular’.³¹¹ Pointing out that the inquiry called upon Aboriginal people to provide ‘a particular form of testimony, reminiscent of the confessional and the courtroom, that of witnesses who “tell it how it was” and so bear the truth about history’, he claims this tended to emphasise the dimension of suffering and trauma. Attwood argues that:

... some of the important ‘grounding’ in historical ‘sources’ that are held to verify what happened in the past and which provide the basis for the discipline of history’s truth claims, at least in the eyes of most people (but also for many historians, too), has been lost. Simultaneously, the retrospective biographical accounts have, in effect, been given not only the burden of witnessing the impact of the program of separating Aboriginal children on individuals but also the responsibility of telling the broader,

³⁰⁸ Mieke Bal, ‘Introduction’ in Mieke Bal, Jonathan Crewe and Leo Spitzer (eds) *Acts of Memory: Cultural Recall in the Present* (Dartmouth College, University Press of New England, Hanover, NH, 1999) vii.

³⁰⁹ Bain Attwood, “Learning about the Truth” The Stolen Generations Narrative’ in Bain Attwood and Fiona Magowan (eds) *Telling Stories: Indigenous History and Memory in Australia and New Zealand* (Allen & Unwin, St Leonards, NSW, 2001) 183. A shorter version of this argument was published as ‘A Matter for History’, *The Australian Financial Review*, 15 December 2000, Weekend Review, 1–7.

³¹⁰ Attwood (2001) 200.

³¹¹ Ibid 207.

collective history about the past, a forensic task these sources are not traditionally thought capable of doing, at least single-handedly, mainly because it is widely recognised that memory can be notoriously malleable and so unreliable.³¹²

Attwood identifies the way he believes the Stolen Generations narrative has, in the context of political and legal battles ‘increasingly consisted of biographical, literary and political representations rather than historical ones’ and that historical interpretation and evidence has in the legal cases often been either supplanted by individual testimony or discarded by lawyers and/or judges, who have been ‘pursuing points of law rather than history’.³¹³

Attwood is here specifically referring to the fact that the historian Peter Read—whose work Attwood suggests has been significant in the evolution of the narrative coalescence—while commissioned by the claimants in the trial of Cubillo and Gunner to prepare a report of historical research, was not called to give expert testimony. Read’s report was not ultimately tendered in the trial. However, given the difficult experience of the other historian called as an expert witness in the trial, Ann McGrath, it would seem more likely that the lawyers for the applicants decided not to submit Read to this process because, contrary to Attwood’s argument, the law found history in this case to be too subjective and unreliable.³¹⁴ The juxtaposition of ‘Aboriginal testimony’ with ‘historical evidence’³¹⁵ reveals Attwood’s suspicion of ‘memory-work’ and resistance to contemporary theorisations of historiography which emphasise the way that historical knowledge is itself discursively formulated. This is despite the fact that he acknowledges that ‘history is not the past but always the past represented and re-presented’,³¹⁶ and his conclusion that autobiographical accounts and testimony can enhance historical understanding.

Rosanne Kennedy takes Attwood to task, suggesting that the contentious status of testimony functions for historians to undermine the witness’ position as interpreter of events and that his essay ‘can be read allegorically as a story about the declining status of academic history as the guardian of the “truth” of the past.’³¹⁷ She argues that Attwood’s

³¹² Ibid 209.

³¹³ Attwood (2001) 209.

³¹⁴ I discuss the role of the historian, Ann McGrath, as expert witness in Chapter 5.

³¹⁵ Attwood (2001) 186.

³¹⁶ Attwood (2001) 188.

³¹⁷ Rosanne Kennedy, ‘Stolen Generations Testimony: Trauma, Historiography, and the Question of “Truth”’ (2001) 25 *Aboriginal History* 116, 116. Kennedy is responding to the version of Attwood’s essay

description of Stolen Generations testimonies as ‘symbolic’ denies the metaphorical nature of historical discourse itself and the importance of witnesses as active producers of historical meaning. The failure, on the part of historians, to acknowledge that they are themselves meaning-makers and that the meaning of all evidence, including testimony, is discursively produced ‘leads to an unsettling realisation: that only the culturally conferred status and authority of the historian distinguishes his or her interpretation of evidence from the interpretation found in testimonies.’³¹⁸

Kennedy argues that ‘testimonies should not be evaluated according to the demands of proof or truth’, that it is the fact of its embodiment and situatedness that makes it valuable, ‘its affective nature—the way that it reveals a past that has not yet been mastered.’³¹⁹ Kennedy points to the way Attwood uses a legal metaphor to describe the role of the historian—as a ‘forensic task’— which she claims is itself a ‘rhetorical move, the aim of which is to distance history from literature’ and ‘positions the historian as a judge—as one who is emotionally distanced from and sits in judgement on the past’.³²⁰ She argues, however, that:

... once historians accept that all evidence is constructed—that it only becomes meaningful, and indeed only functions as evidence, through particular discursive frameworks—then they must acknowledge that they, like witnesses, are meaning makers, not detectives or judges who ‘find fact’.
... A judicial approach to historiography, and the retreat to authority allegedly grounded in factual accuracy, protects the historian from the need to consider his or her own subject-position in relation to the events under consideration.³²¹

I am in agreement with Kennedy’s critique of Attwood’s work, with her deconstruction of the truth-claims of positivist approaches to history and with her advocacy of a ‘critical methodology for reading testimonies’.³²² However, the issues she raises in relation to the necessity to acknowledge discursive and interpretative framework in historiography must also be raised in relation to law. As Kennedy well knows,³²³ narrative and rhetoric function pervasively within the discourse of law, indeed, can be

published in *The Australian Financial Review*: ‘A Matter for History’, 15 December 2000, Weekend Review, 1–7.

³¹⁸ Kennedy (2001) 121–2.

³¹⁹ Ibid 125.

³²⁰ Ibid 122.

³²¹ Ibid 121–2.

³²² Ibid 125.

³²³ See Kennedy’s discussion of the function of narrative as a technology of proof in ‘Legal Sensations: Sexuality, Textuality and Evidence in a Victorian Murder Trial’ in Margaret Thornton (ed), *Romancing the Tomes: Popular Culture, Law and Feminism* (Cavendish Publishing, London, 2002) 69–111.

said to constitute it.³²⁴ If ‘testimonies should not be evaluated according to the demands of proof or truth’, but ‘should be read and analysed for their insights into how people involved in past events interpreted those events and their implications’,³²⁵ what does this say about the function of testimony in legal trials, where it is specifically subjected to rationalist notions of proof and truth?

When Lorna Cubillo was cross-examined in relation to the occasion of her removal from Banka Banka station, a traumatic event which occurred over 50 years ago when she was a small child, she attempted to answer the questions on the basis of her memory and what she had been told. However, O’Loughlin was unconvinced that Cubillo remembers this occasion accurately, that ‘perhaps, over the years, what Mrs Cubillo remembers has become mixed with what she has been told’, concluding that she had ‘engaged in an exercise of reconstruction’, possibly ‘subconsciously’.³²⁶ I would argue that O’Loughlin is drawing here on the notion of ‘narrative accrual’ elaborated by Attwood, suggesting that Cubillo’s individual memory of events and identities has coalesced with stories that other people have told, and that this process has resulted in her presenting a revised version of events, a subjective, unreliable and possibly untruthful version of the past.

What is actually at stake in Cubillo’s memory of her removal from Banka Banka, and particularly, the identity of men who took her away? Counsel for the Commonwealth objected to the evidence on the grounds of relevance, because her claim pertained only to having been unlawfully removed from Phillip Creek, and on the grounds of hearsay, because she ‘did not know the two men—she had never seen them before and she had only learnt their names because of what her grandmother had subsequently told her’.³²⁷ O’Loughlin ruled against these two objections, because he ‘felt that it was the story of her life as a young part Aboriginal girl that was the foundation of her case. In the interests of completeness there was ... a strong case to receive into evidence, a narration of all material events that occurred during her time at Banka Banka and subsequently.’³²⁸

³²⁴ Paul Gewirtz, ‘Narrative and Rhetoric in the Law’ in Peter Brooks and Paul Gewirtz (eds) *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, New Haven, 1996) 3.

³²⁵ Kennedy (2001) 124.

³²⁶ *Cubillo*, paras 405–6. O’Loughlin also pointed out that on 29 April 1999, Mrs Cubillo filed a document entitled ‘Status of Amended Further and Better Particulars of Amended Statement of Claim’ in which she said that she was taken from Banka Banka by ‘Mr Barney McGuinness and another man who she believes was Mr Bill Harney’: para 404.

³²⁷ *Cubillo* para 401.

³²⁸ *Cubillo* para 401.

While the basis of Cubillo's legal action did not specifically include her detention at Six Mile or Seven Mile, her account is significant to the question of the history of Indigenous child removal generally, not only because it indicates that people were alerted to this danger, but also because it clearly suggests that such removals were commonplace. In her thorough account of the Stolen Generations, Anna Haebich claims that between 1932–52 in the Northern Territory, an estimated 583 Aboriginal children were removed from their families and that by the early 1950s, over 60 per cent of these children (357), the majority of 'mixed race' children in the Territory, were in mission institutions.³²⁹

In the trial, during cross-examination, counsel drew a direct link between Cubillo's involvement in the activities associated with the Going Home conference held in Darwin in October 1994 and her memory of the occasion of her removal from Banka Banka. Presenting her pleadings documents,³³⁰ Ms Hollingworth drew attention to a series of inconsistencies between Cubillo's statement and the oral evidence she had given in court, suggesting that she had acquired the memory she had of this occasion as a result of talking with other people recently:

Okay. I want to put it to you that your memory of the circumstances of your removal is a memory that you have acquired for the most part only over the last year or two and only as a result of talking to various people. Do you accept that?---That's incorrect. I remember the day I was removed.

Since the Going Home Conference in 1994, there's been a number of meetings between you and other people who identify themselves as the Stolen Generation Group, haven't there?---We went to rallies.

You've had a number of workshops where you've sat around and talked about your experiences?---We talked as groups of people who were suffering.

...

Since late 1996, your solicitors have shown to you a number of documents connected with your case against the Commonwealth, haven't they?---I haven't been shown a lot of documents; I discussed with them what happened to me.

...

As you have discussed this case with your solicitors, your memory of what happened to you when you were only 3 or 4 years old, more than 57 years ago, have firmed up, that you've become more certain about things than you were before you started talking to your

³²⁹ Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Arts Centre Press, Fremantle, 2000) 468.

³³⁰ Exhibit #R52 Further and Better Particulars, Volume 4 Court Book.

*solicitors?---Miss Hollingsworth, I remember the time I was removed as if I had broken an arm and I would remember it for the rest of my life, Miss Hollingsworth.*³³¹

Hollingsworth's cross-examination of Cubillo is premised on the notion that perception precedes memory and subsequent narration, where 'events and states of affairs occur and have an existence independently of human observation', and 'present knowledge about past events is in principle possible'.³³² The questioning is clearly intended to suggest that Cubillo's account is not based on authentic, first-hand observations which she has carried with her in an unadulterated form throughout her life, but rather the product of a more unreliable form of *collective* memory, a coalescence of memories. It attributes the experience of events an existence independent of subjectivity, as if they could happen to someone else, but are still available to the subject's perception, and to recollection. As Cubillo reveals, however, her memory of these events is an embodied experience, traumatically imprinted, like a physical injury, something she will remember for the rest of her life.

As Kennedy points out, it is specifically the affective dimension of Stolen Generations testimonies, the fact that they are a form which bear witness to intimate and traumatic experiences and require subjects to recall events from the past in the context of the present—"social utterances" which intervene in a present social context³³³—that are most undermining of empiricist methodology, and most challenging to those positioned to respond. She argues that a dialogic understanding of testimony 'as an address draws out the listener's ethical obligation to respond'³³⁴ and that in a 'post/colonial context, listening is a political as well as an ethical act'.³³⁵

How might this ethical obligation function in a legal context? In his decision in *Cubillo*, O'Loughlin indicated that he was well aware of the ethical and political dimensions of the case when, in the opening paragraph of his public summary he stated: 'Neither the evidence in this trial, nor the reasons for judgment, deny the existence of "the Stolen Generation"'. Numerous writings tell tragically of a distressing past.³³⁶ There are also occasions where he indicates that he feels sympathy for the plaintiffs, although this is

³³¹ Transcript, Cross-examination of Lorna Cubillo, 13 August 1999, p 1347.

³³² Twining (1985) 13.

³³³ Rosanne Kennedy, 'The Affective Work of Stolen Generations Testimony: From the Archives to the Classroom' (Winter 2004) 27(1) *Biography* 48, 49.

³³⁴ Ibid 50.

³³⁵ Ibid 56.

³³⁶ Cubillo, Summary of Reasons for Judgment, para 1.

generally expressed in order to point out that such an affective response would not be suitable grounds for making a decision:

I have great sympathy for Mrs Cubillo, for Mr Gunner and for others who, like them, suffered so severely as a result of the actions of many men and women who thought of themselves as well-meaning and well intentioned but who today would be characterised by many as badly misguided politicians and bureaucrats. Those people thought that they were acting in the best interests of the child. Subsequent events have shown that they were wrong.³³⁷

But at no point does O'Loughlin acknowledge the ethical obligation which inheres in his position in listening to the testimonies of those who have suffered traumatic experiences in Australia's violent colonial history. Nor does he acknowledge the racialised context in which the applicants are required to give their testimonies and the power of the law to reinscribe violence by failing to *listen*. O'Loughlin is in the privileged position of being able to express his own affective response to testimonies of trauma—which many would see as an indication of empathy—while at the same time comment negatively on the credibility of witnesses' testimony in light of their demeanour, character, personality, intelligence, motivations and temperament.

THE EPISTEMOLOGY OF AFFECT: SPEAKING OF THE MOTHER TONGUE

According to Lyotard's framework, notions of truth and rationality function, within post-enlightenment conceptual paradigms, as metadiscourses. Such paradigms rely principally upon binary constructions, where, as one in a series of oppositions, rationality is posited contra affectivity. Rationality, alternatively referred to as reason, is seen to provide objective and incontestable truth, whereas affectivity is regarded as irrational, tenuous, unstable and impossible to quantify. Feminist epistemologies provide critiques of the juxtaposition of rationality and affectivity, revealing how rationality is equated with knowledge, cognition, authority, masculinity and the public realm, whereas affectivity is aligned with irrationality, feelings, corporeality, femininity and the private world of the individual.³³⁸ Feminist and non-white theorists have also pointed out the

³³⁷ *Cubillo* para 1562.

³³⁸ See, for example, Alison M Jaggar and Susan R Bordo (eds), *Gender/Body/Knowledge: Feminist Reconstructions of Being and Knowing* (Rutgers University Press, New Brunswick, 1989); Kathleen Lennon and Margaret Whitford (eds), *Knowing the Difference: Feminist Perspectives on Epistemology* (Routledge, London, 1994); Linda Alcoff and Elizabeth Potter (eds), *Feminist Epistemologies* (Routledge, New York, 1993); and Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies* (Cambridge, Polity, 1987). Genevieve Lloyd provides an account of the history of masculinity and reason within philosophic thought in *The Man of Reason: Male and Female in Western Philosophy* (Routledge, London, 2nd ed, 1993).

historical and cultural specificity of such constructions, highlighting how the distinction between reason and emotion emerged in western European philosophy in the context of the rise of modern science and the emergence of positivism.³³⁹ It also emerged in the context of the expansion of colonialism and of the dominance of western European colonial power throughout the world. The racialised, non-white subject—the other of western discourse—is also aligned within this paradigm to the realm of affectivity and irrationality.

Positivist legal discourse regards itself as a science, rejecting subjectivity and affectivity. Underpinning positivist jurisprudential principles is the requirement that the law functions, and is seen to function, objectively, independently and neutrally. Decisions must be made on the basis of evidence of a ‘factual’ nature, received within a formally constituted court, preferably verifiable by documentary sources and subject to the ‘logic’ of cross-examination. The law is unable, within this paradigm, to accommodate expressions of affectivity, in such forms as anger, pain, trauma, passion, rage or sentimentality. Affectivity threatens the law’s claim to rational scientificity, in part because it does not recognise or provide the means with which to evince, assess or quantify emotion.³⁴⁰ The primacy attributed to rationalist conceptions serves to efface other knowledges, including affectivity. Unable to account for or quantify emotion, the law resists its expression: legal processes are imbued with formality, all participants are required to display ‘objectivity’ and detachment, witnesses are expected to relay experiences without emotion, and the role of the judge is to make decisions impartially and without sentiment.

In *Cubillo*, O’Loughlin clearly articulated a commitment to the rationalist tradition. While acknowledging that separation and removal of Aboriginal children from their families may, at least, be ‘a matter of regret’, he nevertheless expressed his task in *Cubillo* in the following way:

³³⁹ Alison Jagger points out that the epistemology associated with the modern redefinition of rationality also gave rise to a reconceptualisation of the understanding of sensory perception, which had, up until this time, been equated with emotion. English empiricism, and subsequently positivism, however, regard knowledge to be derived from empirical testability given directly to the senses: ‘Love and Knowledge: Emotion in Feminist Epistemology’ in Alison M Jagger and Susan R Bordo (eds) *Gender/Body/Knowledge: Feminist Reconstructions of Being and Knowing* (Rutgers University Press, New Brunswick, 1989). Hence, the significance of, for example, visual means of proof in both science and law.

³⁴⁰ For development of these ideas in the United States context, see, for example, Aviva Orenstein, “MY GOD!” A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule’ (January 1997) 85 *California Law Review* 159; and ‘Gender and Race in the Evidence Policy: Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It’ (1999) 28 *Southwestern University Law Review* 221.

The task of the Court is to examine the evidence—both oral and documentary—in a clinical manner, devoid of emotion, for the purpose of ascertaining, first, whether the applicants have causes of action against the Commonwealth; secondly, whether, if they do, they should be permitted to prosecute them, having regard to their delay in the institution of proceedings; and thirdly, if they are permitted to prosecute them, whether they have made out their claims.³⁴¹

O'Loughlin identifies his task as a judge to specifically require the absence of affectivity, asserting that the task of judgment is 'clinical' examination of the evidence with a view to ascertaining the validity of a claim. Within this positivist-empiricist paradigm—resonating with the discourse of medical science³⁴²—the judicial subject is required not to experience emotion, because it is seen to threaten the law's capacity to seek objective truth. However, as Sandra Berns points out, the form of decision-making expected of judges is ultimately inconceivable because it requires

a kind of transcendence, an ability to isolate the self from context, from partiality, from the affections and fallibilities that make up the daily lives of ordinary people. We expect our judges to become the kind of subjects which, in our saner moments, we know to be beyond possibility, beyond comprehension, beyond understanding.³⁴³

Human subjectivity is inconceivable in the absence of affectivity. Contrary to the requirement for dispassionate observation as a basis for forming judgment, affectivity may be regarded as essential to evaluative processes,³⁴⁴ and indeed to meaning itself. As Alison Jagger argues, the notion of dispassionate inquiry is actually a function of ideology.³⁴⁵ The ideal of objectivity and value-neutrality, imbued in legal contexts with the idea of wisdom, serves to efface the ideology underpinning the judicial function. Such values are consistent with the type of knowledge which 'knowers who can be considered capable of achieving a "view from nowhere" that allows them, through the autonomous exercise of their reason, to transcend particularity and contingency'.³⁴⁶ The 'view from nowhere', while masquerading as generalisable human knowledge, actually

³⁴¹ *Cubillo* para 79.

³⁴² Kennedy (2001)119.

³⁴³ Sandra Berns, *To Speak as Judge: Difference, Voice and Power* (Ashgate Dartmouth, Aldershot, 1999) 86.

³⁴⁴ For example, in arguing for a concept of 'embodied diversity' as a basis for legal decision-making, Jennifer Nedelsky draws on the work of the neurologist, Antonio Damasio, who demonstrates the importance of body and emotion in the process of reason and judgment: 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law Journal* 91.

³⁴⁵ Jagger (1989) 157.

³⁴⁶ Lorraine Code, 'Taking Subjectivity into Account' in Linda Alcoff and Elizabeth Potter (eds) *Feminist Epistemologies* (Routledge, New York, 1993) 16.

venerates the type of knowledge produced by 'knowers' whose subjectivity is grounded in privileged white masculinity.

In asserting the requirement for his judgment to be 'devoid of emotion', O'Loughlin is able to disguise his subjective specificity and posit instead a form of universal transcendental subjectivity. This serves the political function of diminishing the significance of the racialised and gendered knowledge which his position embodies.³⁴⁷ It also allows him to discount forms of knowledge, including emotion, which are expressed by witnesses, on the grounds that they are not articulated from a position of objective impartiality. In discussing the type of epistemology formulated as 'S-knows-that-p', Lorraine Code argues that:

Such epistemologies implicitly assert that if one cannot see 'from nowhere' (or equivalently, from an ideal observation position that could be anywhere and everywhere)—if one cannot take up an epistemological position that mirrors the 'original position' of 'the moral point of view'—then one cannot *know* anything at all. If one cannot transcend subjectivity and the particularities of its 'location', then there is no knowledge worth analysing.³⁴⁸

The evidence given by Cubillo and Gunner in relation to their loss of language and discussion of this issue by O'Loughlin provides an interesting site for the examination of the law's resistance to affectivity. Loss of language is one of the key issues in the case. Cubillo and Gunner both gave evidence that they were forcibly prohibited from speaking their own languages in the institutions in which they were placed and that this resulted not only in difficulties communicating with each other in the homes, but also meant that they were unable to communicate with their families when they later had contact with them. This experience was most poignantly described in relation to their reunions with their mothers—occasions, which for each of them, occurred only once. Loss of language is also highly significant to their claims of loss of cultural, social and spiritual life and is particularly relevant to decisions they each made about contact they have had subsequently with their families and communities.

Cubillo's language groups are Walpiri and Warumunga. She gave evidence that these were the languages she spoke as a child before she was removed. While it is unclear how old she was when she was taken to the Retta Dixon Home, approximately two years after being taken from Banka Banka to Phillip Creek, she was possibly only eight years

³⁴⁷ See Chapter 8 for a detailed discussion of judicial subjectivity.

³⁴⁸ Lorraine Code, 'Taking Subjectivity into Account' in Linda Alcoff and Elizabeth Potter (eds) *Feminist Epistemologies* (Routledge, New York, 1993) 16.

old. When giving evidence in relation to her loss of language and in response to a series of questions in cross-examination, Cubillo clearly became frustrated and angry. While this did not prevent her from answering the questions articulately, her evidence is not accepted by O’Loughlin in his judgment because it displayed emotion.

During cross-examination, Cubillo was questioned in detail as to whether she had previously learnt any English at the mission school at Phillip Creek before being taken to the Retta Dixon Home and whether she used English as the primary form of communication with the other children and the missionaries. Cubillo, who would have been about seven years old when she lived at Phillip Creek, gave evidence that the children attended school only for about one hour per day, and that their lessons consisted of recitals of simple words and songs; she said that she spoke a little pidgin English.³⁴⁹ At the Retta Dixon Home, Cubillo gave evidence that the children were forced to stop using their languages and that they were ‘flogged’ when they did so. Counsel for the respondent challenged Cubillo’s claim.

And I put it to you that you did not cease to use your traditional language at Retta Dixon because you were flogged; rather you ceased to use your traditional language out of necessity of learning English—you understand the question? --- Miss Hollingsworth, I was flogged. I was flogged. Our language was flogged out of us. I know what happened to me.

When citing this exchange in his judgment, O’Loughlin again identifies Cubillo’s testimony as an ‘example of subconscious reconstruction’, this time, describing it as having escalated into ‘vitriol’:

I regard this passage of her evidence as another example of subconscious reconstruction. In the hurt and suffering that Retta Dixon came to represent, nothing about it was good: nothing was a cause for happy memories. Undoubtedly, there were incidents when she spoke her native tongue and she was punished for being disobedient. However, out of such incidents, there has escalated the vitriol that was evident in her last answer. I am satisfied that the missionaries discouraged the children from speaking their native tongue but I cannot find why this was so. One possibility is that there was a specific and conscious decision to stop the children speaking their first language but a more likely reason was one of practicality: that is, the children had to learn English so that there could be communication, by means of a common language, between the children and between the children and the staff of the mission. I am prepared to accept that the children were punished for speaking their native tongue; however, I am not

³⁴⁹ Transcript, cross-examination of Cubillo by Ms Hollingsworth, 13 August 1999, 1301–2.

prepared to apply the word “flogged” as being descriptive of that punishment.³⁵⁰

It is difficult to determine on what grounds O’Loughlin does not accept Cubillo’s claim that the children were flogged for speaking their language. When giving evidence about his treatment at St Mary’s Hostel, Gunner also used the term ‘flogged’ to describe the punishment he received when he spoke his own language, in addition to other occasions, for example when he ate food with his fingers.³⁵¹ Other witnesses, including Jimmy Anderson, who had also been an inmate at the Retta Dixon Home, said the children got strapped around their legs if they spoke in their own languages or talked to ‘full-blood’ Aboriginal people.³⁵² It is well documented that forcible removal of Indigenous children, implementing a policy of assimilation, principally involved the destruction of identity through language and culture. As the HREOC inquiry reported:

One principal effect of the forcible removal policies was the destruction of cultural links. This was of course their declared aim. The children were to be *prevented from acquiring the habits and customs of the Aborigines* (South Australia’s Protector of Aborigines in 1909); *the young people will merge into the present civilisation and become worthy citizens* (NSW Colonial Secretary in 1915). Culture, language, land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance of them.³⁵³

O’Loughlin posits ‘practicality’ as the reason for the missionaries’ discouragement of ‘the children speaking their native tongue’—the practical necessity of communication by means of a common language. Practicality accords more with the discourse of rationality than the vitriolic anger and trauma of a person who is asked to recall and describe the experience, as a child, of being punished simply for *speaking*. It suggests an understanding of English as a second language, spoken outside the home environment, but where the first language is used with family and community. However, this is not the context described by Cubillo of the loss of her language; rather, she is describing the trauma experienced as a result of the theft of her mother tongue. Cubillo did not give evidence that the children were punished for speaking on the grounds of practicality, she said that the children’s language was flogged out of them. It is O’Loughlin’s interpretation of Cubillo’s evidence which assumes the notion of practicality. In

³⁵⁰ Cubillo para 593.

³⁵¹ Transcript, examination of Peter Gunner, 16 August 1999, p 1510.

³⁵² Transcript, examination of Jimmy Anderson, 16 August 1999, p 1426.

³⁵³ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997) (hereafter *Bringing Them Home*) 202, italics in original.

superimposing the rational discourse of practicality, O'Loughlin has effectively erased and dismissed the powerful evidence of anger and resentment.

Loss of language is fundamental to the plaintiffs' evidence in relation to their reunions with their families. Cubillo's testimony about the experience of seeing her mother is a moving description of the extraordinary pain and frustration she experienced when unable to communicate with her mother—to speak in the mother tongue:

Were you able to speak with her when you got to Phillip Creek? --- It was very difficult because mum only spoke limited English and I spoke to her through other relatives like an interpreter and it was very difficult to let her know how I felt and to understand what she was saying to me. We just cried and hugged.

How did you feel about seeing her again? --- I was overcome. This was a person who was my mother, who loved me, and she was the only, apart from my grandmother, she was the only person who loved and hugged me. I never had that sort of love from my time in the home.

What about the fact that you had difficulty - your evidence that you had difficulty speaking with her? --- That's right.

How did that impact on you? --- It was really frustrating. I didn't know how to express my feeling and she didn't know how to do it. I was happy and upset with the ordeal.

...

What did you think, Mrs Cubillo, about seeing your mother again?---I was confused. I wanted to be with her, but I felt that my life had been severed from the time I was removed from Phillip Creek and I could not communicate adequately with my mother.

*Did you see your mother again after that visit?---No, I didn't.*³⁵⁴

Cubillo said that while she wanted to be with her mother, she felt that the way she had been dissociated from her family and the impossibility of speaking with her made contact painfully fraught. In evaluating this evidence in his judgment, however, O'Loughlin points out that while Cubillo knew where to find her mother, Maisie, she did not visit her again. He sees this as inconsistent with her claim of forced separation.

Lorna never saw Maisie again; she heard later that she had died; she also thinks that Polly Kelly is dead. The parties agreed that exhibit R36 was the death certificate for Maisie; it recorded that she died in the Tennant Creek Hospital on 7 January 1979 aged about eighty-eight years. This meant that Mrs Cubillo, knowing where to find her surrogate mother, made no attempt at any further contact in the remaining twenty-three years of Maisie's life. I find that lack of contact inconsistent with Mrs Cubillo's fundamental

³⁵⁴ Transcript, examination of Lorna Cubillo, 11 August 1999, 1137.

complaint of her forced separation from the woman whom she had believed to be her mother.³⁵⁵

Cubillo was completely separated from her family and community when she was about eight years old; she is now unable to speak her own language; she is unfamiliar with her culture; she did not see her family or community for the remainder of her childhood; and when she did see her mother, she could not speak to her. In the trial she expressed feelings of loss, loneliness, alienation, anxiety and depression—all of which she has continued to experience throughout her adult life. Nevertheless, O'Loughlin argues an inconsistency in Cubillo's behaviour and in doing so, he elevates the discourse of 'rational' behaviour, suggesting that she was not motivated sufficiently to have contact with her mother—a woman she had not seen since she was a small child and with whom she could not *speak*.

Over-writing Cubillo's narrative of loss and alienation, O'Loughlin diminishes her evidence of pain and trauma and replaces it with an alternative story of resentment, bitterness and vengeance which, he suggests, she has mistakenly directed against the Commonwealth. He determined that she was unhappy because she could not 'adapt' at the Retta Dixon Home and that she has subsequently had a very difficult life. He concludes by asking the rhetorical question:

Is it any wonder that a person who has suffered such hardship and misery would lash out in search of those responsible? Mrs Cubillo has, understandably, built up a tremendous sense of grievance and the litigious process has turned that sense of grievance against the Commonwealth to the exclusion of all others.³⁵⁶

O'Loughlin expresses empathy for Cubillo, and goes on to highlight specific details of the suffering and hardship she has experienced throughout her life. In doing so, he contradicts the assertion that his judgment by necessity be 'devoid of emotion'. However, this expression of affectivity is accorded rational status, whereas Cubillo is said to have 'lashed out', having an irrational sense of grievance towards 'the Commonwealth'. Cubillo did not take action against the Commonwealth because her husband was violent, drank or gambled, because she was poor, had suffered illness, nor because some of her children are drug addicts, suffer mental illness or have been imprisoned. This is notwithstanding the fact that the *Bringing Them Home* report clearly

³⁵⁵ *Cubillo* para 640. Maisie was not actually Cubillo's biological mother—who had died when she was very young—but was her aunt. However, she was the woman Cubillo knew, and referred to, as her mother.

³⁵⁶ *Cubillo* para 730.

identifies the relationship between childhood separation and issues such as lack of opportunities in education and employment, poverty, poor physical health, violence, depression, alcohol dependence, drug addiction and high levels of imprisonment.³⁵⁷ However, in the trial, these issues were highlighted by the respondent, in its argument that the Commonwealth was not responsible for the hardship and suffering Cubillo had experienced as a result of her removal from her family and community. Nevertheless, by determining that Cubillo took action against the Commonwealth as a result of an irrational sense of grievance, O'Loughlin erases the significance of the impact of colonisation and the policy of assimilation to her claim.

Evidence provided to the HREOC inquiry and published in the *Bringing Them Home* report documents the widespread practice in missions and institutions of prohibiting children from speaking in their own languages and punishing them when they did, highlighting the significance of denigration of Aboriginal culture as one of the 'most common experiences of witnesses to the Inquiry'.³⁵⁸ Echoing its title, the report stated that:

Reunion is the beginning of the unravelling of the damage done to Indigenous families and communities by the forcible removal policies. For individuals, their articulated needs to trace their families are diverse. People need to have a sense of belonging and a sense of their own identity. It is important for most people to know their direct and extended family. Reunion is often an essential part of the process of healing when the separation has been so painful.³⁵⁹

However, the report also points out that '[l]anguage differences inhibit many reunions and make rebuilding true relationships virtually impossible'.³⁶⁰ What O'Loughlin failed to recognise is the significance of Cubillo's experience of the loss of her language and of her inability to speak to her mother. He also fails to hear the voice in which she now speaks. As a child, Cubillo lived in an oral culture, a culture in which, as she had previously pointed out in relation to her grandmother, knowledge would have been communicated verbally, in conversation and other narrative forms. Her inability to speak to her mother, and to other people in her community, indicates much more than linguistic frustration, it points to the unspeakability of the pain she has suffered and its unrepresentability in western legal discourse.

³⁵⁷ *Bringing Them Home* (1997) Chapter 11.

³⁵⁸ *Ibid* 156.

³⁵⁹ *Ibid* 234.

³⁶⁰ *Ibid* 238.

CONCLUSION

Justin Evans draws on Jacques Derrida's theorisation of the privileging of speech over writing in Western metaphysics to argue that in the courts in Australia, Indigenous narrative knowledge is regarded as a form of 'writing', on the basis that it does not privilege the presence of the speaking subject. 'The original subject who handed down the laws or rules or narratives that are recited (as much as they can be) in the courts is regarded *in absentia*.'³⁶¹ Evans argues that this produces a 'schism'— an example of what Lyotard refers to as the *différend*—'a situation in which two competing language games are totally incommensurate with each other',³⁶² where the person being judged 'does not share the basic tenets of the system under which he or she is being judged'.³⁶³ 'A person who suffers a wrong that cannot be proven under the present system is a true victim, and his or her claim constitutes a *différend* lying outside the system of justice.'³⁶⁴ The Anglo-Australian legal system cannot hear the marginalised voice of the Indigenous litigant, and instead, uses the dominant language game of legal positivism to bolster its own version of truth and to designate narrative knowledge as 'less truthful than Crown evidence'.³⁶⁵

In his concluding remarks in *The Postmodern Condition*, Lyotard calls for a waging of a 'war on totality', where we might commit to witnessing what may be regarded as 'unpresentable' in an attempt to affirm differences.³⁶⁶ Lyotard argues that each individual is located in relation to a number of minor narratives or language games, indeed, that as subjects, we are interpellated in these narrative constructions. He argues for a rejection of the grand narratives of western modernity, in an affirmation of smaller, localised narrative knowledges. In the following chapter, I will go on to examine a site of testimonial evidence which demonstrates the function of language to interpellate subjects within discourse and ideology, specifically focussing on racialisation as a signifying system. In my analysis, I draw on a framework for an understanding of testimony which asserts the primacy of marginalised, oppositional voices that challenge the metanarrative of legal positivism.

³⁶¹ Justin Evans, 'Indigenous Australians: Language, and the Law' (2002) 15 *International Journal for the Semiotics of Law* 127, 131.

³⁶² Ibid 129.

³⁶³ Douglas Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, Kansas, 1997) 119.

³⁶⁴ Ibid 120.

³⁶⁵ Evans (2002) 132.

³⁶⁶ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, Theory and History of Literature, Volume 10 (University of Minnesota Press, Minneapolis, 1979) 82.

CHAPTER 4

INEFFACEABLE MEMORY: THE TRUTH OF TESTIMONY

*If there is no one universal standard for truth, then claims about truth are contextual: they have to do with how people construct different understandings of the world and historical memory from the same set of facts in situations of gender, ethnic, and class inequality, exploitation, and repression. ... the truth claims for a testimonial narrative ... depend on conferring on the form a certain special kind of epistemological authority.*³⁶⁷

INTRODUCTION

The term ‘evidence’ was, according to early 20th century United States evidence theorist, John Henry Wigmore, until the mid-1700s, used exclusively in reference to testimonial evidence, such that in the trials of that period, ‘an evidence’ was used to mean ‘a witness’.³⁶⁸ This etymology illuminates the common law’s preference for oral testimony and calls attention to the historical connection between theories of evidence and proof and the study of rhetoric. As William Twining points out, ‘one of the most important stimuli for the development of classical rhetoric ... was a practical concern with the art of pleading in court.’³⁶⁹ However, the connection between the intellectual heritage of law and the humanities is generally unacknowledged in the study of evidence, largely because ‘legal scholarship has taken legal doctrine [sic] as its *starting-point*,’³⁷⁰ focussing on the rules of evidence. This is characteristic of legal positivism, which insists on law as a discrete discipline, somehow impervious to other intellectual developments.

Together with Jeremy Bentham, Wigmore is considered a foundational theorist of evidence in Anglo-American law.³⁷¹ Wigmore’s ten-volume theory of judicial proof,³⁷² first published over a century ago, has continued to dominate evidence scholarship and the legacy of his approach remains authoritative in the courtroom. Wigmore outlines

³⁶⁷ John Beverley, *Testimonio: On the Politics of Truth* (University of Minnesota Press, Minneapolis, 2004) 86.

³⁶⁸ John Henry Wigmore, *The Principles of Judicial Proof as given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials* (Little, Brown, and Company, Boston, 1913) 7.

³⁶⁹ William Twining, *Rethinking Evidence: Exploratory Essays* (Northwestern University Press, Evanston, Illinois, 1994) 4–5.

³⁷⁰ Twining (1994) 5.

³⁷¹ While Sir Rupert Cross’s work, *Cross on Evidence*, is now considered the key British text, William Twining notes its lack of theoretical framework for the subject, dealing almost exclusively with the rules of evidence: William Twining, *Theories of Evidence: Bentham & Wigmore* (Weidenfeld & Nicolson, London, 1985) 10.

³⁷² John Henry Wigmore (rev James H Chadbourn), *Evidence in Trials at Common Law* (10 volumes) (Little, Brown and Company, Boston, 1970; 1904).

three essential elements, or processes, of testimony: perception ('the witness must know something'); memory ('the witness must have a recollection of these impressions'); and communication or narration (the witness 'must communicate this recollection to the tribunal').³⁷³ The legal conceptualisation of testimony regards assertions made by a witness to be 'the basis of an evidential inference to the truth of his statement'.³⁷⁴ It is an empirical model which assumes the existence of facts available to perception and the possibility of a witness averring a truthful linguistic account based on his or her objective observation, without reference to subjective location—in short, a correspondence theory of truth. This is the approach to law most influenced by the doctrine of law as science, where law must be based on empirical fact or reason, subject to objective standards, and with a specific focus on proof.

The epistemological tradition underpinning the rules of evidence in Anglo-American law attributes primacy to first-hand observation, specifically the eyewitness account.³⁷⁵ However, witnesses are expected to provide testimonial accounts which are free from interpretation or opinion, without inference, judgment or extrapolation, and to articulate recollections of events perceived or experienced as 'unadulterated facts'. The veracity of witnesses' account is meant to be assessed on the basis of their credibility, defined as their 'ability to observe or remember facts and events'.³⁷⁶ While ultimately, decisions in legal disputes are made on the basis of the perception of narrative coherence, the significance of narrative and its relationship to interpretation is largely denied at the level of evidence given at trial. The authorship of legal stories is reserved for the judge.

Despite Wigmore's professed commitment to evidence as a scientific study,³⁷⁷ his constituent elements for the process of testimony actually points to its foundation in the traditions of the humanities, where perception, memory and narration are central to the study of interpretation, discourse and rhetoric, in disciplines such as history and

³⁷³ Wigmore (1913) 312.

³⁷⁴ Ibid.

³⁷⁵ Perhaps the most infamous evidence rule which is said to support the privileging of first-hand observation is the hearsay rule, which restricts the admissibility of 'evidence of representations made out of court—whether oral, written, or in the form of conduct—that are led as evidence of the truth of the fact the maker of the representation intended to assert by the representation': Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005) 188. The hearsay rule is a long-standing aspect of the common law, encoded in s 59 *Evidence Act 1995* (Cth). There are innumerable exceptions to the rule and it has been trenchantly criticised on a number of grounds.

³⁷⁶ *Evidence Act 1995* (Cth) Dictionary. The credibility rule is contained in *Evidence Act 1995* (Cth) s 102.

³⁷⁷ By 1937, the third edition of his *Principles* had been renamed *The Science of Judicial Proof* (Boston, 3rd ed, 1937), reflecting the pervasive understanding of law as science.

literature. To attribute a scientific model to the testimonial process fails to account for the hermeneutics of communication and appears oblivious to the function of interpretation in the production of meaning—in the importance of Gadamer’s ‘fusion of horizons’ produced between speaker and listener.³⁷⁸ However, the relationship between legal testimony and hermeneutics is actually apparent in the designation of the trial as a *hearing*—a process of listening and of bearing witness, where a judge (and sometimes jury) deploys his or her own faculties of perception, memory, and later, narration in the production of meaning.

This is not to suggest that subjectivity is not accounted for at all in legal frameworks for testimonial evidence. On the contrary, Wigmore also outlines key individual and general, human ‘traits’ which should be considered in relation to the trustworthiness of testimony, specifically: race, age, sex, mental disease, moral character, feeling, emotion and bias, and experience (acquired skill).³⁷⁹ In legal proceedings, the veracity of testimony is determined on the basis of an assessment of the demeanour of witnesses and the plausibility of their narration. As feminist and critical race theorists have shown us, the identification of these ‘traits’ assumes a normative model for the ideal testifying witness, namely the white, able-bodied, heterosexual, middle-class man. However, as I have discussed in the previous chapter, there is no universal standard for knowledge or truth. Our understandings of truth are complex constructions emanating from our subjective experiences; they are inevitably contextual and are produced in language. Nowhere is this more apparent than in an examination of testimony.

There has been a recent burgeoning interest in multidisciplinary studies of the testimonial form, of processes of witnessing and in the production of life writing, particularly in the wake of the Holocaust and other genocides, historical injustices, colonialism and forced migrations.³⁸⁰ In Australia, the recent production of and interest in testimony studies, oral histories and life writing has overwhelmingly been propelled

³⁷⁸ Hans-Georg Gadamer is considered the founder of philosophical hermeneutics, and made a significant contribution to the theorisation of interpretation and historical understanding. His key work, first published in German in 1960, is *Truth and Method* (trans Garrett Barden and W Glen-Doepel) (Sheed and Ward, London, 1975).

³⁷⁹ Wigmore (1913).

³⁸⁰ One recent example of this interest, and the breadth of investigations encompassed by testimony studies, was the *Testimony and Witness: From the Local to the Transnational* conference, Humanities Research Centre, Australian National University, Canberra, 14–16 February 2006. I delivered a version of this chapter as a paper at the postgraduate workshop, 17 February 2006.

by the testimonial stories of members of the Stolen Generations.³⁸¹ Indeed, the conduct of the HREOC inquiry as an extensive program of hearings in which people spoke personally about their experiences, without being subject to cross-examination, was hailed as a groundbreaking approach to the collection of evidence; it was also the subject of strenuous criticism and attack from those who wished to discredit the findings published in the *Bringing Them Home* report.³⁸² Overall, however, accounts of the testimonial form have focussed on textual representations and there has been minimal attention to the production of testimony in the courtroom. While in law, testimony is the preferred form for the delivery of evidence, I would argue that the testimonial voice serves as a challenge to legal positivism, by virtue of its subjective character—in legal proceedings, the tenor of the testimonial voice is highly constrained.

In this chapter, I will critique conventional approaches to legal testimony through an examination of a key site of evidence given by Lorna Cubillo in the trial. Cubillo gave evidence that when she was removed from Banka Banka station as a young child, she remembers hearing one of the men who took her from her grandmother's care utter the word 'half-caste'. This was a crucial piece of evidence in the trial and Cubillo was strenuously cross-examined in relation to her memory of the events that occurred that day, over 50 years previously. In my examination of the court's reception of Cubillo's evidence, I will draw on theories of the testimonial form, particularly the narrative form

³⁸¹ In addition to those works cited in the previous chapter, see also Christine Watson, "Believe Me": Acts of Witnessing in Aboriginal Women's Autobiographical Narratives' in Richard Nile (ed), (2000) 64 *Journal of Australian Studies*, *The Beautiful and the Damned* 142; Simone Gigliotti, 'Unspeakable Pasts as Limit Events: The Holocaust, Genocide, and the Stolen Generations', (2003) 49(2) *Australian Journal of Politics and History* 164; Rosanne Kennedy, 'The Affective Work of Stolen Generations Testimony: From the Archives to the Classroom (Winter 2004) 27(1) *Biography* 48; Rosanne Kennedy, 'Stolen Generations Testimony: Trauma, Historiography, and the Question of "Truth"', (2001) 25 *Aboriginal History* (Special Issue on Genocide: Australian Aboriginal History in International Perspective) 116. Rosanne Kennedy has played an important role in the recent theoretical development of this field in Australia; see also Rosanne Kennedy, 'The Narrator as Witness: Testimony, Trauma and Narrative Form in *My Place*' (1997) 12 *Meridian* 235.

Sally Morgan's autobiographical novel, *My Place* (Fremantle Arts Centre Press, 1987) may be regarded as the first of the recent emergence of published life writing by Aboriginal authors dealing with Stolen Generations themes; there are many others, including, for example, Monica Clare, *Karobran: The Story of an Aboriginal Girl* (Alternative Publishing Co-operative Ltd, Sydney, 1978); Glenys Ward, *Wandering Girl* (Magabala Books, Broome, WA, 1987); Alice Nannup with Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (Fremantle Arts Centre Press, Fremantle, WA, 1992); Rita Huggins and Jackie Huggins, *Auntie Rita* (Aboriginal Studies Press, Canberra, 1994); Wayne King, *Black Hours* (Angus and Robertson, Pymble, NSW, 1996); Doris Pilkington, *Follow the Rabbit-proof Fence* (University of Queensland Press, St Lucia, Qld, 1996) and *Under the Wintamarra Tree* (University of Queensland Press, St Lucia, Qld, 2003); Larissa Behrendt, *Home* (University of Queensland Press, Brisbane, 2004); Claire Henty-Gebert, *Paint Me Black: Memoirs of Croker Island and Other Journeys* (Aboriginal Studies Press, Canberra 2005).

³⁸² See, for example, Douglas Meagher, 'Not Guilty', *Quadrant* (November 2000) 26; Ron Brunton, 'Justice O'Loughlin and Bringing Them Home: A Challenge to the Faith', *Quadrant* (December 2000) 37.

known as *testimonio*.³⁸³ I will discuss testimony as a rhetorical form, a performative speech act, within the framework initially outlined by J L Austin.³⁸⁴ Drawing on Judith Butler's conceptualisation of the performative function of speech and the power of discourse to interpellate subjects,³⁸⁵ I will argue that rather than providing a transparent window on reality, the truth of testimony lies in its effect, in its power to destabilise dominant narratives and in the embodied truth of the survival of the narrator. The importance of Cubillo's testimony is that it recounts an event which has been indelibly impressed upon her, the meaning of which is encapsulated in a word of overriding significance because it produced her racialised status. It is, for this reason, an ineffaceable memory.

THE INTERPELLATIVE FUNCTION OF TESTIMONY

In a series of lectures delivered in 1955, Austin delivered an account of his philosophy of language, called speech act theory, which concerns the production of speech and its effects.³⁸⁶ Austin initially distinguished between constative speech acts, which describe something and which are either true or false, and performative speech acts. According to Austin, a performative speech act is one where 'the uttering of the sentence is, or is part of, the doing of an action, which ... would not normally be described as saying something'.³⁸⁷ He subsequently distinguished between the 'performance of an act of saying something' (ie what is said in an utterance, its meaning), which he referred to as a locutionary act, the 'performance of an act in saying something' (ie what an utterance achieves in addition to its expression, eg promising), which he termed an illocutionary act, and the production of effects on the audience or speaker that an utterance may additionally have (eg persuading), which he termed a perlocutionary act.³⁸⁸

The legal model of the testifying witness, as described by Wigmore, assumes the prior sovereignty of the speaking subject and is premised on the belief in the possibility of

³⁸³ The theorisation of the testimonial narrative form known as *testimonio* derives from analyses of Latin American life story writing which emerged during the Cold War period and is associated with independence struggles. I will draw principally on the work of John Beverley, the foremost theorist of the form, from the collection of his previously published works in *Testimonio: On the Politics of Truth* (University of Minnesota Press, Minneapolis, 2004).

³⁸⁴ J L Austin, *How to do Things with Words* (Clarendon Press, Oxford, 1962).

³⁸⁵ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, New York, 1997).

³⁸⁶ The William James Lectures, delivered at Harvard University in 1955, were published posthumously as the collection *How to do Things with Words* (Clarendon Press, Oxford, 1962).

³⁸⁷ Austin (1962) 5. As he developed his theorisation, Austin concluded that *all* linguistic expressions are performatives, because by making an utterance, a speaker performs a social act: 'Once we realise that what we have to study is not the sentence but the issuing of an utterance in a speech situation, there can hardly be any longer a possibility of not seeing that stating is performing an act.': Austin (1962) 138.

³⁸⁸ Austin (1962) 99–107.

this subject providing a transparent window on reality. This is a view of language as simply a medium of communication, where subjects pre-exist their capacity to articulate. However, within Austin's framework, to testify is an illocutionary speech act, where the performance of the utterance affects its own meaning and evidentiary rules requiring witnesses to swear to 'tell the truth' provide the linguistic and ceremonial conventions necessary to their successful performance. Contrary to an understanding of language as reflecting reality, an interrogation of the illocutionary function of testimony reveals its performative character. Shoshana Felman, an important contributor to the theorisation of testimony, points to the function of testimony not as itself a 'totalizable account', but as a speech act where:

... language is in process and in trial, it does not possess itself as a conclusion, as the constation of a verdict, or the self-transparency of knowledge. Testimony is, in other words, a discursive *practice*, as opposed to a pure *theory*. To testify—to *vow to tell*, to *promise* and *produce* one's own speech as material evidence for truth—is to accomplish a *speech act*, rather than to simply formulate a statement.³⁸⁹

When a witness testifies, she articulates her experience in an embodied act of speaking. It is a performative speech act in which the subject, by virtue of her status as a testifying witness, materialises evidence discursively. In a civil trial, witnesses for the plaintiff carry the responsibility of meeting the evidentiary burden of proving the facts of the case. The veracity of their evidence is assessed, by the judge or jury, directly on the basis of the perceived sincerity, persuasiveness and coherence of this oral performance. The subject performs testimony and in the act of testifying, becomes the witness.

Judith Butler has taken Austin's speech act theory as her starting point, and, in reworking Althusser's well-known model for the interpellative effect of the voice that names³⁹⁰—the 'subject-constituting power of ideology'—she points out that '[a]lthough the subject surely speaks, and there is no speaking without a subject, the subject does not exercise sovereign power over what it says.'³⁹¹ She argues that:

If the subject who speaks is also constituted by the language that she or he speaks, then language is the condition of possibility for the speaking subject, and not merely its instrument of expression. This means that the subject has

³⁸⁹ Shoshana Felman, 'Education and Crisis, Or the Vicissitudes of Teaching' in Shoshana Felman and Dori Laub (eds) *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Routledge, New York, 1992) 5.

³⁹⁰ Louis Althusser (trans Ben Brewster), 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)', *Lenin and Philosophy and Other Essays* (NLB, London, 1971).

³⁹¹ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, New York, 1997) 34.

its own 'existence' implicated in a language that precedes and exceeds the subject, a language whose historicity includes a past and future that exceeds that of the subject who speaks.³⁹²

So, according to Butler, we are each formed in the language in which we speak, but this language exerts its own discursive power in the making of our subjectivity. For members of the Stolen Generations such as Cubillo and Gunner, the performative function of testimonial speech takes on a particular force when it is necessarily delivered not in the mother tongue but in the language of the coloniser. Such an analysis reveals the power of language to *violently* interpellate subjects in discourse and ideology and provides material evidence of the dispossessing logic of assimilation.

Evidence provided to the HREOC inquiry and published in the *Bringing Them Home* report documents the widespread practice in missions and institutions of prohibiting children from speaking in their own languages and the systematic punishment of those who broke the rule. The report highlighted the significance of denigration of Aboriginal culture as one of the 'most common experiences of witnesses to the Inquiry'.³⁹³ The theft of language functions concomitantly not only as an attempt to dispossess the children of their culture and connection with community and country, but also served as repudiation of their memories and abrogates them of the power to represent the traumatic experiences. It meant that they could not, at any subsequent time in their lives, communicate with their families in their own languages, effectively ensuring their experience of cultural and familial dissociation.

Cubillo gave evidence that corporal punishment was routinely administered by the missionaries in the Retta Dixon Home and that this occurred specifically when the children spoke their own languages. She said that while initially the children were cautioned, later on, she 'was taken by a female missionary and strapped around the legs and told to speak English'.³⁹⁴ She said the children 'used to whisper to each other when we thought nobody was around and sometimes the children ran off to tell the missionaries' and that 'we were unduly punished until we had forgotten our language.' Cubillo gave evidence that Christian religious teachings were 'first and foremost' in her upbringing in the home. She said that it was 'preached on the pulpit' that Aboriginal 'rituals and traditions were associated with the devil' and that those who practised these

³⁹² Ibid 28.

³⁹³ *Bringing Them Home* (1997) 156.

³⁹⁴ Transcript, examination of Lorna Cubillo, 11 August 1999, p 1112. Cubillo was able to name a number of the missionaries who administered corporal punishment.

traditions were ‘doomed to the ever-lasting fire of hell’.³⁹⁵ She said that such descriptions disturbed her because it made her think that her grandmother, somebody whom she loved, and others who had died before her, were probably suffering in hell. She said that the teaching included the catechism ‘wash me with the blood of the lamb so that I shall be whiter than the snow’ and that she literally took that to mean that you had to be white, which made her think of the ‘darkness of her grandmother and her people’. Cubillo said that the children were told by Miss Shankelton, the superintendent of the Retta Dixon Home, that it was God’s will that they came to the home, and that when she asked about her family she was ‘told to forget’.³⁹⁶

Such accounts highlight the violence with which assimilationist practices attempt to sever connection to families, culture and country, and the way the prohibition on the children speaking their own languages was a key strategy in their disenfranchisement, depriving them of access to their culture, embedded in language and other forms of representation. Theft of language ensured the children’s inability *ever* to communicate with members of their families and communities, doomed, as Cubillo says, to know only ‘little things’, but not to have any ‘real knowledge’ of their Aboriginal culture and ‘tribal life’.³⁹⁷ John Frow points to the contradictory and ambivalent representation conveyed by such communications, where ‘racial identity is ... simultaneously a kind of original sin and a state of shame that is freely chosen’, but, he claims, ‘[i]n truth, these kids are driven crazy, and part of their craziness consists in the theft of the very language that would allow them to clarify and to state the wrong done to them’.³⁹⁸

MEMORY AND THE SITE OF INTERPELLATION

Significantly, it is precisely at the point of Cubillo’s account of her linguistic interpellation into the discourse of the assimilatory regime that O’Loughlin’s doubt about her memory of events appears to have arisen. It is her vivid memory of the violent power of language to name her, as well as to steal her language and her name, that evokes disbelief. As I discussed in Chapter 3, Cubillo was cross-examined in detail in relation to her testimonial account of her removal from Banka Banka Station, where she claimed two men on horseback came and abducted her when she was in her grandmother’s care. Cubillo claimed that she was taken to the creek bed by Barney

³⁹⁵ Ibid p 1113.

³⁹⁶ Ibid.

³⁹⁷ Ibid p 1152–3.

³⁹⁸ John Frow, ‘A Politics of Stolen Time’ (1998) 57(2) *Meanjin* 351, 359.

McGuinness, who, upon washing the lower part of her leg, uttered the words 'half-caste' to Bill Harney. Cubillo was asked how she could have known what these words meant if she did not, as she claimed, speak English at the time.

Now, back in the 1940, the early 1940s - which is the time we're talking about - was there a Walpiri word, as far as you know, for 'half-caste'?---No.

No? Was there a Warramunga word for 'half-caste'?---Mrs Hollingsworth, you forget that I have been flogged. My language had been flogged out of me and I do not know those words any more.³⁹⁹

...

And you said that two men on horseback came and spoke to your grandmother?---Barney McGuinness said something in pidgin English to my grandmother.

Said something in pidgin. Your grandmother spoke some English, did she?---I would say she would understood a little bit of pidgin.

Did you speak any English at this stage?---I don't think so.

Right. No English?---I'd spoke my other languages. I was comfortable with my other language.

I understand you were comfortable, that's Walpiri and Warramunga, but I'm trying to understand whether you spoke any English?---I spoke no English.

No English, not even pidgin English?---I had no - I only spoke my language with my family.

So when you say that your grandmother spoke to Barney McGuinness in pidgin English, all you know is that it was a language that wasn't familiar to you, it wasn't Warramunga or Warlpiri spoken; is that right?---I wasn't familiar with that language.

You have given some evidence though about a comment that you say Mr McGuinness made to you down in the creek bed. I just want to explore this. You say he took you down to the creek and washed - - -?---It was within a metre of where we sat - - - and washed your leg?---That's right.

I put it to you - I'll rephrase this. You didn't hear Mr McGuinness speaking Warlpiri at any stage to your grandmother or to you, did you?---He didn't say anything. He just took me by my hand and gave me a bit of salt meat and washed my leg in the water.

...

And from the time he and the other gentlemen arrived at the creek to the time they left with you on horseback you didn't hear him speak any Walpiri, did you?---No.

Nor did you hear him speak any Warramunga?---No.

³⁹⁹ Transcript, cross-examination of Lorna Cubillo, 13 August 1999, p 1350–1.

I put it to you that when you said ... that: Mr McGuinness told the other person that I was a half-caste- -?---I did hear that word half-caste. Ms Hollingworth, that is quite clear, I heard him say half-caste.

You spoke no English, Mrs Cubillo, whatsoever, you accept that?---I spoke no English, but he did make reference to - - -You were 3 or 4 years old at the time of this incident?---I was old enough to know and hear and see during that time. And the only word you can remember from this entire incident, two words rather, is that he said half-caste?---That's right.

Is that your evidence?---That is right.

Even though as far as you know nobody had ever - the concept of half-caste was unknown to you until some years later after two further moves when you were at Phillip Creek?---But I will remember those words he said to my grandmother.

Well, I put it to you that you are reconstructing when you say those words?---I am not reconstructing, I am giving you the version and the truth of what happened on that day.⁴⁰⁰

What is at stake in Cubillo's memory of hearing the words 'half-caste'? Under rigorous cross-examination and despite Ms Hollingworth's incredulity, she did not waver from the assertion that this was the truth of what happened that fateful day when she was taken from her grandmother at Barrow Creek on Banka Banka Station. While the expression did not exist in her own languages of Warrumungu or Walpiri, she was unfamiliar with the concept⁴⁰¹ and she did not speak much English, Cubillo *did* hear these words. How else might she have made sense of what was subsequently to happen to her? There was much at stake that day for young Napanangka⁴⁰² because, having been named by the law as a 'half-caste', she was henceforth to experience the full force of the violence of the racist logic of assimilation. The law's naming of her as a 'half-caste' is *why* she was removed; it is specifically this ideological constitution of her which invoked the desire on the part of the colonial authorities and missionary institutions to steal her. Categorized as a 'half-caste', she was to be separated from her family, first to the Aboriginal community at the ration depot at Seven Mile Creek and then to Phillip Creek, where her family lived 'outside the fence line',⁴⁰³ then permanently separated from her family and removed to the Retta Dixon Home, where she was to be punished

⁴⁰⁰ Transcript, cross-examination of Lorna Cubillo, 13 August 1999, p 1352–3.

⁴⁰¹ Transcript, examination of Lorna Cubillo, 11 August 1999, p 1092.

⁴⁰² Cubillo gave evidence that this was her Aboriginal name: Transcript, 10 August 1999 p 1062. Napanangka is Cubillo's Walpiri/Warلمانpa [Warumungu Nappanangka] skin name and hence one that she shared with other members of her group, notably the witnesses Kathleen Napanangka and Eileen Napanangka, Cubillo's sisters [cousins]. In addition to the evidence provided by Cubillo and other witnesses, anthropological evidence of kin relationships and other relevant features of the Aboriginal community and law at the time of her removal was provided in a report prepared by Petronella Vaarzon-Morel, consultant anthropologist, as expert witness for the applicant.

⁴⁰³ Transcript, examination of Lorna Cubillo, 10 August 1999, p 1093.

so repeatedly for speaking her language that she was forced to forget it; where it was, as she said, ‘flogged out of us’.⁴⁰⁴ Here indeed is powerful evidence of the interpellative function of language in the constitution of subjects, in the efficacy of speech to inaugurate racial identity in ideological regimes and in the power of naming.

In her intervention in the debate around ‘hate speech’, Butler points out that the citational function of hailing can take place without the subject knowing; this is the condition, as she points out, ‘for all of us in at the beginning’, when, in being named, we acquire a nominal identity of which we are unaware, but which marks us definitively as subjects in sociality:

The name constitutes one socially, but one’s social constitution takes place without one’s knowing. Indeed, one may well imagine oneself in ways that are quite to the contrary of how one is socially constituted; one may, as it were, meet that socially constituted self by surprise, with alarm or pleasure, even with shock. And such an encounter underscores the way in which the name wields a linguistic power of constitution in ways that are indifferent to the one who bears the name. One need not know about or register a way of being constituted for that constitution to work in an efficacious way.⁴⁰⁵

Importantly, Butler points to interpellation as ‘an act of speech whose “content” is neither true nor false: it does not have description as its primary task. Its purpose is to indicate and establish a subject in subjection, to produce its social contours in space and time.’⁴⁰⁶ The function of the naming of Cubillo as a ‘half-caste’ was not as a benign description of a racial identity, but rather to violently inaugurate a regime of subjection under the law, resulting in her traumatic loss of language, culture and familial relationships. It effectively positioned her as subaltern—a speaking subject but whose language had been stolen.

There are many other things that Cubillo said that she remembers from her time at Banka Banka. She was able to describe the homestead and the garden; she remembered that she used to sit on the rails and watch the men work with the cattle; and that she used to dig for yams with her grandmother, who showed her how to dig in a soak for water, because sometimes waterholes were poisoned.⁴⁰⁷ Cubillo also said she remembers being painted with ‘soot from the billy-can and ashes from the fire’ by her grandmother

⁴⁰⁴ Ibid, 11 August 1999, p 1111.

⁴⁰⁵ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, New York, 1997) 31.

⁴⁰⁶ Ibid 34.

⁴⁰⁷ Transcript, examination of Lorna Cubillo, 10 August 1999, p 1065.

when they travelled away from the station and that her grandmother had told her that she ‘feared authority’, that ‘she knew that the white people had killed our people.’⁴⁰⁸

In his judgment, O’Loughlin said in relation to Lorna’s claim that her grandmother had covered her with soot that: ‘The evidence in the trial has satisfied me that this was a common practice that was adopted by Aboriginal mothers of part Aboriginal children: particularly those with fairer skin. It was an attempt to disguise the children and so to protect them from being taken away by the authorities.’⁴⁰⁹ However, he did not actually accept Cubillo’s testimony of the events at Banka Banka, and went on to say:

Perhaps the events, as she described them, did occur and perhaps her grandmother later told her of them; perhaps, over the years, what Mrs Cubillo remembers has become mixed with what she had been told. It is not possible to come to any conclusion with the degree of satisfaction that should accompany an important finding of fact. I am satisfied that Mrs Cubillo has engaged in an exercise of reconstruction. Perhaps she did it subconsciously. However, there are too many contradictions in her evidence to accept her description as accurate.⁴¹⁰

WHITENESS AS A SIGNIFYING SYSTEM

Which part of Cubillo’s evidence actually lacks credibility? O’Loughlin appears not to have any problem accepting Cubillo’s memory of being covered in soot in order to protect her from being taken away. This is a recollection of her grandmother’s attempt to defeat the long arm of colonial law by literally marking the child’s racial identity as Black. But Cubillo’s memory of the expression—the signifier—which marks her under the law and which is to be the basis of her losing not only her language and culture, but also her name,⁴¹¹ is regarded as unacceptable evidence.

In his judgment, O’Loughlin concluded that ‘in many very important areas, the history of Mrs Cubillo’s removal from Phillip Creek was incomplete’, that ‘[w]e know that Mrs Cubillo was taken away but we do not know why’.⁴¹² But hadn’t Cubillo already said *why* she was taken? Isn’t it true that it was the law’s designation of her as a ‘half-caste’ which

⁴⁰⁸ Ibid p 1062–3. Dr Gerard Gibney, a psychiatrist who gave expert evidence in relation to Cubillo, said, when cross-examined in detail, that while a child of three or four may not be able to remember a word said in another language, that she would have had ‘considerable perception and understanding of what’s going on around her’ and that she would have understood what her grandmother said to her about what was being said: Transcript 14 September 1999, p 2892.

⁴⁰⁹ Cubillo para 400.

⁴¹⁰ Cubillo para 405.

⁴¹¹ As I have previously stated, Cubillo gave evidence that her Aboriginal name was Napanangka: Transcript, examination, 10 August 1999, p 1062.

⁴¹² Summary of Reasons for Judgment, para 9.

is the ‘explanation’ for her forcible removal? Isn’t this the evidence, patently obvious, historically substantiated, but somehow considered absent and therefore invisible to the court? Cubillo’s recollection of what happened to her that day, and later, is quite coherent. We know this because it resonates so poignantly with the stories of so many other people who were removed as children. We know she was taken because she was deemed to have the racial status ‘half-caste’ and that these children were systematically abducted from their families and institutionalised, where their ‘regrooming’ was intended to ‘erase the outer vestiges of their former identity and individuality’,⁴¹³ with the express intention of physically and metaphorically scrubbing the children white.

What Cubillo reveals in her testimony is the way whiteness functions as a signifying system which is ‘formative of racialized subjectivities’,⁴¹⁴ and where the appellation ‘half-caste’ served to interpellate young Napanangka in the legal and political discourse of assimilation. Under the *Aboriginals Ordinance 1918* in force at the time, the Director of Aboriginal Affairs had the power to ‘to undertake the care, custody, or control of any aboriginal or half caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half caste for him to do so, and for that purpose may enter any premises where the aboriginal or half caste is or is supposed to be, and may take him into his custody’.⁴¹⁵ It was the children designated as ‘half-castes of illegitimate birth’ who, in line with the recommendations of the detailed report to the Parliament of Australia by J W Bleakley,⁴¹⁶ should to be ‘rescued from the degradation of the camps’, and ‘placed in institutions for care and training’, ‘removed from Aboriginal association at the earliest possible age’, ‘with a view to their absorption by the white race’.⁴¹⁷ In her comprehensive and detailed account of the separation of Indigenous children from their families over two centuries in Australia, Anna Haebich explains that:

The focus of the Northern Territory administration was almost exclusively on the ‘coloured’ population. It adopted a two-pronged approach: to control the size and composition of this population, largely through punitive controls over Aboriginal women, and to create a viable labour force, by removing ‘mixed race’ children from their families to be trained in

⁴¹³ Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Arts Centre Press, Fremantle, 2000) 343.

⁴¹⁴ Damien W Riggs and Martha Augoustinos, ‘Projecting Threat: Managing Subjective Investments in Whiteness’ (2004) 9(2) *Journal for the Psychoanalysis of Culture & Society* 219, 222.

⁴¹⁵ *Aboriginals Ordinance 1918* (NT) s 6.

⁴¹⁶ ‘The Aboriginals and Half-Castes of Central Australia and North Australia’ by J W Bleakley (Bleakley Report) (Commonwealth of Australia, 1928) 28–9, Exhibit A88 Applicants Policy Documents, Vol 1, pp 165–207.

⁴¹⁷ *Ibid* 179.

institutions ... The Territory Welfare Branch was concerned to stream lighter skinned children into the white community through removal to white children's institutions and over the years adopted programs to move them out of the 'sin sodden north' altogether.⁴¹⁸

As Damien Riggs and Martha Augoustinos point out, whiteness functions not only as a signifying system, but also as a 'set of institutionalized regimes of truth which structure the hegemony of whiteness'.⁴¹⁹ Cubillo's evidence points to the instability of racial categories, but also to the way whiteness always functions to define the normative subject position which gives meaning to all other racialised subjectivities. The designation of children such as Napanangka as 'half-caste', ushering forth the regimes of incarceration, where her name would be stolen from her and her language flogged out of her, served to reinforce the hegemonic power of whiteness and to assuage anxieties about national identity.

However, the subject position 'white' was not ultimately available to children like Napanangka. Fiona Paisley argues that Aboriginal people of mixed-descent were considered 'partial or liminal subjects, unable to become full individuals and members of progressive society within the progressive nation, yet to be moulded as eugenic ... subjects'.⁴²⁰

Critical whiteness theorists have demonstrated that the function of whiteness serves the concomitant purpose of shoring-up its hegemony while at the same time ensuring that the subject position 'white' remains unmarked and invisible, thus affirming its status as normative and dominant. It is an ideological practice performed by and mediated through institutions, formal and informal, discursively and materially, locally and globally. It is historically contingent, socially constructed and culturally determined, a 'strategic rhetoric' which 'makes itself visible and invisible', making itself the 'locus from which Other differences are calculated and organized'.⁴²¹ Ian Anderson clearly articulates the way in which assimilationist regimes attempted to inscribe Aboriginal bodies as 'white' through the theft and incarceration of children, with the intention to 'strip away

⁴¹⁸ Haebich (2000) 194

⁴¹⁹ Riggs and Augoustinos (2004) 222.

⁴²⁰ Fiona Paisley, "Unnecessary Crimes and Tragedies": Race, Gender and Sexuality in Policies of Aboriginal Child Removal' in Antoinette Burton (ed), *Gender, Sexuality and Colonial Modernities* (Routledge, London, 1999) 139.

⁴²¹ Thomas K Nakayama and Robert L Krizek, 'Whiteness as a Strategic Rhetoric' in Thomas K Nakayama and Judith N Martin (eds) *Whiteness: The Communication of Social Identity* (Sage Publications, Thousand Oaks, 1999) 91.

their otherness by disarticulating the black bits from their bodies, historical consciousness and practices'.⁴²²

Assimilation practices which aimed to transform the black into the white were allied to representations of Koori people in which our sociality was ambiguous and fragmented. These representations conflated the fragmenting impulse of colonialism with a product, black bit–white bit people. In representing the Aboriginal body as a determinate entity which simply mirrored its location within the social process of assimilation colonialism, complete renovation into an acceptable 'white' body was a prospective *fait accompli*, a matter of time.⁴²³

What was the law's response when Cubillo revealed the function of whiteness, when, in answering the question: 'What do you remember?', she ascribed responsibility for her suffering and loss to a violent discursive regime? While accepting other aspects of her testimony, O'Loughlin determined however that she could not have heard those words, that her evidence on this subject 'cannot be accepted as reliable' and later that there was an 'absence' of evidence. In refusing to heed her articulate memory of regimes of racialised inscription, O'Loughlin denies the rhetorical power of law to violently interpellate subjects into positions of dispossession and subjugation.

SUBALTERN SPEECH

The subject position in which Napananka found herself interpellated—kidnapped from her family, incarcerated, assigned a fragmented racial identity and new name, dispossessed of her culture and the capacity to speak—may be understood as subaltern. First developed by Antonio Gramsci in his analysis of Italian history to describe oppressed peasant classes,⁴²⁴ the concept of the subaltern has become critical to postcolonial theory where it is commonly used to describe the subordinated subject whose position remains outside hegemony—the Other of colonial discourse—occupying 'the space that is cut off from the lines of mobility in a colonized country'.⁴²⁵ During the 1980s, subaltern studies emerged as a mode of intellectual inquiry concerned with representations of 'the small voice of history',⁴²⁶ particularly in South Asia and

⁴²² Ian Anderson, 'Re-claiming Tru-ger-nan-ner', (1993–4) 66 *Art Monthly*, 10, 11.

⁴²³ Ibid.

⁴²⁴ Quintin Hoare and Geoffrey Nowell Smith (eds and trans), *Selections from the Prison Notebooks of Antonio Gramsci* (International Publishers, New York, 1971) 52.

⁴²⁵ Gayatri Chakravorty Spivak, 'Subaltern Talk: Interview with the Editors' in Donna Landry and Gerald Maclean (eds) *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Routledge, New York, 1996) 288.

⁴²⁶ Ranajit Guha, 'The Small Voice of History', (1996) 9 *Subaltern Studies* 1.

Latin America.⁴²⁷ It is a form of strategic and politically-motivated scholarship which draws on the tradition of Marxist political theory from the position of contemporary critical poststructuralist and postcolonial theory. As a conceptual framework, subaltern studies attempts to take account of the aftermath of the collapse of communism and the escalation of globalisation and neoliberalism. Perhaps one of its defining characteristics is the struggle to engage in intellectual reflexivity, a concern with attempting to ‘take into account the complicity of the academy itself ... in producing the elite/subaltern relation’,⁴²⁸ while ‘intervening politically in that production on the side of the subaltern’.⁴²⁹

In a oft-cited contribution to a feminist theorisation of gendered subalternity, Gayatri Chakravorty Spivak famously posited the question: ‘Can the subaltern speak?’⁴³⁰ Later clarifying that her question should not be reformulated as ‘The subaltern cannot talk’,⁴³¹ she describes a ‘certain not-being-able-to-make-speech acts’⁴³² which is central to the concept of subalternity. The point Spivak makes is that a speech act requires both speaking and listening and her critique is actually directed towards the complex and interdependent relationship between the academic and the ‘native informant’, and specifically to the question of an adequate representation of the subaltern woman.

Within the effaced itinerary of the subaltern subject, the track of sexual difference is doubly effaced. The question is not of female participation in insurgency, or the ground rules of the sexual division of labor, for both of which there is ‘evidence’. It is, rather, that, both as object of colonialist historiography and as subject of insurgency, the ideological construction of gender keeps the male dominant. If, in the contest of colonial production,

⁴²⁷ The significance of Gramsci’s concept of the subaltern, together with the Michel Foucault’s work in historiography, was first taken up and developed by the group of Indian historians known as the South Asian Subaltern Studies Collective in the 1980s, whose journal of the same name was founded by Ranajit Guha in 1982. Subsequently, subaltern studies took off in the United States, particularly at the behest of Gayatri Chakravorty Spivak, and spawned the establishment of the Latin American Subaltern Studies Group in the early 1990s, whose membership included John Beverley, a literary theorist, whose work on *testimonio* I discuss below. Collections of work include: Gayatri Chakravorty Spivak and Ranajit Guha (eds), *Selected Subaltern Studies* (Oxford University Press, New York, 1988); Ileana Rodríguez (ed), *The Latin American Subaltern Studies Reader* (Duke University Press, Durham, 2001).

⁴²⁸ John Beverley, *Subalternity and Representation: Arguments in Cultural Theory* (Duke University Press, Durham, 1999) 10.

⁴²⁹ Ibid 28.

⁴³⁰ Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’, in Cary Nelson and Larry Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, Urbana, 1988). This piece was based on a lecture given in 1983, but has subsequently been revised and is superseded by Chapter 3 in *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, Cambridge, Massachusetts, 1999).

⁴³¹ Gayatri Chakravorty Spivak, ‘Subaltern Talk: Interview with the Editors’ in Donna Landry and Gerald Maclean (eds), *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Routledge, New York, 1996) 289; Spivak attributes this point to Meaghan Morris without citation.

⁴³² Ibid 289–90.

the subaltern has no history and cannot speak, the subaltern as female is even more deeply in shadow.⁴³³

Beverley describes the silence of the subaltern as not being able to speak ‘in a way that would carry any sort of authority or meaning for us without altering the relations of power/knowledge that can constitute it as subaltern in the first place’.⁴³⁴ This is clearly the position which Napananka/Cubillo and other members of the Stolen Generations have been ascribed to—their lives silenced by and subjected to political, legal and historiographic negation. However, subalternity is not an embodied ontological category of identity.⁴³⁵ As Spivak points out, the status of the subaltern, no more than any subject position, is not fixed for all time. She cautions theorists working in the area of subaltern studies, to be alerted to the desire to keep the native informant in a position of oppression in order to vindicate our intellectual inquiries. Spivak points out that ‘[w]hen a line of communication is established between a member of subaltern groups and the circuits of citizenship or institutionality, the subaltern has been inserted into the long road to hegemony’.⁴³⁶

When Cubillo took action against the Commonwealth in a landmark test case, she established a line of communication with the politico-legal institution of the State which had been responsible for her silencing. She clearly spoke as a representative member of a subaltern group and the manner in which she deployed this agency was through her testimonial voice and the position of bearing witness to collective oppression.

THE TRUTH OF TESTIMONY

In the trial, Cubillo clearly articulates her opinion of the wrong performed in the use of fear and violence as a means of social control and of the interdiction of speech in the mother tongue. She consistently affirms the truth of her testimony based on her experiential knowledge by representing her individual experiences as one of a group of children, with whom she shared connection to language and country. In spite of, as she recounts, having been ‘forced into this language’,⁴³⁷ Cubillo’s testimonial voice conveys an overwhelming sense of urgency to communicate the significance of bearing witness

⁴³³ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, Cambridge, Massachusetts, 1999) 274.

⁴³⁴ John Beverley, *Subalternity and Representation: Arguments in Cultural Theory* (Duke University Press, Durham, 1999) 29.

⁴³⁵ Ibid 30.

⁴³⁶ Spivak (1999) 310.

⁴³⁷ Transcript, cross-examination of Lorna Cubillo, 13 August 1999, p 1355.

to the truth of her collective experience. It resonates strongly with the narrative form of witnessing known as *testimonio*, which emerged in the context of Indigenous Indian struggles against Spanish colonial power linked to national liberation movements in Latin America during the Cold War period.⁴³⁸ *Testimonio* may be regarded as ‘part of the agency of the subaltern’.⁴³⁹

Testimonio is generally regarded as a form of literature, particularly as it is represented in the North American academy, where texts such as *I, Rigoberta Menchú*⁴⁴⁰ are taught as exemplary of the form. However, in both its English and Spanish forms, ‘to testify’⁴⁴¹ derives its semantic and conceptual foundation from the legal domain, connoting a pledge to truth-telling in a courtroom setting. John Beverley, who has made a significant contribution to the theoretical conceptualisation of *testimonio*, explains:

The word *testimonio* in Spanish carries the connotation of an act of truth telling in a religious or legal sense—*dar testimonio* means to testify, to bear truthful witness. *Testimonio*’s ethical and epistemological authority derives from the fact that we are meant to presume that its narrator is someone who has lived in his or her person, or indirectly through the experiences of friends, family, neighbours, or significant others, the events and experiences that he or she narrates. What gives form and meaning to those events, what makes them *history*, is the relation between the temporal sequence of those events and the sequence of the life of the narrator or narrators, articulated in the verbal structure of the testimonial text.⁴⁴²

The analogousness of the narrative form of *testimonio* and the oral evidence given in the trial of Cubillo and Gunner is particularly evident in its performance as a collective voice, ‘where the ‘I’ that speaks ‘stands for a multitude’.⁴⁴³ However, while it is its politicised, racialised and collective nature which defines the significance of its agency, in the trial, these characteristics were seen to exceed the necessary elements of testimony and precisely epitomised what was determined to compromise its credibility. In articulating the pain of members of the Stolen Generations, and bearing witness to what can never be experienced by white subjects, Cubillo’s testimony offered a form of authority, of truth, to which we do not otherwise have access. However, in O’Loughlin’s

⁴³⁸ John Beverley, *Testimonio: On the Politics of Truth* (University of Minnesota Press, Minneapolis, 2004) x.

⁴³⁹ Ibid xvi.

⁴⁴⁰ Rigoberta Menchú, with Elisabeth Burgos-Debray (trans Ann Wright), *I, Rigoberta Menchú: An Indian Woman in Guatemala*, (London, Verso, 1984).

⁴⁴¹ ‘To testify’ and ‘*dar testimonio*’ derive from the Latin *testificari*, bear witness, and ‘testimony’ from the Latin *testimōnium*, evidence, attestation.

⁴⁴² Beverley (2004) 3–4.

⁴⁴³ Beverley (2004) 27.

judgment, it was precisely her oral testimony which served to invoke forms of truth which the law refused to hear.

Testimonio is generally conceived of as a written, not, as it is in law, an acoustic form. Beverley describes it as a ‘novel or novella-length narrative in a book or pamphlet ... form, told in the first person by a narrator who is also the real protagonist or witness of the events he or she recounts, and whose unit of narration is usually a “life” or significant life experience’.⁴⁴⁴ Nor does *testimonio* fit easily into the genre of autobiography, for as Suvendrini Perera has argued, in a reading of Ruby Langford Ginibi’s *Haunted by the Past* as a narrative form of testimonial, it can be distinguished from autobiography on the basis that it is a ‘chronicling, not the development or success of an individual self, but a complex and intermeshing, inescapably political, *collective* story that necessarily exceeds the confines of the narrowly personal’.⁴⁴⁵

I am drawing attention to these points of distinction not because I consider it necessary to categorise *testimonio* within an established literary genre; on the contrary, I am arguing that the significance of its characteristics determine its escape from, indeed defiance of, the western humanist literary, and legal, canon. Perera points to the way that attempts to fit Ginibi’s work into pre-ordained literary genres are a form of what the author herself has deplored as attempts to ‘gubba-ise’, or whiten her work.⁴⁴⁶ The importance, as Perera points out, of these life stories, their defining characteristics, is the racialised nature of the experience, the collective nature of subjectivity, and the all too common experience of criminalisation and incarceration.⁴⁴⁷

Of course, the genealogy of racialised imprisonment in Australia documented through Ginibi’s text includes the systematic forced removal and institutionalisation of Indigenous children, the ongoing function of incarceration as one of the contemporary technologies of child theft highlighted by the *Bringing Them Home* report. There is no coincidence in the emergence and use of the testimonial form in response to ongoing histories of racialised violence, oppression and punishment. As Beverley points out:

⁴⁴⁴ Ibid 30–1.

⁴⁴⁵ Suvendrini Perera, ‘Having Trouble with the Law: Racialised Punishment and Testimonies of Resistance’ in Margaret Thornton (ed), *Romancing the Tones: Popular Culture, Law and Feminism* (Cavendish, London, 2002) 119–20.

⁴⁴⁶ Ibid 119.

⁴⁴⁷ Perera focuses on Ruby Langford Ginibi’s, *Haunted by the Past* (Allen & Unwin, Sydney, 1999), also referring to Mumia Abú Jamal’s, *Live from Death Row* (Avon, New York, 1996). Another example of testimonial writing in support of her argument from the Canadian context would be Rudy Wiebe and Yvonne Johnson, *Stolen Life: The Journey of a Cree Woman* (Alfred A Knopf, Toronto, 1998).

‘The situation of narration in testimonio has to involve an urgency to communicate, a problem of repression, poverty, subalternity, imprisonment, struggle for survival, implicated in the act of narration itself.’⁴⁴⁸

On the basis of evidence presented to the inquiry, the *Bringing Them Home* report concluded that in the decades between 1919 and 1970, ‘not one Indigenous family has escaped the effects of forcible removal’ with most families being affected ‘in one or more generations by the forcible removal of one or more children.’⁴⁴⁹ Christine Watson points to the strategic use by Aboriginal women writers of autobiographical and life story narratives of the ‘rhetorical power of witnessing’, ‘vocal assemblage’ and the ‘overwhelming weight of evidence’ as a way of attempting to overcome the colonial narrative of theft, loss and disappearance. She argues that:

To be a witness necessarily implies the claim of personal involvement as a basis for the authority which justifies both the telling of the narrative and the legitimisation of the content of the narrative itself; ... The notion of witnessing goes beyond just giving testimony to the facts, although that is one of the rhetorical manoeuvres from which such an act gains its power, for to ‘witness’ may also mean ‘to make evident; to evince’.⁴⁵⁰

Drawing on the *testimonio* form, Francesca Bartlett has examined stories given for the HREOC inquiry, reading them as texts which are ‘organically imbricated in politicised resistance movements’,⁴⁵¹ arguing that they necessitate politically-informed reading practices. There is no doubt that Cubillo and Gunner saw their action against the Commonwealth as a political act, in which they performed a representational role on behalf of members of the Stolen Generations. When they took action, it was on the basis of a claim that there had been a nationwide, systemic practice of forcibly removing children dating back to the first days of colonisation.

⁴⁴⁸ Beverley (2004) 32.

⁴⁴⁹ *Bringing Them Home* 37.

⁴⁵⁰ Christine Watson, “‘Believe Me’: Acts of Witnessing in Aboriginal Women’s Autobiographical Narratives’ in Richard Niles (ed), (2000) 64 *Journal of Australian Studies*, The Beautiful and the Damned, 142, 144.

⁴⁵¹ Francesca Bartlett, ‘Public Stories of the Stolen Generations: Narratives of Assimilation and Resistance’, PhD Thesis, La Trobe University (1999) 259. In particular, Bartlett examines, ‘After the Removal’ and ‘Telling Our Story’, both submissions to the Inquiry by the Western Australian Aboriginal Legal Service on behalf of 700 clients. Bartlett and others have also examined Aboriginal life stories, most commonly written by women, as resistance literature; see for example: Francesca Bartlett, ‘Aboriginal Resistance Literature: Life Stories, Governmentality and Collectivity’ (1999) *UTS Review* 4(2) 80; Debbie Rodan, ‘Testimony, Narrative, and a Lived Life’ (2000) 1(1) *Balayi* <www.law.murdoch.edu.au/balayi/home.html>.

While serving as a source of dispute within the trial, the legacy of the action taken by Cubillo and Gunner is indicative of the collective voice with which they spoke, and of the test case character of the litigation. In October 1994, prior to the referral by the Attorney-General to HREOC to conduct the inquiry, the Going Home Conference was held in Darwin, hosted by the Karu Aboriginal Child Care Agency. This was a week-long gathering for ex-residents, and their families, of the eight institutions⁴⁵² to which children were removed in the Northern Territory. The conference included speakers providing information on a range of issues including historical accounts and access to archival information, rights to land, human rights, compensation and information on possible legal action. One of the speakers, John Ah Kit, Executive Member from the Northern Land Council, declared the conference to be ‘an act of saying, to the whole world, that the stolen generations of Aboriginal people refuse to be considered as just victims of historical injustice’, that they ‘want to control their histories, and create their own futures’, that they ‘have a real and continuing connection with the families and country that were alienated from them by the policies of past repression, and that those links will be restored in the future’.⁴⁵³

Beverley highlights the way *testimonio* functions as ‘the insistence on and affirmation of the [speaking] subject’, marking ‘the desire not to be silenced or defeated’, but ‘to impose oneself on an institution of power’ from the position of exclusion or marginality.⁴⁵⁴ Cubillo’s evidence, her urgent, testimonial voice and tenacious mode, clearly demonstrated her struggle to affirm ‘the individual self in a collective mode’.⁴⁵⁵ Indeed, in asking questions and daring to talk back to the law, she was reprimanded by the judge, who concluded that her testimony, along with that of Gunner’s, may have been inadvertently influenced by the belief in the injustice of their experiences. While not suggesting that they deliberately lied, O’Loughlin claimed that the conviction with which Cubillo and Gunner spoke—an element of witnesses’ demeanour of which he is entitled to evaluate—acted as a counterpoint to his assessment:

I am convinced that they have, with total conviction, concluded that they have a just cause to pursue the Commonwealth. I have no doubt that they believe that their experiences—what they might call their incarcerations—

⁴⁵² The institutions were Garden Point, Kahlin Compound, The Bungalow, St Mary’s Home, Croker Island, Retta Dixon Home, Groote Eylandt Home and St John’s Home.

⁴⁵³ John Ah Kit, ‘Bringing Social Justice Back Home’, Going Home Conference, Darwin, 5 May 1994. Text on file with Stolen Generations Litigation Unit, Northern Australian Aboriginal Legal Aid Service.

⁴⁵⁴ Beverley (2004) 34.

⁴⁵⁵ Beverley (2004) 35.

were legally, as well as morally, wrong. Armed with this powerful persuasion, there is the risk that, in some areas, they may have given distorted, but not deliberately false, accounts of matters to which they deposed in their evidence. In exercising this caution, I have chosen not to engage in a personal or subjective assessment of their demeanour. I would be entitled to have regard to their presentation in Court, but I prefer not to rely on that. I find more comfort in making an objective assessment of the evidence so that I can test whether it appears to be inherently improbable, or whether it matches other evidence, or whether it is logically probative.⁴⁵⁶

When being cross-examined about her recollection of her mother, Maisie's, movements between Phillip Creek and Banka Banka Station, where she worked, Cubillo said that her mother 'made it her business to visit me as often as possible'; she remembered that her mother sometimes came on the meat truck. When documentary evidence was tendered which recorded that the meat truck only moved between these two locations for a few months in 1946, Cubillo replied that sometimes her mother would walk. It was then pointed out to her that the distance was approximately 40 miles.

It was too far to walk in one day, for instance?---My people walked all their lives and I walked with them.

I'm not disputing that, Mrs Cubillo?---I'm trying to make you understand that our - our people did walk long distances.

...

It's too far to walk in a couple of days, isn't it? It would be a long walk?---Mrs Hollingsworth, my people have been walking long before, thousands of years, and even in my childhood they travelled many distances within their own land.

Mrs Cubillo, I'm not arguing with you about that. If you just listen to the question we'll get along a lot quicker?---You're trying to make me assume things. I'm telling you that if they want to go from A to B, they did so.

...

You're not aware of any reason why Maisie couldn't have come and lived at Phillip Creek during those 2 years that you were at Phillip Creek, are you?---Maisie worked on the Banka Banka Station, Miss Hollingsworth, and I don't know how many times I'm going to tell you that she was a working person.

But you've given a lot of evidence about movements between your family from Banka Banka to Six Mile to Seven Mile and to Phillip Creek; you remember giving that evidence?---We were - we were moved by - by the government of that time. During those time, Miss Hollingsworth, I will tell you - - -

⁴⁵⁶ Cubillo para 124.

HIS HONOUR: Just a minute, please, both of you. There's a strict protocol of question and answer, and I'd ask you both to adhere to it.

Such a desire to assert a speaking position which takes on more than the passive role of answering questions demanded of witnesses is no mean feat in the environment of the courtroom. When I interviewed Cubillo about her experience of giving evidence in the trial, she pointed to this position in which she saw herself, and her desire to speak back to the institutional representative responsible for her removal, counsel for the Commonwealth, clearly re-articulating the occluded point she had made in her testimony.

When I was being questioned by the Commonwealth lawyer, I didn't know if I could reply in the way I wanted to. I just sort of said 'yes' and 'no' about a few things, but I would've liked to ask questions myself, and ask the reason why I was taken. I would have liked some answers from the Commonwealth and to say: 'Have you got any proof that my mother and my family neglected me?' I was taken because of the colour of my skin—the fact that my mother was an Indigenous woman and my father was an Anglo-Saxon—for no other reason but that.⁴⁵⁷

Whether or not Maisie was readily able to travel between Banka Banka and Phillip Creek was an important issue for the Commonwealth's defence. Maisie was not Cubillo's birth mother—she was her mother's sister—but Cubillo gave evidence that 'Maisie had always been my mother', that 'I don't have any recollection of my mother, but her name was Maude'.⁴⁵⁸ As she explained: 'In the Aboriginal law our mother's sisters are our mothers and our father's brothers are our father'.⁴⁵⁹ She said that she was locked in the dormitory at night at the settlement at Phillip Creek, but would go outside the fence line every day to where her grandmother and other relatives were living, including her sister Eileen, her father's sisters, and Jimmy Anderson's mother, Ada Phillips, who she said she called 'mum'. Cubillo's testimony clearly indicates that she had strong, recognised familial kinship relationships throughout her childhood up until her removal—indeed, this was the basis of her claim—and this was supported by other witnesses.

The disputing of Cubillo's memory as a source of historical accuracy resonates with the debate which has ensued regarding the truth of *testimonio*—whether there is a 'storytelling' element in the construction of testimonial narratives—a debate which has centred on Rigoberta Menchú's account of the torture and execution of her brother by

⁴⁵⁷ Interview with Lorna Cubillo, Darwin, 25 September 2004.

⁴⁵⁸ Transcript, examination of Lorna Cubillo, 10 August 1999, p 1060.

⁴⁵⁹ Ibid, 11 August 1999, p 1094.

the Guatemalan army.⁴⁶⁰ Beverley argues that the debate over the veracity of Menchú's testimony is an ideological struggle, pointing to attempts to impeach her authority as 'in effect resubalternizing her— like a good lawyer ... giving the *appearance* that she was not completely reliable'.⁴⁶¹

This is analogous with the conundrum Cubillo faced when cross-examined about her recollection of the events of her childhood. Detailed questioning about her memory of dates and time periods, distances and physical descriptions of people were intended to create doubt about her reliability as a witness. It is the fact of her embodied experience of the events in question, that she has lived them, which, perversely, is seen to make her testimony less reliable. Like Menchú, 'by virtue of being an interested party to the events that she describes' carries the implication that she 'cannot be objective, and the proof of her lack of objectivity are the absences or discrepancies ... in her account'.⁴⁶² By virtue of their speaking positions as members of the Stolen Generations, the way they regarded themselves as representational voices, both Cubillo and Gunner were seen to have a political agenda. As Beverley points out, what this suggests is that there is an 'objective, value-free position distinct from the narrator'.⁴⁶³ However, as he goes on to say:

There is not, outside of discourse, a level of social facticity that can guarantee the truth of this or that representation, given that what we call 'society' itself is not an essence prior to representation but precisely the consequence of struggles to represent and over representation.⁴⁶⁴

Geoffrey Gray makes the point that Indigenous peoples are often anthropologically represented as having 'historical amnesia ... without history, without a knowledge of their past, and without place'.⁴⁶⁵ In demanding that Cubillo provide an account of events which meets the standard of objective truth, the law actively engaged her in a struggle over the representation of history. Despite the law's professed preference for oral testimony, O'Loughlin's repeated lament as to the absence of documentary evidence to support the testimonial claims clearly reveals his view that historical accuracy must be verified by the archive. But the law has itself been a definitive agent in the constitution

⁴⁶⁰ See Arturo Arias (ed), *The Rigoberta Menchú Controversy* (University of Minnesota Press, Minneapolis, 2001).

⁴⁶¹ Beverley (2004) 4.

⁴⁶² Ibid 5.

⁴⁶³ Beverley (2004) 4.

⁴⁶⁴ Ibid 73.

⁴⁶⁵ Geoffrey Gray, 'Naturalising Discourses: Anthropological Knowledge, Native Title and Aboriginality in Settled Australia', paper delivered at the Placing Race and Localising Whiteness conference, Flinders University, Adelaide, 1–3 October 2003, published collection of same name edited by Susanne Schech and Ben Wadham (2004).

of the Stolen Generations; it was by virtue of the Aboriginals Ordinance that the power to remove children existed. In this test case, the law was seriously implicated; it could not meet the impossible burden of proof.

BEARING WITNESS TO TESTIMONIAL TRUTH

While there may not have been any other surviving witnesses available to give ‘corroborating’ evidence about her removal from Banka Banka, there were four women who gave eye-witness accounts of the removal of the children from Phillip Creek in 1947. The recollections of these witnesses of the events which occurred over 50 years ago, some of which was delivered with the assistance of an interpreter, is remarkably consistent and is particularly striking for its attention to, and articulate expression of, the trauma of the events. This testimony also bears witness to the way the theft of the children caused their families to mourn, to feel *sorry*, and to go *sorry way*, as Indigenous people describe it, as if the children had died.

Anne Cubilié and Carl Good highlight the importance of trauma for testimonial studies, pointing out that it is this relationship which gives testimony its ‘conceptual and political urgency’, where ‘[t]estimony emerges not merely *as a result of* the destabilization of narrative, memory, identity and history by trauma’, but also as ‘*a response to trauma*’.⁴⁶⁶ The testimony given by these four elderly women was invaluable, and while there may have been some inconsistency and contradiction in the recollections they recounted—which O’Loughlin himself readily acknowledged was a natural consequence of the vagaries of time and memory—what was of overriding significance was their significance as collective memories. What occurred in the trial, however, was the choice of one witness’s recollection over another, as if the truth of an event exists in isolation from the historical, cultural and subjective context in which the events occur, as if it exists outside language. As Beverley argues, picking holes in testimony is not ‘so much about the empirical details of what happened ... but rather over who has authority to tell the story.’⁴⁶⁷

⁴⁶⁶ Anne Cubilié and Carl Good, ‘Introduction: The Future of Testimony’, (2004) 25 (1& 2) *Discourse* 4, 7.

⁴⁶⁷ Beverley (2004) 4–5.

One of Maisie's daughters, Kathleen Napanangka⁴⁶⁸ gave evidence, with the assistance of an interpreter, that 'Lorna Cubillo is my cousin European way, but Aboriginal way she's my sister'⁴⁶⁹ and that after Lorna Cubillo's mother passed away when she was a baby, Kathleen's 'mother has looked after Lorna'.⁴⁷⁰ She also said that Maisie had had three children whose father was a white man before she was born who were also taken away, providing direct evidence of the systemic genealogy of child theft. She said that her father had passed away when she 'was a baby in a coolamon' and that afterwards, '[m]y mother was a sister-in-law to the next father who took care of me.'⁴⁷¹ Napanangka also gave evidence that Maisie was living at Phillip Creek when the children were taken away, but that afterwards she went to Banka Banka to work. She said 'My mother been walked away, sorry way',⁴⁷² and 'after Lorna had gone to school. Mum was so sorry',⁴⁷³ later explaining:

Like people nowadays feel sorry for kids that been gone. That's not from Banka Banka, but Phillip Creek.

*What do Aboriginal people do when they have sorry business or when there is sorry way? What do Aboriginal people do?---Sorry way is sorry for children or anyone who passed away; anyone who finishes up.*⁴⁷⁴

Eileen Napanangka, who also gave evidence with the assistance of an interpreter, said that she was Lorna's '[l]ittle sister in Kukatja',⁴⁷⁵ "little sister" in Warumunga way from two mother. Two mother were sisters.⁴⁷⁶ She agreed that Lorna's family lived at Phillip Creek and that they looked after her.⁴⁷⁷ Eileen said she was at Phillip Creek when the children were taken away and that she remembered that day. When asked what happened that day, she said that:

White men came and took them away - took her away.

⁴⁶⁸ It was pointed out by counsel for the applicants that the preferred form of address for Kathleen Napanangka and Eileen Napanangka was 'Napanangka', clearly pointing to their close kinship relationship with Lorna, who also went by this name as a child. While this form of address was used by counsel for the applicants, Mr Dreyfus, Justice O'Loughlin referred to them in his judgment with their Western, Christian names, 'to distinguish their evidence': para 458.

⁴⁶⁹ Transcript, examination of Kathleen Napanangka, Tennant Creek, 26 August 1999, p 1862.

⁴⁷⁰ Ibid p 1864.

⁴⁷¹ Ibid p 1865.

⁴⁷² Transcript, cross-examination of Kathleen Napanangka, 26 August 1999, p 1872.

⁴⁷³ Ibid p 1877.

⁴⁷⁴ Transcript, re-examination of Kathleen Napanangka, 26 August 1999, p 1899.

⁴⁷⁵ Transcript, examination of Eileen Napanangka, Tennant Creek, 26 August 1999, p 1901. The interpreter, Ms Lauder, explained that 'kukatja' is the Warumungu expression for 'little sister'.

⁴⁷⁶ Ibid 1908.

⁴⁷⁷ Ibid 1902.

Were there other children taken away at the same time?---Yes.

*Napanangka, who was there, Aboriginal people, when the children were taken away?---
Yes, they were big mob. Lots of Aboriginal people.*

...

*THE INTERPRETER: There was lots of Aboriginal people there. Big mobs.
There were all sort of tribes like Warumunga, Warlpiri and Warlmanpa people there.*

MR DREYFUS: Were the children taken in a vehicle?---Yes, in a truck.

*What were the Aboriginal people doing when the truck left? What were they doing, these
Aboriginal people?---Mothers were crying.*

Were they doing anything else?---Just crying.

What were the children doing, the children on the truck?---They all were crying.

...

*The white people who were with the truck, the two white people with the truck, did they
live at Phillip Creek?---No, they didn't stay there.*

Had you seen those white people before they took the children away on the truck?---No.

*Did you see the white people who were on the truck talking to the mothers before they
took the children away?---They talked to the mothers, telling them that they were taking
them away for a picnic.*

*Did those white people ask permission of the mothers before the children were taken
away?---No.*

Was your mother there when Lorna was taken away?---Yes.

*What did your mother do after Lorna was taken away?---We were both crying, mum and
myself.*

*Did your mother stay at Phillip Creek after Lorna was taken away?---No, she went to
Banka Banka Station.*

...

*MR DREYFUS: Do you know why she went away from Phillip Creek?---She was
sorry.⁴⁷⁸*

Bunny Napurrula was also present when the children were removed from Phillip Creek. She explained that she slept in the dormitory which was on one side of the settlement and was for the girls, that there was another dormitory on the other side for the boys, and that the middle dormitory was where the 'half-caste' children slept. She agreed that

⁴⁷⁸ Transcript, examination of Eileen Napanangka, Tennant Creek, 26 August 1999, p 1905.

all of the 'half-caste' children were taken away, and that other children in the camp were also taken.⁴⁷⁹ Napurrula was able to name Mr Penhall and Miss Shankelton as the two people who removed the children.⁴⁸⁰ Despite the racist segregation of children, she said that Aboriginal people did not treat the 'half-caste' kids any differently, that they played with the other children and that the mothers treated them the same as their own families. She said that the men 'loved them as their own families. Like in Aboriginal way, all we love. Doesn't matter what tribe you belong to, what colour, you loved your family.'⁴⁸¹ When asked what happened when the children were taken away, she said:

We went and lock ourself inside the house and we wept for those kids with our whole tribe of family, we're like sorry for those kids.

MR DREYFUS: *What were Aboriginal people doing when that truck left?---All camp were howling for them.*

*All camp?---Crying for them. Some of the mothers, they left the settlement and they went away bush.*⁴⁸²

When Napurrula was asked if Aboriginal people leave a place after someone has died, the following exchange took place:

Those kids left and all our people, those mums and dad or grandma whatever, they were left to[o] and us mob, we were just went inside to the house. We wept for those kids and our whole people they wept too, and they didn't come back to the settlement till after a couple of months or weeks they came back.

Those people who went away, is that like people go away when someone dies?---Yes.

*Did they go away for that same reason?---Yeah.*⁴⁸³

It was Mr Penhall, a witness for the Commonwealth, and at the time a cadet patrol officer, who, together with Miss Shankelton, took the children from Phillip Creek on 24 July 1947; he was the only representative of the Native Affairs Branch present. Penhall said that he was instructed 'to go to Phillip Creek and pick up some children and take them to Darwin'⁴⁸⁴ He said that from what he remembered about whether the parents had given their consent to the children being taken away, that he 'talked to [Miss Shankelton] about the children inasmuch as I think I said, "Are the children—have the children been spoken to and are they ready to go?" sort of thing' and that he had been

⁴⁷⁹ Transcript, examination of Bunny Napurrula, Tennant Creek, 26 August 1999, p 1252.

⁴⁸⁰ Ibid p 1253.

⁴⁸¹ Ibid p 1961.

⁴⁸² Ibid, p 1954–5.

⁴⁸³ Ibid, p 1955–8.

⁴⁸⁴ Transcript, examination of Leslie Penhall, 8 November 1999, p 5282.

informed by Miss Shankelton that 'it had been discussed with the parents of the children. They had been told that they were going on a picnic for 2 or 3 days and then they would be going to live in a house and go to school in Darwin.'⁴⁸⁵ However, he clearly remembered the wailing of the women and children as they left.

What do you say as to the wailing that you heard or observed on this occasion?---Well, again, there was a certain amount of wailing and chasing the children, chasing the truck not the children, and to me it seemed to be the normal reaction of Aboriginal people.

*Yes. A normal reaction to what?---To someone leaving their community.*⁴⁸⁶

When it was put to Penhall that the 'children were going to be removed from Phillip Creek whether or not the mothers and the families and the children consented or not', he said that he could not answer that. However, Penhall did agree that '[w]hat went on at Phillip Creek when those children were getting onto the truck, and when [he] drove the truck out of Phillip Creek, was a scene that [he] would not want to see again', that '[i]t was a highly charged and emotional event' and that he remembered 'mothers running after the truck'.⁴⁸⁷

The women chased the truck?---Yep.

That children were crying?---Yes.

There were a lot of by-standers around, were there not?---Yes.

Who indicated their disturbance at what was going on by wailing?---By wailing, yes.

Yesterday you said in your evidence that you considered what you saw at Phillip Creek a normal reaction to people leaving the community; is that right?---Yes.

That is a normal reaction, what you saw and heard, when people are not going to come back to that community, isn't it?---Not necessarily so.

You compared it to a medical evacuation?---Yes.

And medical evacuations occurred at that time when people were seriously ill?---Correct.

You compared it to someone, or an Aboriginal person being apprehended and taken off by police?---Someone arrested for an offence?

Yeah?---Yes.

And that in Aboriginal community is a person that they might think will never return?--No, I can't agree with that.

⁴⁸⁵ Ibid p 5285.

⁴⁸⁶ Ibid p 5292.

⁴⁸⁷ Transcript, cross examination of Leslie Penhall, 8 November 1999, p 5381.

You can't agree with that?---No.

Wailing in Aboriginal custom is a sign of great grief, isn't it?---It is.

The striking of heads and the drawing of blood is a sign of great grief, isn't it?---Yes.

Did you see that at Phillip Creek?---I can't say that I actually saw it. I was too busy driving the truck.

The sort of circumstances that you've described you would not be surprised if it occurred though?---It could have occurred, yes.

And those circumstances and that description, I suggest, is the way Aboriginal people react when someone has died?---When someone has died?

*Yes?---Yes.*⁴⁸⁸

While concluding that '[t]here was no acceptable evidence, one way or the other, that would justify a finding that Aboriginal families were consulted about their children being taken from Phillip Creek to the Retta Dixon Home: nor was there any direct evidence that would support a finding that they were not consulted',⁴⁸⁹ O'Loughlin acknowledged that there was substantial and uncontested evidence that the day of the removal of the children by Miss Shankelton and Mr Penhall from Phillip Creek was a scene of considerable grief and trauma. Cubillo gave evidence that she had suffered, and suffers to this day as a direct result of her removal from her family, culture and country. She said that she 'lived in despair' and had been 'overawed with pain and anxiety'. Nevertheless, O'Loughlin concluded that: 'It could not be said, on the evidence that was adduced in these proceedings, that either removal was motivated by ill-will or by disregard for the welfare or the interests of the child',⁴⁹⁰ and that 'since the policy was in accordance with the law, there was no wrongdoing in its formulation'.⁴⁹¹

In a discussion of the importance of the role of the listener to testimonies of traumatic experience, Dori Laub argues that 'the victim's narrative ... does indeed begin with someone who testifies to an absence, to an event that has not yet come into existence, in spite of the overwhelming and compelling nature of the reality of its occurrence', that 'the trauma—as a known event and not simply as an overwhelming shock—has not been truly witnessed yet, not been taken cognizance of. The emergence of the narrative which is being listened to—and heard—is, therefore, the process and the place wherein

⁴⁸⁸ Ibid p 5390–1.

⁴⁸⁹ *Cubillo* para 440.

⁴⁹⁰ *Cubillo* para 1556.

⁴⁹¹ *Cubillo* para 1558.

the cognizance, the “knowing” of the event is given birth to.⁴⁹² When I interviewed Cubillo about her experience of giving evidence in the trial, she recounted the events at Banka Banka, closely approximating the account she had given in the trial. In support of Laub’s claim of the importance of the testimonial process to the recollection of memory, Cubillo also commented that: ‘You know Bill Harney didn’t occur to me until I went to court? Bill Harney used to drive around in this black car ... it just dawned on me it was Bill Harney’.⁴⁹³

The courtroom should not, however, be mistaken for the analytic context in which Laub works, nor even necessarily that of the testimonial or oral history interview, where the presence of an empathetic listener may provide the environment necessary for the articulation of subjective truths, an environment which I endeavoured to create in the interview with Cubillo.⁴⁹⁴ Such a safe environment is not one the law is reputed for providing in the courtroom. Nevertheless, I would argue that in trials dealing with historical injustices of the systemic nature and magnitude of that of the Stolen Generations, a unique set of legal and evidentiary conditions are presented which require a considered approach to the role and significance of testimony.

Despite O’Loughlin’s attention to the claims of ‘the personal histories of two people’ rather than what he acknowledges is the ‘tragic’ history of the Stolen Generations, the case was unmistakably one of a representational nature, a test case, in which individual claims were being made, but on the basis of government policy implemented over a significant period of time and across an entire nation, *not* one of individual or isolated incidents. The agreement by the parties and the judge to join together the individual claims of Cubillo and Gunner, despite their differences in circumstances, time frame and institution of incarceration, provides simple evidence of a recognition of this point, and also the potential for a class action. In such circumstances, the testimonial voice of the claimants should, I would argue, be heard as one with a ‘representational value’

⁴⁹² Dori Laub, ‘Bearing Witness or the Vicissitudes of Listening’ in Shoshana Felman and Dori Laub (eds), *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Routledge, New York, 1992) 57.

⁴⁹³ Interview with Lorna Cubillo, 25 September 2004, Stolen Generations Aboriginal Corporation, Darwin.

⁴⁹⁴ A more appropriate analogy is the *Bringing Them Home* Oral History Project conducted by the National Library of Australia between 1998–2002, a project established in order to create a ‘comprehensive public record of first-hand testimony’ of children who were removed and their families, institutional carers and government officers: Doreen Mellor and Anna Haebich (eds), *Many Voices: Reflections on Experiences of Indigenous Child Removal* (National Library of Australia, Canberra, 2002) 3.

evoking ‘an absent polyphony of other voices, other possible lives and experiences’,⁴⁹⁵ and other possible narratives.

As was repeatedly asserted by O’Loughlin, the case also presented particular evidentiary circumstances due to the lapse of time, the death or infirmity of potential witnesses and the absence or loss of possible documentary evidence. While the law regards this as presenting an overwhelming prejudice to the respondent in rebutting the claim, such that the burden of proof became, for Lorna Cubillo at least, impossible to meet, surely such circumstances should rather serve to reinforce the significance and value of the testimonial evidence which *is* available.

CONCLUSION

The action brought by Cubillo and Gunner was, as O’Loughlin himself acknowledged, ‘not a usual case’.⁴⁹⁶ It was a direct challenge to the representational body governing the nation concerning the violent foundation of the assertion of that sovereignty. Occurring, as it did, in the wake of an increasingly articulate acknowledgment of the violent history of colonial race relations in the public sphere, the case specifically concerned a nation-long history of racist repression with genocidal intentions. As Indigenous leaders and theorists so often point out, it is the fact of survival which is evidence itself of the struggle. Contrary to the conventional evidentiary paradigm, testimony can never provide a transparent window on the past; it is not a simple process of perception, memory and narration. Attention to the performative character of testimony reveals that the truth of testimony lies in its *effect*, in the production of meaning in discourse, and its power to destabilise dominant narratives.

⁴⁹⁵ Beverley (2004) 34.

⁴⁹⁶ Transcript, Justice O’Loughlin, 24 September 1999, p 3278.

CHAPTER 5

EXPERTS ON TRIAL: ANTHROPOLOGY AND HISTORY IN THE COURTROOM

Historians and anthropologists construct identities for us, identities which can obliterate ancient knowledge held in the collective memory of Nungas. Sometimes the identities they construct become the master texts of who we are: who is 'traditional', when 'tradition' ceases, who is authentic and sufficiently 'native'.⁴⁹⁷

Colonising narratives ... subtly and relentlessly inform contemporary judgements concerning Indigenous individuals and their culture. Here we see how the subjective underlying processes of historical formation can eventually become legal bedrock.⁴⁹⁸

INTRODUCTION

Recent forays into trials by expert witnesses from areas of the humanities and social sciences, such as historians and anthropologists, are serving as a challenge to law's conceptualisation of the role of expert evidence. Traditionally, expert witnesses have been practitioners in fields such as medicine, psychology, science or technology.⁴⁹⁹ Expert evidence is commonly conceptualised as technical or scientific knowledge, based in facts about observable phenomena, and where the epistemological framework deployed often relies on the concept of probability.⁵⁰⁰ In anthropology and history, however, the distinction between fact and opinion, specialised expertise and common knowledge may not be as sharply defined as in the sciences. These disciplines have their

⁴⁹⁷ Irene Watson, *Looking at You, Looking at Me ...: Aboriginal Culture and History of the South-east of South Australia, Volume 1* (Dr Irene Watson, Nairne, SA, 2002) 13–14.

⁴⁹⁸ Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (The Australian Academy of the Humanities, Canberra, 2003) 10–11.

⁴⁹⁹ Note, however, that the most recent edition of the key text on expert evidence in Australia by Ian Freckelton and Hugh Selby, includes a chapter devoted to anthropology evidence, and a brief discussion of historians as experts: *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook Co, 3rd ed, 2005).

⁵⁰⁰ During the past two decades, there has been expansion of the areas of knowledge recognised as within the parameter of expert psychological evidence, particularly where it provides information about the experience of women and children, such as in sexual assault and family violence. This evidence is regarded as falling within the ambit of 'expert' because it is considered to be potentially beyond the common knowledge of the judge or jury, thus demonstrating the extent to which law remains blinkered by a masculinist perspective. However, generally, this evidence pertains to a paradigm of psychological syndrome, such as 'battered woman syndrome', 'rape trauma syndrome', 'repressed memory syndrome' in order to fit within the law's positivist view of knowledge. In Victoria, recent amendments in relation to sexual offences provides for 'evidence of a person's opinion that is based on that person's specialised knowledge (acquired through training, study or experience)', including social, psychological and cultural factors: *Evidence Act 1958* (Vic) s 37E. It will be interesting to see how this provision is interpreted by the courts.

own epistemological frameworks which practitioners attempt to bring to bear in the context of the courtroom when they are called as expert witnesses.

Expert anthropological evidence has been accepted in a range of Indigenous claims in land rights, native title and cultural heritage cases, since at least the 1970s in Australia. Historians, on the other hand, have been called to give expert evidence only relatively recently. The requirement that anthropologists, almost exclusively non-Indigenous, provide evidence which serves as proof of kinship, tradition, law and culture, as a way of corroborating or discrediting the claimants' own oral testimony, demonstrates the law's fundamental mistrust of Indigenous knowledge. Knowledge based in oral tradition does not conform to the law's positivist model because it generally cannot be verified by reference to documentary sources or credentials acquired in the western academy. In this way, anthropologists as expert witnesses are used by Anglo-Australian courts in denial of Indigenous epistemology, in an attempt to fill the perceived 'void' of Indigenous knowledge.

In his own doctoral research, Wayne Atkinson has provided a critique of the failure of law to acknowledge Indigenous epistemologies in his account of the Yorta Yorta struggle for land justice.⁵⁰¹ Taking his own position as a Yorta Yorta elder as an epistemological standpoint, Atkinson argues that the requirement that Indigenous knowledge be verified with reference to non-Indigenous expertise is played out in the courtroom, such as when he gave evidence in the Yorta Yorta hearing,

... where white lawyers argued about my credibility as a witness. They tried to distinguish knowledge I had as a Yorta Yorta man from knowledge I had gained from non-Indigenous sources such as anthropologists and historians. Given that the common source of both knowledges is substantially my Yorta Yorta ancestors, this is a formidable task.⁵⁰²

In *Cubillo*, a number of expert witnesses gave evidence, including historian, Dr Ann McGrath, and anthropologists, Dr John Morton and Petronella Vaarzon-Morel.⁵⁰³ In

⁵⁰¹ Wayne Atkinson, "Not One Iota": The Yorta Yorta Struggle for Land Justice, PhD Thesis, School of Law and Legal Studies, La Trobe University, Victoria, 2000.

⁵⁰² Ibid 5.

⁵⁰³ Historian, Dr Peter Read, who had been asked to prepare to give evidence, was not ultimately called and his report was not given into evidence. Similarly, Kenneth Maddock, consultant anthropologist, was asked by the respondent to prepare a report, but was not called to give evidence. In addition, psychiatrists, Dr Brent Waters, Dr Gerard Gibney and Dr Jonathon Philips gave expert evidence for the applicants concerning the psychological impact of their removals and detentions; Mr David Avery, solicitor for the Central Land Council gave evidence for the applicants on their lack of recognition as traditional owners of their traditional lands; Dr Richard Keys and Dr James Burrow gave evidence for the respondent as to

this chapter, I will critically examine the delivery and reception of this evidence, offering at times a comparison between the evidence emanating from the two disciplines. As a social science discipline, anthropology adopts an empiricist methodology which makes it appear ‘scientific’ and is therefore accommodated by a legal positivist model. The experiences of anthropologists as expert witnesses has given rise to debate within their professional forums about how their knowledge is received by the courts. However, what is less often acknowledged is the significant role played by anthropology in the actual construction of Indigeneity itself, and in the mediation of these understandings within the law. As Geoffrey Gray points out, the discourse of anthropology has been critical to acceptance of the pervasive narrative of ‘loss’ of Indigenous cultural identity, and valorisation of the ‘traditional’ as a subject position, which has become critical to the law’s construction of eligibility for rights in native title and heritage claims.⁵⁰⁴

This narrative is also apparent in the *Cubillo* trial, where the anthropologists who gave evidence for the applicants were requested to focus on the impact of removal and detention on Gunner and Cubillo in terms of their ability to ‘continue to be part of the family, cultural and spiritual life of that community and to now re-enter that life’, including their ability to become traditional owners. This was considered central to their claim in relation to their losses as a result of their removals and detentions. However, as I will argue, it also served to reinforce the anthropological binary construction of ‘traditional’ versus ‘contemporary’, as discussed by Aileen Moreton-Robinson, perpetuating a de-historicised account which fails to take account of the impact of colonisation. In the decision in *Cubillo*, this construction was deployed by O’Loughlin in his determination that the applicants, particularly Cubillo, had failed to mitigate her losses by returning to her family and community as an adult.

In the trial, the historical evidence provided by Dr Ann McGrath was significantly curtailed as a result of a series of objections and vociferously challenged under cross-examination. It received cursory acknowledgment in O’Loughlin’s decision. I will argue that the law has difficulty accepting expert evidence of historians, largely because legal

the competence of potential witnesses Dorothy Bott and Harry Giese, respectively. Psychologist, Dr Matthew Summers also gave evidence for the respondent as to the competence of Giese.

⁵⁰⁴ Geoffrey Gray, ‘Naturalising Discourses: Anthropological Knowledge, Native Title and Aboriginality in Settled Australia’ in Susanne Schech and Ben Wadham (eds), *Placing Race and Localising Whiteness*, Conference Proceedings, Flinders University, 1–3 October 2003 (Flinders University Press, 2004) 8. Gray points to the *Yorta Yorta* decision as the key case in point, in addition to the role played by anthropologists in the debates over authenticity in the Hindmarsh Island bridge dispute in South Australia. For a detailed account of this, see Margaret Simons, *The Meeting of the Waters: The Hindmarsh Island Affair* (Hodder, Sydney, 2003).

and judicial subjects regard the interpretation of the past, specifically the hermeneutic processes involved in the interpretation of historical documents, as a skill in which they are already well versed. Indeed, I will argue that law regards itself *as* history, thus sloughing-off the challenge provided by other methodological approaches to the interpretation of the past.⁵⁰⁵ This is not to say that there are not jurists who have an informed and nuanced appreciation of the role of historiography, hermeneutics and the problematic nature of historical sources in the context of colonial history.⁵⁰⁶ However, in some significant cases, one of which is *Cubillo*, I would argue that the court's failure to demonstrate a sophisticated understanding of the interpretation of documentary historical evidence, coupled with a cynical regard for the expertise offered by historians, reflects law's myopic vision.

EXPERTS GIVING EVIDENCE

The assertion of 'facts' and their distinction from 'opinion' is one of the fundamental principles underlying legal practice in the courtroom. The trial judge or jury is regarded as the finder of fact, and evidence and proof, or lack thereof, form the basis of the decision. As Andrew Ligertwood puts it, as the facts and events can rarely be experienced by the trier of facts directly, they need to be 'reconstructed from their traces'.⁵⁰⁷ He goes on to say that:

The theory of the common law trial is that those traces, physical remnants and the experiences of witnesses, are presented to the court by the parties, and from those traces and those traces alone, the material facts and events

⁵⁰⁵ Alexander Reilly makes the point that as a result of native title litigation, courts are producing historiography in the form of the summaries of historical evidence produced in trials. He argues that these histories often 'overstate the extent of the destruction of Aboriginal traditional life, and ... misrepresent the form and substance of Aboriginal laws and customs. In doing so, native title trials risk becoming a perpetuation of the colonialism that they were supposed to overcome.' 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453, 454.

⁵⁰⁶ For example, Justice Kirby demonstrates a good understanding of issues associated with the hermeneutic process. For example, in his dissenting judgment in *Kartinyeri v Commonwealth* [1998] HCA 22 (1 April 1998), in which the court was asked to determine the validity of the *Hindmarsh Island Bridge Act 1997*, in light of the meaning of para (xxvi) of the Australian Constitution (the 'race power'), he said that '[e]ach generation reads the Constitution in the light of accumulated experience. Each finds in the sparse words ideas and applications that earlier generations would not have imagined simply because circumstances, experience and common knowledge did not then require it. Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself and the changes in the international community to which the Australian community must, in turn, accommodate.' He said that while the High Court had previously been resistant to the use of historical materials 'to help elaborate and explain the text' of statutes, it had now 'abandoned its former self-denial': para 132. Justice Kirby goes on to provide a detailed hermeneutic analysis of the para (xxvi) in light of parliamentary debates and historical events.

⁵⁰⁷ Andrew Ligertwood, *Australian Evidence* (Butterworths, Sydney, 3rd ed, 1998) 446.

are reconstructed, inferred, by the trier of fact employing his or her general knowledge and experience of the world.⁵⁰⁸

As he goes on to point out, however, ‘the primary trace (fact)’ and the ‘epistemological inference drawn from it (opinion)’ of observational witnesses are ‘in every case an inextricable admixture’ because they are reported through a ‘conceptual medium, circumscribed by language’.⁵⁰⁹ The only evidence regarded by the law as veracious is that which is conceived of as fact, commonly described as objective, in the sense generally equated with impartiality. To this end, general witnesses are required to comply with the opinion rule, under which they must avoid interpreting their observations with ‘subjective beliefs and values’, and refrain from expressing opinion.⁵¹⁰ Expert witnesses, however, are expected to testify in the form of opinion,⁵¹¹ and are therefore exempt from the opinion rule, although they must meet the requirement of relevance.⁵¹² Ligertwood points out that there are ‘remarkably few High Court decisions discussing the principles regarding the admissibility of expert evidence.’⁵¹³

Expert witnesses may be called to give evidence ‘when the subject matter of the evidence lies beyond the sort of knowledge that people are likely to acquire in the course of their ordinary, general experience of life’⁵¹⁴ and therefore potentially beyond the knowledge of the jury members or judge. The archetypal expert witness generally appears in criminal cases, offering expertise in areas of knowledge which have been utilised in attempts to validate logistical issues, not unlike that offered by technologies such as fingerprinting, DNA testing, handwriting, ballistics etc. Such fields of knowledge are regarded as compatible with law’s rational, deductive approach.

Characteristic of legal positivism, expert evidence is traditionally discussed in terms of rules of admission, namely, what areas of knowledge may be regarded as fields of

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid 447. The uniform Evidence Act reflects this: s. 78.

⁵¹⁰ Graham Roberts, *Evidence: Proof and Practice* (LBC Information Services, North Ryde, NSW, 1998) 509. The common law rules against expression of opinion are enacted in the *Evidence Act 1995* (Cth) s 76, subsection (1) of which states: ‘Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed’. What constitutes opinion is not defined. Nevertheless, as Roberts points out, in general, ordinary witnesses are permitted to express judgment in relation to ‘matters falling within the experience that adult members of a particular society may be supposed to acquire by virtue of belonging to that society’: 511.

⁵¹¹ *Evidence Act 1995* (Cth) s 79 provides that ‘If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge’.

⁵¹² *Evidence Act 1995* (Cth) s 56(2).

⁵¹³ Andrew Ligertwood, *Australian Evidence* (Butterworths, Sydney, 3rd ed, 1998) 452, [7.30], n 142.

⁵¹⁴ Roberts (1998) 513.

expertise, whether the area of specialised knowledge is accepted in the disciplinary field, whether expertise may be gained from experience, the ‘factual basis’ of expert opinion and the requirement of disclosure, whether expert opinion may be given on a matter of ‘common knowledge’, and the rule that an expert’s opinion should not be the deciding factor in a trial.⁵¹⁵

One of the most contentious, but seemingly intransigent, of evidentiary rules is the restriction on hearsay.⁵¹⁶ However, despite the tenacity of the hearsay rule, the substance of the law on hearsay principally concerns situations of exception.⁵¹⁷ Relaxation of the hearsay rule for expert witnesses extends to the expression of opinion based on published research which is ‘part of the corpus of expert knowledge’, even though not conducted by the witness.⁵¹⁸

Expert witnesses commonly come up against objections on the basis of these evidentiary rules. However, while there is a plethora of rules pertaining to expert opinion, such evidence is received into evidence largely at the discretion of the trial judge.⁵¹⁹ Jeremy Gans and Andrew Palmer discuss expert evidence as an exception to the rule against the expression of opinion as ‘the price exacted for this permission’ resulting in ‘special scrutiny’ of expert witnesses.⁵²⁰ As with other forms of testimony, the weight attributed to expert evidence is based on the perceived credibility of the witness and an assessment of the accuracy of the facts and assumptions relied upon. Ironically, given its alleged status as authoritative knowledge, expert evidence is

⁵¹⁵ The rules are known as the expertise rule, field of expertise rule, basis rule, common knowledge rule and ultimate issue rule: Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook Co, 3rd ed, 2005) 2. Note that the Australian uniform Evidence Acts, largely enacted in the federal jurisdiction as the *Evidence Act 1995* (Cth), has abolished the ultimate issue and common knowledge rules (s 80) and there is ongoing debate about the field of expertise and basis rules.

⁵¹⁶ *Evidence Act 1995* (Cth) s 59(1): ‘Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.’

⁵¹⁷ The areas covered by the exception are: evidence admitted for a non-hearsay purpose which is relevant for a hearsay purpose: *Evidence Act 1995* (Cth) s 60; first-hand hearsay (ss 62–68); and second-hand hearsay (ss 69–75).

⁵¹⁸ Graham Roberts, *Evidence: Proof and Practice* (LBC Information Services, North Ryde, NSW, 1998) 526–7. A distinction is drawn, however, between ‘an expert’s reliance on facts peculiar to the particular case, which require proof according to the ordinary rules of evidence, and reliance on scientific data of general application, which may be derived from sources usually relied on by experts’: *PQ v Australian Red Cross Society* [1992] 1 VR 19, 36.

⁵¹⁹ For this reason, there is considerable disparity between cases in regard to the reception and consideration of both expert historical evidence and published and oral historical sources. These decisions are made at the trial level and some judges display a good understanding of the complexity of the issues: see, for example, the decision of Lee J in the native title claim of *Ward (on behalf of the Miriung and Gajerrong people) v Western Australia* (1998) 159 ALR 483, who cited extensively from both published historical sources and oral histories, as well as historians as expert witnesses.

⁵²⁰ Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing, London, 2nd ed, 2004) 243.

commonly the subject of scepticism, both within the legal system and in popular representations.

ANTHROPOLOGISTS ON TRIAL

In Australia, anthropologists have primarily acted as expert witnesses in land claims under land rights and native title legislation, and in heritage claims.⁵²¹ The evidence provided by anthropologists has often been central to these claims, where knowledge about kinship relationships, customary law, religious beliefs and cultural practices is used to meet the legal requirements in determining connection to country. Debate within anthropological professional forums about their role as expert witnesses has tended to focus on issues associated with the legal requirement for objectivity and impartiality and the need to maintain principles of professional ethics and integrity, particularly in situations where academic anthropologists are employed by land councils and other Indigenous organisations as researchers.⁵²²

The principal methodology employed by cultural anthropology,⁵²³ known as participant observation, involves anthropologists spending often extended periods of time living within the communities they study, learning languages and establishing relationships with their informants. It has been suggested that this methodological approach potentially compromises the endeavour of objectivity and professional integrity if the

⁵²¹ Under the terms of the *Aboriginal Land Rights Act (Northern Territory) 1976*, claimants are required to provide evidence of ongoing land tenure practices. Under the *Native Title Act 1993*, title holders are required to prove a traditional connection with or occupation of the land, under the laws and customs of that group. The first significant decision dealing with the admissibility of expert evidence given by anthropologists in Australia was that of Justice Blackburn in *Milirrpum v Nabalco Pty Ltd (the Gove Case)* (1971) 17 FLR 141 in which the issue of anthropological evidence as hearsay was discussed.

⁵²² See, for example, papers presented at the Australian Anthropological Society/Adelaide Research Centre for Humanities and Social Sciences (Adelaide University)/Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit conference, 'Expert Evidence in Native Title Court Cases: Issues of Truth, Objectivity and Expertise', Adelaide, 6–7 July 2001, <www.aas.asn.au/confpapers.htm>. For more general discussion of the interface of law and anthropology, see Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives, Proceedings of a Workshop conducted by the Australian Anthropological Society and Australian Institute of Aboriginal and Torres Strait Islander Studies, Australian National University, Canberra, 14–15 February 1996* (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1996).

⁵²³ Anthropology was established as an academic discipline in Australia, at the University of Sydney, in 1928, although the pursuit of ethnographic knowledge had been occurring since the moment of colonisation. Since this time, like all disciplines, anthropology has undertaken different theoretical and methodological directions. Gillian Cowlishaw points out that, having first identified itself as a science in which physical and social considerations were seen to be of equal importance, by the 1940s and 50s there was fairly widespread rejection of racial classifications in favour of cultural and social forms: 'Studying Aborigines: Changing Canons in Anthropology and History', in Bain Attwood and John Arnold (eds), *Power, Knowledge and Aborigines*, Special Edition of *Journal of Australian Studies* (La Trobe University Press in association with the National Centre for Australian Studies, Monash University, Melbourne, 1992) 20, 22–3.

anthropologist is then called upon to provide information which may jeopardise a claim being made by that community. Kenneth Maddock has argued that a ‘popular anthropological role ... is that of advocate or handmaid for the community or interest group retaining the anthropologist’s services’.⁵²⁴ However, John Morton, one of the anthropologists in the *Cubillo* trial, who has also given evidence in other significant cases, argues that in his experience of giving evidence in court, contrary to a partisan position, the formalities of legal procedure function to restrain his agency:

I cannot speak from a passionate position—I am not an advocate for anything or anybody, just a mouthpiece for information or ‘expert opinion’. My agency is pared to a minimum: I speak only when I’m spoken to, and even before that I work to a brief that is not at all my own. I cannot speculate, nor can I appear as a critic of the court’s procedure. For however many moments that I work to a brief and sit in the appropriate chair, I am indeed a servant of the court—an instrument played by opposing interests and a referee. Anything that could get in the way of such service is put in abeyance. I am a model of detachment: and that is precisely how I feel—strangely disengaged, eerily focused, thinking almost mechanically, my truths flowing forth to take their part in the larger ‘truth’ that, thanks to the agency of the judge, will be the outcome of the case.⁵²⁵

When I interviewed Dr Morton, he made similar comments about his experience of giving evidence in the *Cubillo* and *Gunner* trial. Looking at the court settings ‘as an anthropologist rather than a witness’, he observed that ‘[t]he structure of power relations is laid out spatially, in a quite specific manner and you’re placed in there and made to feel subordinate to the judge, in every way.’⁵²⁶ In describing his experience of giving evidence as an expert witness in the trial, Morton said: ‘My phenomenological sense of myself in that setting is, I feel, eerily strange, I don’t feel myself at all. I feel [in a different body in some way]’.⁵²⁷

Morton’s account appears to be suggesting that the anthropologist ‘becomes evidence’,⁵²⁸ acting in the place of the Indigenous claimants, his subjectivity somehow

⁵²⁴ Kenneth Maddock, ‘Bearing Witness’, Australian Anthropological Society, (March 1999) 75 *Newsletter* 23, 24. Maddock was the anthropologist commissioned by the Australian Government Solicitor to prepare an anthropological report for the Commonwealth in *Cubillo*.

⁵²⁵ John Morton, ‘I-Witnessing I the Witness: Courtly Truth and Native Title Anthropology’, paper delivered at the ‘Expert Evidence in Native Title Court Cases’ conference, 11 <www.aas.asn.au/confpapers.htm>. This and other papers at the conference were in part responding to the article written by Kenneth Maddock.

⁵²⁶ Interview with Dr John Morton, La Trobe University, 29 October 2004.

⁵²⁷ *Ibid.*

⁵²⁸ Julian Steward, ‘Theory and Application in a Social Science’ (1955) 2(4) *Ethnohistory* 292, cited in Arthur J Ray, ‘Expertise in Aboriginal Title Claims Litigation in Australia and North America, 1946–2002, in Iain

dissociated from the socio-political context in which he speaks. However, he does not address the issue of power inherent in the position of the white academic expert speaking on behalf of Indigenous people—the ‘problem of voice’⁵²⁹—which has pervaded critical debates about the function of anthropological knowledge.⁵³⁰

As a discipline of western knowledge in pursuit of understandings of human social organisation, development and behaviour, anthropology is engaged in the exploration of human difference. It has studied non-western, particularly Indigenous peoples, whose social formations have been, at least until the 1960s, regarded as paradigmatic ‘primitive’, ‘preliterate’ societies, the study of which was seen to provide an understanding of the social evolution of humankind.⁵³¹ This has resulted in the construction of knowledge about Indigenous peoples’ social and cultural life which privileges the perceived objectivity of expertise based in the academy over the authority of subjective knowledge and experience.

Anthropology is ensnared in the classic formation of post-enlightenment, western intellectual epistemology in that it is a ‘discourse of alterity’⁵³² in which the binary construction of us/them, western European/Indigenous Other are central to the knowledge produced. Drawing on Edward Said’s influential theory of Orientalism,⁵³³ the concept of Aboriginalism⁵³⁴ is used to describe a discursive practice which ‘produces authoritative and essentialist “truths” about indigenes’,⁵³⁵ including the fundamental production of alterity through ‘a style of thought which is based upon an epistemological and ontological distinction between “Them” and “Us” in which

McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, Canberra, 2003) 99.

⁵²⁹ Ibid 99. Ray describes the situation (in the United States, Canada and Australia) as one where anthropologists acted as ‘surrogate spokespersons’: 100.

⁵³⁰ These critiques have been particularly influenced by the work of Michel Foucault, *The Archaeology of Knowledge* (Pantheon Books, New York, 1972) and *The Order of Things: An Archaeology of the Human Sciences* (Vintage Books, New York, 1994 (1971); and Edward Said, *Orientalism: Western Conceptions of the Orient* (Penguin Books, London, 1978).

⁵³¹ Talal Asad, ‘Introduction’ in *Anthropology and the Colonial Encounter* (Ithaca Press, London, 1973), 11.

⁵³² Nicholas Thomas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific* (Harvard University Press, Cambridge, Massachusetts, 1991) 3.

⁵³³ Said (1978).

⁵³⁴ Bob Hodge and Vijay Mishra are credited with first coining this term in *Dark Side of the Dream: Australian Literature and the Postcolonial Mind* (Allen & Unwin, North Sydney, 1990), where they use it in an analysis of Australian literature.

⁵³⁵ Bain Attwood, ‘Introduction’ in *Power, Knowledge and Aborigines*, Special Edition of *Journal of Australian Studies* (La Trobe University Press in association with the National Centre for Australian Studies, Monash University, Melbourne, 1992) i.

‘Europeans imagine “the Aborigines” as their “Other”, as being radically different from themselves’.⁵³⁶

Despite the infiltration of a more critical perspective in much of contemporary anthropological writing,⁵³⁷ discussions about the role of the anthropologist as expert witness fail to acknowledge the significance of anthropological knowledge in the actual *construction* of Aboriginality, and indeed, Aboriginal subjects.⁵³⁸ It is in the context of the colonial enterprise that the hundreds of distinctive and heterogeneous Indigenous nations are imagined as an homogenised Other, ‘reduced to silence and ... then fetishised and controlled, becoming an endlessly fascinating object of discourse’.⁵³⁹ Bain Attwood and others⁵⁴⁰ have emphasised the centrality of the discourse of Aboriginalism to the colonial and neocolonial order, where ‘[m]uch European knowledge of the autochthonous people is peculiarly dependent on representations which construct ‘the Aborigines’ in their absence’, ‘an object of knowledge over which European Australians, as the dispensers of truth about their needs and requirements, gain control.’⁵⁴¹

The emergence of anthropological knowledge is of course inextricably connected to the European colonial enterprise. The quest for ethnographic information about Australia’s Indigenous peoples flourished from the moment of invasion; indeed, as Attwood reminds us ‘Australia’s autochthonous people became central to the development of anthropological theory as they were regarded as among the best examples in the world of “early humankind”’.⁵⁴² Since this time, ethnographic and anthropological discourses have defined and promulgated the ‘authentic’ Aboriginal subject as ‘essentially “traditional”’.⁵⁴³ This privileging of an essentialised traditional subjectivity is extremely pervasive and fundamentally underlies non-Indigenous conceptualisations of the

⁵³⁶ Ibid.

⁵³⁷ Since the 1980s, the influence of critical discourse theory which recognises the importance of hermeneutics and interpretation in the production of knowledge is apparent, particularly influenced in the field of anthropology by the publication of the collection edited by James Clifford and G E Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, Berkeley, 1986).

⁵³⁸ Citing Roy Wagner’s text, *The Invention of Culture* (University of Chicago Press, Chicago, 1975), James Clifford describes the ‘historical predicament’ of ethnography as ‘the fact that it is always caught up in the invention, not the representation, of cultures’: ‘Introduction’ in James Clifford and George E Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, Berkeley, 1986) 2.

⁵³⁹ Hodge and Mishra (1990) xiii.

⁵⁴⁰ See, for example, Bain Attwood, *The Making of the Aborigines* (Allen & Unwin, Sydney, 1989); Jeremy Beckett (ed), *Past and Present: The Construction of Aboriginality* (Aboriginal Studies Press, Canberra, 1988) and contributions to Attwood (ed), *Power, Knowledge and Aborigines* (La Trobe University Press in association with the National Centre for Australian Studies, Monash University, Melbourne, 1992).

⁵⁴¹ Attwood (1992) ii.

⁵⁴² Ibid vi.

⁵⁴³ Gillian Cowlishaw, ‘Studying Aborigines: Changing Canons in Anthropology and History’ in *ibid* 20, 22.

Indigenous Other. As Aileen Moreton-Robinson reveals in her analysis of the texts of Australian women anthropologists, there exists an ideological construction of an *a priori* essentialised race and culture, which she argues results in the establishment of the ‘traditional’ versus ‘contemporary’ binary, functioning to erase the impact of colonialism.⁵⁴⁴

Anthropology has not only been central to the construction of Aboriginality, but has also been instrumental in mediating this knowledge for non-Indigenous people and institutions, including the law. As Geoffrey Gray points out, in some of the most significant legal decisions anthropologists have given expert evidence concerning ‘the construction of a people’s identity and whether a people’s cultural practices are authentic and continuous’.⁵⁴⁵ He points to the central role anthropology has played in framing and supporting legal understandings of cultural identity which valorise the traditional and support a view that ‘loss of cultural practices, including transformation of these practices, leads to a diminution of Aboriginality’.⁵⁴⁶ The production of the binary subject positions of ‘traditional’ and ‘non-traditional’ relies on the narrative of ‘loss’, where Indigenous peoples’ cultural knowledge, social affiliation and religious practices are seen to be forfeited as the price of access to modernity brought about by colonialism.

The perpetuation of this narrative of ‘cultural loss’ serves to obscure the function of violent coercion, fear-mongering and theft in the colonial enterprise. It is premised on a model of exchange seen to be inherent in colonialism where Indigenous ‘traditional’ culture, while signifying ‘authenticity’, must be necessarily abandoned in the perceived inevitable process of acculturation, in order for Indigenous subjects to access the ‘gift’ of modernity. This economy is therefore portrayed as one in which subjective agency serves as motivation for a ‘transition’ between social and cultural locations. It fails to

⁵⁴⁴ Aileen Moreton-Robinson, *Talkin’ Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, Brisbane, 2000) 72–93. Moreton-Robinson discusses what has come to be known as the Bell–Huggins debate, a significant debate between white feminist anthropologist Diane Bell and a number of Indigenous women, including Jackie Huggins and Moreton-Robinson, about anthropological representations of Indigenous women, carried out principally in the journal *Women’s Studies International Forum*. See also, Aileen Moreton-Robinson, ‘Tiddas Talkin’ up to the White Woman: When Huggins et al. Took on Bell’ in Michele Grossman (ed), *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melborne University Press, Melbourne, 2003) 66–77.

⁵⁴⁵ Geoffrey Gray, ‘Naturalising Discourses: Anthropological Knowledge, Native Title and Aboriginality in Settled Australia’ in Susanne Schech and Ben Wadham (eds), *Placing Race and Localising Whiteness*, Conference Proceedings, Flinders University, 1–3 October 2003 (Flinders University Press, 2004) 8, 9. Gray is here particularly pointing to the decision in the Yorta Yorta native title claim and the Hindmarsh Island dispute.

⁵⁴⁶ Ibid 8.

take account of the violent and racist practices of colonial governments, missions and police specifically intended to force Indigenous peoples to leave their traditional lands and abandon their religious and cultural practices, not least of which was the theft of children.

Underlying the discursive construction of an irredeemable identity is the conflation of race and culture. As Moreton-Robinson points out, '[i]n constructing the "traditional", the theoretical deployment of "culture" and "race" denies everyday practice as the stuff of culture and refers to the anthropologically constructed, dehistoricised, *a priori* authoritative meanings which preserve and capture within the text the exotic and the biologically pure'.⁵⁴⁷ Overridingly, the construction of the dichotomy 'traditional'/'non-traditional' Indigenous person is premised on a western conceptualisation of human teleological progress where 'traditional' Indigenous people occupy a position on an 'evolutionary scale' which finds its realisation in advanced white civilization. The 'non-traditional' Indigenous person is seen more closely to approximate the status of whiteness and is therefore positioned in contra-distinction to the 'traditional' Indigenous person.

This dichotomous construction of traditional/non-traditional culture and Aboriginal/non-Aboriginal person deployed through the narrative of cultural and racial loss played a significant role in the Cubillo and Gunner trial and was particularly evident in the treatment of the evidence given by the anthropologists. In the action, anthropologists were specifically commissioned by the applicants' counsel to give evidence in relation to the traditional life of the claimants' families and the impact of having been removed on their potential to 're-enter' their traditional life and to be recognised as traditional owners of country. This evidence was called to support the claim that the Commonwealth, in being vicariously responsible for the removal of the children, had failed in its statutory and fiduciary duties to act in their best interests by depriving them of their knowledge of, and spiritual and physical connection to, traditional lands, and opportunity to participate in ceremonial and ritual practices.

In his judgment, O'Loughlin acknowledged that Cubillo and Gunner had suffered compensable losses through not being regarded as traditional owners as a result of their removals. However, he determined that such losses were reversible and that the

⁵⁴⁷ Moreton-Robinson (2000) 77–8.

claimants, particularly Cubillo, had failed to take responsibility for mitigating her losses by returning to her former community and culture, and thus reclaiming her 'Aboriginality'.⁵⁴⁸ Gunner, on the other hand, having returned to Utopia community as an adult, was said to have 'attempted to mitigate his damages', although O'Loughlin pointed out that this would result in a reduction of his compensable loss.⁵⁴⁹

ANTHROPOLOGICAL CONSTRUCTIONS OF 'ABORIGINALITY'

In the trial, anthropologists, Dr John Morton and Ms Petronella Vaarzon-Morel had been commissioned by counsel for the applicants to prepare reports,⁵⁵⁰ in relation to Peter Gunner and Lorna Cubillo respectively, on a series of issues: the traditional life and development of their natal communities and immediate families during the period in question, including their connection with traditional owners; the significant family, cultural and spiritual heritage features of the communities; the impact of their removals and detention in terms of their ability to continue to be part of the family, cultural and spiritual life of the natal communities; and the extent to which generalisations can be made more broadly to those removed and detained in the Northern Territory.⁵⁵¹

Both reports received objections from counsel for the respondent, Mr Meagher, who focused on the necessity to draw a distinction between 'assumed fact' and 'opinion' in the reports, arguing that any statement which was based on more than direct observation must be regarded as speculation. During these deliberations, counsel for the respondent argued that Morton may have exceeded his role as an expert witness by extrapolating on the basis of what he had been told by other people. It was therefore suggested that his evidence not be elevated to that of expert opinion, but accepted

⁵⁴⁸ *Cubillo* para 1517.

⁵⁴⁹ *Cubillo* para 1512.

⁵⁵⁰ Anthropologist, Kenneth Maddock, had been asked to review the relevant anthropological literature in relation to two specific matters: 'what was being reported to and by anthropologists about the effects of any alleged removal of children from aboriginal communities' and 'to what extent half-caste aboriginals ... were accepted into the aboriginal communities, and in what circumstances; and whether or not their acceptance depended on the amount of their aboriginal blood or their skin colour: whether or not they enjoyed the same rights as full-blooded aborigines, and what type of rights': 'Anthropological Report on Lorna Cubillo and Peter Gunner v Commonwealth prepared for the Australian Government Solicitor' (13 February 1999), on file with the Stolen Generations Litigation Unit, Northern Australian Aboriginal Legal Aid Service, Darwin.

⁵⁵¹ They were each asked to address the same issues in relation to each of the applicants and in doing so, they provided what appears to be comparable information on kinship and family relationships (including genealogies), traditional life, cultural and spiritual heritage, land ownership, requirements for recognition of traditional ownership under relevant legislation and the impact of the removals on Cubillo and Gunner's respective 'ability to continue to be part of the family, cultural and spiritual life of the communities and to now reenter that life'. Morton's report was identified as Exhibit A69 and Vaarzon-Morel's as Exhibit A77.

simply on the basis of first-hand observation. Meagher also argued that substantial sections of the report were irrelevant and that Morton had in places strayed beyond his area of expertise.⁵⁵² O'Loughlin agreed to sections of Morton's report being expunged on the grounds of relevance, but declared himself to be 'a bit more lenient'⁵⁵³ in relation to the matter of expertise, acknowledging that anthropology was an area in which he did not have knowledge. In light of the success of the respondent's objections, however, Vaarzon-Morel's report was also heavily edited before being tendered as evidence.

The objections to Morton's evidence derive from the rule against hearsay. Hearsay information is viewed as tentative and unreliable because its veracity cannot be tested by cross-examination, the rhetorical process regarded in law to evince the truth. The attempt to restrict evidence to first-hand observation and reporting relies upon an ethnographic model for anthropological investigation, a scientific analysis which uses cultural and racial classification and ordering to explain difference. Similarly, the insistence that expertise fit neatly within disciplinary boundaries, including the rejection of information contained in the reports which provided historical and anthropological contextualisation, can be seen to characterise law's obstinate anxiety about its own disciplinary limitations.

One of the specific areas of information the anthropologists were asked to provide focussed on the impact of Gunner and Cubillo's long absences from their families and communities and the issues associated with any attempt they might have made to reintegrate themselves into those communities. In his report, Morton wrote that it is reasonable to suppose that had Gunner 'stayed in his natal community ... he would have steadily learned more about kin and country, moving through the various stages of education relating to dreamings, land, law and social expectations'.⁵⁵⁴ During examination, when asked what the effect of removing a person from his community at an age of eight and him not return until his late forties might be, Morton replied that such a person 'is simply unable to pursue the normal trajectory of a ritual career. In other words, would not be initiated, would not enter into the proper ranks of adult men and would not be able to achieve seniority in traditional terms'.⁵⁵⁵

⁵⁵² Transcript, Mr Meagher for respondent, 29 September 1999, p 3666–704.

⁵⁵³ Transcript, O'Loughlin J, 29 September 1999, p 3704.

⁵⁵⁴ Exhibit A69, p 25.

⁵⁵⁵ Transcript, examination of Dr Morton, 30 September 1999, p 3722.

Gunner had returned to Utopia community as an adult in about 1990, together with his wife, a Luritja woman, and had lived there since then. Their home was at 'Three Bores, the location of the old Utopia Station homestead. When I travelled there to interview Gunner, he pointed out that he now lived within about half a kilometre of the place where he was when he was removed as a child.⁵⁵⁶ This was Gunner's country. He gave evidence that when he returned there both his mother and grandmother were still alive. By the time of the trial, he had become the chairperson of the Urapuntja Council, an elected position which involved administrative responsibility for the community.⁵⁵⁷

However, despite this role of apparent authority, Gunner said that he was not able to participate in tribal matters and could not attend meetings where these issues were discussed because he had not been through the appropriate law or ceremony. He said this was a situation he felt 'pretty angry' about.⁵⁵⁸ Gunner said that as his stepfather, his mother's husband, Hatches Creek Tom, had died, there was no one who was able to sponsor him, to hand over the land to which he could take on authority, as an owner of the business in relation to particular dreamings and country.⁵⁵⁹

Morton was questioned about Gunner's claim that he was unable to undergo men's initiation ceremony and that this therefore prohibited him from taking on a decision-making role in relation to land or laws, ceremonies, dreamings and songs.⁵⁶⁰ He confirmed Gunner's evidence, saying that '[y]ou need to have gone through law and to have acquired knowledge in order to assume authority for looking after country and looking after the business associated with the country.'⁵⁶¹ He confirmed that his research indicated that Hatches Creek Tom was a ritually important person, evidenced by the fact that despite his death having been about seven or eight years previously, his name was still not mentioned, indicating that 'his name is still too powerful to utter'.⁵⁶²

Both Gunner and Morton were questioned about their knowledge of Sonny Jim Kunoth, another mixed-race boy from Utopia who had not been removed, but had stayed living in the region, married and had children, including sons who had gone through initiation ceremonies. Morton asserted that this 'shows unequivocally that being

⁵⁵⁶ Interview with Peter Gunner, at his home at Utopia community, 28 September 2004.

⁵⁵⁷ The council is the local government authority responsible for the administration and management of the Alywarra and Angarapa Land Trusts.

⁵⁵⁸ Transcript, examination of Peter Gunner, 17 August 1999, p 1552.

⁵⁵⁹ Ibid p 2087.

⁵⁶⁰ Transcript, examination of Peter Gunner, 17 August 1999, p 1552.

⁵⁶¹ Transcript, examination of Dr Morton, 30 September 1999 p 3727.

⁵⁶² Ibid 3722.

a half-caste in that community is no impediment to full acceptance into traditional life'.⁵⁶³

During cross-examination, Morton was asked questions about the discipline of anthropology, specifically, whether it was a science, and about his research methodology. He was asked whether, when speaking to people he asked them to speak 'truly', whether he spoke to people in English or through an interpreter, and whether there was anyone present to challenge his informants in any way. He was also quizzed about his use of secondary sources. Morton was asked what difference it would make to his opinion if Hatches Creek Tom had not been married to Gunner's mother, Topsy, before he was taken away, and what difference it would make if Topsy had rejected Gunner or arranged for him to go to St Mary's Hostel. When it was put to Morton that he engaged in speculation, Morton affirmed his opinion on the basis of the scientific nature of his discipline:

*So when you say, for example, that if he hadn't gone away, he would've been initiated and grown up in the Aboriginal customs with knowledge of the law, that's speculative really, isn't it?---It's a speculation, but it's a speculation based on my scientific understanding of the norms of that community which - which are indisputable.*⁵⁶⁴

In addition to a written report, Ms Vaarzon-Morel gave oral evidence about the familial and genealogical relationships of Lorna Cubillo. During cross-examination, she was asked questions about whether Cubillo had sought to be recognised as a traditional owner and whether she had sought to resume living in the area around Tennant Creek. Vaarzon-Morel said that she had 'observed Lorna in Tennant Creek. She hasn't known exactly where she's fitted into in the family or her dreamings are. She's ... been discovering this and re-working it.'⁵⁶⁵

She was also questioned in relation to other members of the local descent group who had been removed as children from the community around Tennant Creek and whether they had subsequently been accepted as members of their families. She was asked if she was aware of 'full-bloods' who also went away to be schooled and if they had any trouble being accepted back into the community. Vaarzon-Morel pointed out that these children came back to their families during the school holidays and that the purpose of their participation in western education was different, that it was 'meant as a

⁵⁶³ Transcript, examination of Dr Morton, 30 September 1999 p 3727.

⁵⁶⁴ Transcript, cross-examination of Dr Morton, 30 September 1999, p 3740.

⁵⁶⁵ Transcript, cross-examination of Vaarzon-Morel, 4 October 1999, p 3805.

complement to their culture and didn't supplant it'.⁵⁶⁶ Continuing to deploy racial categorisation as the basis for his argument, counsel for the respondent, Mr Meagher, suggested that there would therefore not be any difference for 'half-caste' children.⁵⁶⁷ He relied on white racist racial categorisation to explain Aboriginal law in relation to cultural knowledge. However, Vaarzon-Morel pointed out that 'people don't discriminate against children on the basis of colour', that where problems arise is in their understanding of culture, whether they have a right to speak for land, and whether their right to participate in ceremonies and other aspects of ritual life is recognised by the community at large. Reflecting a positivist framework, Meagher appeared to understand culture to be a form of formal knowledge, as something that can be learned, consciously, provided the person is willing to 'make an effort' by returning to their community.

But that depends on the individual's willingness, does it not, ...?---Willingness to learn and the fact - here you have to take into account that the culture is something that it learned and acquired over a lengthy period of a person's life ... enculturation happens as a child ... culture is taken for granted, meanings and understandings and practices, and these are things that people learn almost unconsciously ... It is very difficult ... as an adult, to suddenly enter into that and be able to have cultural literacy, if you like, in all the areas of life.

...

*You've studied it, haven't you?---Yes, I've studied it. I don't claim to be totally fluent in all the areas of ... Warumungu life.*⁵⁶⁸

Vaarzon-Morel stated that in her opinion it was particularly significant if a person had been separated from their community during childhood and that while it was indeed possible to resume cultural life, difficulties would be experienced in gaining full cultural understanding and language fluency.

In his decision, O'Loughlin discussed the evidence provided by the anthropologists in some detail, pointing out that neither their descriptions of the relevant Aboriginal communities nor family and community relationships and entitlements to land rights had been disputed. He went on to cite the determination of Justice Maurice in the Warumungu Land Claim, in which he stated that 'the superficial trappings of white civilization belie the fact that, in my judgment, they remain deeply Aboriginal'.⁵⁶⁹

⁵⁶⁶ Transcript, cross-examination of Vaarzon-Morel, 4 October 1999, p 3810.

⁵⁶⁷ Ibid p 3811.

⁵⁶⁸ Ibid p 3811.

⁵⁶⁹ Justice Maurice, *Warumungu Land Claim Report No 31* (1988) xii, cited in *Cubillo* para 1511.

Deploying a similar rhetoric, O'Loughlin stated that Cubillo and Gunner had each 'made a very strong submission that their removal and detention cost them the loss of their Aboriginality, their culture and their family.' While affirming that this was initially true, he then went on to ask:

But what have they done to recoup those losses? In the case of Mr Gunner, he had done quite a lot by returning to Utopia, reuniting with his family and finding a substantial degree of acceptance. But even he could have done more if it had been his wish. He knew in 1969 where to find his mother, his community and his home but he did not go back until 1991—twenty-two years later. He complained that he is not an initiated man but the evidence has established to my satisfaction that he could undergo the initiation ceremonies if he wanted to. Yet compared to Mr Gunner, Mrs Cubillo has done nothing. Apart from the few short visits to her family she has made no attempt to gain back any part of her Aboriginality. ... I do not accept her claims with respect to her continuing losses of her Aboriginality, family, and culture. I am prepared to allow her something for them for several years as a teenager and a young adult. However, as her children grew up, she could have, if she had wanted to, started to pick up aspects of her Aboriginal past.⁵⁷⁰

At no stage during proceedings had Cubillo or Gunner claimed that they had lost their 'Aboriginality'; this was not an element of their statements of claim. Rather, they claimed that in having been removed and detained, they had been deprived of their families, cultural and spiritual heritage. Despite the impetus driving the policy of removing mixed-race children from Aboriginal communities as one of 'whitening' them, Cubillo and Gunner did not claim to have lost their racial identity. On the contrary, they both clearly identified as Indigenous people, but argued that they had been deprived of formative familial relationships and access to cultural knowledge.

The shorthand deployment of the concept of 'Aboriginality' serves to essentialise the complex ideological constructions of race and culture. It establishes the traditional/non-traditional Aboriginal/non-Aboriginal binary, where, as Moreton-Robinson explains, 'what becomes operationalised and takes precedence ... is an *a priori* essential biologism'.⁵⁷¹ Within this binary construction, it is the concept of the 'traditional' which is equated with authenticity, seen as the subject position of the 'real' Aboriginal. This is a function of the discursive formation of Aboriginalism, where an epistemological and ontological distinction is established in order to imagine the Indigenous Other as radically different from the white Anglo-Celtic settler Australian. As Moreton-Robinson

⁵⁷⁰ *Cubillo* para 1523.

⁵⁷¹ Moreton-Robinson (2000) 80.

points out, this prescriptive designation of singular and unified subjectivity denies the highly complex ways in which Indigenous people have had to navigate subjective identifications and acquire knowledge in colonial and neocolonial society. She claims that this results in Indigenous people having multiple subjectivities, but does ‘not preclude the existence of a core subject position that has the ability to acquire, interpret and create different subject positions in order to participate in society’.⁵⁷²

While I do not accuse the individual anthropologists who gave evidence in this trial of overtly perpetrating this construction of Aboriginalism, the discipline of anthropology itself has played a significant part in its propagation. Testament to this is the perceived need to call white anthropologists to offer authoritative knowledge about Cubillo and Gunner’s genealogical relationships and traditional cultural life when there are many individuals from both their communities who were able, and in some cases did, give evidence of these matters. The anthropologists were in some instances offering academic confirmation of this subjective expertise. As Gray points out, ‘[l]egal and public ideas about “Aboriginality” are mediated through the lens of ethnographic knowledge’.⁵⁷³

O’Loughlin deploys a now well-established neocolonial legal narrative when he asserts that loss of cultural practices leads to loss of Aboriginality. This narrative privileges the concepts of tradition and continuity as exclusive signifiers of Indigenous authenticity. In line with the argument presented by counsel for the respondent, O’Loughlin suggests that ‘Aboriginality’ is something which Cubillo and Gunner could simply have acquired, like a second language, provided they were motivated and diligent. Culture is perceived as a discipline, like anthropology, that can be learnt consciously, through a process of participant observation, thus reducing and dehistoricising the way the specificities of cultural identifications are formed through life-long, embodied, socially-engaged lived experience. Failing to acknowledge the extraordinary complexity that must undoubtedly be involved in any decision Cubillo or Gunner might, or might not, have made to return to their communities as adults, O’Loughlin appears to present this as a simple case of individual subjective agency, of free will. Employing a register which resonates with that of a patronising colonial administration, he affirms Gunner’s decision to return to Utopia to live, but admonishes him for not having done so earlier in life; Cubillo is

⁵⁷² Ibid 89.

⁵⁷³ Gray (2003) 14.

chastised for having ‘done nothing’ to mitigate her losses, ‘to gain back any part of her Aboriginality’.⁵⁷⁴

Tim Rowse makes the salient point that there is no anthropology of incarcerated Aborigines.⁵⁷⁵ With few exceptions,⁵⁷⁶ anthropology has generally been preoccupied with the conceptualised ‘traditional’ Indigenous culture and has not made significant contributions to understanding the experience of long-term separation and imprisonment on Indigenous cultures. What does O’Loughlin imagine might be possible for Cubillo and Gunner to reclaim? They were forcibly dissociated from their families and culture when they were both small children and incarcerated until they reached adulthood without explanation or knowledge of the location or fate of their families. There is no prospect of them ever being able to recuperate the formative experiences that they would otherwise have had with individuals and community; it is simply not possible to reclaim what has been lost during this time, irrespective of where they may choose to live. By determining that Cubillo and Gunner have not attempted sufficiently to mitigate their losses, O’Loughlin erases the subjugating imposition of colonial rule on Indigenous peoples in Australia—the experience of incarceration, familial fragmentation and dislocation, lack of financial resources and information—to which not only Cubillo and Gunner, but also other members of the Stolen Generations have testified in their accounts.

To suggest that it may be possible to ‘take back’ Aboriginality by picking up aspects of the past fixes an ‘authentic’ and legally-recognised identity within a paradigm which perceives Indigenous culture to be both static and located in the temporal past. This serves to assert as authority a western conceptualisation of Indigenous culture based on a stereotypical construction of the ‘traditional’ Aboriginal person, characteristic of Aboriginalism. However, it also functions to define the claimants’ Aboriginality as irredeemably lost to history.

O’Loughlin fails to take account of the fact that the concept of tradition as continuing cultural practice is itself undermined by the advent of colonialism, specifically as a direct result of the forcible separation of children from families and communities. In

⁵⁷⁴ *Cubillo* para 1523.

⁵⁷⁵ Tim Rowse, *After Mabo: Interpreting Indigenous Traditions* (Melbourne University Press, Melbourne, 1993) 28.

⁵⁷⁶ Gillian Cowlishaw is an example of an Australian anthropologist who has focused on the relationship between Indigenous and settler societies. See, for example, *Blackfellas, Whitefellas and the Hidden Injuries of Race* (Blackwell, New York, 2004).

determining that the claimants have not demonstrated sufficient desire to identify as Aboriginal because they have not conformed to an imagined model for cultural authenticity, the law erases the reality of colonialism as perpetrator of the theft of children, and culture. Such logic demonstrates the function of legal positivism in the failure to take into account the circumstances of the removals, not just the fact of removal itself. The judgment functions as a double repudiation for Gunner and Cubillo, who, having already suffered the ramifications of separation and incarceration at the hands of agents of the colonial state, are subsequently denied recourse to any source of reparation because they are said to have failed to mitigate their losses.

James Clifford describes ethnography as an allegorical practice, ‘a performance emplotted by powerful stories’.⁵⁷⁷ He argues that the pervasive theme of the ‘vanishing primitive’ is a ‘rhetorical construct legitimating a representational practice’ which he describes as ‘salvage or redemptive ethnography’, and as characteristic of a ‘pastoral narrative tradition’. This is a practice whereby ‘[t]he other is lost, in disintegrating time and space, but saved in the text’.⁵⁷⁸ The imagined Other of colonial discourse, the stereotypical ‘traditional’ Aboriginal, characterised by the court as irredeemably lost, derives from the archive of colonial and anthropological texts. Anthropological knowledge has been highly influential in the development and implementation of policy and administrative practices in relation to Aboriginal peoples. A number of anthropologists have played significant roles in interpreting and mediating political and legal understandings of Indigenous epistemology and subjectivity and they continue to do so.

‘COLLISIONS’⁵⁷⁹ OF KNOWLEDGE: HISTORIANS ON TRIAL

Evidence provided by historians as expert witnesses has been admissible in Australian trials only in recent years. When considering evidence provided by historians, courts have commonly drawn a distinction between the ‘facts’ of history and analyses of events, the latter of which has been designated as hearsay.⁵⁸⁰ The role of the historian as

⁵⁷⁷ James Clifford, ‘On Ethnographic Allegory’ in James Clifford and George E Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, Berkeley, 1986) 98.

⁵⁷⁸ Ibid 112.

⁵⁷⁹ This term is used by Deborah Bird Rose to describe what happened in the trial in the *Yorta Yorta* native title claim when expert evidence was heard and ‘scholarship collided with adversarial cross examination’: ‘Reflections on the Use of Historical Evidence in the Yorta Yorta Case’ in Mandy Paul and Geoffrey Gray (eds), *Through a Smokey Mirror: History and Native Title* (Aboriginal Studies Press, Canberra, 2003?) 35.

⁵⁸⁰ Demonstrating this highly positivist approach, Justice Young of the Supreme Court of NSW, when considering the issue of expert evidence of historians, concluded that: ‘Whilst courts may obtain the basal

expert witness is, however, emerging as an important area of interest and debate in Australia, particularly in the context of claims made by Indigenous people in relation to native title, cultural heritage and for compensation as members of the Stolen Generations, such as in the action taken by Cubillo and Gunner.⁵⁸¹

There is also a growing body of scholarship within and across disciplines devoted to interrogations of the concepts of evidence, proof and inference and their relationship to truth, to which debates about history, historiography, law and jurisprudence are inextricably connected. While for centuries law and history have been seen to be closely related,⁵⁸² and the traditional methodological approach of the historian and of the judge have been regarded as analogous, such shared disciplinary characteristics are increasingly being questioned, particularly in contexts which involve challenges to traditional epistemological approaches and where the possibility of differing forms of knowledge are being invoked.

Traditionally, both history and law have regarded the mediums of proof to provide a window on truth. The relationship between history and law as ‘intellectual cousins’⁵⁸³ is said to be based on a shared commitment to common sense empiricism, historical and legal methodology as processes of forensic inquiry,⁵⁸⁴ and positivist conceptualisations of the notion of proof and its relationship to objective truth. In a discussion of the affinities between the judge and the historian, Carlo Ginzberg points out that while in the classical tradition, ‘[t]he historian, like the lawyer, was expected to make a convincing argument by communicating the illusion of reality, not by exhibiting proofs

facts such as when a particular war broke out or other matters of record from reputable histories, analyses as to why certain things happened and generally how people behaved is not a matter which can be proved by the evidence of people who were not there but have ascertained the historical facts and then have analysed them to work out a conclusion’: *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364, 371.

⁵⁸¹ Subsequent to the *Mabo* decision in 1992, historians have become more involved in litigation in Australia and have been called upon to give expert evidence in relation to native title claims to address the requirement that title holders prove an on-going traditional connection to the land in question. For debate over these issues, see for example, McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, Canberra, 2003). For more general debate around the interface of law and history, see proceedings of conferences organised by the Australian and New Zealand Law and History Society, for example, Diane Kirkby and Catharine Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (Manchester University Press, Manchester, 2001).

⁵⁸² Carlo Ginzberg, ‘Checking the Evidence: The Judge and the Historian’ in Arnold I Davidson, James Chandler and Harry Harootunian (eds), *Questions of Evidence: Proof, Practice and Persuasion Across the Disciplines* (The University of Chicago Press, Chicago, 1994) 291.

⁵⁸³ Graeme Davison, ‘History on the Witness Stand: Interrogating the Past’ in McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, Canberra, 2003) 53.

⁵⁸⁴ Ibid.

... from the end of the nineteenth century and through the first decades of the twentieth, much historiography ...developed in a courtlike atmosphere.⁵⁸⁵

Despite the parallels drawn between the traditional methodologies of law and history, historians claim that they are currently 'having a hard time in court',⁵⁸⁶ where they often find that they have been required to defend their claims against stringent attack with specific reference to their disciplinary methodology. In Australia, it is particularly in the context of claims made by Indigenous peoples that these issues are arising, where questions are being raised about the appropriateness of traditional methods of historical validation in law, and some acknowledgement of the need to re-evaluate the relationship between law and history, and particularly the role of the historian in the courtroom.⁵⁸⁷

Historians are finding that their testimony is not consistently being accepted because they are not as enamoured of positivist conceptions of proof and its relationship to truth as are lawyers. Deborah Bird Rose describes this as a collision between scholarship and adversarial cross-examination, which 'all too often ... failed to honour either the integrity of scholarship or the integrity of the system of justice that underwrote the whole process.'⁵⁸⁸ Debate is occurring, largely initiated by historians working in native title litigation, and a literature is emerging in which the similarities and differences between the understandings of practitioners and scholars in the law and the humanities are interrogated in the context of the experience of the historian as expert witness.⁵⁸⁹

Within these debates, it is not uncommon for historians to be called upon to 'play by the lawyers' rules',⁵⁹⁰ and to be accused of a misconceived understanding of the role of the law. The trial, practising lawyers and judges are inclined to remind us, is not about seeking access to the truth, but is rather a search for the facts. When addressing the

⁵⁸⁵ Ginzberg (1994) 291–2.

⁵⁸⁶ Ann Curthoys and Ann Genovese, 'Evidence and Narrative: History and Law' in McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, Canberra, 2003) 83.

⁵⁸⁷ This is reflected, for example, in the conference organised by the Australian Academy of the Humanities focussed on the different ways in which lawyers, historians, anthropologists and literary scholars engage with the concepts of evidence, proof and truth and the issues facing humanists as expert witnesses: McCalman and McGrath (eds) (2003) and Paul and Gray (eds) (2002). The significance of these issues to the tasks of lawyers and judges was discussed by Justice Michael Kirby of the High Court of Australia, with specific reference to this conference, in his annual speech as a patron, together with Lowitja O'Donoghue, of the Institute of Postcolonial Studies, entitled 'Other Sources, Other Traditions', North Melbourne, 30 April 2004.

⁵⁸⁸ Deborah Bird Rose, 'Reflections on the Use of Historical Evidence in the Yorta Yorta Case' in Mandy Paul and Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title* (Aboriginal Studies Press, Canberra, 2003?) 35.

⁵⁸⁹ See, for example McCalman and McGrath (eds) (2003) and Paul and Gray (eds) (2002).

⁵⁹⁰ Davison (2003) 65.

plenary session of a conference dedicated to a discussion of the topic of the humanist as expert, Hal Wooten, for example, argued that '[h]umanists sometimes assume ... that courts are established for the purpose of ascertaining truth',⁵⁹¹ while 'others might talk of ascertaining the truth, lawyers usually talk of ascertaining "the facts"'⁵⁹² and that 'the search for truth is necessarily curtailed by the requirement to finalise the dispute'.⁵⁹³ Geoff Gray similarly argues that historians are displaying naivety in assuming that the 'court is concerned to discover the "truth"'.⁵⁹⁴

While it may seem self-evident, not only to practising lawyers and judges, but also to anyone who has had direct experience in litigation, in addition to those of us critically engaged with the law from a theoretical perspective, that any legal process is seriously constrained in its search for truth,⁵⁹⁵ the law does continue to deploy the rhetoric of truth, even if sometimes exclusively on its own terms. It is perhaps the chameleon-like quality of law to be one moment concerned with 'truth', as well as with 'justice', while simultaneously adhering to notions of 'fairness', always in some sort of relationship to 'facts', that facilitates its apparent capacity to resist the type of critique which may lead to significant pragmatic reform.⁵⁹⁶

As many of the commentators in the field point out, the difficulties historians are experiencing in courts when called to give expert testimony, is largely as a result of the influence on their discipline of postmodern critiques of the universality of truth and understandings of history based on notions of truth as stable, singular or complete. Graeme Davison points out that '[p]racticing lawyers have probably been much more resistant to these relativising influences than academic historians'.⁵⁹⁷ Perhaps, as Iain McCalman and Ann McGrath argue, the crucial issue is how the different approaches define their relationship to the contested terms of proof and truth, that 'while proof and

⁵⁹¹ Hal Wooten, 'Conflicting Imperatives: Pursuing Truth in the Courts' in McCalman and McGrath (eds), (2003) 16.

⁵⁹² Ibid 18.

⁵⁹³ Ibid 19.

⁵⁹⁴ Geoff Gray, 'Historians in the Courtroom: A Brief Consideration of Some Issues' in Paul and Gray (eds), (2002) 24.

⁵⁹⁵ This was, for example, the substance of a critical comment made by a referee of my own work, who stated that I had 'overstated ... the idea that the law is committed to truth', suggesting that I had represented law as understood by 'legal theorists and possibly Law Reform Commissions, rather than law as understood by cynical legal practitioners, practical judges, or sceptical political scientists': Dr Roger Douglas, 6 March 2003.

⁵⁹⁶ I note, however, the recent substantial review of the uniform Evidence Acts conducted by the Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission.

⁵⁹⁷ Davison (2003) 54.

truth continue to constitute the bedrock of both the law and humanities' it is their 'geomorphology' which is 'often fractured and unstable'.⁵⁹⁸ It is apparent that the way law and history attempt to arrive at the truth of the past and what methods they each use for substantiating claims are distinct; however, to what extent this is a matter of differing methodological, rather than epistemological, foundations, is less obvious.

The collision between these different conceptualisations of how to access, understand and interpret the past is amply exemplified in the trial in *Cubillo*. In this section, I will examine the reception and treatment of the historian as expert witness in the trial, arguing that it provides an example of the operation of evidence law as a theory of historical knowledge. Through the privileging of forms of rational knowledge as expertise, the laws of evidence are seen to emulate scientific models of proof. The exclusion of other forms of knowledge, such as are represented by the humanities, serves to negate law's own interpretative, hermeneutic practices. An understanding of law's interpretative practices reveals 'law as the author of history, not just in the instrumental sense in which law can be said to make a difference in society, but in the ways that law constructs and uses history to authorize itself and to justify its decisions.'

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However, rather than acknowledge its own hermeneutic processes, law tends to regard itself *as* history. This is a function of legal positivism—only that which has previously been accepted into the canon of legal doctrine may be cited and authorised as legitimate precedent. That which is not received into evidence is not documented and is therefore not available as a source of historical knowledge in the law; it is undocumented and therefore unavailable as evidence. Theories of evidence are themselves histories in that they provide methodologies for evaluating and determining what has occurred in the past. Evidence is always offered after the fact; it is a means of interpreting and drawing conclusions about events as past. Through a metonymic process in which only law is available as evidence, and history can only be evinced through the laws of evidence, law functions in the place of history. As is revealed by some of the calls by members of the legal profession for a more realistic, even cynical, appraisal of law, it also has important ramifications for our expectations of its capacity to deliver justice.

⁵⁹⁸ Iain McCalman and Ann McGrath, 'Introduction' in McCalman and McGrath (eds), (2003) 6.

⁵⁹⁹ Austin Sarat and Thomas R Kearns, 'Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction', *History, Memory and the Law* (The University of Michigan Press, Ann Arbor, 1999) 2–3.

Mark Dreyfus, one of the counsel acting for Cubillo and Gunner in their claim, argues that the difference between historiographical and legal methodologies is that 'historians construct narratives' and that they are freer to 'select and order material' and to offer interpretation, that '[d]ifferent historians will offer different narratives of the same set of events', whereas in law 'the document speaks for itself'.⁶⁰⁰ He concludes that as a result of these different approaches, the law is 'essentially unreceptive' to historical methodology, a situation which he claims to be possibly 'unresolvable'.⁶⁰¹ This account demonstrates law's failure to acknowledge the hermeneutic process in its construction of knowledge. Dreyfus overlooks the fact that lawyers also construct narratives, that they also select and order material and that different lawyers, judges and courts will offer different narratives of the same set of events. Legal representatives select and order material, presenting competing narratives of events, judges and juries interpret this material, developing further narratives, and different courts, sometimes judges on the same court, select a preferred narrative. Insidiously, this selected narrative acquires the status of history.

Ann Curthoys and Ann Genovese⁶⁰² argue that historians and lawyers have competing notions of what evidence is and what relationship it has to narrative, resulting in the relationship between law and history being played out in the courtroom as a contest, which they refer to as 'Fact versus Story'.⁶⁰³ They claim that the 'difficulties historians experience in the courts arise from the fact that although lawyers and historians both practise daily the skills involved with evidence and fact gathering, and reconstructing that evidence into narrative forms, their conceptual understanding of what these skills mean emerge from quite different disciplinary traditions'.⁶⁰⁴ They point out that while, traditionally, historical investigation was once not unlike the practice of the law, during the 20th century, theoretical developments which question positivism and highlight the function of interpretation have had considerable impact on history. However, according to Curthoys and Genovese,

⁶⁰⁰ Mark Dreyfus, 'Historians in Court' in McCalman and McGrath (eds), (2003) 79.

⁶⁰¹ Ibid 78–9. Dreyfus does point out, however, that in native title cases at least, 'Australian courts will continue to attempt resolution, or at least to find appropriate means of using historical work'.

⁶⁰² Curthoys and Genovese have both, together with Larissa Behrendt and Ted Wright, recently been working on an Australian Research Council funded project to 'investigate the ways in which historical evidence is adduced or excluded, and rebutted, under the rules of evidence and procedure applying in the Federal Court, and also the ways in which historical evidence is then weighted and interpreted by judges in decisions': Curthoys and Genovese in McCalman and McGrath (eds), (2003) 84.

⁶⁰³ Ibid 84.

⁶⁰⁴ Ibid 85.

... [t]he theoretical influences which have allowed these developments in history have not been open to law. In order to maintain the rule of law, its practice must remain circumscribed by a commitment to discovering the truth through verifiable, objective fact-telling. The need for fairness, impartiality, consistency, and the authority of the judiciary in an adversarial system necessitates the codification of evidentiary practices, through court rules and practice directions, and legislation, to assist in the adjudication of which facts can be adduced in a legal dispute and how those facts may be presented.⁶⁰⁵

But I would ask, why these theoretical developments are not available to law? And, perhaps more pertinently, what does law's resistance to these developments reveal about its own self-conceptualisation? As Genovese and Curthoys point out, as a result of the developments in historical methodology, including the recognition of the importance of oral testimony, 'huge advances in historical understanding have been made precisely because historians have listened to the voices of Indigenous people, individually and collectively, setting out a very different version of the past from the one that prevailed in conventional written Australian histories.'⁶⁰⁶

EXPERT HISTORICAL EVIDENCE AND TRUTH

In the trial, the historian, Dr Ann McGrath, was called by the applicants to give expert evidence concerning prevailing attitudes towards child removal during the period 1946–62. She prepared a written report and was called by the applicants to appear as an expert witness. The respondents opposed the evidence of McGrath in its 'entirety', objecting to the 'authenticity of a historian giving evidence in court',⁶⁰⁷ arguing that the role of the historian was 'not dissimilar' to that of the judge. Counsel suggested that unlike the judge, the historian is not bound by the rules of evidence or due process and is not required to attest to the reliability of their information, choosing their interpretation on the basis of whether it accords with a thesis they want to advance.⁶⁰⁸ Counsel for the respondent, Mr Meagher, asked whether there is an 'extent to which in seeking to provide to a judge an analysis of facts with inferences ... and conclusions drawn that lacks any special skill ... over and above what the judge has got ... isn't supplanting of the judicial function.'⁶⁰⁹

⁶⁰⁵ Ibid 86.

⁶⁰⁶ Ibid.

⁶⁰⁷ Transcript, O'Loughlin J summarising respondent's objections, 21 September 1999, p 3083.

⁶⁰⁸ Transcript, Mr Meagher for the respondent, 22 September 1999, 3091.

⁶⁰⁹ Ibid 3090–3.

Another historian, Dr Peter Read, had also been commissioned by the applicants to prepare a report and was listed as a potential witness. Read is considered an expert on the history of the Stolen Generations, having conducted groundbreaking research in NSW and had appeared as an expert witness in previous cases. Read prepared a historical report which provides a detailed analysis of the policy and practice of the removal of Indigenous children in the Northern Territory, arguing that this history is different from that of other states. It also provides an account of the tension between church and state in relation to the policies. However, during proceedings, towards the end of the cross-examination of McGrath, counsel for the applicants announced that they would not be calling Read as a witness.⁶¹⁰ When I met Read, he said that he still did not know why he had not been called to give evidence.⁶¹¹ He said he had been sent a copious amount of archival material on which to base his research, and had devoted considerable time to the task. I don't think there's any doubt that McGrath's experience of cross-examination, which I will go on to discuss, served as a catalyst for this decision by counsel.⁶¹²

O'Loughlin ruled in principle against the objections of the respondent that a report of an historian is *prima facie* admissible in the circumstances of the case. He identified how the need for such evidence actually related directly to the respondent's defence.⁶¹³ Pointing out that such a defence raises the necessity for examination of more than the specific circumstances of Cubillo and Gunner, he concluded that:

... it is not so likely that the answer to that question will be found in public documents. It is more likely that evidence on this subject will come from the views expressed by responsible members of the public, by institutions, even I add, by including organs of the media, a source not usually received into evidence. ... Allowing for the fact that so many potential witnesses are now dead, I'm of the opinion that it is appropriate for a confident person to give evidence to the court about these standards.⁶¹⁴

⁶¹⁰ Transcript, Mr Dreyfus, for the applicants, 22 September 1999, p 3087. Note that Dr Peter Read's name is incorrectly spelt 'Reid' in the transcript.

⁶¹¹ I met Peter Read and had a brief and informal conversation with him at the Placing Race and Localising Whiteness conference, Flinders University, Adelaide, 1–3 October 2003.

⁶¹² Having read Read's report, I would also suggest that this decision may well have been misjudged. I say this because the style of presentation of Read's report appears more readily to fit within a legal model for historical evidence.

⁶¹³ Transcript, O'Loughlin J, 23 September 1999, p 3266. The respondent argued that such a policy did not exist; however, also claimed that if it did exist, it should be determined 'by reference to standards, attitudes, opinions and beliefs prevailing at the time'.

⁶¹⁴ Transcript, O'Loughlin J, 23 September 1999, p 3267.

Subsequent to this ruling, however, the respondent presented a further series of objections to McGrath's report on the grounds that it was biased. While O'Loughlin did not accept that the report was biased, he did find that it 'lacked the objectivity and neutrality that is expected of an expert witness', and ruled against tendering of the report, stating that:

*In my opinion, the style and contents of Doctor McGrath's report lack the objectivity and neutrality that is expected of an expert witness. Emotive statements are dotted throughout the report which, as the work of an advocate for a cause, is quite appropriate, but Doctor McGrath is not presented as an advocate, she is presented as an expert witness.*⁶¹⁵

He cited two examples of what he considered to be 'global statements' which he found to be 'inappropriate and inadmissible', arguing that McGrath's role was to persuade the court that 'certain prevailing circumstances and opinions existed'. O'Loughlin claimed that her report provided only one attitude with 'oblique references to contrary views' and 'made no attempt to evaluate competing attitudes'.⁶¹⁶ O'Loughlin stated that '[e]xpert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation'.⁶¹⁷

Evidence as to prevailing attitudes to forced Indigenous child removal was crucial to the case as it was seen as a defence to the claim. McGrath was considered to have the appropriate expertise to offer an opinion as to prevailing standards and perceptions, on the basis of views which were expressed at the time, as long as she refrained from making any judgment as to the 'reasons for or the reasonability of those standards'.⁶¹⁸ However, having compiled a report based on 'views expressed by responsible members of the public, by institutions' and 'organs of the media'⁶¹⁹—a report which was described by O'Loughlin as both 'informative and helpful' in documenting organised opposition to a 'policy of removing part-Aboriginal children'—based on material which would be 'prima facie admissible', McGrath's evidence became inadmissible because 'emotive statements' are seen to undermine 'assertions of fact', and therefore her credibility as an

⁶¹⁵ Transcript, 23 September 1999, 3268-9.

⁶¹⁶ Transcript, O'Loughlin J, 23 September 1999, p 3270.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid 3268.

⁶¹⁹ McGrath drew on a range of primary and secondary documentary and popular culture sources in her 30-page report, including policy documents tendered as evidence, contemporary critical historiography, unpublished theses, film, previously conducted interviews, and the then unpublished work by Anna Haebich, *Broken Circles*.

expert witness. While McGrath, as an expert witness, is permitted to depose of ‘facts within her own knowledge’, any assertions of fact which she makes which lack the ‘authority of any sourced material would not be received into evidence’. McGrath was placed in a catch 22 position: she had been asked to give opinion evidence on an area of knowledge in which she has acknowledged expertise, but her report was rejected on the grounds that it lacked objectivity. I would argue that the deliberation over her report in the trial is indicative of the law’s ambivalent response to knowledge which does not readily conform to a positivist model, where there is not a clearly defined distinction between fact and opinion, and where the task of interpretation is not obliquely obscured, as it commonly is in scientific disciplines.

McGrath’s written report was not received into evidence; it is not identified or referred to in the judgment and therefore has no place in legal doctrine. She was, however, permitted to give oral testimony, on the basis of her report. However, any assertions she made were required to be substantiated through the presentation of her documentary sources so that the objectivity of her opinions could be evaluated by the court. McGrath’s evidence was given over at least five days, the time largely occupied by cross-examination by the respondent and involving vigorous and punctilious questioning in relation to the documents which she was required to submit. This resulted in a particularly inefficient and time-consuming process of presenting historical evidence. Rejection of her written report and the subsequent requirement that she give oral testimony also served to de-legitimise her expertise as a scholar and placed her in a position more akin to a lay witness.

Much of the time spent in examination and cross-examination of McGrath involved discussion of the methodological approach she had used in her research. Indeed, she was ostensibly called upon to provide a defence of methods of inquiry which do not conform with a positivist paradigm of history based on a process of empirical data collection. The decision not to table the report compiled by Dr Peter Read, another historian, for submission as expert evidence meant that McGrath was the only historian to give evidence in the case. Given O’Loughlin’s belief that the case suffered as a result of a lack of evidence, brought about by ‘incomplete history’, the ‘huge void’ of documentary evidence, such limitations on the presentation of historical evidence seems decidedly counter-productive.

McGrath said that she had set out to interrogate what she regarded as contemporary ‘collective memory’ or ‘commonly held beliefs about the past ... that ... the general public in Australia did not know about this policy of Aboriginal child removal, or that ... they knew about it but they believed that it was for their own good and they supported the policy’ by looking to see if there was opposition to the policy of removal of Indigenous children.⁶²⁰ She stated that her ‘survey certainly suggests disquiet, sometimes deep concern’, evident amongst white women, Aboriginal protection groups, unionists and other groups including the YWCA, and a wide array of individual people in the period 1946–62. She said she had found evidence of ‘government people who were deeply concerned about the policy ... of child removal’ and that she was ‘surprised, in looking at all these primary sources, by the amount of activism in the community ... to get the Government to change the legislation because ‘they felt that something cruel and inhuman was happening to Aboriginal mothers and their children’.⁶²¹ She concluded that she did not find ‘overwhelming evidence saying that that policy—that that actual way of implementing assimilation by a removal of children from their mothers was endorsed by the wider community to any significant degree.’⁶²²

During cross-examination of McGrath, O’Loughlin pointed out that what the court ideally wished to ‘achieve is an identification ... of discrete passages in primary source documents which are the sources of the opinion’.⁶²³ She was asked by Meagher whether there were source documents, other than those provided, on which she based her opinion, what those primary records were and why she had not brought them with her.⁶²⁴ McGrath argued that she based her research findings on a wide range of source material, not all of which had been tendered in support of her evidence and that she had conducted research in the area relevant to the question she had been asked to address for many years.

At a significant moment in the trial, immediately prior to a weekend adjournment, O’Loughlin posed a question to McGrath and asked her to consider it over the weekend. In summary, he asked: ‘[W]hy did you commence your investigations by proceeding on the premise that white Australia had any particular view on the subject of

⁶²⁰ Transcript, cross-examination of Dr McGrath, 24 September 1999, p 3388-9.

⁶²¹ Ibid p 3353.

⁶²² Ibid.

⁶²³ Ibid 3290.

⁶²⁴ Ibid 3384.

the removal of half-caste children?’⁶²⁵ The following Monday, McGrath responded by providing an overview of some of the recent Australian historical scholarship which ‘concerns the way in which our society in the present constructs its vision of the nation as a community ... out of which dominant beliefs about the past may arise’.⁶²⁶ Through reference to some of the contemporary theorisation of the silence, ‘historical amnesia’ and ‘erasure’ of Aboriginal history, and including reference to the work of other historians, Henry Reynolds, Chris Healey and Ann Curthoys, she argued that views about colonisation that involved moral and ethical evaluations of its justification needed ‘to be scrutinised very carefully’, particularly as such views were ‘widely circulated, including by the most powerful people in our government’, citing a number of comments which had made by Prime Minister John Howard and then Minister for Aboriginal Affairs, John Herron, in relation to perspectives on Australian history. She claimed that her methodology as a historian addressed ‘such questions as the present asks of the past’, testing ‘popular understandings of the past’, or ‘collective memory’. In relation to her methodology, she went on to say that it was generally believed by historians that their investigations are best directed by having a specific argument or thesis to test. She said:

*I started with a topic, prevailing attitudes ... One way to get at the start would be to consider what people might think were the prevailing attitudes of the time and then to test this by doing careful historical investigation, by reading the actual words of what people were saying, which can be found in the archives, by reading the actual attitudes of the people at the time. ... By placing the commonly held assumptions of the day about the past at the forefront of historical investigation you avoid such attitudes covertly in forming your analysis and the kinds of biases that can therefore be introduced by not confronting the prejudices that the people of your own generation might have about the past. So in the end as a historian, you do not want to merely reinforce present assumptions about the past; you don't want to conduct your investigations by just looking for evidence that backs that up. You make your inquiries wider. You want to extend knowledge and understanding; you want to present new findings, different views that may not conform with present assumptions.*⁶²⁷

McGrath is here outlining an approach to historiography which has been articulated since at least the 1940s by the English historian R G Collingwood and was further elaborated by E H Carr in the 1960s, who, in answer to the question ‘What is history?’ replied that ‘it is a continuous process of interaction between the historian and his facts,

⁶²⁵ Transcript, O’Loughlin J, 24 September 1999, p 3391.

⁶²⁶ Transcript, cross-examination of Dr McGrath, 27 September 1999, p 3395.

⁶²⁷ Ibid 3395–7.

an unending dialogue between the present and the past'.⁶²⁸ McGrath is describing a form of investigation in which interrogation of archival sources through the lens of 'commonly held assumptions' has the potential to reveal evidence of contemporary misconceptions about the past. It is an approach which acknowledges the interpretative and hermeneutic characteristics of historical scholarship. However, it does not coalesce with law's requirement that evidence of the 'facts' of history appear self-evidently through reference to 'discrete passages in primary source documents'.⁶²⁹

During cross-examination, Meagher asked McGrath if applying her expertise as a historian to the research task had important consequence because the process of selection she described necessarily involved exclusion of other matters, and that this process of the selection of evidence 'is a moral judgment', suggesting that she had chosen material which reflected her own moral outrage. McGrath responded by saying that it 'is not a simple matter ... as a historian, especially given the fact that this was going to be part of a legal case, I attempted to make this as objective as possible and I think that the best history does not hector or moralise overtly. ... So certainly the main purpose of this was not for me to moralise or be passionate', but that 'any writer inevitably will bring some of themselves into what they write'. The following exchange then took place:

Yes, and you've done that here?---Well - - -

Well, have you or haven't you?---Well, if you want the particular examples of where I'd done it, I'd have to look at the whole thing and do a self-critique - - -

No no, we may get to that, doctor, I simply ask at the moment whether you've done it or not. Do you follow me? It's a 'yes' or 'no' answer I would have thought but perhaps not?---

Well, no, it's not because - okay, so to - to be totally objective about this - - -

Yes?---It would probably help if I was not a woman, if I was not a mother, if I didn't believe that Aboriginal people could get justice. That would all help.

Yes?---But I'm not a robot. No such person exists.⁶³⁰

When asked if she believed that it was 'the role of the historian to make moral judgments', she replied that the question of objectivity was 'a rather difficult one because sometimes people think that if you write objectively you've got to leave

⁶²⁸ E H Carr, *What is History?* (Penguin Books, London, 2nd ed, 1987) 30.

⁶²⁹ Transcript, O'Loughlin J, 24 September 1999, p 3290.

⁶³⁰ Transcript, cross-examination of Dr McGrath, 27 September 1999, 3475.

emotion out and I don't agree with that because I think that human experience involves emotions' and that she did 'not oppose including ... passion in history writing.'⁶³¹ She was also repeatedly chastised for giving 'lengthy' responses to questions to which a simple 'yes' or 'no' answer was seen to have sufficed.⁶³² McGrath did not fulfil the expectation that she give evidence according to a particular model of investigation which the law regards as 'objective' and she resisted conforming to expectations as to how an expert witness should provide evidence. Ironically, this is despite the fact that the account she gave of her research methodology, which involved testing a hypothesis, is actually drawn from science. McGrath's 'mistake' was to honestly concede some of the difficulties and hazards of her research methodology, and to be prepared to acknowledge issues of subjectivity in research.

During the final addresses, 85 pages of written submissions were tendered in objection to the evidence of McGrath and a further half-day was devoted to criticising her evidence, during which counsel for the respondent argued that McGrath is a historian who utilises a 'post-modernist analysis' which placed 'great emphasis on the significance of images, signs and language', to the 'exclusion of objective truth'.⁶³³ Mr Meagher claimed that:

*From this arises a cultural politic which criticises the dominant white male metropolitan grand theories and images of the social and economic world in which the theory characterises women and people of colour as victims of oppression. It assumes there is little or no justification for one specific theory or view of knowledge as a better representation of the reality than another, and this results in the rejection of objective truth. The language employed by Dr McGrath showed an adherence to such theories. Many of the difficulties that arose during her examination, and which are addressed later, are explicable in terms of the conflict between objective truth and post-modernistic analysis.*⁶³⁴

McGrath's methodology is dismissed on the grounds that it is postmodern, and therefore not concerned with 'objective truth', but rather with exposing and critiquing 'grand theories', and her testimony is tainted by a 'cultural politic'. Despite the fact that, throughout the process of cross-examination, every statement she made was required to be substantiated by reference to 'discrete passages in the documentary sources', she is accused of placing emphasis on images, signs and language. It is McGrath's language

⁶³¹ Ibid p 3400.

⁶³² At one point during the trial, during McGrath's absence from the courtroom, O'Loughlin discussed this issue, having observed that she had taken nine minutes to answer his question, discussed above: 28 September 1999, p 3620.

⁶³³ Mr Meagher for the respondent, 21 February 2000, p 6494.

⁶³⁴ Ibid.

which is seen to expose her allegiance to such theoretical approaches and which are alleged to have given rise to the difficulties experienced during her examination. This suggests that the law, on the other hand, is never distracted by the possibility of differing versions of reality in the all consuming task of unmasking the truth—supposedly unambiguous and self-evidently apparent in an examination of evidentiary sources. However, I would argue that in asserting an analogous coherence between the form of evidence and the potential for truth claims, the law is able to obscure the nature of its own interpretative practices.

In the single paragraph in the judgment in which O’Loughlin referred to the evidence of McGrath, he stated that she had been called by the applicants to give evidence on a ‘limited subject’, but that he accepted her opinion, that it ‘was supported by other material that was tendered in evidence’.⁶³⁵ Despite the fact that, as Mark Dreyfus points out, there is very little case law available in which the role of the historian as expert witness is discussed, O’Loughlin does not enhance this situation by offering comment and at no point in the judgment is this issue discussed. On the basis of this paragraph, are we to assume that McGrath’s evidence was accepted only because it was supported by other material tendered into evidence? Is expert historical evidence only being accepted when it is authorised by other mediums of knowledge?

Graeme Davison points out that it is only when history is argued as if it were law that law appears able to accommodate historical reasoning.⁶³⁶ This suggests two things: that law can only accommodate knowledge which conforms to a positivist construction, and, that historical knowledge so constructed is accommodated by law, because it is then regarded as resembling law. Historical evidence is only accepted by law when it can be subsumed *into* law, so that law can claim history as itself.⁶³⁷ The propensity for law to regard legal history, that is, the history of legal doctrine and the rules of precedent, as the only valid source of history, or historiography, in the courtroom, reveals the way law conceptualises both itself and the past. Law continues to be attached to positivist approaches to evidence because it must otherwise confront the fragility of its own premises. If the holy grail of objective truth is not transparently made visible through

⁶³⁵ *Cubillo* para 232.

⁶³⁶ Davison (2003) 59. Davison points to Henry Reynolds as an example of a historian who assumes ‘the stance of a legal and historical positivist, appealing directly to his primary sources, without reference to the views of other historians and seldom dwelling on the ambiguities or contradictions between his authorities’.

⁶³⁷ This was a defining feature of the *Mabo* decision, where the High Court overturned the legal principle of *terra nullius* to recognise the existence of native title.

the positing of ‘basal facts’, what does this reveal about the law’s own history? If the evidence of historians as expert witnesses can only be accepted if it is supported by other evidence, or previously established as law, the potential of the legal system to offer justice in relation to claims which extend beyond living memory and where historical records are not available is seriously in question. In refusing to deal with such claims, the law’s siding with ‘objective truth’ reveals its own unmistakeable bias towards ‘dominant white male metropolitan grand’ theory.

CONCLUSION

In his ‘Australia Day’ address on 26 January 2006, Prime Minister, John Howard, called for ‘a sense of balance’ in an understanding of the nation’s history. He said that ‘[t]oo often history ... is taught without any sense of structured narrative, replaced by a fragmented stew of ‘themes’ and ‘issues’. And too often, history, along with other subjects in the humanities, has succumbed to a postmodern culture of relativism where any objective record of achievement is questioned or repudiated.’⁶³⁸ Howard’s use of the term ‘narrative’, however, betrays his allegiance to one particular account of the past, a master narrative. It is based on an understanding that ‘there is a single knowable historical truth’,⁶³⁹ with populist appeal. As Mark McKenna argues, ‘[i]n the public domain, critical history has been supplanted by balanced history, a thinly disguised euphemism for comfort history where the past is narrated as little more than patriotic allegory.’⁶⁴⁰ The ongoing debate about authoritative history in contemporary Australia, including contention about who has the right to write narrative accounts of history, is itself a result of the destabilising impact of theorisations of historiography which acknowledges the role of narrativity in the writing of history.⁶⁴¹

As Christine Choo, an historian who has played an important role as an expert witness in native title litigation, points out, this is also the case in the court, where ‘the very method of examination and cross-examination of witnesses shapes the narrative as

⁶³⁸ John Howard, ‘A Sense of Balance: The Australian Achievement in 2006’, Address to the National Press Club, Parliament House, Canberra, 25 January 2006, <www.pm.gov.au/news/speeches/speech1754.html>.

⁶³⁹ Ann Curthoys and John Docker, *Is History Fiction?* (UNSW Press, Sydney, 2006) 232. Curthoys and Docker provide a very accessible account of the background to the debate about historiography, narrative and notions of historical truth.

⁶⁴⁰ Mark McKenna, ‘Writing the Past: History, Literature and the Public Sphere in Australia’, public lecture sponsored by the Humanities Writing Project, Queensland College of Arts, Brisbane, 1 December 2005, <www.humanitieswritingproject.net.au/mckenna.htm>, published as ‘Writing the Past’, *The Australian Financial Review*, 16 December 2005, Review, p 1–2, 8.

⁶⁴¹ See, for example, Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (John Hopkins University Press, Baltimore, 1987).

witnesses are questioned in a manner which attempts to favour a particular narrative over others.⁶⁴² Both anthropology and history function as epistemological paradigms which produce knowledge in particular formations which reflect the socio-political context from which they emanate, and are therefore inscribed by race, class and gender. In the next chapter, I will go on to interrogate the court's reception of an extensive archive of historical documents, drawing on Michel Foucault's concept of the genealogy of history, which has been an important tool in the deconstruction of historical metanarratives.

⁶⁴² Christine Choo and Margaret O'Connell, 'Historical Narrative and Proof in Native Title' in Paul and Gray (eds), (2002) 14.

CHAPTER 6

THE JURISGENESIS OF ASSIMILATION: DOCUMENTARY EVIDENCE AND THE POLITICS OF READING

*The document is not the fortunate tool of a history that is primarily and fundamentally memory; history is one way in which a society recognizes and develops a mass of documentation with which it is inextricably linked.*⁶⁴³

*Relations of reciprocal symmetry can only come into existence if the Other remains unassimilated.*⁶⁴⁴

INTRODUCTION

Within the common law, documentary evidence is said always to be overshadowed by the ‘paramountcy of oral testimony’.⁶⁴⁵ Graham Roberts points out that documentary evidence must be supported by oral testimony, such that it is neither autonomous nor self-authenticating.⁶⁴⁶ The primacy attributed to the oral testimonial form is based on the principle that all evidence must be subject to challenge through cross-examination of witnesses, a process which is said to provide the surest method for testing the veracity of evidence. This secondary status attributed to documentary evidence suggests that it is viewed with some suspicion within the law, as a potentially fraudulent, false or misleading evidentiary source, the truthfulness of which must be tested by subjective evaluation. As such, documentary evidence does not wear its meaning on its sleeve, but must be incorporated into a narrative to support its interpretation. Documents are not simply inscriptions, but are also inscribed with meaning through the practice of reading—a complex hermeneutic process in which the subjectivity of the reader and the socio-political context of the reading are active participants in the elucidation of meaning. As Gayatri Chakravorty Spivak puts it:

We produce historical narratives and historical explanations by transforming the socius, upon which our production is *written* into more or less continuous and controllable bits that are *readable*. How these readings

⁶⁴³ Michel Foucault (trans A M Sheridan Smith), *The Archaeology of Knowledge and The Discourse on Language* (Pantheon Books, New York, 1972) 7.

⁶⁴⁴ Drucilla Cornell, *The Philosophy of the Limit* (Routledge, New York, 1992) 16.

⁶⁴⁵ Graham Roberts, *Evidence: Proof and Practice* (LBC Information Services, North Ryde, NSW, 1998) 533.

⁶⁴⁶ Ibid.

emerge and which ones get sanctioned have political implications on every possible level.⁶⁴⁷

In an account of the history of the emergence of written records in England, Michael Clanchy points to the political function of writing and reading in his contention that lay literacy developed out of bureaucratic and legal requirements, rather than any particular demand for knowledge.⁶⁴⁸ Initially produced as correspondence of the monarchy to other royal officials, by the 14th century, documents had become more widespread, and were specifically employed as evidence of property ownership and conveyance, and for other legal processes.⁶⁴⁹ Nevertheless, Clanchy identified legal procedures, such as oral summons and pleadings, as exemplary of the continuing privileging of the spoken word, despite the increasing proliferation of documents.⁶⁵⁰ He points to the historic function of the *narrator* or *conteur*, the precursor to barristers, who ‘spoke on the litigant’s behalf in his presence’ as ‘an extension of the litigant’s faculty of speech’.⁶⁵¹ According to Clanchy, ‘[w]riting shifted the emphasis in testing truth from speech to documents’,⁶⁵² but the privileging of oral testimony over documents ‘shows how cautiously—and perhaps reluctantly—written evidence was accepted’.⁶⁵³

Consequently, the principal rules relating to documentary evidence concern methods for proving originality and authenticity, with verifying the reliability of the documents as evidence of their content. Documents must be demonstrably what they purport to be in order for the statements contained therein to be accepted by the court. While in the modern technological environment, requirements of originality have been relaxed under recent changes to the laws of evidence,⁶⁵⁴ this preoccupation with verisimilitude reflects

⁶⁴⁷ Gayatri Chakravorty Spivak, ‘Who Claims Alterity?’ in Barbara Kruger and Phil Mariani (eds), *Remaking History*, Dia Art Foundation, Discussions in Contemporary Culture, Number 4 (Bay Press, Seattle, 1989) 269.

⁶⁴⁸ M T Clanchy, *From Memory to Written Record: England 1066–1307* (Blackwell, Oxford, 2nd ed, 1993) 19.

⁶⁴⁹ Ibid, Chapter 2: The Proliferation of Documents. Clanchy points out that this did not mean that everybody could read, much less write, but that during the Middle Ages, a class of literates, or clerks, did the writing and reading: 53. To illustrate the shift from memory to written records, Clanchy points to the change in the meaning of the word ‘record’, from *recordationem*, to make legal record, such that in the 12th century, to ‘record’ meant to ‘bear oral witness’, when pleas may have been conveyed in person by knights of the court, but by the early 13th century, such procedures required documents with seals and the role of oral transmission was of lesser significance: 77.

⁶⁵⁰ Ibid 272.

⁶⁵¹ Ibid 274.

⁶⁵² Ibid 275.

⁶⁵³ Ibid 263.

⁶⁵⁴ Under the *Evidence Act 1995* (Cth), the requirement for original documents has been abolished: ‘[t]he principles and rules of the common law that relate to the means of proving the contents of a document are abolished’: s 51.

the dominance of legal positivism over more contextual and interpretative methodologies for the reading of textual sources.

Despite this overriding privileging of oral testimony within the common law, in Australia, in significant recent native title cases, the courts have displayed a marked preference for the documentary rather than oral testimonial form. In his decision in the Yorta Yorta native title claim,⁶⁵⁵ Justice Olney reversed the legal principle attributing authority to the oral form of evidence, determining that less weight should be accorded to the oral histories of the claimants than that of the ethnographic writings of Edward Curr, even though they were written some thirty years after the events on which he reported.⁶⁵⁶ Rather than oral testimony providing the basis for verification of documentary evidence, in this case, Olney determined that '[a]rchival texts would interpret and value oral texts'.⁶⁵⁷

In his judgment, Curr's memoirs were described by Olney as '[t]he most credible source of information concerning the traditional laws and customs of the area', while '[t]he oral testimony of the witnesses from the claimant group ... being based upon oral tradition passed down through generations' should be accorded 'less weight'.⁶⁵⁸ In this way, Curr's writings, tendered as documentary evidence by the State of Victoria as respondent in the trial, were read to disprove the 'authenticity' of the claimant group. Olney's determination that: 'The tide of history has undoubtedly washed away any traditional rights that the indigenous people may have previously exercised in relation to controlling access to their land'⁶⁵⁹ has functioned as a significant impediment to the success of any further claims for recognition of native title by Indigenous peoples from the south-eastern regions of Australia, whose lifestyles have now been determined by the law to be 'non-traditional'. It would seem that when it comes to oral testimony, the

⁶⁵⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria*, Federal Court of Australia, Olney J, 18 December 1998, unreported, [1998] FCA 1606 (hereafter *Yorta Yorta*).

⁶⁵⁶ Edward Curr, *Recollections of Squatting in Victoria, Then Called Port Phillip District (from 1841 to 1851)* (George Robertson, Melbourne, 1883). A 1968 facsimile edition was presented as evidence in the trial.

⁶⁵⁷ Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, Durham, 2002) 165. See also Mark Harris, 'Mythologising "Recollection of Squatting in Victoria": Law's Intersection with Colonial Memory' (2003) 1 *Law, Social Justice & Global Development* <<http://elj.warwick.ac.uk/global/03-1/harris.html>>; Bruce Buchan, 'Withstanding the Tide of History: The Yorta Yorta Case and Indigenous Sovereignty', (2002) 1(2) *borderlands e-journal* <www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/buchan_yorta.html>; Alexander Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title', (2000) 28 *Federal Law Review* 453; Roderic Pitty, 'A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998), (2000) 6 *Australian Journal of Legal History* 1.

⁶⁵⁸ *Yorta Yorta* para 106.

⁶⁵⁹ *Yorta Yorta* para 126. Natasha Case describes this as more akin to a 'tsunami' than a 'tide': 'The Tide of History or Tsunami', (1999) 17(4) *Indigenous Law Bulletin* 17.

law's preference is for hearing only some voices; it is deaf to the voices of those who have been disenfranchised by the law itself.

Native title jurisprudence has resulted in Australian courts examining historical accounts of Indigenous life and colonial relations in an unprecedented way.⁶⁶⁰ However, documentary evidence will invariably be sourced from the colonial archive and can only ever present the perspective of white settler history and historiography. Such records are an important element in the armoury of colonial authority and power, often functioning, as can be seen in the *Yorta Yorta* decision, to construct Indigenous subjectivity in legal discourse. As I have discussed in the previous chapter, white imaginings of 'Aboriginality' are created in particular discursive regimes, including historiography.

In the trial of *Cubillo*, substantial documentary evidence was tendered in support of the applicants' claim that there was a general policy of removal of 'part-Aboriginal' children from their families and communities, without consideration of their individual circumstances. In this chapter, I will draw on Michel Foucault's well-known theorisation of the genealogy of historiography⁶⁶¹ to interrogate the reception of this documentary evidence.⁶⁶² Foucault argued that traditional historiography is an attempt to establish continuity, unity and coherence through notions such as 'tradition', 'influence', 'development and evolution', with which historical analysis functions to 'group a succession of dispersed events' by linking them to 'one and the same organizing principle'.⁶⁶³ His method of historical analysis involves detailed questioning and undermining of that which may seem readily apparent in order to reveal its underlying premises and assumptions, specifically the relationship between power and knowledge.

Foucault described genealogy as 'a form of history which accounts for the constitution of knowledges [*savoirs*], discourses, domains of objects, etc., without having to refer to a subject, whether it be transcendental in relation to the field of events or whether it

⁶⁶⁰ While the *Native Title Act 1993* (Cth) as originally passed stated that the court was 'not bound by technicalities, legal forms or rules of evidence' (s 82(3)), an amendment in 1998 reversed this presumption to state that the court *is* bound by the rules of evidence, except where the court otherwise provides: s 82(1).

⁶⁶¹ I will principally be drawing on *The Archaeology of Knowledge* (Pantheon Books, New York, 1972).

⁶⁶² While the policy documents tendered as evidence are extensive and provide a rich source of historical material, I will limit my focus in this section on those documents referred to in the judgment, concentrating on those attributed with significant determinative value.

⁶⁶³ Foucault (1972) 21–2.

chase in [sic] its empty identity throughout history.⁶⁶⁴ Foucault's theorisation of discursive regimes has been highly influential in the emergence of critical approaches to historical research and writing. Drawing on Foucault's analysis, I will argue that in *Cubillo*, O'Loughlin employs an interpretative strategy in his reading of the policy documents which is imbued with the 'logic', or structure, of assimilation. Rather than recognising the contested rhetoric of Indigenous/white relations apparent in the historical archive, O'Loughlin repeatedly attributed to the documents a meaning which denied the function of power, racism and colonial violence. He fails to acknowledge what Robert van Krieken has described as the 'barbarism of civilization'—the way in which colonial relations between European and Indigenous peoples is characterised by multiple meanings, such that societies can engage in barbaric practices '*in the name of civilization*', as 'part and parcel of processes of *integration*'.⁶⁶⁵

READING THE ARCHIVE

The contemporary Australian context of the 'history wars' has given rise to a significant level of debate between historians and other scholars, in addition to the broader public, about methodological approaches to reading the archive and writing history. Ann Curthoys and John Docker point out that '[h]istory wars, wherever they occur, have a way of driving historians back to the sources, checking the relationship between historical narration and analysis on the one hand and the documentary and other records on the other.'⁶⁶⁶ In addition to the highly contested terrain of historical writing in Australia, there has emerged a further debate about the writing of fictionalised accounts of history and autobiographical narrative, and the relationship between history and fiction.⁶⁶⁷ McKenna, a historian, cautions against confusing history with fiction, arguing that '[u]nlike the novelist, the historian is tied to the limits of the archive, to real contexts, places and time'.⁶⁶⁸ Significantly, these debates centre on representations of Australian colonial history and specifically on race relations in contested contexts of

⁶⁶⁴ Michel Foucault, 'Truth and Power', Interview with Alessandro Fontano and Pasquale Pasquino in Meaghan Morris and Paul Patton (eds), *Michel Foucault: Power, Truth, Strategy* (Feral Publications, Sydney, 1979) 35.

⁶⁶⁵ Robert van Krieken, 'The Barbarism of Civilization: Cultural Genocide and the "Stolen Generations"' (June 1999) 50(2) *British Journal of Sociology* 297, 299.

⁶⁶⁶ Ann Curthoys and John Docker, *Is History Fiction?* (UNSW Press, Sydney, 2005) 232.

⁶⁶⁷ This debate is currently being played out in the public arena partly in response to a growth in literary accounts of the past and a renewed public interest in historical fiction, such as Kate Grenville's *The Secret River* (Text Publishing, Melbourne, 2005), a literary account of early frontier history on the Hawksbury River in NSW. See Mark McKenna, 'Writing the Past', *The Australian Financial Review*, 16 December 2005, 1–2, 8; Stella Clarke, 'Havoc in History House', *The Weekend Australian*, Review, 4–5 March 2006, p 8–9; Mark McKenna, 'Comfort History', *The Weekend Australian*, Review, 18–19 March 2006, p 15.

⁶⁶⁸ McKenna (2006) 15.

settlement, on ‘frontier’ battles and on settler relationships to land and to the Indigenous peoples whose country was claimed.⁶⁶⁹

Too often, however, these debates fail to interrogate, or sometimes even acknowledge, the overriding fact that the limit of the archive is the fact that it is constituted by accounts of the past invariably written from the perspective of the white settler/colonial. Written documents—reports, correspondence, certificates, applications, declarations, surveys, calculations, inventories, registrations and other administrative records, in addition to legislation, regulations and legal judgments—are intrinsic to the armoury of colonialism; indeed, it is these bureaucratic and legal records through which much of the force of colonial power and authority is wielded.

Historiography which attempts to provide accounts of the past based on the archive is primarily restrained because documentary sources are necessarily framed by hegemonic ideological discourses and subjective locations—as I will argue, by whiteness. Writing an introduction to a collection of critical approaches to historiography, Barbara Kruger and Phil Mariani point out that ‘[i]f traditional history writing has been in a sense a process of collecting, it has also been a process of marginalizing, omitting. ... The foundation of traditional historiography, the *document*, has now become one discursive text among many, and which ones the historian chooses for his or her analysis becomes a crucial issue in itself, bringing into focus such questions as race, gender, class, and institutional affiliation.’⁶⁷⁰

In his book, *The Archaeology of Knowledge*,⁶⁷¹ Foucault critiqued the traditional approach to historiography, which he argued is a search for origins, ‘in which men retrace their own ideas and their own knowledge’, ‘pushing back further and further the line of antecedents, ... reconstituting traditions’. Describing traditional historiography as the ‘discourse of the continuous’,⁶⁷² Foucault argued that the desire for continuity in history

⁶⁶⁹ For an innovative and compelling approach to the writing of history, autobiography and cultural theory, see Katrina M Schlunke, *Bluff Rock: Autobiography of a Massacre* (Curtin University Books, Fremantle Arts Centre Press, Fremantle, WA, 2005).

⁶⁷⁰ Barbara Kruger and Phil Mariani (eds), ‘Introduction’ in *Remaking History*, Dia Art Foundation, Discussions in Contemporary Culture, Number 4 (Bay Press, Seattle, 1989) x.

⁶⁷¹ Michel Foucault (translated by A M Sheridan Smith), *The Archaeology of Knowledge and The Discourse on Language* (Pantheon Books, New York, 1972). In his introduction, Foucault discusses the relationship between this text and his earlier works, *Madness and Civilization: A History of Insanity in the Age of Reason* (New York, Random House, 1965), *The Order of Things: An Archeology of the Human Sciences* (London, Tavistock, 1970) and *Birth of the Clinic: An Archeology of Medical Perception* (Tavistock, London, 1973), describing them as a ‘very imperfect sketch’ of ideas, which he hoped to clarify in this later text.

⁶⁷² Foucault (1972) 12.

is to attempt to ‘preserve, against all decentrings, the sovereignty of the subject’.⁶⁷³ As a counter to this approach, Foucault outlined a methodological framework for a ‘new history’ which stressed the importance of the concept of discontinuity in historical analysis. Discontinuity, Foucault argued, as ‘both an instrument and an object of research’, can be transferred from ‘the obstacle to the work itself’, functioning as a ‘working concept’ for historical research.⁶⁷⁴

Writing in the late 1960s–early 1970s, Foucault identified a shift in historical understanding, which he argued centred on the ‘questioning of the *document*’.⁶⁷⁵ History, he argued, had regarded documents as the ‘reconstitution’ of the past, as ‘the language of a voice since reduced to silence’.⁶⁷⁶ Now, however, he argued that history ‘organizes the document’, ‘trying to define within the documentary material itself unities, totalities’.⁶⁷⁷ He goes on to suggest that:

... let us say that history, in its traditional form, undertook to ‘memorize’ the *monuments* of the past, transform them into *documents*, and lend speech to those traces which, in themselves, are often not verbal or which say in silence something other than what they actually say; in our time, history is that which transforms *documents* into *monuments*.⁶⁷⁸

Foucault argued that the preoccupation with continuity in history and other discourses, where there is the consistent attempt to organise disparate events and phenomena under the same ‘organising principle’ is ‘[a]s if we were afraid to conceive of the *Other* in the time of own thought’.⁶⁷⁹ Foucault’s work has been instrumental in the development of the field of critical historiography, where there has subsequently been considerable attention to the function of rhetoric and narrative in historiography. He is also credited with providing inspiration for the development of the field of postcolonial studies, including acknowledgement from Edward Said in his theorisation of the concept of Orientalism.⁶⁸⁰ Despite his significant appeal to feminist and poststructuralist theorisations, Foucault has been duly criticised for his highly Eurocentric approach, for

⁶⁷³ Ibid.

⁶⁷⁴ Ibid 9.

⁶⁷⁵ Ibid 6.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid 7.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid 12.

⁶⁸⁰ Edward Said, *Orientalism: Western Conceptions of the Orient* (Penguin Books, London, 1978).

falling into his own trap of developing meta-narratives, and for his failure to interrogate issues of gender, race and colonialism in his work.⁶⁸¹

Nevertheless, I would argue that Foucault's deconstruction of representations of historical processes serves as a useful framework for an interrogation of the function of documentary evidence in cases involving historical injustices. What are the techniques available for reading the archive? In re-conceiving the concept of the archive as a discourse rather than simply a repository of documents, Foucault makes the important point that '[t]he archive is first the law of what can be said, the system that governs the appearance of statements as unique events'.⁶⁸² In the next section, I will go on to examine the reception of the documentary evidence tendered in the trial, drawing on Foucault's critique, with specific attention to the way the documentary evidence was read to determine what could be said about practices of Indigenous child removal.

THE WEIGHT OF THE ARCHIVE: DOCUMENTARY EVIDENCE IN *CUBILLO*

When conducting research in the NSW State Archives on the Wiradjuri people in the early 1980s, historian Peter Read explains that he was shocked to discover the copious documentation, principally produced by the Aborigines Protection Board, relating to the removal of Aboriginal children from their families. While individual records from the early 20th century of state wards were often extremely curt, he found that by the 1930s there was a proliferation of documents—'fat files still secured by a rusting clip, almost invariably trace, through 50 or 60 dusty pages, a child's distressing trauma and sometimes disintegration'.⁶⁸³

Over 2000 pages of archival material was tendered as evidence in the trial of *Cubillo*, including government reports, letters and telegrams, memoranda, conference proceedings, newspaper articles and parliamentary statements, covering the period 1911–66.⁶⁸⁴ The applicants argued that these documents provided evidence of a general

⁶⁸¹ For discussions of Foucault's work from feminist perspectives, see, for example, Gayatri Chakravorty Spivak, 'More on Power/Knowledge' in Donna Landry and Gerald MacLean (eds), *The Spivak Reader* (Routledge, New York, 1996) and Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Indiana University Press, Bloomington, 1994).

⁶⁸² Foucault (1972) 129.

⁶⁸³ Peter Read, *A Rape of the Soul so Profound: The Return of the Stolen Generations* (Allen & Unwin, St Leonards, NSW, 1999) 47.

⁶⁸⁴ The evidence discussed in this section was tendered by the applicants in support of their claim of the existence of a long-standing policy of forcible removal of children, entitled Applicants' Court Book: Policy, Exhibit A88, including a 115-page summary. It consists of five volumes (over 2000 pages) of copies of a range of archival documents, chronologically organised and covering the period 1911–66. The

policy of removal of ‘part-Aboriginal’ children from their families and communities, without regard to their individual circumstances. However, in his judgment, O’Loughlin claimed that he could not find evidence of a general policy of removal in the documentary sources. He determined that the applicant’s submission

... suffered from a lack of support from the documentary evidence ... The 1952 principles were clear and concise and I see no reason to withhold from saying that they applied four years later at the time when Peter Gunner went to St Mary’s. The position that existed in Lorna Nelson’s time was not so clear cut however ... [T]here was nothing in any of the writings that would justify a finding that all part Aboriginal children had to be removed or that all illegitimate part Aboriginal children had to be removed or that all illegitimate part Aboriginal children living in native camps had to be removed. ... [T]he evidence failed to establish that there ever was, at any time, activity on such a scale that it could be said that a general policy of removal was then being enforced.⁶⁸⁵

Having had an opportunity to examine the documents tendered as evidence by the applicants, I would contest O’Loughlin’s determination. The 1952 principles to which he refers, and which he determined applied four years later when Peter Gunner was removed to St Mary’s Hostel, formed the basis of detailed consideration in the judgment. They were contained in various documents, including a Circular Memorandum from the Director of Native Affairs, Mr F H Moy, dated 1 May 1952 and entitled ‘Removal of Partly Coloured Children from Aboriginal Camps’. The first paragraph of the memorandum states that ‘the Policy of this Branch to remove partly coloured children from aboriginal camps has been fully adopted by the Honourable The Minister for Territories’.⁶⁸⁶ Another memorandum of the Director of Native Affairs to the Administrator dated 20 March 1950 entitled ‘Removal of Part-Aboriginal Children’ was earlier in the judgment identified by O’Loughlin as representative of ‘the official view of the Native Affairs Branch about the removal of part Aboriginal children in July 1947’, when Lorna Cubillo was taken from Phillip Creek to the Retta Dixon Home.⁶⁸⁷ Citing the ‘wide powers’ of the Director of Native Affairs under sections 6 and 7 of the *Aboriginals Ordinance 1918–47* (NT), Mr Moy stated that ‘wherever possible it is

original documents are principally held by the Australian Archives and are commonly discussed in Australian historical writings, including some of those discussed in this chapter.

⁶⁸⁵ *Cubillo* paras 1159–60.

⁶⁸⁶ Applicants’ Court Book: Policy, Volume 3, page 440, Document No 2753. This document included a note regarding distribution to District Superintendents and Patrol Officers by name.

⁶⁸⁷ He said that ‘there is no evidence that would suggest that the position in July 1947, when Lorna Nelson was taken from Phillip Creek to the Retta Dixon Home, was any different to that prevailing in March 1950. In other words, it would be reasonable to proceed, in my opinion, upon the premise that the official view of the Native Affairs Branch about the removal of part Aboriginal children in July 1947 was fairly represented by the Director’s letter of 20 March 1950 to the Administrator’: para 219.

the policy of this Branch to remove the children from their native mothers as soon after birth as is reasonably possible'.⁶⁸⁸ Contrary to O'Loughlin's finding, I would argue that such unequivocal statements indeed provide documentary evidence of a general policy of removal.

The 1952 principles were those of Sir Paul Hasluck, Commonwealth Minister for Territories from 1951–63, the period described by Russell McGregor as 'the high water point of assimilationism in Australian Aboriginal policy', and under whose guidance assimilationist policies and practices were 'refined, extended and systematised'.⁶⁸⁹ O'Loughlin quoted the nine principles in full, engaging in a 'careful reading', with 'regard to the context in which they were written', and concluded that '[t]he documentary evidence established that, although every consideration was to be given to the mother's feelings and to her wishes, ultimately, her consent was not required to her child's removal.'⁶⁹⁰

Nevertheless, this did not establish a 'blanket policy' of removal of children according to O'Loughlin, who determined that the relevant legislation, the *Aboriginals Ordinance* and the *Welfare Ordinance*, were 'not to be regarded as examples of punitive legislation' but rather 'were intended to be items of welfare or caring legislation'.⁶⁹¹ He maintained, however, that '[t]hat conclusion does not ... address the further questions—how was the legislation implemented?' and 'What policy or policies guided that implementation', questions which he determined were 'central to the litigation'.⁶⁹² While acknowledging that they were 'to a degree, inter-related', O'Loughlin maintained that the question as to 'whether there ever was a policy of the Commonwealth that called for the removal of part Aboriginal children from their environment and their placement in homes, orphanages, missions or institutions', 'what it was', whether it was 'legislatively authorised' and 'how, why and when it was implemented' required 'independent consideration' from the circumstances of the removal and detention of Cubillo and Gunner.⁶⁹³ He argued that:

⁶⁸⁸ Applicants' Court Book: Policy, Volume 3, para 266, Document No 963.

⁶⁸⁹ Russell McGregor, 'Wards, Words and Citizens: A P Elkin and Paul Hasluck on Assimilation' (1999) 69 *Oceania* 243.

⁶⁹⁰ *Cubillo* para 268.

⁶⁹¹ Justice O'Loughlin based this on the decisions in *Namatjira v Raabe* [1959] 100 CLR 664 and *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 190 CLR 1.

⁶⁹² *Cubillo* para 164.

⁶⁹³ *Cubillo* para 166.

... although it may be proved that some policy existed, that does not thereby mean that the policy was implemented in respect of the young Lorna and the young Peter. A benign policy might have been harshly applied against the interests of a particular child by a public servant for whom the Commonwealth was responsible: a harsh policy might have been benignly applied in the best interests of the child.⁶⁹⁴

Why could O'Loughlin not see the policy of removal of children when he referred to it himself innumerable times? What is the significance of race-based policies when they are imbued with the rhetoric of 'humanitarian welfarism'?⁶⁹⁵ In a rationale which parallels that of assimilation, O'Loughlin could not find evidence of a policy of forcible removal of children because, as Jennifer Clarke points out, he was 'blind to the differences between race-specific legislation and a parallel child welfare regime'.⁶⁹⁶ His reading of the legislation and policy documents repeatedly inscribes statements and strategies with the rhetoric of benevolence and evidence of practices of child abduction with 'benign intent', effectively erasing the racist basis to the policy, and ultimately, the policy itself.

O'Loughlin's reading of the evidence assimilates the discordant, contradictory and contested rhetoric of Indigenous/white settler race relations by attempting to link them to the same organising principle. In doing so, he produces a narrative which is a more coherent national history, a more palatable account which erases the violent history of racialised incarceration. It is, I would argue, a reading which, paralleling the policy of assimilation, relies on elision of the significance of racial difference and where the rhetorical function of whiteness is deployed to construct a national history where colonial violence becomes invisible.

THE FLOATING SIGNIFIER OF RACE

Stuart Hall argues that race is a 'floating signifier', a discursive construct which 'organises classificatory systems' and that in order to 'unhinge common sense assumptions about race', we should examine the way that race works as a discursive construct, or language.⁶⁹⁷ Regarding race as a 'sliding signifier', he argues, reveals the 'making meaning practices' in a culture, which 'gain their meaning not because of what

⁶⁹⁴ Ibid.

⁶⁹⁵ Russell McGregor, "'Breed out the Colour" or the Importance of Being White' (2002) 120 *Australian Historical Studies* 286.

⁶⁹⁶ Jennifer Clarke, 'Case Note: Cubillo v Commonwealth', (2001) 25 *Melbourne University Law Review*, 218, 293.

⁶⁹⁷ Stuart Hall, 'Race: The Floating Signifier', Public Lecture, Goldsmith College, London, 1996 (Media Education Foundation, Northampton, 1996).

is contained in their essence, but in the shifting relations of difference which they establish with other concepts and ideas in a signifying field.’⁶⁹⁸ Closer to home, Marcia Langton has also argued that, ‘Aboriginality’ is constructed in discourse, that it is not a ‘fixed *thing*’, that it is ‘created from our histories’ and ‘arises from the subjective experience of both Aboriginal people and non-Aboriginal people who engage in any intercultural dialogue’.⁶⁹⁹

Of course, this does not mean that Aboriginal and non-Aboriginal people do not exist as embodied and socially engaged beings. Nor does it negate the political, social or cultural meanings and importance of racial identification. However, even a cursory examination of the textual representations of race in the policy documents submitted as evidence in *Cubillo* reveals it to be a highly contested signifying domain. As Langton points out, ‘[t]he label “Aboriginal” has become one of the most disputed terms in the Australian language’ and this is nowhere more the case than in legal discourse, where it has been noted that there are ‘sixty-seven definitions of Aboriginal people, mostly relating to their status as wards of the State and to criteria for incarceration in institutional reserves’.⁷⁰⁰

Recognising that the meaning of race is relational, not essential, reveals the way colonial discourse is characterised by strategies which attempt to secure, transcendentally, the meaning of the racial category ‘white’. However, as Hall asserts, there is always ‘a certain sliding of meaning’, ‘a margin’, ‘something about race left unsaid’, ‘always someone, a constitutive outside whose very existence the identity of race depends on and is absolutely destined to return from its expelled, dejected position outside the signifying chain to trouble the dreams of those who are comfortable inside’.⁷⁰¹ In Australian colonial discourse, I would argue that it is the figure of the ‘half-caste’, being simultaneously both inside and outside the categories of ‘white’ and ‘black’, threatening the purity of the binary construction of ‘civilised/primitive’, which disrupted the colonial enterprise. The figure of the ‘half-caste’ occupies an ambivalent position in colonial discourse, being both reviled, as visible evidence of interracial sexual relations and of miscegenation and at the same time desired, invoking a narcissistic impulse, to possess whiteness, to appropriate bodies, to *steal* children. One of the key sites for the articulation of this ambivalent response is in the discourse of assimilation.

⁶⁹⁸ Ibid.

⁶⁹⁹ Marcia Langton, *Well, I heard it on the radio and I saw it on the television...* (Australian Film Commission, Sydney, 1993) 31.

⁷⁰⁰ Ibid 28–9.

⁷⁰¹ Hall (1996).

THE DISCOURSE OF ASSIMILATION

While images of assimilation are most readily associated with the period of Australian race relations during the 1950s, as a discourse, ‘assimilation’ dates back to the earliest days of the colonial enterprise. Throughout Australia’s settler-colonial history, the discourse of ‘assimilation’ can be characterised as representing the project of eradicating racial signifiers of indigeneity—skin colour, identity, culture and kinship—through government-instituted policies and strategies of biological and/or social ‘absorption’, with the express aim of creating a white national imaginary. These discourses bear relationships to historical temporality, circulating, sometimes concurrently and contradictorily, and continue to do so, embedded as they are in the national psyche. As Irene Watson has recently asserted, in the contemporary climate of race relations post-ATSIC, assimilationist agendas have resurfaced through the rhetoric of mutual obligation arrangements, specifically targeted at remote Indigenous communities.⁷⁰²

By the beginning of the twentieth century, the noticeable presence of an increasingly large population of Aboriginal children of mixed descent, particularly in the Northern Territory, gave rise to strategies to ‘breed out the colour’ through a process of ‘absorption’, a version of ‘assimilation’ located on the body, as McGregor points out, ‘equally a process of breeding them into the community of the nation’.⁷⁰³ During this time, the concept of the modern citizen formed the key to the new nation’s identity, imagined, in the sense elaborated by Benedict Anderson,⁷⁰⁴ as a single, cohesive, homogenous community of individuals, unified through whiteness. Indigenous subjects cannot be accommodated within the fantasy of the white nation and throughout Australia’s colonial history various theories and discourses have been propounded to explain, and explain away, the tenacious existence of the Indigenous inhabitants, whose sovereignty, while always denied, has never ceased to invoke fear in the white Australian imaginary. As Russell McGregor has expounded, until at least the beginning of World War II, white Australia was committed to the belief in the eventual demise of Aboriginal Australians, discursively constructed through social

⁷⁰² Irene Watson, Keynote Address, Re-Collections: Official Knowledge and the Memory of Unofficial Practices, Law and Society Conference, Griffith University, Brisbane, 12 December 2004. Importantly, Watson asks: ‘When was self-determination?’

⁷⁰³ Russell McGregor, “‘Breed out the Colour’ or the Importance of Being White’ (2002) 120 *Australian Historical Studies* 286.

⁷⁰⁴ Benedict Anderson, *Imagined Communities* (Verso, London, 1983).

Darwinist thinking as a ‘primitive race’ whose extinction was considered an inevitable consequence of the advent of modernity.⁷⁰⁵

Tim Rowse claims that assimilation ‘signifies a doctrine of nationhood better than it defines a distinct and internally coherent practice of government’, arguing that ‘[a]n historical understanding of “assimilation” must first admit to its heterogeneity.’⁷⁰⁶ As a policy ideal, Rowse argues that by the early 1950s, ‘assimilation’ was ‘available as a narrative of Indigenous development through “stages,”’⁷⁰⁷ which was intended to ‘induce Indigenous people to adopt the same way of life as the colonists’—‘planned social change, conferring “citizenship”’.⁷⁰⁸ He argues that the project of assimilation, specifically as implemented in Central Australia from the 1930s–50s, represented the transition from a pre-modern form of government characterised by a ‘negative power over life and death’⁷⁰⁹ to an ‘interventionist, “modern” style of government’, concerned with ‘enhancing the mind and body’—an ‘explicitly normative’ approach to governing Indigenous Australians.⁷¹⁰

As Robert van Krieken points out in his analysis of the dynamics of barbarism and civilisation in the Australian colonial enterprise, ‘[c]ivilization was colonialism’s most central organizing concept, quintessentially what imperialism and the colonial project was meant to achieve, and the degree of civilization spread over the globe the measure of its success or failure.’⁷¹¹ He argues that the failure of the earlier colonial strategy of relegating Aborigines into the category of barbaric ‘Other’, as represented by the increasing population of mixed-race people, ‘threatened the very boundaries and character of civilization itself’.⁷¹² The response to this was a “civilizing offensive” on the part of both State and Church, both aiming to protect as well as advance civilization by eliminating Aboriginality in this hybrid form from a ‘White Australia’ completely.⁷¹³ This offensive, as van Krieken and others have elaborated, involved both a legislative regime concerned with the ‘protection’ of Aboriginal people, including the separation of

⁷⁰⁵ Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory 1880-1939* (Melbourne University Press, Carlton, 1997).

⁷⁰⁶ Tim Rowse, *White Flour, White Power: From Rations to Citizenship in Central Australia* (Cambridge University Press, 1998) 107–8.

⁷⁰⁷ Ibid 2

⁷⁰⁸ Ibid 3.

⁷⁰⁹ Ibid 6.

⁷¹⁰ Ibid 8.

⁷¹¹ Robert van Krieken, ‘The Barbarism of Civilization: Cultural Genocide and the “Stolen Generations”’ (June 1999) 50(2) *British Journal of Sociology* 297, 299.

⁷¹² Ibid 305.

⁷¹³ Ibid.

'half-caste' and 'full-blood' Aborigines, and the removal of 'half-caste' Aboriginal children through the assumption of legal guardianship by the State.⁷¹⁴

THE JURISGENESIS OF ASSIMILATION

Recognising the discursive construction of 'assimilation' reveals the way in which it is possible to also regard it as a hermeneutic practice, one which can be *performed*, as an interpretative strategy, in relation to texts. Zygmunt Bauman argues that assimilation, as performed by the modern nation-state, represents the fight against ambivalence, that it is:

a declaration of war on semantic ambiguity, on over- or under-determination of qualities. A manifesto of the either/or dilemma: of the obligation to choose, and to choose unambiguously. More importantly still, it was a bid on the part of one section of society to exercise a monopolistic right to provide authoritative and binding meanings for all—and thus to classify sections of the state-administered body that 'did not fit' as foreign or not sufficiently native, out of tune and out of place, and thereby in need of radical reform.⁷¹⁵

This power to provide authoritative and binding meanings might otherwise be characterised as the normative operation of law, as Robert Cover has elaborated, a *nomos* 'held together by the force of interpretive commitments',⁷¹⁶ in which law and narrative are inseparable.⁷¹⁷ What was the narrative model that O'Loughlin drew upon when examining the meaning and significance of the policy documents tendered as evidence? In imposing the normative force of law on the contradictory and contested discourses of assimilation, what narrative—Cover's 'jurisgenesis'—is generated? If, as Bauman asserts, the logic of assimilation is ostensibly linguistic, that it is an ordering intended to eliminate ambiguity through 'making alike', its interpretative function is more readily apparent.

In *Cubillo*, the archival documents tendered as evidence of the existence of a policy of forcible removal spanned a period of over 50 years and reflect various trajectories and permutations of official policy concerning Aboriginal people. The performance of jurisgenesis requires an assemblage of divergent practices and a condensation of

⁷¹⁴ Ibid 305–8.

⁷¹⁵ Zygmunt Bauman, *Modernity and Ambivalence* (Polity Press, Cambridge, 1991) 105.

⁷¹⁶ Robert Cover, 'Nomos and Narrative' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (The University of Michigan Press, Ann Arbor, 1993) 98.

⁷¹⁷ Ibid 102.

meanings. Overshadowing this is the imperative to make meanings where evidence cannot be assembled, where the law perceives only absences and voids. The jurisgenesis produced by the decision in *Cubillo* assimilates the incoherent and heterogeneous manifestations of the various policies and practices designed to control Aboriginal people into a narrative of benevolence, as Bauman points out ‘part of the liberal political programme, of the tolerant and enlightened stance that exemplified all the most endearing traits of the “civilized state”’.⁷¹⁸

In relation to assimilation, O’Loughlin stated that ‘much has been heard about the “policy of assimilation” but neither the 1918 Ordinance nor the Welfare Ordinance refer to any such policy by name. The policy of the 1918 Ordinance when it was introduced was the care and well-being of Aboriginal and part Aboriginal people. The policy of the Welfare Ordinance was the care and well-being of wards.’⁷¹⁹ Nevertheless, O’Loughlin did not fail to point out the significance of assimilation to his decision, identifying its discursive and contested nature:

The subject of assimilation has loomed large in these proceedings. Assimilation was, in the 1940s, the 1950s and the 1960s, as it is now, a social and political issue. It is neither morally nor legally wrong of a person or of a Government to advocate or implement a policy that approves of or rejects the concept of assimilation. In so far as it may be possible to generalise, the most that can be said is that many interested and concerned people in former times favoured assimilation but, today, the pendulum has swung back strongly in favour of the retention of Aboriginal tradition and lore. The changing swings and moods of social thinking have had a great effect on the presentation of the cases for the applicants and in the Commonwealth’s defence.⁷²⁰

In this way, the significance of assimilation is addressed in the judgment in order to be excised from consideration. The definition of assimilation cited by O’Loughlin was formulated during the latter years of Paul Hasluck’s term as Minister for Territories and is often quoted in discussions of assimilation. It characterises the normative function of the policy:

The policy of assimilation means that all aborigines and part aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities,

⁷¹⁸ Bauman (1991) 107.

⁷¹⁹ *Cubillo* para 167.

⁷²⁰ *Cubillo* para 92.

observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.

As Rowse points out, ‘simply by repeating the word “same” Hasluck avoided specifying the cultural attributes which “assimilation” was to discourage or promote. ... Residual cultural difference, he feared, would challenge Australia’s unity. Keeping “culture” at bay, Hasluck presumed an emergent individualism with jural, but not cultural, predicates.’⁷²¹ The jural predicates, or legal declarations made through the discourse of assimilation, particularly that espoused by the politician Hasluck, are those represented by the policy documents presented as evidence in the trial in *Cubillo*. By inscribing these declarations with meaning which assimilates the two different regimes of racial segregation and control and care and protection with the same organising principle, the judgment serves to produce a historiography in which sameness and continuity are the overriding motifs.

It is important to point out that counsel for the applicants in *Cubillo* did not argue that they had been removed under the policy of assimilation, but under a more general policy of removal. Nor did they argue that *all* Aboriginal children of mixed descent were removed. However, as O’Loughlin pointed out, the policy of assimilation, particularly that documented during the period of Hasluck, ‘loomed large’, principally because O’Loughlin regarded the dates of removals of Lorna Cubillo, in 1947, and particularly Peter Gunner, in 1956, to be pursuant to a policy of assimilation.

Over 50 pages of the judgment is devoted to an examination of the policy documents tendered as evidence, principally by the applicants, to determine if a policy of forced removal and detention of children existed, and, if so, what was its underlying rationale. Having determined that the legislation was intended to be implemented in the ‘best interests of the child’, O’Loughlin established a burden of proof which required the applicants to demonstrate that *all* ‘part Aboriginal’ children were, or were intended to be, forcibly removed and that on no occasion was there consideration of any individual’s personal circumstances. Any reference in the documents to the circumstances of individual children was effectively read as consideration of their welfare, and therefore as disproof of the existence of a general policy of forcible removal and detention without consideration to individual circumstances. Any

⁷²¹ Tim Rowse, *White Flour, White Power: From Rations to Citizenship in Central Australia* (Cambridge University Press, 1998) 110.

expression of concern for parental approval was read as evidence of care, and determined to provide evidence that a unilateral policy of removal did not exist.

O'Loughlin relied on a form of logic as a means of proof whereby, in order for it to be demonstrated that X occurred, it must always have occurred, and never not occurred. This belies his 'careful reading' and professed attention to historical context. Patrick Wolfe argues that the essential feature of the assimilation policy was that 'part-aboriginal' came to mean 'non-aboriginal', which he describes as a 'descending opposition', consisting of '[a] rigorous identity criterion whereby anything that does not embody all and only all the features of a given category is not merely outside that category but is, rather positively categorized in opposition to it.'⁷²²

It is possible to see this logic operating in the decision in *Cubillo*. In outlining the logic of his jurisdiction, O'Loughlin clearly sought indisputable evidence of a policy of removal of part-Aboriginal children—a 'rigorous identity criterion' demonstrating an incontrovertible and unambiguous statement of purpose—a 'blanket policy'. He also argued that even if it were established that such a policy existed, it would then be necessary for the applicants to prove that they were removed subsequent to such a policy. Importantly, the existence of a 'blanket policy' could be relevant to determining that children were removed without consideration as to their welfare. However, he added an important proviso: the key to proving that any individual removal was conducted pursuant to this policy—namely, without consideration to the individual circumstances—would be the demonstration of the existence of a blanket policy, that is, 'demonstrating all the features of the given category'. In this way, any evidence of consideration as to individual circumstances was construed as evidence that a blanket policy did not exist. That is, he assimilated evidence of consideration of individual circumstances as evidence of the absence of a policy. O'Loughlin said that:

[t]he existence of a particular policy could be relevant evidence in determining whether a particular removal and detention was in the best interests of a child who had been removed and detained. Thus, for example, if it should be established that there was a blanket policy that all part Aboriginal children were to be removed and detained irrespective of their personal circumstances (and no such policy has been suggested) then the existence of such a policy would invite a prima facie finding that

⁷²² Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell, London, 1999) 34.

the removal of a child had been effected in circumstances where consideration had not been given to the personal interests of that child.⁷²³

Even when reference to a ‘blanket policy’ of removal is identified, O’Loughlin inscribed it with welfare intention and therefore erases the racist and violent basis of the policy. For example, the 1928 report to the Prime Minister by Mr J W Bleakley, appointed by the Commonwealth to conduct a special inquiry into Aboriginal matters in Central and North Australia, recommended that ‘[a] definite policy, framed upon understanding the peculiar position and characteristics of the half-castes, and aiming at what is likely to be best for their future happiness and usefulness, should be formulated.’⁷²⁴

All half castes of illegitimate birth, whether male or female, should be rescued from the camps, whether station or bush, and placed in institutions for care and training. Even where these children are acknowledged and being maintained by the putative fathers, their admission to an approved institution for education should be insisted upon.⁷²⁵

O’Loughlin acknowledged that ‘[t]he use by Mr Bleakley of the term “all half-castes of illegitimate birth” shows that he was advocating a general or a blanket policy with respect to that group’ but claimed that ‘it could not be said that his was an uncaring policy.’⁷²⁶ Maintaining that it was ‘plain’ that Bleakley ‘personally considered that each child who was a “half-caste of illegitimate birth” living in a camp would be better off by being placed in an institution’, he observed that it was ‘interesting to note that he was so confident of his personal views that he did not even take time to consider how the child and the child’s family might react to his proposal’ and concluded that by ‘[i]solating the words of significance from the quoted passage, it is not unreasonable to summarise his view as one where “rescue” brings “care” and “education” and with that comes “happiness” and “usefulness”.’⁷²⁷

Bleakley’s Report, ‘The Aboriginals and Half-Castes of Central Australia and Northern Australia’, which included proposed amendments to the Aboriginal Ordinances, was tendered in full by the applicants in the trial. The section cited by O’Loughlin appears under the sub-heading of ‘Half-Caste’. In the preceding paragraphs, Bleakley identified the ‘evils of miscegenation’ to be ‘[p]erhaps the most difficult problem of

⁷²³ *Cubillo* para 169.

⁷²⁴ Bleakley, cited in *Cubillo* para 179.

⁷²⁵ *Ibid.*

⁷²⁶ *Cubillo* para 180.

⁷²⁷ *Cubillo* para 179.

all—how to check the breeding of them and how best to deal with those now with us’. He attributed this to an absence of white women as a result of ‘climactic and other conditions’ and claimed that ‘efforts to check the abuse of these defenceless aboriginals and the breeding of half-castes will have little likelihood of success until conditions can be developed that will encourage white women to brave the hardships of the outback.’ Bleakley’s policy recommendation is summarised and includes:

(2) Collect all illegitimate half-castes, male and female, under sixteen years of age, not otherwise being satisfactorily educated, and place in Aboriginal Industrial Mission Homes for education and vocational training.

...

(5) Transfer those with preponderance of white blood to European institutions at early age, for absorption into the white population after vocational training.⁷²⁸

In a critical response to Bleakley’s report, Dr Cecil Cook, Chief Protector of Aboriginals in the Northern Territory, claimed that in the Northern Territory:

... the policy has been to endeavour to save the white element in the half-caste from further dilution and to encourage the half-caste to qualify for and accept the duties of citizenship. So far from regarding the quadroon as Mr Bleakley does as a menace even more deplorable, considerable care has been exercised in raising these delicate children, with a view to their future availability in the total breeding out of colour.⁷²⁹

Russell McGregor points out that while ‘Cook may not have fairly represented Bleakley’s views ... it was an accurate summary of his own administrative ambitions: to solve the half-caste problem by encouraging the marriage of mixed-blood women to white men, so that within a few generations all apparent traces of Aboriginal descent would be “bred out”’.⁷³⁰ He claims that Bleakley’s recommendation that ‘categories of part-Aboriginals should receive differential treatment according to their percentage of white blood in fact had been in operation in the Northern Territory for some years before 1928, although on an irregular and ad hoc basis’.⁷³¹

⁷²⁸ *The Aboriginals and Half-Castes of Central Australia and North Australia: Report by J W Bleakley, Chief Protector of Aboriginals, Queensland, 1928* (The Parliament of the Commonwealth of Australia, 1929) 179, contained in *Applicants’ Court Book: Policy*, Volume 1, p 165–207.

⁷²⁹ Cited in *Cubillo* para 181.

⁷³⁰ Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory 1880–1939* (Melbourne University Press, Carlton, 1997) 17.

⁷³¹ *Ibid.*

Despite such explicit and commonplace references to policies of removal and detention, O'Loughlin concluded that '[i]f Dr Cook was correct in stating the existence of such a policy, primary documents establishing its existence have not been produced'.⁷³² When discussing the implementation of the Bleakley's recommendations, O'Loughlin cited a Ministerial Press Release dated 14 July 1930 which stated that '[g]eneral approval has been given to Mr Bleakley's recommendations regarding the collection and education of half-castes', concluding that:

The presence of the words 'the collection and education of half-castes' could point to the implementation of, if not the continuance of, a practice of bringing in young part Aboriginal children—ostensibly because it was considered to be in the best interests of the children to do so.³⁹

In an examination of the trajectory of the 'doomed race' theory in Australian policies in relation to Aboriginal people during the period 1880–1939, Russell McGregor points out that 'many of the most eloquent proponents of the doomed race idea were men of strong humanitarian views, who were horrified by what they saw of the brutal treatment of Aborigines'.⁷³³ He claims that Bleakley was always concerned to bear in mind that 'part-Aboriginals' were 'human beings with a conflicting mixture of the civilised and the savage'.⁷³⁴

A letter to the Secretary of the Department of Territories in Canberra dated 21 November 1951⁷³⁵ was identified by O'Loughlin as one of the more important documents tendered during the trial. In the letter, Mr F J Wise, Administrator of the Northern Territory, stated that '[t]he transfer of a child to a more favourable environment calls sometimes for the exercise by a Patrol Officer of a high degree of patience, tact and understanding, and I am satisfied that the officers of the Native Affairs Branch carry out this delicate and difficult task humanely and with the knowledge that the move is essential in the child's interests'. Substantially drawing upon another letter, from Mr Frank Moy, Director of Native Affairs, which O'Loughlin identified as being indicative of the policy relevant to the time, the letter stated: 'We cannot expect the normal aboriginal mother to appreciate the reasons why her part aboriginal child should be taken from her ... and, to ensure that the least upset

⁷³² *Cubillo* para 182.

⁷³³ McGregor (1997) 151.

⁷³⁴ *Ibid.*

⁷³⁵ Applicants' Court Book: Policy, Volume 3, page 374, Document No 511. Also known as Exhibit A14.

is caused to the mother and child, methods have to be employed to suit the circumstances of each case which calls for tact, understanding and sympathy on the part of the officer'.⁷³⁶ The letter also went on to say:

Patrol Officers, under the Director of Native Affairs, are required from time to time to endeavour to remove certain part aboriginal children from their native environment on cattle stations and other places, and it is the duty of these officers to prepare the aboriginal mother for the eventual separation in the best interests of the child. The mother is therefore impressed with the advantages to be gained. The matter is also discussed with the tribal husband. If the officer is not successful on his first visit and the mother does not part with the child, other attempts are made later until such time as the child is willingly handed to the custody of a patrol officer. Under these circumstances there is no distress on either the part of the mother or child. Since this method has been employed there have been instances where mothers have given part aboriginal children into the care of Native Affairs Branch without persuasion.⁷³⁷

O'Loughlin interpreted 'that section of the letter as inviting the reader to infer that the children are only removed by gentle persuasion and with the informed consent of the mother'. He followed up by asking 'does such an interpretation accord with the truth of the matter? Were these the words of a senior public servant who had the best interests of the part Aboriginal children at heart or were they nothing more than pious hypocrisy?'⁷³⁸

It is the role of education in the discourse of assimilation which appears to offer O'Loughlin persuasive argument as to its well-intended and beneficial outcomes. This is not surprising, given the function of education in the construction of modern citizenship and its characterisation as self-evidently and indisputably 'good'. Anna Haebich points out that the 'socialising, moralising and normalising force' of education provided the rationale for the removal of children in the post-war period, which appear to have increased during that time.⁷³⁹ If, as McGregor asserts, 'citizenship' provides the rhetorical centre to the discourse of assimilation, it can be argued that 'education' functions as the rhetorical centre of child abduction. It is also what lends a progressivist tone to social assimilation policies, reinforced by liberalist notions of individual betterment, or 'uplift'.

⁷³⁶ Ibid.

⁷³⁷ Cited in *Cubillo* para 220.

⁷³⁸ *Cubillo* para 223.

⁷³⁹ Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Arts Centre Press, Fremantle, 2000) 421.

Sister Eileen Heath, founding superintendent of St Mary's Hostel and a strong advocate of assimilation, whose published writings were cited extensively during the trial, gave evidence that it was necessary to bring children of mixed descent into St Mary's in order to provide them with the 'opportunity of education and social training and adjustment, the necessary prelude to full citizenship'.⁷⁴⁰ Former patrol officer, Creed Lovegrove, was cited as describing the policy of assimilation as 'preparing Aborigines, especially young Aborigines, to be equipped to take full advantage of equality within the Australian nation' with a greater emphasis on education for 'part Aboriginal children, more so than for Aboriginal children'.⁷⁴¹ He said that, in his implementation of the new assimilation policy, he had to pursue the twin objectives of first, ensuring that children attended school and secondly, encouraging parents to make sure that the children went to school.⁷⁴² Citing the definition of assimilation adopted by the 1961 Native Welfare Conference, O'Loughlin highlighted one of the methods to advance the policy of assimilation resolved at the conference, namely '[p]rovision of education in normal schools and pre-schools to the extent possible otherwise in special schools and pre-schools for all aboriginal and part aboriginal children,' noting a comment made by Lovegrove in his evidence that the policy of self-determination introduced during the early 1970s involved 'a real swing back to Aboriginal culture at the cost of Aboriginal children's education'.⁷⁴³

CONCLUSION

O'Loughlin's examination of the policy documents results in the conclusion that 'the Commonwealth Government had, since about 1911, pursued a policy of removing some part Aboriginal children and placing them in institutions in Alice Springs and Darwin', however, that '[t]he material is not sufficient to sustain a finding that this policy applied to all part Aboriginal children', and that the 'probabilities are that the policy was intended for those illegitimate part Aboriginal children who were living in tribal conditions whose mother was a full blood Aborigine and whose father was a white man'.⁷⁴⁴ He maintained, however, that by 1947, when Lorna Cubillo and the other children were removed from Phillip Creek to the Retta Dixon Home, 'a perceptible change in attitude to the policy of removing part Aboriginal children from their families

⁷⁴⁰ *Cubillo* para 115.

⁷⁴¹ *Cubillo* para 278.

⁷⁴² *Ibid.*

⁷⁴³ *Cubillo* para 299.

⁷⁴⁴ *Cubillo* para 200.

had started to develop. The need to obtain the family's consent was beginning to be openly discussed' and that 'those changes commenced well before Peter Gunner left Utopia in 1956 for St Mary's'.⁷⁴⁵

The notion of 'consent' falls within the discourse of contractualism, implicitly conveying the assumption of legal enfranchisement and of rights. Given that 'full-blood' Aboriginal women had an ambiguous citizenship status at the time of Cubillo's and Gunner's removals, it begs speculation as to the grounds of which women might have been entitled *not* to consent to removal of their children. However, for O'Loughlin, the appearance of discussion in the documents of the need for parental consent provides evidence of humane intention. The emergence of humanitarianism functions to ameliorate the consequences of removal and serves to locate the practice within the meaning of 'care and protection' which he ascribes to the legislation. Evidence of the nature of the policy of child removal is drawn from attention to the 'common sense' meaning of words found in the documents, consistently read as truth effects and as providing the potential for transparent access to historical reality. O'Loughlin does not locate policies and practices of child removal within ideological or discursive domains and in this way fails to acknowledge that racist ideology is not a 'fixed system of ideas definable through its content'.⁷⁴⁶

Foucault argues that the problems besetting the methodology of historical analysis can be summed up as 'the questioning of the *document*'.⁷⁴⁷ While, since its inception, analysis of history has revolved around questions about documents, ultimately, 'all this critical concern, pointed to one and the same end: the reconstitution, on the basis of what the document say, and sometimes merely hint at, of the past from which they emanate and which has now disappeared for behind them; the document was always treated as the language of a voice since reduced to silence, its fragile, but possibly decipherable trace'.⁷⁴⁸ In the next chapter, I will go on to examine in detail the reception of a particular item of evidence, a 'Form of Consent', which exemplifies this process of reading documents as the reconstitution of past events, as the corpus of the past—the body of evidence.

⁷⁴⁵ Cubillo para 219.

⁷⁴⁶ Margaret Wetherell and Jonathan Potter, *Mapping the Language of Racism: Discourse and the Legitimation of Exploitation* (Harvester Wheatsheaf, New York, 1992) 58.

⁷⁴⁷ Michel Foucault (trans A M Sheridan Smith), *The Archaeology of Knowledge and The Discourse on Language* (Pantheon Books, New York, 1972) 6.

⁷⁴⁸ Ibid.

CHAPTER 7

INTENTION AND ITERABILITY: THE BODY AT THE SCENE OF WRITING⁷⁴⁹

*In order to function, that is, in order to be legible, a signature must have a repeatable, iterable, imitable form; it must be able to detach from the present and singular intention of its production.*⁷⁵⁰

*A person's fingerprint 'is not testimony about his body, but his body itself'.*⁷⁵¹

INTRODUCTION

The term 'evidence' in legal discourse, and particularly 'documentary evidence', refers to both the facts to be proven and the media of proof. According to John Henry Wigmore, evidence signifies a relation between the 'proposition to be proved' and the 'material evidence of the proposition'.⁷⁵² Wigmore identifies two modes of persuasion: 'the presentation of the *thing* itself', referred to as 'autoptic proference'⁷⁵³ and the 'presentation of some independent fact, by *inference* from which the persuasion is to be produced'.⁷⁵⁴ Terence Anderson and William Twining stress the necessity that all evidence presented at a trial be in a form which can be perceived by judges with their senses and must be either in the form of testimonial statements or physical objects.⁷⁵⁵

The epistemological relationship between sensory perception and the law of evidence is highlighted in recent theoretical discussions which point to the significance of vision and light to evidentiary techniques. Piyal Haldar argues that the laws of evidence conceptualise the foundations of knowledge through a process of representation which is essentially visual. He claims that evidence is the 'ordered play of vision, where the

⁷⁴⁹ An earlier and much shorter version of this chapter was published as 'Intention and Iterability in *Cubillo v Commonwealth*' in Helen Addison-Smith, An Nguyen and Denise Tallis (eds), *Backburning* (2005) 84 *Journal of Australian Studies* 35.

⁷⁵⁰ Jacques Derrida (trans with additional notes Alan Bass), 'Signature Event Context', *Margins of Philosophy* (The University of Chicago Press, Chicago, 1982) 328.

⁷⁵¹ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, Vol 4 (Little Brown, Boston, 2nd ed, 1923) 874.

⁷⁵² John Henry Wigmore, *The Science of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials* (1937), reproduced in Terence Anderson and William Twining, *Analysis of Evidence: How to do Things with Facts* (Weidenfeld and Nicolson, London, 1991) 54.

⁷⁵³ The term 'autoptic' comes from the Greek *autopsia*, meaning 'seeing with one's own eyes'.

⁷⁵⁴ Wigmore (1937), reproduced in Anderson and Twining (1991) 56.

⁷⁵⁵ Anderson and Twining (1991) 61.

court best experiences a representation through the perceptual capacity of sight'.⁷⁵⁶ While the visible presence of a witness giving oral testimony in a courtroom, under oath and subject to cross-examination is the primary and preferred model of evidence, as Haldar points out, documentary evidence conforms to the requirement of visibility. Both 'the witness and the document are subject to the laws of vision: both are "seen-to-be-believed" and both find expression in visual imagery'.⁷⁵⁷ Indeed, the physical materiality and tangibility of documentary and real evidence attributes to such forms the status of 'fact', making it appear more authoritative than the 'indeterminacy' of testimonial evidence.

In *Cubillo*, O'Loughlin repeatedly highlighted the overriding difficulties the case presented due to the 'incompleteness' of the history and the lack of documentary evidence. In relation to the removal of Lorna Cubillo and the other children from Phillip Creek, he stated that 'curiously, neither the applicants nor the respondent could produce a single document in respect of that removal',⁷⁵⁸ that 'people are dead and documents, if they ever existed, have been lost'.⁷⁵⁹ He concluded, however, that '[t]he position concerning Mr Gunner is quite different. In his case, there were several pieces of documentary evidence concerning his leaving Utopia and going to St Mary's'.⁷⁶⁰

In particular, O'Loughlin identified a 'form of consent by a parent',⁷⁶¹ tendered by the applicants on the second day of hearing, but ultimately relied upon by the respondent in its defence. It is a form of consent with the purported thumbprint of Gunner's mother, Topsy Kundrilba.⁷⁶² O'Loughlin regarded this form as indicating that Kundrilba had requested that her son be removed to St Mary's Hostel and the presence of a thumbprint or fingerprint on the form was read as an indication of her intention. The exhibit was crucial to O'Loughlin's decision in relation to Gunner's claim. It functioned to suggest that Gunner's mother consented to his removal to St Mary's Hostel. While the trial judge determined that it was not possible to make findings of fact about the circumstances of the removal of Gunner from Utopia Station to St Mary's Hostel, and

⁷⁵⁶ Piyel Haldar, 'The Evidencer's Eye: Representations of Truth in the Laws of Evidence' (1991) II(2) *Law and Critique* 171, 172.

⁷⁵⁷ Ibid 186.

⁷⁵⁸ *Cubillo* para 56.

⁷⁵⁹ Summary of reasons for Judgment, para 10.

⁷⁶⁰ *Cubillo* para 1246.

⁷⁶¹ Exhibit A21 (Interlocutory)/A73, 'Form of Consent by a Parent'.

⁷⁶² Counsel for the respondent maintained that Gunner's mother was known by a number of names, including Purula and Ngala, in addition to Kundrilba (spelt variously in the documents): Transcript, opening address, 3 March 1998, p 409.

he accepted Gunner's claim that he was forcibly removed against his wishes, O'Loughlin nevertheless found the form of consent a sufficiently persuasive exhibit that it formed the grounding for the court's rejection of the claim.

The text of the form reads as follows:

I, TOPSY KUNDRILBA being a full-blood Aboriginal (female) within the meaning of the Aboriginals Ordinance 1918-1953 of the Northern Territory, and residing at UTOPIA STATION do hereby request the DIRECTOR OF NATIVE AFFAIRS to declare my son PETER GUNNER aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said Aboriginals Ordinance. My reasons for requesting this action by the Director of Native Affairs are:
My son is of Part-European blood, his father being a European.
I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
I am unable myself to provide the means by which my son may derive the benefits of a standard European education.
By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made available to him by admission to St. Mary's Church of England Hostel at Alice Springs.

The form is undated and unwitnessed. It includes the statement 'signed of my own free will this _ day of 1956 in the presence of _ ', but the gaps have not been filled in. There is a thumbprint or fingerprint with the typed words 'her' and 'mark' on either side, and 'TOPSY' and 'KUNDRILBA' above and below.⁷⁶³

In *Cubillo*, the form of consent functioned as documentary evidence that Topsy Kundrilba had given her informed consent to the removal of her son. However, a hermeneutic analysis gives rise to some obvious questions with which we may interrogate this aspect of the judgment. How, for example, do we know that she did consent? How indeed can we know that the thumbprint is in fact Topsy's? How do we know what she was intending by putting her thumbprint to the form? Do we know if she understood what this action would result in? Did she know that she would not see her son again until he returned as an adult? Was there coercion? O'Loughlin himself acknowledged that many of these questions could not be answered. He stated that there was no way of knowing how the contents of the document were explained to Topsy or whether they were explained at all; in which case, he asserts that the document would probably be a nullity. On the 'balance of probabilities' however, O'Loughlin found that

⁷⁶³ A reproduction of the exhibit appears as Appendix 2.

the 'line of documents' favoured a positive conclusion that Topsy gave her informed consent to her son going to St Mary's. He said:

In coming to that conclusion, I am aware that there was no way of knowing whether the thumb mark on the 'Form of Consent' was Topsy's; even on the assumption that it was, there was no way of knowing whether Topsy understood the contents of the document. But it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as Topsy the meaning and effect of the document. I have no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document.⁷⁶⁴

O'Loughlin is here identifying the fundamental question which hermeneutics attempts to address—how do we understand the past, in the present. The initial questions provoked by the judge's reading of the exhibit can be traced to Hans-Georg Gadamer's significant contribution to hermeneutics and his theorisation of the 'historicality of understanding',⁷⁶⁵ particularly his concept of temporal distance and the challenge presented to communication by our historical situatedness, or 'horizon of understanding'. There is in this case a multiplying of hermeneutic contexts which exemplify the challenge to understanding of the relationship between text and interpretation. In the imagined first instance, there is the context of the unidentified patrol officer and Topsy Kundrilba—a socio-linguistic situation of incommensurable alterity. Subsequently, there is the possibility of circulation of the document to other readers, such as the Director of Native Affairs, and its unknown location up until its storage in the Australian Archives. There is the sourcing of the document as an exhibit and its contested significance within the trial, and the hermeneutic context of its reception by the Federal Court. Of course, there is also now the hermeneutic context here of my, and your, interpretation of the document, and that of any other current or future analysis.

For Gadamer, 'understanding is always an interpretation, and hence interpretation is the explicit form of understanding'.⁷⁶⁶ All interpretation is in the form of a dialogue, between speaker and listener, past and present, where an interpreter of a text '*applies* the text to her historical condition ... *to present before her* that piece of history (the text), or the

⁷⁶⁴ *Cubillo* para 788.

⁷⁶⁵ Demetrius Teigas, *Knowledge and Hermeneutic Understanding: A Study of the Habermas–Gadamer Debate* (Associated University Presses, London, 1995) 40.

⁷⁶⁶ Hans-Georg Gadamer (trans Garrett Barden and W Glen-Doepel), *Truth and Method* (Sheed and Ward, London, 1975).274.

partner in discussion (the text), and to allow its corresponding horizon to join with her own, by fusing the two horizons.⁷⁶⁷ As has been pointed out, Gadamer's theorisation of the 'application' of the text is not unlike that of the application of the law, where a judge 'applies the law to the present—by “translating” or “reading” it into the present circumstances’.⁷⁶⁸ However, as the interpretation of the form of consent in *Cubillo* demonstrates, this is not always the manner of judicial application.

Gadamer's claim that all understanding is linguistic provided a groundbreaking critique of the dominance of positivist theories of knowledge and his work has been central to the 'linguistic turn' in critical theory, including semiotics and deconstruction. These theoretical frameworks all reject the possibility of transcendental meaning, arguing for the linguisticity of understanding and offer interpretative methodologies with which to analyse discursive and textual production. In this chapter, I will draw on hermeneutics, semiotics, speech act theory and deconstruction in order to raise a series of questions in relation to the exhibit and its reception by the court and the significance of this evidence to the decision. First providing an account of the evidentiary status of the form of consent and its attendant thumbprint, I will offer a hermeneutic interpretation of the exhibit which highlights the historical conditions in which it was produced and which I argue must be taken into account in any interpretation. It is the semiotic function of the thumbprint as a signature, however, which appears to have caught the imagination of the trial judge, sealing the fate of the exhibit, and to which I will then turn. Drawing on the semiotic theory of Charles Sanders Peirce, I analyse the connotative and denotative function of the thumbprint as an iconic symbol. In order to recognise it as signature, however, O'Loughlin necessarily regarded the thumbprint as a performative speech act which communicates intention.

While hermeneutics may be characterised as a search for meaning in the possibility of an “event” of mutual understanding,⁷⁶⁹ deconstruction focuses on the ‘irreducible equivocation and undecidability of meaning’.⁷⁷⁰ It is concerned with the ‘independence of textual meaning from authorial intention’⁷⁷¹ and the necessary possibility of the separation of any given sign from its context which therefore opens it up to new

⁷⁶⁷ Teigas (1995) 51 (emphasis in original).

⁷⁶⁸ Ibid 50.

⁷⁶⁹ Diane P Michelfelder and Richard E Palmer (eds), *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (State University of New York Press, Albany, 1989) 1.

⁷⁷⁰ Ibid 2.

⁷⁷¹ Ibid 7.

meaning. Drawing on the critique of speech acts theory provided by Jacques Derrida, I will conclude by investigating the significance of the concepts of iterability to the interpretation of the document, arguing for the importance of an ethical reading of texts and contexts.

DOCUMENTARY AND REAL EVIDENCE

O'Loughlin determined that the form of consent was documentary evidence. In law, a document consists of two elements: the material substance and the marks upon it. Julius Stone provides a definition of the nature of a document: that it may consist of any substance, 'permanent in nature, bearing upon it symbolic marks intended to transmit thoughts from one person to another through the medium of the senses.'⁷⁷² It differs, he claims, from speech in its durability and from things in the fact that it is a symbol for meaning.⁷⁷³ Under the *Evidence Act 1995* (Cth), a document is defined to mean 'any record of information', including '(a) anything on which there is writing; or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them'.⁷⁷⁴

The exhibit had been sourced in the Australian Archives. While undated, unwitnessed and bearing no official seal or insignia, the form of consent was regarded as a public document, making further evidence as to its authenticity unnecessary.⁷⁷⁵ Documentary evidence is said to refer to evidence the significance of which is attributed to its content, as opposed to some aspect of the document itself as a physical object.⁷⁷⁶ To function as evidence in a trial, the relevance and admissibility of the contents of a document to the disputed issues at trial must be established, in addition to which, the contents of the document must be proved. Jeremy Gans and Andrew Palmer point to the two aspects of this latter requirement: that the contents of a document be proved by secondary

⁷⁷² Julius Stone (rev W A N Wells), *Evidence: Its History and Policies* (Butterworths, Sydney, 1991) 468.

⁷⁷³ Jeremy Gans and Andrew Palmer echo Stone's analysis, claiming that at common law, a document 'is essentially an object upon which is visibly inscribed intelligible writing or figures. The medium upon which the writing or figures are inscribed is unimportant ... What matters is that the inscription must be visible to the human eye': *Australian Principles of Evidence* (Cavendish Publishing, London, 2nd ed, 2004) 72.

⁷⁷⁴ *Evidence Act 1995* (Cth), Dictionary.

⁷⁷⁵ *Evidence Act 1995* (Cth) s 156.

⁷⁷⁶ As Gans and Palmer point out, the definition of a document under the legislation needs to be taken into account alongside the provision that it is the contents of the document which are sought to provide evidence: (2004) 73.

evidence, that is, evidence other than the original document itself; and that the document be authenticated, that is, proof that it is what it purports or is claimed to be.⁷⁷⁷

However, where the significance of the document lies in its objective status—where its pure existence has potentially determinative consequences, such as when a contract or a will is presented as evidence—it is classified as real evidence. Such distinctions prompt the question as to whether the form of consent is real or documentary evidence. Did O’Loughlin attribute significance to the form of consent as simply one in the ‘line of documents’, the paper trail he found had been compiled in the Native Affairs Branch? Was it the content of the document—an apparently proforma document—which had such bearing on his decision to reject the claim? Or was it, as O’Loughlin himself acknowledges, the presence of a mark, a thumbprint or fingerprint, read as a signature, and interpreted by O’Loughlin, on the balance of probabilities, to favour ‘a positive conclusion that Topsy gave her informed consent to her son going to St Mary’s.’⁷⁷⁸ In considering the form of consent, O’Loughlin specifically highlighted the significance he attributed, ‘[m]ost importantly’ to Gunner’s ‘mother’s thumbprint on a form of request’, as evidence in support of his conclusion that ‘Peter went to St Mary’s at his mother’s request’, concluding that ‘the evidence did not justify a finding that the Director of Native Affairs removed Mr Gunner from his family against the wishes of his mother’.⁷⁷⁹ While the judge did not clarify his perception of the evidence as specifically documentary or real, it would appear that it was the potential status of the thumbprint as a signature—as the sign of authority—which proved to be most persuasive.

PROOF OF SIGNATURE

The problem of identifying the writer of a particular document, commonly referred to as ‘proof of signature’, is central to most cases involving use of documents. According to Wigmore, ‘most documents bear a signature, or otherwise purport on their face to be of a certain person’s authorship. Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. ... A document purports in itself to indicate its authorship.’⁷⁸⁰ He points out that the general principle concerning writing is that there must be some evidence of the genuineness of writing attributed to a particular author, that it ‘cannot go to the jury as

⁷⁷⁷ Gans and Palmer (2004) 71.

⁷⁷⁸ *Cubillo* para 787.

⁷⁷⁹ *Cubillo*, Summary of Reasons for Decision, para 11.

⁷⁸⁰ John Henry Wigmore (rev James H Chadbourn), *Evidence in Trials at Common Law* (10 vols) (Little, Brown and Company, Boston, 1970) §2130.

possibly genuine, merely on the strength of this purport.⁷⁸¹ More contemporaneously, Stone states that '[t]he problem of identification is legally the same whether a document is signed by a name, by a mark or completely unsigned.'⁷⁸² He points out that legal transactions generally involve an attesting witness to a signature, who, particularly in the past, may have been called to give oral testimony as to the authenticity of the handwriting.

The role of an attesting witness is crucial to the law pertaining to documentary evidence, where the witness' own signature serves as a statement that the document was known to have been 'executed by the purporting maker'.⁷⁸³ Wigmore highlights the necessity for the 'double testimonial knowledge' of the witness' familiarity with both the individual's style of handwriting and the observation of the writing in question. He points, however, to a series of conditions of attestation, including that the witness actually *sign*, or else the attestation becomes a nullity and the document may be excluded as invalid.⁷⁸⁴ The use of marks such as thumbprints or crosses on documents in contexts where the signer is illiterate would generally necessitate the signature of a literate witness authorising the mark of the signer.⁷⁸⁵

While the question of the genuineness of the mark of an illiterate person has been raised on rare occasions, Wigmore claims that there 'should be no hard and fast rule', that it should be left to the discretion of the trial judge. He cites a number of contradictory decisions at common law, generally depending on whether the mark had any particular identifiable features.⁷⁸⁶ Wigmore does not address the situation where the authenticity of a mark is not supported by that of an attesting witness. Indeed, in his ten-volume account of evidence in trials at common law, he does not appear to conceive of a

⁷⁸¹ Ibid.

⁷⁸² Stone (1991) 498.

⁷⁸³ Wigmore (1970) §1292. While it is in the area of wills and estates that proof of signature is a legal requirement, it is not uncommon for documents pertaining to other matters, such as financial transactions, immigration and consent in relation to medical procedures, to require a witness' attestation.

⁷⁸⁴ Wigmore (1970) §1292.

⁷⁸⁵ For example, the *Commonwealth Electoral Act 1918* (Cth) provides for voters who are unable to sign their names in writing to make marks as their signatures on electoral papers, but the mark must be made in the presence of a witness who signs the paper: s 336(2). It is my understanding that this occurs when elections are held in Australia, particularly on remote Aboriginal communities where some people are illiterate. Since the 1980s, mobile polling booths have been used in remote areas of Northern Territory and Western Australia in state and federal elections. Coincidentally, this was the case when I traveled to Utopia community to interview Peter Gunner, on 28 September 2004 in the lead up to the federal election. Gunner made a point of telling me that he refused to vote in the election until the federal government apologised to members of the Stolen Generations and asked me to use whatever connections I might have with the media to make his position publically known. I did notify the station manager of ABC Local Radio in the Northern Territory of Gunner's political stance.

⁷⁸⁶ Wigmore (1970) Vol 3, §693.

situation, as was the case in *Cubillo*, where a signature can neither be proved through the supporting testimony of the attesting witness nor of the maker, or, in the case of a fingerprint functioning as a signature, where it cannot be authenticated.⁷⁸⁷

According to contemporary civil procedure, there are special rules for affidavits where the deponent is illiterate, blind, unable to understand English or where the document has been sworn in a foreign language outside the jurisdiction. Where a deponent is unable to understand the affidavit when read in English, the affirmation of an interpreter is required.⁷⁸⁸ In *Cubillo*, however, the form of consent does not exhibit the signature of an interpreter or witness; nor, indeed, does it include a date. Such deficiencies alone could well invalidate the document's efficacy in the legal environment of contract law, yet these omissions were not referred to by O'Loughlin in his judgment and did not prevent him from concluding, on the basis of the exhibit, that Topsy Kundrilba gave her consent to the removal of her son.

According to Stone, the burden on a litigant relying upon an 'ancient document'⁷⁸⁹ is particularly great because what witnesses there might have been are usually dead. The trial in *Cubillo* suffered from the absence of many key witnesses, as a result of death or infirmity. In particular, the key witness for Gunner, his mother, had died. During the course of the trial some of the witnesses were asked questions about the form of consent. When presented with the exhibit, Sister Eileen Heath, founding superintendent of St Mary's and at the time of Gunner's admission, claimed never to have seen such a form before.⁷⁹⁰ Harry Kitching, patrol officer in the area covering Utopia Station at the time and considered by O'Loughlin probably to be responsible for Gunner's removal, said he recognised the form, but could not recall anything about Peter Gunner's situation at Utopia, nor the reasons for his recommendation that he be admitted to St Mary's. In his affidavit, he said 'I had no recollection of being present when Topsy

⁷⁸⁷ Wigmore does cite a case where fingerprints functioned as a signature: *Romaniw's Will*, 163 Misc. 481, 296 N.Y. 925 (1937), 'an alien illiterate's will, in type and print, was offered, with no name spelled out as signature, but instead "left hand" with four fingerprints', which, he points out, was 'duly testified to, but also a fingerprint expert comparing the will prints with those of the party taken immediately after decease and testified that they were identical': §414, p 485, n 2. His omission of other cases comparable to *Cubillo*, where fingerprints may have functioned as signatures, such as those involving Native Americans, is surprising.

⁷⁸⁸ Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (Butterworths, Sydney, 1998) [13.6.1–13.6.3].

⁷⁸⁹ According to Stone, the qualification for an 'ancient document' was fixed under the *Evidence Act 1938* (UK) at 20 years.

⁷⁹⁰ Transcript, cross-examination of Eileen Heath, 4 August 1998, p 67.

marked the form. I note that it was not signed or dated.⁷⁹¹ Yet documentary evidence that referred to Gunner, recorded by Kitching, was presented in the trial.⁷⁹² Thomas Creed Lovegrove claimed never to have seen such a form during his time as a patrol officer in the Northern Territory and stated that he didn't remember how children came to be in the care of the Welfare Branch. He also acknowledged that explaining the full meaning of the document would be 'a difficult job'.⁷⁹³ Another former patrol officer, Colin McLeod, stated that he didn't recollect ever having seen such a form before, even though there is documentary evidence that he recommended the removal of at least three children from the Wave Hill Station in 1957. He said that he had no recollection of whether he told the mother of those children who would be caring for them.⁷⁹⁴ In the context of a trial brought for damages, these absences, memory loss and confusion are regarded as 'prejudice' to the respondent.

CONSENT AND CITIZENSHIP

Evidence of such indeterminacy prompts questions relating to the function of the exhibit and how its significance is to be read. The form of consent was a proforma document, based on the legislative regime in force at the time; the names of the individuals whose lives were to be affected were inserted into the legal framework. The form functioned to authorise Gunner as an 'Aboriginal' under the Ordinance. Until 1953, the Aboriginals Ordinance gave power to the Director of Aboriginal Affairs as the guardian of all 'half-caste' children, notwithstanding the existence of a parent. After this date, it was necessary that the Director declare an individual to be an 'Aboriginal' for the purposes of the Ordinance. As one witness at the trial put it 'part-Aboriginal' people were considered 'citizens', not Aborigines.⁷⁹⁵

Paradoxically, within the legislative framework in operation at the time, Topsy Kundrilba, an Aboriginal—a status approximating that of a 'non-citizen'—was able to authorise the removal of her son, a 'part-Aboriginal', and therefore a 'citizen', from her own parental custody. Such categorisation recalls the notion of active and passive

⁷⁹¹ Kitching's affidavit, paras 82–4, cited in transcript, 7 August 1998, p 95.

⁷⁹² Exhibit A15, Memo from Evans to Acting Director, dated 4 November 1954, includes copies of an inspection report of Utopia conducted by Kitching in June 1954; Exhibit HSK4 contains extracts from Kitching's diary reports of visits to Utopia between January–June 1955, in which he notes that when he arrived at the camp on 4 April 1955, the 'children fled into scrub'; Exhibit A17, Undated Memorandum from Mr McCoy to the Director of Welfare, (September 1955), written by Kitching, included the suggestion that he had met with Kundrilba and Gunner and that he was willing to attend St Marys.

⁷⁹³ Transcript, cross-examination of Thomas Creed Lovegrove, 11 September 1999, p 5556.

⁷⁹⁴ Transcript, cross-examination of Colin McLeod, 16 November 1999, p 5868.

⁷⁹⁵ Transcript, cross-examination of Harry Kitching, 6 August 1998, p 35.

citizenship developed by Immanuel Kant, who identified active citizens as those with lawful freedom, civil equality and civil independence.⁷⁹⁶ Passive citizens, on the other hand, included apprentices, domestic servants, minors and all women—those lacking in ‘civil personality’ because of their reliance upon others for their ‘preservation’.⁷⁹⁷ Kant, however, acknowledged the apparent contradiction in the notion of a passive citizen. Margaret Thornton elaborates the significance of Kant’s dichotomous schema to contemporary judicial constructions, pointing out that Kant fails to take account of Indigenous peoples, who, she argues, have been regarded more as ‘sub-citizens’. Illustrating the way in which otherness was constructed in the colonial judicial context through techniques such as the selective admissibility of evidence of Aboriginal people, she argues that this is a form of judicial activism which ‘helps reify the subordination of Aboriginal people’.⁷⁹⁸

Anglo-Australian courts have effectively policed the boundaries of citizenship throughout the 200-year history of white settlement, including determining who is or is not an Aboriginal person. Rather than a neutral hermeneutic site, therefore, adjudication has played an active role in the construction of the conjunction of Aboriginality and subjection.⁷⁹⁹

The form of consent presented as evidence in the trial was part of the legal armoury and state bureaucracy of the colonialist regime in force at the time under which Indigenous peoples were subjugated. Its purpose was not only to document alleged maternal consent to the removal of a child, but also to declare Gunner an ‘Aboriginal’ under the Act. The legislation functioned as a type of surveillance because such a declaration served to transfer responsibility for the child from the mother to the state. O’Loughlin’s reading of the thumbprint on the form as indicating Kunderlba’s consent to the removal of her son reinscribes her status according to law as an illiterate Indigenous woman. While she was not accorded the rights of citizenship, the colonial administrative regime apparently made provision for a sufficient level of agency such that she was accorded the sovereign power to consent to the removal of her son. The bureaucratic convenience of this ambiguous sovereign status is subtly reinscribed in the judgment some 50 years later where the form of ‘consent’ is repeatedly referred to as a form of

⁷⁹⁶ Immanuel Kant (trans and ed Mary Gregor), *The Metaphysics of Morals* (Cambridge University Press, 1996) §46, 92.

⁷⁹⁷ Ibid.

⁷⁹⁸ Margaret Thornton, ‘Citizenship, Race and Adjudication’ in Tom Campbell and Jeffrey Goldworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate Dartmouth, Aldershot, 2000) 342.

⁷⁹⁹ Ibid.

‘request’,⁸⁰⁰ suggesting a level of instrumental agency on the part of Kundrilba which exceeds that of simple acquiescence.

There is of course another way in which the notion of consent is eclipsed in the reading of the form, for there is also the question of consent to sexual relations, specifically the dynamics of liaisons between Aboriginal women and white men in colonial contexts. In her analysis of the function of consent in the decision in *Cubillo*, Hannah Robert draws on feminist critiques of the function of consent in rape trials to argue that O’Loughlin similarly deploys the notion of parental consent—invoking a ‘legitimate’ legal ground for removal of children—which reflects that of a criminal rape trial. She argues that:

Consent is problematic in both rape and stolen generation trials due to the way in which law reads male/female or State/Aboriginal person as subject/object in their interactions, so that the legal right of the object is read down as only a qualified veto—to permit or not—rather than a right to their own subjectivity in actively deciding and participating in interactions with State/male.⁸⁰¹

As Ann McGrath has documented, sexual relations between Aboriginal women and white men in the Northern Territory in the first half of the 20th century were common, particularly on stations where Aboriginal women often worked, despite the fact that for much of this time it was illegal.⁸⁰² In an environment where there was a markedly disproportionate number of white men to white women, and a substantially larger population of Aboriginal people to white, one of the ‘side benefits’ for white men of working on a station was access to Aboriginal women who were regarded as ‘available’ for prostitution.⁸⁰³ While McGrath claims there were a range of different types of relationships—sometimes involving forced sexual relations in ‘exchange’ for small items, sometimes rape, other times longer-term ‘loan’ arrangements—she argues that these sexual relations may be characterised by a level of strategic opportunism on the woman’s part because of the possibilities they provided for a level of economic security

⁸⁰⁰ *Cubillo*, Summary of Reasons for Judgment, para 11, and judgment, para 1246.

⁸⁰¹ Hannah Robert, “‘Unwanted Advances’: Applying Critiques of Consent in Rape to *Cubillo v Commonwealth*” (2002) 16 *The Australian Feminist Law Journal* 1, 16.

⁸⁰² Under the *Aboriginals Ordinance 1918*, it was an offence for a white man or Asian to ‘habitually consort’ with an Aboriginal woman or ‘half-caste’, or ‘to keep’ one as a ‘mistress’: s 53(1). In 1933, a further provision made it an offence to procure a woman for ‘carnal knowledge’ and for a female Aborigine or part-Aborigine to ‘solicit prostitution’.

⁸⁰³ Ann McGrath, “‘Black Velvet’: Aboriginal Women and their Relations with White Men in the Northern Territory 1910–40’ in Kay Daniels (ed), *So Much Hard Work: Women and Prostitution in Australian History* (Fontana, Sydney, 1984) 256. McGrath remarks that in an interview she conducted with Xavier Herbert, he said that Aboriginal women *had* to be on stations, otherwise white men would refuse to work there.

and protection.⁸⁰⁴ However, Larissa Behrendt highlights the complexity of the notion of consent in colonial contexts, arguing that:

the ability to exercise consent and agency within the colonial context should not obscure the constraints imposed by colonial structures (and their legacies) on the lives of Aboriginal women. The extent to which consent to labour and sexual relations is given needs to be considered against the backdrop of power relations within the colonial hierarchy. Free and open consent is absent within the colonial context; ‘consent’ was given within constraints and the legacies of colonial sexual exploitation.⁸⁰⁵

Similarly, in an analysis of the form of consent in the *Cubillo* trial, any consideration of the possibility of Kundrilba’s volition in permitting her son to be taken to St Mary’s must be framed in the context of colonial power relations in which it was not actually possible for her to exercise legal authority because she was not accorded the rights of citizenship. The form of consent did not function to enfranchise Kundrilba. It was produced as part of the colonial administration’s bureaucratic paper trail that was available to counter political concerns which were at this stage increasingly being expressed to the federal government by citizens and humanitarian organisations.⁸⁰⁶

COLONIAL FINGERPRINTS

There is a vast literature on fingerprinting in criminal law and more recently on thumbprints and fingerprints as forms of identification technologies in a digital, including forensic, environment. However, the prevalence and significance of thumbprints or fingerprints functioning as signatures of illiterate people in colonial contexts has received scant attention. Research I have conducted at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the National Archives of Australia indicates that the performance of thumbprints by Indigenous people on official documents and forms occurred in a variety of bureaucratic and legal

⁸⁰⁴ Ibid 236, 261.

⁸⁰⁵ Larissa Behrendt, ‘Consent in a (Neo)Colonial Society: Aboriginal Women as Sexual and Legal “Other”’, (2000) 15 (33) *Australian Feminist Studies* 353, 365. Behrendt focuses on an critique of the representation of sexual violence towards Aboriginal women in Thomas Keneally’s *The Chant of Jimmy Blacksmith* (Penguin Books, Ringwood, Vic, 1972). The other key literary text in which inter-racial sexual relations on the ‘frontier’ in the Northern Territory is represented is Xavier Herbert’s *Capricornia* (A&R Classics, HarperCollins Publishers, Sydney, 1996(1938)).

⁸⁰⁶ For example, in her historical report, McGrath cites published accounts by Aboriginal activists, such as Pearl Gibbs and Margaret Tucker, the public profiles of activist white women and men, such as Olive Pink, Mary Bennett, Phyllis and Charles Duguid, and Jessie Street, who campaigned for the rights of Aboriginal women, and organisations such as the League for the Protection and Advancement of Aboriginal and Half-caste Women which lobbied politicians, as indicators of prevailing attitudes during the post World War II period against government policy for the removal of Aboriginal children: Lorna Cubillo and Peter Gunner v The Commonwealth of Australia, Historical Report by Dr Ann McGrath, August 1999.

contexts, at least up until the 1940s. Significantly, it is in family histories, sometimes tracing the lost trajectories of members of the Stolen Generations that such records appear, including identity cards, specifying that Aboriginal people were under 'protection' legislation;⁸⁰⁷ 'exemption tickets' excluding individuals from legislative provisions;⁸⁰⁸ birth certificates;⁸⁰⁹ and police statements.⁸¹⁰ A simple catalogue search of the holdings of AIATSIS also reveals a significant number of biological and genetic research studies focussing on the dermatoglyphics of Indigenous peoples, particularly during the 1950s–70s, reflecting the ongoing prevalence of eugenicist frameworks for understanding racial typology.

There appears not to be a clear understanding of when and where the use of fingerprinting as a means of authenticating individual identity first emerged.⁸¹¹ Tracing the history of the use of fingerprinting for criminal identification, Simon Cole points out that the British system of fingerprint identification first emerged in the colonies, specifically India, as a bureaucratic technology and as a way for a small number of British civil servants to administer and police a large local population.⁸¹² Cole traces the emergence of identification technologies of dactyloscopy (fingerprinting) and anthropometry (measuring the size and proportions of the human body) during the late nineteenth century not only for criminal suspects but also for other people considered 'suspect' or alien, including Indigenous peoples in Europe's colonies, recent immigrants,

⁸⁰⁷ For example, Cissy Ross-Kelly, *My Family History* (c2000) includes reproductions of a number of identity cards which include right and left thumbprints of members of the author's family, only one of which has a date of imprint, from Cooktown, Queensland.

⁸⁰⁸ For example, Agnes Burchill with Linda Camilleri, *Nayn Kuku Balkan, My Story* includes a copy of a dated 'exemption ticket' for the author's grandfather with his 'print' and the signature of a member of the police at the Mossman Police Station, Queensland in 1941.

⁸⁰⁹ For example, Peter Gunner's birth certificate, dated some ten years after his alleged date of birth, bears a thumbprint described as that of his mother, Topsy Kundrilba (Exhibit R93, Peter Gunner's Birth Certificate, giving his date of birth as 19 September 1948) and a witness for Gunner, George Kenmore, also an inmate at St Mary's, said that his birth certificate had both a cross and a thumbprint: Transcript, examination of George Kenmore, 21 September 1999, p 2969. Ross-Kelly's book also includes a copy of a birth certificate for the author's sister with her mother's 'mark', which is witnessed and dated.

⁸¹⁰ For example, Pamela Hart with Loretta Spratt, *Our Story* includes a statement with details of police brutality on Palm Island, apparently provided for an investigation by the Chief Protector's Office in 1933 with a witnessed thumbprint.

⁸¹¹ According to Simon Cole, fingerprints have been found in China dating back to the 7th century, embossed in clay seals used to sign documents, perhaps as old as the Former Han Dynasty (202 BCE–220 CE) and the practice is said to have spread to Japan, Tibet and India where fingerprints were used as signatures or seals. There is a report by the Persian historian, Rashid-eddin, in 1303 of the use of fingerprints as signatures in China: Zhao Xian-Xin and Liu Chun-Ge, 'The Historical Application of Hand Prints in Chinese Litigation' (Jan 1989) 14: 55 *Fingerprint World* 84; Bernard Laufer, *History of the Finger-Print System* (Washington, Government Printing Office, 1913); Bernard Laufer, 'Concerning the History of Finger-Prints' (1917) 45 *Science* 504–5: cited in Simon Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Harvard University Press, Cambridge, Mass., 2001) 60–1.

⁸¹² Cole (2001) 63.

the poor, vagrants and prostitutes.⁸¹³ As he elaborates, such technologies of the body emerged concurrently with the increasing popularity of Darwinian theories of evolution, particularly as developed by Francis Galton, most famous for his work on hereditary science which developed into the popular field of eugenics.⁸¹⁴ As criminal identification systems, these technologies were developed in response to the new criminally punishable category of the ‘habitual offender’, or recidivist, and, in Britain, in the wake of the cessation of transportation to colonial Australia in 1868.⁸¹⁵

It was during this time that the figure of Australian national identity began to be enshrined in the body of the ‘white man’. As Ann Curthoys points out, debates about the need for indentured labour, particularly from India and China, ultimately resulted in exclusionist immigration policies, reflecting a vision for Australia of an all-white colony which emulated that of Britain, ‘with the idea of forming a racially new society, a new Britannia, in the south’.⁸¹⁶ Non-white immigrant labour generated the ‘image of immorality’, the ‘spectre of contamination’ and the possibility that ‘one group in society would infect and pollute the character of the whole’, producing a ‘fear of degradation’.⁸¹⁷

In a fascinating investigation of ‘evidentiary tropes of the body’ in literary texts and other cultural ‘articulations’ in the context of the United States, Sarah Chinn argues that ‘bodily signs, both on the outside like skin and fingerprints, and on the inside like blood and DNA, are constructed as evidentiary material in a case of identity, where “case” takes on the multiple meanings of law, medicine, and experimental science, as well as detective fiction and newspaper reporting’.⁸¹⁸ She argues that concepts of evidence construct ‘an explanatory network of systems’ which claim to ‘help one recognize different kinds of people, particularly in terms of race, through looking at their bodies’⁸¹⁹ and that ‘[t]oo often over the past century, bodies have been interpellated as a bundle of evidentiary signs in order to shore up the hierarchies of race’.⁸²⁰ Chinn points

⁸¹³ Cole (2001) 3.

⁸¹⁴ Ibid 74.

⁸¹⁵ Ibid 19.

⁸¹⁶ Ann Curthoys, ‘Liberalism and Exclusionism: A Prehistory of the White Australia Policy’ in Laksiri Jayasuriya, David Walker and Jan Gothard (eds), *Legacies of White Australia: Race, Culture and Nation* (University of Western Australia Press, Crawley, WA, 2003) 10.

⁸¹⁷ Ibid 22.

⁸¹⁸ Sarah E Chinn, *Technology and the Logic of American Racism: A Cultural History of the Body as Evidence* (Continuum, London, 2000) xii.

⁸¹⁹ Ibid xv.

⁸²⁰ Ibid xvi.

out that it ‘has been crucial to the operations of white supremacy that the juridical lines between the categories of “white” and “black” appear impermeable.’⁸²¹

Cole highlights identification technologies as methodologies of classification which created a link between bodies and records held by the state, creating ‘one of the most seemingly powerful and unshakeable forms of truth around’.⁸²² Underlying the use of these technologies, historically, and in the contemporaneous use of fingerprints and iris scanning, is the notion that ‘personhood is biological ... the idea that our individuality is vouched for by our biological uniqueness’.⁸²³ Cole points to the way fingerprinting has been dissociated from its historical connection with other identification techniques such as anthropometry and photography—technologies used during the nineteenth century to trace heredity, create differences between the ‘races’ and predict criminality and predisposition to disease. He claims that this

... selective amnesia is not accidental; rather, it played a crucial role in establishing the legitimacy of fingerprinting in criminal identification. Fingerprint examiners strengthened their authority by disassociating themselves from their colleagues who speculated about the predictive powers of fingerprints to tell, not only the past, but also the future. By turning the fingerprint into an empty signifier—a sign devoid of information about a body’s race, ethnicity, heredity, character, or criminal propensity—fingerprint examiners made fingerprint identification seem less value-laden, more factual.⁸²⁴

Cole’s reference to the semiotic function of fingerprints, and to the way the meaning of the fingerprint as a signifier has changed over time, highlights the necessity of close attention to signification processes in order to reveal their protean and multifarious nature. It also highlights the important function of ideology in the generation of meaning. As Cole points out, fingerprints collected in criminal investigations are not seen to carry information about a body’s corporeality, its subjectivity; rather, they are used, bureaucratically, in an attempt to trace individual identity, to match a suspect with a ‘known criminal’. In this way, fingerprinting is seen as a forensic technology to have ‘objective’ scientific status; its truth value is enhanced by its association with knowledge as a function of regimes of administration. Even when fingerprints and other forensic evidence (such as hair) has been demonstrated not to always be a reliable source of

⁸²¹ Ibid.

⁸²² Cole 4.

⁸²³ Ibid 5.

⁸²⁴ Ibid 100.

information about identity, its status, particularly in the contemporary context of DNA and biometric technologies, is commonly regarded as unquestionable.

In *Cubillo*, the status of the form of consent was enhanced by virtue of it being read by the judge as the culmination of a 'line of documents that were compiled in the Native Affairs Branch'.⁸²⁵ These documents included diaries prepared by patrol officer Harry Kitching in relation to his inspections of Utopia station and correspondence between the offices in Alice Springs and Darwin of the Director of Native Affairs, the Director of Welfare and the District Superintendent.⁸²⁶ While Kitching maintained that he could not now remember the details of the occasions, on 4 April 1955 he had reported that: 'The majority of children on Utopia all disappear as quickly as possible' when he approached, noting that he made 'no attempt to chase them but have tried to build the confidence of the remainder in native affairs officers being [sic] in mind the coming census and the need for an accurate count.'⁸²⁷ However, when he returned on 14 September 1955 to compile the census, he reported that: 'Two children, Florie Ware, and Peter, were seen with their parents, and it now appears that they will both be willing to attend school and to go to St Mary's Hostel in the coming year'⁸²⁸ and that he had promised that the children would be able to come home at Christmas.⁸²⁹ When cross examined in relation to these documents, Kitching said that it was his understanding that the children taken to St Mary's were allowed to return home for holidays at Christmas, that 'if the parent feels that they've lost their child forever, they are going to definitely be against it, but if they know that, as in some other cases, the children are coming home at holiday time, they feel they've still got them'. He agreed that this promise enabled him to achieve the consent to remove Peter Gunner, and that he had used it as 'part of the overall policy of getting Peter Gunner to go to St Mary's'.⁸³⁰

⁸²⁵ *Cubillo* para 787.

⁸²⁶ The exhibits included Exhibit HSK9: Letter from Mr McLeod, station owner Utopia, to Mr Evans, Acting District Superintendent (14 November 1953); Exhibit HSK2.1: Census (1954); Exhibit HSK3 and HSK4: Diary extracts of Mr Kitching (January–June 1955); Exhibit A13 Mr Richards Memorandum (25 February 1955); Exhibit A14: Letter from FJS Wise; Exhibit A15: Memo from Evans to Acting Director (4 November 1954); Exhibit A16: Letter dated 21 February 1955; Exhibit A17 Undated Memorandum from Mr McCoy to the Director of Welfare; Exhibit HSK13: Correspondence from Mr Giese to Acting Director, Alice Springs (1 April 1955); Exhibit R6: Report of A E Richards (12 April 1955); Exhibit R9 Document dated September 1955.

⁸²⁷ Transcript, cross examination of Kitching, 6 August 1998, referring to exhibit of letter dated 6 April 1955.

⁸²⁸ Exhibit HSK15, Transcript, cross examination of Kitching, 6 August 1998, p 78.

⁸²⁹ Exhibit HSK15, Transcript, cross examination of Kitching, 7 August 1998, p 103.

⁸³⁰ Transcript, cross examination of Kitching, 7 August 1998, p 104.

In between these two occasions, correspondence between the Kitching's superior, Mr Richards, and the Director of Welfare which supported 'Kitching's judgment as to the inadvisability of chasing the half-caste children', resulted in a response from Mr Giese, the Acting District Welfare Officer, which stated that: 'Every endeavour should however be made to gain the confidence of these half-caste children, as I feel that this branch is responsible for their future. I would like to be advised of the progress made by Patrol Officer Kitching in this matter.'⁸³¹

There was also a series of documents which had been prepared on 17 and 18 May 1956, including correspondence from the Acting District Welfare Officer, Mr McCoy, to the Director of Native Affairs containing 'forms of information of births of Aboriginal children Kathleen and Jeffrey and Peter Gunner'; a request to the Administrator for approval of the registration of the births; a letter from McCoy to the Director concerning admission of Gunner to St Mary's; a letter from Harry Giese to the Administrator requesting that Gunner be declared an Aboriginal in accordance with the provisions of the Ordinance; and a letter, dated 24 May 1956, from Mr McCoy to the Director with details of Gunner's proposed admission to St Mary's⁸³²

On the basis of this collection of evidence, O'Loughlin concluded that 'there were several pieces of documentary evidence concerning [Gunner] leaving Utopia and going to St Mary's'.

[T]he documents that were available point strongly to the Director, through his officers, having given close consideration to the circumstances of the young boy. First, there was a lengthy prelude to Peter's removal during which Mr Kitching reported that he was of the opinion that Topsy's consent would be forthcoming. Secondly, the promise concerning Peter returning home for the holidays was indicative of personal consideration for the future of the boy. Finally, there was Topsy's thumbprint on the form of request.⁸³³

Having acknowledged the uncertainty of the status of the form of consent and its attendant 'signature', where the trace of an unverifiable corporeality may be seen to sabotage a simple technical interpretation, the trial judge drew on the archive of bureaucratic administration to reinforce his jurisprudence. Locating the form of consent as simply one of a 'line of documents' serves to disassociate the thumbprint from its

⁸³¹ Exhibit HSK14, Transcript, cross examination of Kitching, 6 August 1998, p 77.

⁸³² Transcript, opening address by the respondent, 3 March 1999, p 416–20.

⁸³³ *Cubillo* para 1246.

historical function as eugenicist and criminological referent, and its apparent role as a bureaucratic formality intended to present the appearance of parental consent in order to meet the policy requirements in force at time. In the judgment, the thumbprint surfaces as a floating signifier, its uncertain status imbuing it as potentially void of meaning, yet begging to be inscribed by the law.

A SEMIOTIC READING OF THE THUMBPRINT

O'Loughlin's reading of the semiotic function of the thumbprint on the form of consent imbues it with legal status, a status according with that of an identifiable signature on a legally valid document. While acknowledging that there were many important issues regarding the contextual circumstances in which the form of consent circulated which remain unknown, he nevertheless concluded that '[t]he form of consent that was said to bear Topsy's thumbprint was consistent with the proposition that she consented to his removal.'⁸³⁴ While impossible to verify as Topsy Kundrilba's or to know as indicating her informed consent to the removal of her son, the thumbprint on the form of consent was taken as a sign and this sign was read as substituting for something else—namely, a signature. As Umberto Eco, one of the key semiotic theorist, points out, '[t]his something else does not necessarily have to exist or to actually be somewhere at the moment in which a sign stands in for it'.⁸³⁵

Semiotics, as first developed in the United States by Charles Sanders Peirce,⁸³⁶ employs a dialogic framework in which all forms of communication are recognised as signs and sign systems. Within a semiotic analysis, all communication, including linguistic and non-linguistic, or non-verbal, forms function *like* a language. According to Eco, 'semiotics studies all cultural processes as *processes of communication*. Therefore each of these processes would seem to be permitted by an underlying *system of significations*'.⁸³⁷ The now well-known contribution of theoreticians such as Roland Barthes to the field of semiotics has demonstrated the way all social and cultural behaviour is infused with

⁸³⁴ Cubillo para 838.

⁸³⁵ Umberto Eco, *A Theory of Semiotics* (Indiana University Press, Bloomington, 1976) 7.

⁸³⁶ Ferdinand de Saussure is regarded the founder of semiotics in Europe; interest in the field developed on both sides of the Atlantic concurrently. Saussure's *Cours de Linguistique Générale* (1915) translated into English by Wade Baskin as *Course in General Linguistics* (The Philosophical Library Inc, New York, 1959) is considered the foundational work in structuralism. Saussure's work made famous the distinction between *langue* and *parole* and the function in the sign of the signifier and signified, also a tripartite model of semiotics.

⁸³⁷ Eco (1976) 8.

signification, and all human practices can be constituted as signs and signifying systems.⁸³⁸

Roberta Kevelson, one of the key legal semioticians, states that the purpose of semiotic methodology is ‘to account for the process of how one thought or judgment sign, grows out of another, of how decisions and beliefs develop, and of how new knowledge evolves’.⁸³⁹ As Kevelson argues, semiotics can contribute significantly to analyses of the law because it is able to reveal the way law is itself a sign system which engages specific rhetorical strategies. She claims that semiotics not only provides an analytic framework for legal rhetoric, but also that ‘the entire notion of a legal system, consisting of interrelating communicative processes between legal discourse and legal practice, functions almost universally as a model of dialogic thought development’.⁸⁴⁰

How are we to read the alleged thumbprint of Gunner’s mother, Topsy Kundrilba, as a signature? Drawing on the work of Peirce, I will here propose a semiotic reading which accounts for its communicative signification. Pierce developed a theory of signs as part of his extensive work in the field of logic, in which he proposed four elements to the process of semiosis: a sign, which he refers to as a *representamen*, is ‘something which stands to somebody [its *interpretant*] for something [its *object*] in some respect or capacity [its *ground*]’.⁸⁴¹ Peirce developed a complex classification of signs based on triadic relations between the representamen, object and ground in processes of comparison (which he referred to as the nature of logical possibilities), performance (the nature of actual facts) and thought (the nature of laws) from which he identified ten classes of signs.⁸⁴² According to his second trichotomy, a sign may be divided according to its relation to its object consisting in the sign ‘having some character in itself, or in some existential relation to that object, or in its relation to an interpretant’.⁸⁴³ Within this trichotomy, a sign may be termed an *icon* (a sign which refers to the object it denotes by

⁸³⁸ See, for example, a selection of Barthes’ work on a range of cultural practices in *Mythologies*, selected and translated by Annette Lavers (Jonathan Cape, London, 1972). The field of semiotics includes, but is not limited to, the study of the codes of ‘natural’ language, formalised languages (eg chemistry and algebra), paralinguistics (eg laughing, crying, yawning etc), kinesics and proxemics (eg gesture), music, scent, visual communication (eg colour), aesthetics, written languages, medicine (eg symptoms, psychoanalysis), taste, tactile communication, culture (eg family systems), objects (eg architecture), text theory, plot structure, mass communication and rhetoric: Umberto Eco, *A Theory of Semiotics* (Indiana University Press, Bloomington, 1976) 7–14.

⁸³⁹ Roberta Kevelson, *The Law as a System of Signs* (Plenum Press, New York, 1988) 4.

⁸⁴⁰ Ibid 4.

⁸⁴¹ Charles Sanders Peirce (eds Charles Hartshorne, Paul Weiss and Arthur W Burks), *Collected Papers of Charles Sanders Peirce Vol II: Elements of Logic* (Harvard University Press, Cambridge, Mass, 1932) 2.228.

⁸⁴² Ibid 2.235–2.254.

⁸⁴³ Ibid 2.243.

virtue of characters of its own, ie it is *like* its object), an *index* (a sign which refers to the object it denotes by virtue of being really affected by that object, ie it has a quality in common with the object) or a *symbol* (a sign which refers to the object it denotes by virtue of a law, or an association of general ideas, which cause the symbol to be interpreted as referring to that object).⁸⁴⁴

Within a semiotic framework, the thumbprint, like all forms of communication, linguistic and otherwise, is a sign. Within the semiotic analysis developed by Peirce, a thumbprint on a form may be regarded as a sign with the qualities of an *icon* (because it resembles its object, in that it is an ‘image’, as opposed to language), but more importantly as a *symbol*, because it requires the existence of a ‘rule’ of convention to give it meaning due to its arbitrary relationship to that which it signifies (in this regard, being like language). As Peirce elaborates:

a sign may be *iconic*, that is, may represent its object mainly by its similarity, no matter what its mode of being. ... The only way of directly communicating an idea is by means of an icon; and every indirect method of communicating an idea must depend for its establishment upon the use of an icon.⁸⁴⁵ ... A Symbol is a law, or regularity of the indefinite future. Its Interpretant must be of the same description; and so must be also the complete immediate Object, or meaning. But a law necessarily governs, or “is embodied in” individuals, and prescribes some of their qualities. Consequently, a constituent of a Symbol may be an Index, and a constituent may be an Icon.⁸⁴⁶

The dominant mode of the sign of a thumbprint or fingerprint on a form, its epistemology, under Peirce’s classification may then be characterised as an *iconic symbol*.⁸⁴⁷ While the thumbprint is an icon to the extent that it functions as a sign by virtue of its characteristic of *resembling* its object—namely, a thumbprint—(there is a fitness of resemblance with the sign), it is also a symbol because in order to function as the sign of a signature, there must exist a rule, convention or habitual association between itself and its object, an arbitrary relationship between the thumbprint as a signifier and the

⁸⁴⁴ Ibid 2.247. It is important to point out that Peirce’s classifications of signs are not mutually exclusive. He later determined that there are ten, rather than three, trichotomies and sixty-six classes of signs.

⁸⁴⁵ Ibid 2.276–278.

⁸⁴⁶ Ibid 2.293.

⁸⁴⁷ I should point out that this is not a category of sign specifically identified by Peirce within his first ten classifications.

signified signature, which requires the presence of an interpretant, or context, to give it meaning.⁸⁴⁸

As I have discussed, the thumbprint—or fingerprints in general—does not always signify a signature. Fingerprints are more commonly known as signs for the identification of criminal suspects. In the context of criminal investigations, the semiotic function of fingerprints, the way they are read, is indexical: fingerprints are seen to have qualities *in common with* the person alleged as a criminal suspect. As Peirce himself puts it: ‘because it is in dynamical (including spatial) connection both with the individual object ... and with the senses or memory of the person for whom it serves as a sign’.⁸⁴⁹ The existence of fingerprints is regarded as proof of the prior physical presence of an individual. However, as we have seen in relation to the history of fingerprinting investigated by Cole, as a somatic sign *of* the body, ‘a hereditary marker in the body itself’,⁸⁵⁰ which might have been seen, within the eugenicist discourse of the late nineteenth century to provide evidence of ‘race, heredity, or criminal propensity’, fingerprint patterns were emptied of meaning:

What emerged, then, was a new way of visualizing criminality: Criminality, rather than being indicated by the body itself, through the stigma of a supposedly ‘criminal’ fingerprint, was ‘proven’ by using the fingerprint as a link between the criminal body and the criminal record. The fingerprint was no longer a stigma, a sign containing its own meanings and indications about the character of the bearer. Instead, the fingerprint had become merely an indexical sign which referred the eyes of the authorities to another message—the text contained in the criminal record.⁸⁵¹

⁸⁴⁸ In her work on the history of the signature, Beatrice Fraenkel identifies what she argues are the representations of the three elementary signs of modern identity—the name, the portrait and the fingerprint: Beatrice Fraenkel, *La Signature: genese d'un signe* (Gallimard, Paris, c1992). According to Jane Caplan, in doing so, Fraenkel points to a significant analogy between these signs of modern identification and Peirce’s second trichotomy of signs: the symbol, icon and index. Caplan argues that:

In the Peircean system of signs, the symbol (here the proper name) is the Saussurean signifier, that is, an arbitrary sign that has neither resemblance nor an existential relationship to its referent. The icon (the portrait) ‘represent[s] its object mainly by its similarity’ to it: the relationship between signifier and signified is not arbitrary, but is one of resemblance or likeness. The index, finally, ‘refers to its object ... because it is in dynamical ... connection’ with it—here the fingerprint (and more generally the trace...). ...If Fraenkel’s analogy is correct, the imaginary or archetypal identity document thus triangulates the system of signification that underpins the field of modern semiology as such.

Jane Caplan, ‘“This or That Particular Person”: Protocols of Identification in Nineteenth-Century Europe’ in Jane Caplan and John Torpey (eds), *Documenting Individual Identity: State Practices in the Modern World* (Princeton University Press, Princeton, 2001) 52. Quotes from Peirce in Buchler (1955) 102–9.

⁸⁴⁹ Peirce (1932) 2.305.

⁸⁵⁰ Cole (2001) 99.

⁸⁵¹ Ibid 118.

According to Eco, Peirce's approach to semiotics, unlike that of the other leading theorist of semiotics, Ferdinand de Saussure, 'does not demand, as part of a sign's definition, the qualities of being intentionally emitted or artificially produced.'⁸⁵² Drawing on the initial work of Saussure and Peirce, Eco developed a general theory of semiotics which he divided into a theory of codes and a theory of sign production. Describing the concept of 'iconism' as 'naïve', Eco points out that the notion that a 'sign-function is the correlation between an expression and a content based on a conventionally established code (a system of correlation rules), and that codes provide the rules that generate sign-functions', begs the question as to the nature of the correlation convention, 'which is not co-extensive with that of arbitrary link, but which is co-extensive with that of *cultural* link'.⁸⁵³

Critiquing Peirce's trichotomous categories of signs, Eco argues for attention to the 'mode of producing sign functions', rather than types of signs, and the importance of context to the establishment of the 'coded value of a sign'.⁸⁵⁴ One feature of Eco's typology of modes of sign production to which he attributes particular importance is the function of recognition.⁸⁵⁵ In relation to the recognition of *imprints*, Eco points to the way in which they function both metaphorically and metonymically: 'In fact imprints appear to be "similar" to the imprinting agent and substitute for or represent it; and they can be taken as proof of past "contiguity" with the agent.'⁸⁵⁶ He concludes that '[o]ne could say that imprints and clues, even though coded, are "proper names", for they refer back to a *given* agent.'⁸⁵⁷

In what way can the imprint of a thumb or finger on a bureaucratic document be viewed to function metaphorically? Metaphor functions by way of similarity or analogy, whereby a word or a concept is like another: a thumbprint is *like* a signature, it is a written mark, an inscription made by a human subject, a textual signifier. It also functions metonymically, contiguously, acting in the place of, or substituting for, a signature. It could also be said that as a signature, the thumbprint functions synecdochically, in that it represents the body of the person signing, it is part of the body in the place of the whole.

⁸⁵² Eco (1976) 15.

⁸⁵³ Ibid 191.

⁸⁵⁴ Ibid 216.

⁸⁵⁵ Ibid 221.

⁸⁵⁶ Ibid 221.

⁸⁵⁷ Ibid 224.

Following the work of Saussure, Roland Barthes made significant contributions to the direction of the theorisation of the semiotics of non-linguistic signs. He argued that the relationship between signifier and signified is one of ‘equivalence’, a correlation, or structural relationship in which the two produce the third term, the sign. As such, the signifier is empty of signification; as a sign, it is full. As Terence Hawkes explains:

What has filled it (with signification) is a combination of my intent and the nature of society’s conventional modes and channels which offer me a range of vehicles for the purpose. The range is extensive, but conventionalized and so finite, and it offers a complex system of ways of signifying.⁸⁵⁸

Within this framework, evidence such as the thumbprint on the form of consent in the trial, may be regarded as empty of signification; it is only as a result of the attribution of it to Topsy Kundrilba and the subsequent reading, or interpretation of its existence as an indication of *something* (possibly intent or consent) which imbues the imprint with meaning. As Haldar points out, ‘until evidence is articulated, it is empty. In the “eyes” of the law that evidence does not mean anything. ... [A]t a certain point an item of evidence can mean anything ... In this respect evidence ... is a “shifter”, a sign filled with signification, precisely because it is a mere frame, an empty vessel within which only the ghosts, the traces of meaning spiral.’⁸⁵⁹

Roland Barthes was instrumental in developing a theoretical framework for semiology which could take account of complex signification processes, including the possibility of a signified having several signifiers. Barthes’ important contribution to the theorisation of semiotics included what he referred to as the concept of ‘myth’, ‘the complex system of images and beliefs which a society constructs in order to sustain and authenticate its sense of its own being: ie the very fabric of its system of “meaning”’.⁸⁶⁰ He developed the framework for an understanding of the way signification operates not just at a primary level, but also at a secondary level, where cultural significance takes place.⁸⁶¹ Barthes applies his schema to the processes of signification which occur on two planes: denotation (where language means what it says) and connotation (where language means something other than what is said). He argued that:

⁸⁵⁸ Terence Hawkes, *Structuralism and Semiotics* (Methuen & Co, London, 1977) 131.

⁸⁵⁹ Piyel Haldar, ‘The Evidencer’s Eye: Representations of Truth in the Laws of Evidence’ (1991) II(2) *Law and Critique* 171, 184.

⁸⁶⁰ Hawkes (1977) 131.

⁸⁶¹ His famous example of this process is the cover image of the magazine *Paris-Match* in which a young Black man in a French military uniform is saluting the French flag: *Mythologies* (ed and trans Annette Lavers) (Jonathan Cape, London, 1972).

... a connoted system is a system whose plane of expression is itself constituted by a signifying system: the common cases of connotation will of course consist of complex systems of which language forms the first system (this is, for instance, the case with literature).⁸⁶²

What are the connotative and denotative significations of the thumbprint? In the colonial context in which Topsy Kundrilba is alleged to have placed her mark on the form of consent, a thumbprint or fingerprint denotes a signature, a unique identifying mark. The signature is a sign. The sign, however, is that of illiteracy, an inability to provide a signature within the conventions of a written language. It also connotes criminality, through the use of fingerprinting as a form of identification; and the act of witnessing, through its association with other forms of identifying marks such as crosses.

Consideration of the connotative and denotative function of the thumbprint points us to the need to account not simply for its value as a code, as a signature, but also as an act of communication, an enunciation between sender and addressee. Attention to the function of the thumbprint on the form of consent as a speech act may assist us in accounting for its meaningfulness, its linguistic function. For it is clear that in order to read the thumbprint on the form of consent as evidence of Topsy Kundrilba's informed consent to the removal of her son, it is necessary to regard the exhibit as an act of communication.

In his philosophy of language,⁸⁶³ J L Austin makes reference to the signature as a performative speech act in terms of its capacity to invoke the "'I' who is doing the action' or 'utterance-origin'.⁸⁶⁴ In an attempt to distinguish constatives from performatives, Austin points to the importance of 'something which is *at the moment of uttering being done by the person uttering*' arguing that 'where there is *not*, in the verbal formula of the utterance, a reference to the person doing the uttering, and so the acting, by means of the pronoun 'I' (or by his personal name), then in fact he will be 'referred to' in one of two ways:

In verbal utterances, *by his being the person who does* the uttering—what we may call the utterance-*origin* which is used generally in any system of verbal reference-co-ordinates.

⁸⁶² Roland Barthes (trans Annette Lavers), *Elements of Semiology* (Hill and Wang, New York, 1968) 89–90.

⁸⁶³ I have provided an outline of Austin's speech act theory in Chapter 4.

⁸⁶⁴ The William James Lectures delivered at Harvard University in 1955 were published posthumously as a collection entitled *How to do Things with Words* (Clarendon Press, Oxford, 1962).

In written utterances (or transcriptions), by his *appending his signature* (this has to be done because, of course, written utterances are not tethered to their origin in the way spoken ones are).⁸⁶⁵

Abandoning his earlier distinction between constatives and performatives, Austin ultimately argued that '[t]he total speech act in the total speech situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating'.⁸⁶⁶ In the final lecture, he attempted to develop a classification of performative speech acts, derived from verbs, based on their illocutionary force, which he claimed could contribute to dispelling the 'truth/false fetish' and the 'value/fact fetish'. One of Austin's classes, commissives, which commit the speaker to a certain course of action, includes 'intend' and 'consent'.⁸⁶⁷ As the purported thumbprint of Kundrilba can only function as a valid signature on the form if it is read as a performative speech act in which intention is communicated, it is to the function of intention in legal discourse that I will now turn.

SIGNS OF INTENTION

The concept of intention is a key premise in Western thought where it is regarded as the foundation of rational agency. Intention forms the basis of moral responsibility and accountability for human action. It therefore fundamentally underpins legal discourse. In criminal law, intention is central to the question of criminal responsibility and culpability; the underlying assumption in the law of contract is that an agreement is formed on the basis of the intentions of the parties; intention also underpins questions of legislative interpretation and it is crucial to the judicial role.

In law, intention is regarded as a 'mental state' or frame of mind. It is considered a conscious process of premeditation which motivates human subjects, and is directly related to the notion of free will. Intention is central to the self-determined subject with freedom of choice; this is the same subject who is both competent and compellable to give evidence in a trial—Kant's active citizen. However, while intention is considered central to the law of evidence, it cannot be physically observed. Legal processes of cross-examination rely on the belief that as individuals we may 'know' our own intentions—indeed, it cannot be an intention unless we 'know' it, unless it is a conscious

⁸⁶⁵ Austin (1962) 60.

⁸⁶⁶ Ibid 147.

⁸⁶⁷ Ibid 156. Austin's other classes are verdictives (the giving of a verdict), exercitives (the exercising of powers), behabitives (having to do with attitudes and social behaviour) and expositives (make plain how utterances fit into the course of an argument or conversation): 150–1.

wish; unconscious desire is not regarded by law as evidence of intention. But while individuals can 'reveal' their intention to the court, it cannot be physically observed or known. As has been pointed out, intention is therefore regarded as an epistemological question for law: 'How can intention be known?'.⁸⁶⁸

Whether or not intention is regarded by a court to have existed in relation to an act at the time of the act is however determined retrospectively, pointing to the constructed nature of the juridical concept of intention. As Margaret Thornton points out, the key to intention in legal discourse is its pragmatic role in construing signification, in understanding intendment and therefore in being able to allocate responsibility or culpability.

By and large, the role of intention within liberal legalism is functional; it is employed as a device to give retrospective meaning to a situation or text in order to assign responsibility for an act. Judges are formally charged with performing the interpretive role in a way that accords with legal and social norms. Because the purposive role of intention is paramount, law is not overly concerned with speculating about what might have transpired within the secret recesses of the mind of an accused, litigant or legislature, months, or even years, before. Pragmatism, not philosophical inquiry, is the dominant *modus operandi*.⁸⁶⁹

In *Cubillo*, O'Loughlin's reliance on intent operates in a number of ways: through deference to the social and political ideology which was dominant at the time the relevant legislation was enacted and operated; through assessment of the actions of the officials and missionaries called as witnesses as being motivated by a desire to act in the 'best interests' of the children; and through his reading of key pieces of documentary evidence. The form of consent was central to O'Loughlin's decision in relation to Gunner. It was taken as evidence of a request by Gunner's mother that he be removed to St Mary's Hostel. The issue of intent, and therefore of how the form is read, is vital to the decision because consent is a complete answer to any claim for false imprisonment. As Hannah Robert points out, it removed the requirement to invoke the statutory provisions of the Aborigines Ordinance in force at the time and therefore

⁸⁶⁸ Ngaire Naffine, Rosemary Owens and John Williams (eds), Introduction: 'The Intention Project' in *Intention in Law and Philosophy* (Ashgate Dartmouth, Aldershot, Hampshire, 2001) 6.

⁸⁶⁹ Margaret Thornton, 'Intention to Contract: Public Act or Private Sentiment?' in *ibid* 217.

transfers the responsibility of removal and subsequent detention from the state to the mother.⁸⁷⁰

What evidence is there that Topsy Kundrilba understood the effect applying her thumbprint would have? Gunner gave evidence that he was removed from Utopia homestead in the morning on a ration day, that he remembers he was crying and screaming, that all the other families were present, including his mother, and that a lot of people were ‘crying and yelling in Aboriginal language’.⁸⁷¹ He said he did not know why he was being placed on the back of the khaki-coloured truck by a white man in uniform, that he had not been told where he was to be taken or why, and that he had not seen anyone in uniform speak to his mother or any other member of his family beforehand.⁸⁷² He also said that there had been two previous attempts to take him. He testified that when, as an adult, he first returned to Utopia years later and met his mother, she could not speak English.⁸⁷³ Harry Kitching, the patrol officer identified by O’Loughlin as probably the one who took Gunner, stated in evidence that he spoke with Aboriginal people in English, ‘as well as now and again picking up a bit of what they were saying in Areyonga’.⁸⁷⁴ Clearly, he did not speak Topsy Kundrilba’s language sufficiently to explain the ramifications of the removal of her son from his family and community. He also acknowledged that ‘a house girl’ such as Topsy Kundrilba, would not be able to read and write in English. As the relevant patrol officer, Kitching stated that he had the discretion to decide if a child was ‘at risk’ and whether to recommend that they be removed, acknowledging that such a decision was premised on the belief that placement at an institution in Alice Springs was *always* in the child’s best interests. He claimed, however, that there would be no reason to remove Gunner on the basis of neglect, stating that ‘because of his part-Aboriginal background. He was still a misfit.’⁸⁷⁵

One of the most well-known and prolific speech act theorists, whose work develops J L Austin’s philosophy of language with particular attention to the issue of intention, has

⁸⁷⁰ Hannah Robert, “‘Unwanted Advances’”: Applying Critiques of Consent in Rape to *Cubillo v Commonwealth*’ (2002) *The Australian Feminist Law Journal* 16, 6. Hannah Robert provides a very fine critique of the decision in *Cubillo* drawing on models of consent used in feminist legal theory in analyses of rape law.

⁸⁷¹ Transcript, examination of Peter Gunner, 16 August 1999, p 1505.

⁸⁷² Ibid.

⁸⁷³ Ibid, 17 August 1999, p 1545.

⁸⁷⁴ I will point out here that it is my understanding that Areyonga is a place, not a language, located in the Pitjantjatjara lands, southwest of Alice Springs. Peter Gunner gave evidence that his mother’s group was Anmatyerr. This is at least one of the languages she would have spoken.

⁸⁷⁵ Transcript, cross-examination of Harry Kitching, 6 August 1998, p 64.

been John Searle. Searle's theoretical inheritance and staunch advocacy of analytic philosophy is characterised by the necessary belief in the primacy of factual certainty as presented by science, where language is essentially representational and 'the theories that we develop are intelligible only as representations of how things are in *mind-independent* reality'—a theory that truth simply exists, outside context and distinguished from subjective evaluation.⁸⁷⁶ In his initial work in the field of speech acts, Searle focussed on what he termed regulative rules (regulating pre-existing activity logically independent of the rules) and constitutive rules (constituting activity the existence of which is logically dependent on the rules) governing the production of meaning. This resulted in the development of his '*X counts as Y*' and '*X counts as Y in context C*' formula, wherein intention plays a crucial role.

Searle argues that illocutionary acts, that is, acts which are 'said to *have meaning*' and where the speaker is said to '*mean something* by the utterance' are characterised through the recognition of the intention of the speaker, which is realised in the moment of its recognition by the hearer.⁸⁷⁷ Searle developed his ideas regarding the function of intention in speech acts into a theory of intentionality, arguing that '[i]ntentional states represent objects and states of affairs in the same sense of "represent" that speech acts represent objects and states of affairs', claiming that language is derived from intentionality, not the converse, and that meaning is but one form of intention.⁸⁷⁸

Let us attempt to apply Searle's theory of the function of intention to the illocutionary speech act of signing a signature. Within Searle's schema, if I sign my signature on a document which states that I do not wish to be kept alive on life support in the event of a serious accident in which I lose my capacity to communicate my wishes, I am communicating my intention to such a procedure in a certain situation. This would be represented by the formula *X stands for Y in C*, where X is my signature, Y my permission and C the context in which I have lost my capacity to communicate. But there are questions which remain unanswered here. Where is intent represented in this formula? And how can I indicate my preference for something not to occur in the event of my not being able to communicate? If all that existed of my intention to give such permission was a form containing my purported signature, at what point would another

⁸⁷⁶ Barry Smith, 'John Searle: From Speech Acts to Social Reality' in Barry Smith (ed), *John Searle* (Cambridge University Press, Cambridge, 2003) 2.

⁸⁷⁷ John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge, University Press, 1969) 43.

⁸⁷⁸ John R Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge, Cambridge University Press, 1983) 4–5.

person, not knowing my wishes outside of the existence of the form, recognise my intention?⁸⁷⁹

If it is necessary that in order to read the thumbprint on the form of consent as a speech act which represents a signature—that is, for us to recognise it as a signature—and in order for that signature to convey the meaning that Kundrilba gave her informed consent to the removal of her son, at what point do we recognise this as her intended meaning? When is the intention said to pre-exist the illocutionary act recognised and in that moment achieved? Topsy Kundrilba herself is unable to tell us and Harry Kitching can't remember. And what about comprehension? Where does the speaker's understanding fit into a theorisation of illocutionary speech acts? Surely lack of comprehension of the illocutionary force of a speech act on the part of a speaker falls into Austin's category of 'infelicity' or Searle's 'defective'. In attempting to account for the successful performance of illocutionary acts, Searle's first condition is 'normal input and output conditions obtain', where "output" covers the conditions for intelligible speaking and "input" covers the conditions of understanding. Together they include such things as that the speaker and hearer both know how to speak the language'.⁸⁸⁰

As O'Loughlin himself acknowledges, it is impossible to answer the question as to whether and how the issues and concepts of the form could be understood by Topsy Kundrilba.

In the first place Topsy is dead: she cannot give evidence about her comprehension. In the second place, neither party was able to identify the officer from the Native Affairs Branch who was responsible for getting Topsy's thumbprint on the document. It was possibly Mr Kitching, but he had no recollection of the event. There was therefore no way of knowing how the contents of the document were explained to Topsy. Perhaps they were not explained at all—in that case the document would probably be a nullity. Perhaps they were explained with infinite patience and care—in which case the document would become tangible proof of Topsy's understanding. The short answer is that we will never know. But that was no reason for assuming that because Topsy was a tribal Aboriginal, she did not understand what was happening.⁸⁸¹

⁸⁷⁹ Recognising the complications inherent to such speech acts, people are generally advised by organisations such as the Voluntary Euthanasia Society that such instructions, advance directives, be witnessed, the person's wishes be openly discussed with family and partners and that they then witness the signing of the document.

⁸⁸⁰ Searle (1969) 57.

⁸⁸¹ *Cubillo* para 787.

But we *do* know that Kundrilba did not speak English because her son told us that when he first went back to Utopia to see his mother again in 1969, he could not talk with her because he had lost his language and she could not speak English. He said:

*I found it very hard when I left Utopia that day. I could never speak that language to make her understand that—to tell her stories of where I was taken, where I was locked up. I could not tell her stories what had happened to me. It would have been good if she can understand where I was taken.*⁸⁸²

But Gunner’s eyewitness testimony and the significance of what must be acknowledged as a highly credible scenario was somehow eclipsed by a document found in the historical archive. Would the intention and comprehension attributed by O’Loughlin to Kundrilba exist if the form of consent had not been located by the researchers amidst the thousands of documents in the Australian Archives? The significance of the form of consent to his decision, the meaning attributed to it, was affirmed by O’Loughlin *in the place of* what he perceived as an evidentiary void. As evidence, it *stands in for*, or represents, what the law does not know. Connal Parsley argues that ‘the void identified in the “technical nature of the decision” underwrites all the priority decisions made in regard to the “thumbprint evidence”, and that this “performs” a sovereign entity, or more precisely a being of sovereignty and a sovereign Being. Thus, a void at the heart of sovereignty’.⁸⁸³

If, as O’Loughlin acknowledges, we cannot know the thumbprint was Topsy Kundrilba’s, how do we know that it is not in fact mine? If it were my signature, placed here in the context of this thesis, what would it signify? In this different context, it could not mean the same thing as it did when Kundrilba is alleged to have applied her thumb. In reproducing the text of the form and reinscribing it with my thumbprint, a new event involving intention and expression would have occurred. It would be another event in the ever-disseminating process of the generation of meaning. The meaning of the thumbprint, like all signifiers, cannot be located in the transcendental mind of the author; it cannot be fixed or known.

INTENTION AND ITERABILITY

Deconstruction challenges the primacy attributed to the function of intention in communication and any account of signification which locates meaning in the

⁸⁸² Transcript, examination of Peter Gunner, 17 August 1999, p 1544–5.

⁸⁸³ Connal Parsley, ‘Seasons in the Abyss: Reading the Void in *Cubillo*’ in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, Cambridge, 2006) (forthcoming).

consciousness of the speaking subject. One of the many important contributions made by Jacques Derrida is his critique of western philosophy as built upon what he refers to as the ‘metaphysics of presence’—the idea that there is an origin of knowledge from which ‘truth’ can be determined and made present. It is an approach to meaning and interpretation based on the belief that signifying systems such as language function like a code to provide transparent access to the origin of truth and full meaning in the sign. As Derrida meticulously explicates, there can be no ‘full and determinate original meaning’ because all signs inevitably refer to other signs. There is, according to Derrida, only what he terms *différance*—difference and deferment—‘the signified can be grasped only as the effect of an interpretative or productive process in which interpretants are adduced to delimit it’.⁸⁸⁴

While the influence of the theoretical work of Derrida and other critical poststructuralist theorists concerned with language was initially most apparent in the fields of philosophy and literature, there has been more recent interest in this work from theorists working in law and jurisprudence, particularly in the area dubbed ‘law and literature’. As interpretative practices and as sites in which knowledge and truth are seen to be produced, law, jurisprudence and judicial decision-making appear as fertile ground for critical investigation influenced by deconstruction. Derrida’s critical philosophical investigations call into question the fundamental basis of all forms of knowledge, including law, and highlight some of the paradoxes of legal discourse. Deconstruction provides a particularly valuable framework for a critique of the laws of evidence because it offers an epistemological critique through analysis of discourse. Halder has drawn attention to the potential offered by deconstruction to a critique of the laws of evidence, focusing not on the power of evidence to represent to the court an outside ‘reality’ but on the ‘play of connections and severances between the ideas of presence and representation’.⁸⁸⁵ He points out that a deconstructive reading sees intention not as pre-existing the text, but as a textual effect:

... ‘intention’ is merely something which is read/built into the witness’s statement, it is a construction of the signifying practices. It is this reading which becomes written as the attached articulated discourse, the supplement. The court, the body, becomes an inscriber rather than a mere receiver or transmitter ... in both speech and writing, the intention and the

⁸⁸⁴ Jonathan Culler, *Structuralist Poetics: Structuralism, Linguistics and the Study of Literature* (Routledge & Kegan Paul, London, 1975) 19–20.

⁸⁸⁵ Piyel Halder, ‘The Evidencer’s Eye: Representations of Truth in the Laws of Evidence’ (1991) II(2) *Law and Critique* 171, 172.

origin of the speaker/author are lost as soon as the performance is in the
offing;⁸⁸⁶

So far, I have argued that the meaning attributed by the trial judge to the thumbprint on the form, that is, the potential for intention on the part of Kundrilba, stands in the place of what he perceived as an evidentiary void. While acknowledging that we cannot know the nature of Kundrilba's intention in placing her mark on the form, nevertheless he attributes to her, transmitted through time and space in the mark of her body as signature, the intention that her son be taken away to St Mary's Hostel. In this way, we can see that the notion of intention is a juridical construction, it is discursively produced by the law, but attributed to a prior event and to an original authorial subject. It is characteristic of positive law to seek out causation as a way of attempting to establish a foundation for certainty in knowledge.

What are the conditions of this hermeneutic practice? How does the semiotic function of the thumbprint inform O'Loughlin's interpretation? In this section, I will draw on Derrida's notion of iterability to investigate the performative function of the thumbprint as a signature. I will argue that O'Loughlin's reading of the document as evidence of Kundrilba's consent to the removal of her son is derived from Derrida's metaphysics of presence, the desire for an origin of meaning and a belief in the inherent capacity of language to provide transparent access to truth—a epistemological paradigm which mirrors that of the laws of evidence. Contrary to O'Loughlin's reading, I argue that the mark tells us *nothing* about Kundrilba's intention and cannot be read as her consent. Nevertheless, the mark and the document on which it appears are open to other significant interpretations—readings which O'Loughlin failed to take into account in his judgment—about the context of colonial relations in which documentary practices were implemented in an attempt to make Indigenous subjects legible and to produce subjectivity which conformed to normative white patriarchal order.

Derrida discusses the signature in his piece 'Signature Event Context', in which he critiques Austin's speech act theory. As Derrida points out, Austin had attempted to develop an account of signification, or the 'illocutionary force' of utterances, not by reference to an origin of meaning but through an account of the linguistic system in which they are produced. Derrida argues that at a certain point in Austin's analysis—the

⁸⁸⁶ Ibid 185–6.

point at which ‘the divided agency of the legal signature emerges’⁸⁸⁷—he reintroduces the notion of the source of communication. While pointing to the deconstructive gesture made by Austin in attempting to ‘free the analysis of the performative from the authority of the value of truth, from the opposition true/false’,⁸⁸⁸ Derrida’s critique focuses on the way in which Austin, by privileging the significance of the intention of the author of communication in his analysis of the performative, ultimately reaffirms the metaphysics of presence. He argues that:

Austin’s analyses permanently demand a value of context, and even of an exhaustively determinable context, whether de jure or teleologically; and the long list of ‘infelicities’ of variable type which might affect the event of the performative always returns to an element of what Austin calls the total context. One of these essential elements—and not one among others—classically remains consciousness, the conscious presence of the intention of the speaking subject for the totality of his locutory act. Thereby, performative communication once more becomes the communication of an intentional meaning, even if this meaning has no referent in the form of a prior or exterior thing or state of things.⁸⁸⁹

Rather than intention, Derrida posits the concept of iterability, the capacity to be repeatable in the absence of the addressee, as central to the formation of meaning. He argues that what Austin excludes from his analysis of successful performatives—that which he regards as anomalous, exceptional, ‘non-serious’ or ‘infelicitous’—is actually ‘citation (on the stage, in a poem, or in a soliloquy), the determined modification of a general citationality—or rather, a general iterability without which there would not even be a “successful” performative’.⁸⁹⁰ For Derrida, all signs, linguistic or non-linguistic, spoken or written, can be cited and therefore can ‘break with every given context and

⁸⁸⁷ Jacques Derrida (trans with additional notes Alan Bass), ‘Signature Event Context’, *Margins of Philosophy* (The University of Chicago Press, Chicago, 1982) (hereafter SEC) 327. The history of the publication of this paper is interesting and can be viewed as offering an exemplification of the argument proposed by Derrida. It was first given at a conference entitled ‘Communication’, held in French in Montreal in 1971 and published in French as part of the conference proceedings. An English translation by Samuel Weber and Jeffrey Mehlman was published in the first issue of the journal *Glyph* in 1977. In 1982 it was published in *Margins of Philosophy*. In the same year, the second issue of *Glyph* included a response by John Searle, entitled ‘Reiterating the Differences: A Reply to Jacques Derrida’ and also a reply to Searle by Derrida entitled ‘Limited Inc a b c...’. In 1988, a collection entitled *Limited Inc* (Northwestern University Press, Evanston, Illinois, 1988) was published in English including the translation by Weber and Mehlman, a summary of Searle’s response (as he had refused to give permission to have his essay included), the response by Derrida and an interview of Derrida by the editor, Gerald Graff, entitled ‘Afterword: Toward an Ethic of Discussion’.

⁸⁸⁸ SEC 322.

⁸⁸⁹ SEC 322.

⁸⁹⁰ Ibid 325.

engender infinitely new contexts in an absolutely nonsaturable fashion.⁸⁹¹ It is the fact of iterability, in the absence of the speaker and receiver, which facilitates meaning.

Derrida identifies three characteristics of the classical concept of writing—indeed, as he argues, all signs or forms of communication—in which his concept of iterability is demonstrated. For Derrida, the concept of iterability incorporates the notions of both repetition and alterity.⁸⁹² He argues that a ‘written sign ... is a mark which remains, which is not exhausted in the present of its inscription, and which can give rise to an iteration both in the absence of and beyond the presence of the empirically determined subject who, in a given context, has emitted or produced it.’ ‘By the same token’ he says ‘a written sign carries with it a force of breaking with its context, that is, the set of presences which organize the moment of its inscription.’⁸⁹³ What may be considered the ‘real’ context of the writing—including the author and his or her intention—is ‘irremediably lost’, but the writing must remain ‘legible’. Derrida argues that it is this force of breaking which is essential to the structure of writing. All writing can be inscribed or grafted onto other chains of signification; ‘[n]o context can enclose it’. ‘This force of rupture’, according to Derrida, is itself due to the ‘always open possibility of its extraction and grafting.’⁸⁹⁴ It is the possibility of this disruption of presence, of the notion of the source of communication, which Derrida considers offers a challenge to the logocentric structure of western philosophy.

Derrida discusses the signature and Austin’s attempt to mark it as the performative equivalence of the speaker or ‘utterance-*origin*’.⁸⁹⁵ A signature is a written mark that is given in the absence of the signer; it is generally regarded as attesting to a presence and an intention at a particular moment. Derrida argues that while ‘a written signature implies the actual or empirical nonpresence of the signer’ it also ‘marks and retains ... the transcendental form of nowness’.⁸⁹⁶

For the attachment to the source to occur, the absolute singularity of an event of the signature and of a form of the signature must be retained: the pure reproducibility of a pure event ... The condition of possibility for these effects is simultaneously ... the condition of their impossibility, of the

⁸⁹¹ Ibid 320.

⁸⁹² Derrida points out that the link between iterability and alterity inheres in the etymological connection between *iter* ‘once again’, coming from *itara* ‘other’ in Sanskrit.

⁸⁹³ SEC 317.

⁸⁹⁴ SEC 317.

⁸⁹⁵ It is important to point out that this is the published version of the paper which Derrida had previously delivered in person, at the end of which his appended printed signature was included.

⁸⁹⁶ SEC 328.

impossibility of their rigorous purity. In order to function, that is, to be readable, a signature must have a repeatable, iterable, imitable form. It must be able to be detached from the present and singular intention of its production. It is its sameness which, in altering its identity and singularity, divides the seal.⁸⁹⁷

Importantly, as Culler points out, Derrida's argument about iterability does not amount to a dismissal of the importance of context, but rather, 'in citation, iteration, of framing it is new contextual features that alter illocutionary force. A theory of speech acts must in principle be able to specify every feature of context that might affect the success or failure of a given speech act or that might affect what particular speech act an utterance effectively performed.'⁸⁹⁸ The point is, however, that context is itself boundless; it is actually impossible to comprehensively specify all the characteristics of any given communicative environment. But this does not mean that context is not relevant to illocutionary force. On the contrary, context is central to meaning; it is its condition of possibility. As Gayatri Chakravorty Spivak explains: 'the principle of an undecidable and/or alterable (to the point of rupture) context is the condition of possibility of every mark, *written* or *spoken*.'⁸⁹⁹ In her own deconstructive reading of the debate between Searle and Derrida, Spivak argues that Derrida's 'graphic of iterability' is part of his 'alternate denomination for the method of metaphysics'—graphematic rather than logocentric—where 'every repetition is an alteration'. She goes on to say:

But repetition is the basis of identification. Thus, if repetition alters, it has to be faced that alteration identifies and identity is always impure. Thus iterability—like the trace structure—is the *positive* condition of possibility of identification, the very thing whose absolute rigor it renders impossible. It is in terms of iterable (rather than repeatable) identities that communication and consensus are established.⁹⁰⁰

Is the thumbprint iterable? Can it be detached from the present and singular intention of its production? Is it recognisable as the signature of Topsy Kunderlba? A signature is a written mark which reproduces the name—the sign—of the person signing. A signature is literally to sign a sign; it is to sign the sign [the name, mark or symbol] of the subject.⁹⁰¹ Each time I sign my name, I am meant to reproduce the same sign; otherwise,

⁸⁹⁷ Ibid 328–9.

⁸⁹⁸ Jonathan Culler, *On Deconstruction: Theory and Criticism after Structuralism* (Routledge & Kegan Paul, London, 1983) 123.

⁸⁹⁹ Gayatri Chakravorty Spivak, 'Revolutions That As Yet Have No Model: Derrida's "Limited Inc."' in Donna Landry and Gerald MacLean (eds), *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Routledge, New York, 1996) 79.

⁹⁰⁰ Ibid 87.

⁹⁰¹ The word 'sign' comes from the Latin *signum* meaning mark or signal.

the validity of the signature, its authenticity, can be called into question. In order to function as a valid sign, a signature must resemble itself. When I am required to sign my name, I am commonly asked to provide a form of identification on which my signature also appears so that it can be checked against that which I have just signed. My signature must imitate itself. Yet for most of us, in signing our name, we must write quickly, spontaneously, and not think about the action we are performing. If I hesitate or pause for thought when signing my name, or if I feel self-conscious in front of another, I may not be able to replicate my own signature and I may feel like a forger. While a signature can be forged by someone other than the person whose sign it is, this repetition is not considered a valid signature (even if successful in the transaction) and can subsequently be revoked. While, in order to function, a signature must be imitable, it should only be imitated by its own author; indeed, it is difficult for someone to imitate another's signature. While the name signed in a signature may be illegible, it is regarded as the authentic mark of the named individual; it is the mark of the individual subject.

Steve Connor claims that '[f]orging a signature, or imitating one's own, cannot be done letter by letter or word by word, for a signature belongs to a different order from writing—the order of marks. A signature is therefore not to be inscribed, but stamped.'⁹⁰² As he points out, the signature is also the sign of literacy.

A signature appears different from a mark: it is the illiterate peasant who, presenting himself to perform an act of witness, makes his mark, his handprint, his thumbprint, or a cross, instead of forming a sequence of letters—the joined up writing that marks the successful passage into literacy.⁹⁰³

The mark on the form of consent does not conform to the model of a signature. It is not the name of the author; indeed, it is not even a linguistic form. We cannot compare it to another repetition of itself. As O'Loughlin himself points out, there is no way of even knowing if it is the mark of Kundrilba. No other documents were tendered with her purported mark. When I interviewed Peter Gunner, he highlighted this failure of the court to authenticate the purported mark of his mother, pointing out that there well may have been other documents, such as at the hospital in Alice Springs, on which her mark may have been recorded. He also made the point that there was apparently more than

⁹⁰² Steve Connor, 'The Law of Marks', paper written for the Birkbeck College School of Law Research Seminar, 21 November 2001 <www.bbk.ac.uk/english/skc/marks/> accessed 9 November 2002.

⁹⁰³ Ibid.

one woman who was known as ‘Topsy’ living at Utopia at the time,⁹⁰⁴ highlighting the way that nominal individualised identity is often undermined by its own discursive production.

Indeed, no other documents on which indexical marks, or even crosses, are displayed were tendered as evidence in the trial. Contrary to the use of fingerprints in criminal investigations, marks on documents such as the form of consent do not function as individual identification. As we have seen, marks such as crosses and thumbprints or fingerprints were solicited in colonial contexts as identification technologies associated with criminal investigations and as a form of social control. In the trial, there were a number of witnesses who worked as patrol officers in the Northern Territory at the time Kundrilba is alleged to have placed her mark on the form. Not one was able to provide clear evidence about the collection of thumb-marks in the situation where children were removed from their mothers, or for other bureaucratic processes. Overall, the evidence about this practice was notably sketchy and inconsistent. This was arguably not a simple case of ‘memory loss’ or ‘confusion’, as O’Loughlin concluded, but rather, indicative of the fact that as a practice, soliciting marks as signatures was uncommon and rarely performed. It appears to have begun in the 1930s, possibly as a response to mounting community concern about the practice of child removal and international pressure on the government from humanitarian organisations.⁹⁰⁵

The uniqueness of a signature and the impossibility of its authentic reproduction authorises the status of the signer as an autonomous subject within the discourse of western liberalism. Here we can see a connection between the meaning of the word ‘character’ as a ‘stamped impression’, as in a system of writing, and the notion of ‘having a self’.⁹⁰⁶ Character is that which distinguishes one individual from another and refers to moral constitution or status.⁹⁰⁷ The authority to sign a document is regarded within the post-enlightenment philosophical tradition as a function of the free and self-determined,

⁹⁰⁴ Interview with Peter Gunner, Utopia community, 28 September 2004 Gunner regarded this failure as indicative of a lack of rigour in research methodology for the trial.

⁹⁰⁵ In particular, the publication of an article in the *Melbourne Herald* in 1951, reporting the speech of Dr Charles Duguid at the annual meeting of the Aborigines Advancement League (Applicants Policy Documents, Vol 3, p 348) which criticised the government’s ‘cruel policy’ of removal of children gave rise to a flurry of correspondence to the Minister and a question on notice in the House of Representatives which necessitated clarification of the policy and practice from the Director of Native Affairs.

⁹⁰⁶ Connor (2001).

⁹⁰⁷ According to the Macquarie Dictionary, the word ‘character’ comes from the Greek ‘charaktēr’ meaning ‘an instrument for marking, mark’. Hence the meaning of character as a symbol in a writing system, such as the letters of an alphabet.

reasoning subject. It is closely connected to the capacity to make moral judgments, to act within the law and to consent to actions—the active citizen in Kant’s formulation. At the time the form of consent was purported to have been signed, however, thumbprints were not read as individualised identity. On the contrary, the thumbprint signified membership of an illiterate group. The thumbprint was inscribed with collective identity and in this way the uniqueness of the event is undermined.

The concept of individualised identity and subjectivity is itself tied to the emergence of the modern bureaucratic state and the development of documentary practices which made citizens visible and ‘open to the scrutiny of officialdom’.⁹⁰⁸ One of the key functions of the emergence of written forms of individualised identification in western Europe was as a means to record real property ownership, inheritance and exchange through contracts, wills and estates. These are legal documents on which the signatures of parties and testators function as the sign of agreement, obligation or receipt, whose authentic identity is subsequently verified by a witness through another signature or mark. The semiotic function of the signature as the sign of individualised identity is inextricably connected to legal and bureaucratic processes of state control and land ownership.

Jane Caplan points to the tension incorporated in the term ‘identity’ between identity as self-same in the ‘individualizing, subjective sense’ and identity as sameness with another in the ‘classifying, objective sense’.⁹⁰⁹

Here the juridical identification of the individual actor meets the categorical identification of a type or class: in virtually any systematics of identification, everyone is not only ‘himself’ but also potentially the embodiment of a type, and in an important respect the history of identification is a history not so much of individuality as of categories and their indicators.⁹¹⁰

In this way, as she points out, quoting from Fraenkel’s history of the signature, identity incorporates both ‘that which distinguishes an individual from others and that which assimilates him to others.’⁹¹¹ The mark on the form of consent does not function as a

⁹⁰⁸ Jane Caplan and John Torpey (eds), ‘Introduction’ in *Documenting Individual Identity: State Practices in the Modern World* (Princeton University Press, Princeton, 2001) 1.

⁹⁰⁹ Jane Caplan, “‘This or That Particular Person’: Protocols of Identification in Nineteenth-Century Europe’ in Jane Caplan and John Torpey (eds), *Documenting Individual Identity: State Practices in the Modern World* (Princeton University Press, Princeton, 2001) 51.

⁹¹⁰ Ibid.

⁹¹¹ Caplan (2001) quoting Beatrice Fraenkel, *La Signature: genèse d’un signe* (Gallimard, Paris, c1992) 197. This is presumably Caplan’s own translation of Fraenkel’s fascinating sounding work, as I have not been able to find an English translation available.

signature, as a sign of individualised identification. It is not a name. It does not inaugurate an autonomous legal identity for Kundraiba. On the contrary, it signifies a lack of nominal status. The thumb-mark as signature represents the imposition of colonial bureaucratic regimes. It is an attempt to imbue a highly complex cross-cultural discursive context with a singular, homogenous legally-defined meaning. The document itself served to control the production of racialised identity within the defined parameters of the legislation. As so many Aboriginal people recall, this is the regime which generated the identity expressed as coming ‘under the Act’: the production of legislatively-defined racial identity in accordance with the policy of assimilation. It is a process of making subjects legible to racialised bureaucratic regimes.

MAKING THE SUBJECT LEGIBLE

James Scott et al refer to this process of the production of legal identities as ‘state projects of legibility’, a process which they analyse through the historic development and imposition of the permanent family surname.⁹¹² The authors examine the function of fixed personal names, and particularly permanent patronyms, as legal identities carried out as state-making projects of the modern era, ‘in which it was desirable to be able to distinguish individual (male) subjects’ for purposes such as ‘tax collection ... conscription, land revenue, court judgements, witness records, and police work’.⁹¹³ Pointing out that ‘[v]ernacular naming practices throughout much of the world are enormously rich and varied’ and ‘[i]n many cultures, an individual’s name will change from context to context and ... over time’,⁹¹⁴ they argue that ‘the use of inherited familial surnames represents a relatively recent phenomenon intricately linked to the aggrandizement of state control over individuals and the development of modern legal systems and property regimes.’⁹¹⁵

The deployment of the notion of legibility in the authors’ argument serves to illuminate the semantic function of colonial and other state-making naming practices in an attempt to inscribe meaning on contexts which are otherwise illegible to the colonialist:

⁹¹² James C Scott, John Tehranian and Jeremy Mathias, ‘The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname’ (2002) 44(1) *Comparative Study in Society and History* 4.

⁹¹³ Ibid 11. As the authors point out, within the English tradition, the link between the naming system and the security of private property rights was particularly manifest. ‘In a bargain that replicates itself in many other nations, the aristocracy gained security for their property rights by adopting heritable patronyms. Their new legal identity was a political resource in their claim to property in land and office.’: 12.

⁹¹⁴ Ibid 7. Most of us are familiar with the conditions of the situation in which if asked, ‘What is your name?’ we might reply ‘That depends’... (on who you are, on where I am etc).

⁹¹⁵ Ibid 6.

landscapes which seem inhospitable, people who appear unintelligible. It is an attempt to fix the meaning of the Indigenous Other according to the known and privileged discursive, legal and administrative paradigm of the colonial ruler. As Scott et al point out, the production of legal identities is symptomatic of the desire for 'synoptic, standardized knowledge',⁹¹⁶ and to make subjects legible to the bureaucratic regime.⁹¹⁷

The form of consent was a proforma document on which the names 'Peter Gunner' and 'Topsy Kunderilba' were inscribed, bureaucratically inserted *into* the colonial legal framework and racially-defined according to an assimilationist and eugenicist discourse. The name 'Topsy' is itself symptomatic of colonial naming practices and was most likely attached to Kunderilba at some point when she had contact with the bureaucratic processes of the Native Affairs Department or when she began working as a domestic servant for the McLeods at the station homestead. It is resonant with colonial notions of femininity: diminutive and familiar. It is not the name she would have been known by in her own family network. Gunner gave evidence that before he was taken away he used Aboriginal names for the members of his family group⁹¹⁸ and that he never used his mother's European name.⁹¹⁹

Gunner's experience readily illustrates the colonial production of legible subjects and of patronymic legal identity. He said that he had been 'given' the name 'Peter Gunner', the name of his purported father—literally the patronym—when he became an inmate of the institution of St Mary's Hostel. Of course, this would not have been the name he was known by in his family before he was taken away. The imposition of the name 'Peter Gunner' was a function of colonial bureaucratic administration, an attempt to make the child legible to the state. As Gunner pointed out, it was also at St Mary's that he was given a date of birth,⁹²⁰ another important example of hegemonic State-naming identity practices. Gunner and Cubillo both claimed that on no occasion were they given the opportunity to return home during the school holidays, thus contributing to their alienation from family and culture. They argued that their names had been stolen from them, as part of the theft of their language, culture and relationships with their families.

⁹¹⁶ Ibid 5.

⁹¹⁷ They provide an account of the creation of permanent patronyms for Native Americans in the United States around the turn of the last century, where the instability and plurality of indigenous naming practices were considered incompatible with the 'twin normative requirements of civilized life: property ownership and marriage by law': 20.

⁹¹⁸ Transcript, examination of Peter Gunner, 16 August 1999 pp 1496–7.

⁹¹⁹ Ibid p 1503.

⁹²⁰ Transcript, examination of Peter Gunner, 17 August 1999 p 1519.

And as so many members of the Stolen Generations have testified, the loss of one's name is also the loss of cultural knowledge, one's identity in terms of skin and kinship relationships, the law governing who one is permitted marry and the means to retracing these connections; it is the loss of this subjectivity.

Gunner was inscribed with the name of the white father, emblematic of the logic of assimilation. This naming was an attempt to displace the child of mixed-race parentage's Indigenous identity and the specificity of kinship relations evidenced in the name—the only identity previously known to Gunner—and replace it with an identity which conformed to the white Australian normative patriarchal order. This is despite the fact that Gunner's biological paternity was actually unknown to him and subsequently revealed to be uncertain. While the patrol officer Kitching referred to him in his records as 'Peter Gunner', and this name was subsequently given to him at St Mary's, the anthropologist John Morton stated in his report that there appeared to have always been some doubt about the identity of his biological father, who was possibly either a white station worker called Peter Gunner or Sid Kunoth, the son of Trot and Amelia Kunoth, who 'settled' Utopia Station at the end of World War I.⁹²¹

When, under cross-examination, Gunner was confronted by this information, he said that people had told him about Kunoth, but that having been a child growing up with his tribal family and mother, he wouldn't have known who his biological father was, that he didn't know if Kunoth was his father and that he didn't even know if the man called Peter Gunner was his father. He said he hadn't spoken to this man, gone near him or had anything to do with him, that he felt he 'can't just put a claim on someone'.⁹²² Gunner's uncertainty as to the identity of his father, his relative indifference to accurate 'biological' knowledge of his paternity, and his caution about confronting individual men who were said to be his father flies in the face of the evident preoccupation on the part of the colonial administration and the mission, and subsequently the law, with the identity of his father, as the basis to the production of his legal and racial identity.

⁹²¹ Dr John Morton, Anthropologist's Report re Gunner v the Commonwealth of Australia (21 June 1999) 15.

⁹²² Transcript, cross-examination of Peter Gunner, 20 August 1999.

THE BODY AT THE SCENE OF WRITING⁹²³

A signature is considered to be a unique identifying mark, yet it does not carry the trace of racial identity. In the context of the form of consent on which Topsy Kundrilba is said to have placed her thumbprint, however, the presence of race relations is unmistakable. Signs are produced by the body. A thumbprint is the trace of the body at the scene of writing. In this case, it is the sign of indigeneity, the trace of colonial violence, dispossession and genocide.

The form of consent functioned to transfer responsibility for the ‘care, custody and control’ of Gunner from his mother to the state. Framed as a request by his mother to the Director of Native Affairs, who had the legislative power to determine the racial status of Aboriginal people, the form functioned to inscribe the young Gunner with the legal status of ‘an Aboriginal’. Under the *Aboriginals Ordinance 1918*, the Director of Native Affairs had power over all Aboriginal people, including the power to act as their legal guardian until they turned 18 years, notwithstanding the existence of a parent.⁹²⁴ Gunner is said to have been removed from his mother in 1956, the year after the *Welfare Ordinance 1953* came into effect.⁹²⁵ Under the new legislation, the definition of ‘aboriginals’ was redefined to exclude ‘half-castes’. However, a new sub-section was introduced which empowered the Director of Native Affairs to declare a person, if one of their ancestors came within the statutory definition of ‘Aboriginal’, to be deemed an Aboriginal if the Director considered it to be in their best interests, and the person requested it. O’Loughlin concluded that as Gunner was himself only a child at the time, the authorities had perceived the need for his mother to request the declaration.⁹²⁶

Had Kundrilba signed her name cursively, rather than with the sign of her *body*, what might this have signified? The thumbprint is itself a sign of illiteracy. In western culture, illiteracy is considered a sign of ignorance and is associated with incompetence and with the uncivilised. The form itself explicitly states that the signer, a ‘full-blood aboriginal (female) within the meaning of the Aboriginals Ordinance 1918–1953’ desires ‘my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste’ and that she was ‘unable myself to provide the

⁹²³ I have appropriated this expression from Vicki Kirby, ‘*Corpus delicti*: the body at the scene of writing’ in Rosalyn Diprose and Robyn Ferrell (eds), *Cartographies: Poststructuralism and the Mapping of Bodies and Spaces* (Allen & Unwin, North Sydney, 1991).

⁹²⁴ *Aboriginals Ordinance 1918* (NT) s 7.

⁹²⁵ The *Welfare Ordinance 1953* (NT) commenced in May 1957, repealing the *Aboriginals Ordinance 1918*.

⁹²⁶ *Cubillo*, para 139.

means by which my son may derive the benefits of a standard European education'. The discursive framework in which the form circulated was eugenicist, relying on a presupposition that Aboriginal women were incapable of providing the parental care and educational opportunities to which a boy such as Gunner was entitled, by virtue of the status of his 'Part-European blood, his father being a European'. Under the legislative regime in force at the time, Gunner was of a different caste to his mother. Whiteness, with which he was inscribed as a ramification of his white paternity *made* him, produced him as a subject entitled to an education, and to other entitlements seen to be part of the civilising project of assimilation.

Throughout the trial, there was an underlying suggestion made by counsel for the Commonwealth that Kundrilba's relationship with Gunner was ambivalent and that she had rejected him as a child.⁹²⁷ Mrs McLeod, who together with her husband, had managed Utopia Station at the time Gunner was removed, gave evidence for the Commonwealth, by way of affidavit, pre-recorded interview and extracts from a diary she had written at the time.⁹²⁸ While O'Loughlin concluded that due to her age and failing memory, the difficulty she had in maintaining concentration and the discrepancies between her oral testimony and that in her affidavit, that it 'was necessary to assess her evidence with caution',⁹²⁹ he nevertheless cites extensively from her affidavit.

Topsy Kundrilba had worked in the McLeod's home as a 'house-girl',⁹³⁰ during which time the young man alleged to be Gunner's biological father, Peter Gunner Snr, also worked at the station, living at the stockman's quarters, near the homestead.⁹³¹ In her affidavit,⁹³² Mrs McLeod gave evidence of a conversation she said she remembered having with Topsy, some fifty years earlier, the day after Topsy gave birth, in which she

⁹²⁷ During cross-examination, anthropologist, Dr Morton, was specifically asked if Gunner's mother had 'rejected him virtually from birth and indeed attempted to kill him would that have any consequence so far as the likelihood of him being brought up as an Aboriginal child in the community?' Morton said that during his research, he was not told anything about any attempt to kill Gunner: Transcript, 30 September 1999, p 3739.

⁹²⁸ Mrs McLeod gave her evidence at the Old Timers Village in Alice Springs.

⁹²⁹ *Cubillo* para 799.

⁹³⁰ According to Mrs McLeod's diaries, she began working at the house on 21 January 1947.

⁹³¹ According to Mrs McLeod's diaries, he worked on the station between 18 June–28 November 1947.

⁹³² Mrs McLeod's affidavit was taken on 14 December 1998.

claimed Topsy had said that the baby 'had been put down a rabbit burrow', by which Mrs McLeod said that she understood that 'the baby had been killed'.⁹³³ She also said:

*By then I was well aware of Topsy's status in the native camp. She was a fullblood woman herself but she had a halfcaste child and in those days if you were a halfcaste you didn't belong to the black people and you didn't belong to the white people. Because Topsy had a halfcaste child she was treated as an outcast in the camp. She wasn't being looked after or helped in the camp, she didn't have a husband, which I'm sure she would have by that age if she didn't have the halfcaste baby, and she was dependent on our support and rations to get by.*⁹³⁴

O'Loughlin concluded that: 'If that information about Topsy were correct, it would constitute some incentive to give up her half-caste child.'⁹³⁵ He pointed out however, that despite being a 'dedicated diarist', nowhere in Mrs McLeod's diaries was there mention of Peter's birth, nor of 'Topsy telling her that she had put her baby down a rabbit burrow', that 'the evidence does not support a finding that Topsy tried to kill her new born baby', concluding that 'At the end of the day, I regard the evidence on this subject as too confusing to make any finding at all.'⁹³⁶

Despite rejecting the evidence of attempted infanticide, the dominant narrative employed by O'Loughlin to account for the removal of Gunner ultimately pivoted on the mark on the form of consent functioning as evidence—the sign—of Kundrilba's willingness to relinquish her son. Having posited this explanation for Gunner's removal, he claimed henceforth to be unable to find anything to contradict this conclusion. In particular, he found that the failure of counsel for Gunner to call as witnesses Kundrilba's four sisters, Molly, Polly, Kathleen and Angeline, all of whom were apparently present at Utopia at the time of Gunner's removal, to be of significance, concluding that the absence of these potentially key witnesses, 'suggested that their evidence would not support a finding of non-consensual removal'.⁹³⁷ As documentary evidence, 'The form of consent that was said to bear Topsy's thumbprint was consistent

⁹³³ *Cubillo* para 803. This evidence functioned as a device used by at least one of the agents of the reactionary response to the HREOC inquiry and the Cubillo and Gunner case, Peter Howson, previously a Liberal Party MP and Minister for Aboriginal Affairs between 1971–2, who published a number of articles, including 'Rescued from the Rabbit Burrow' (June 1999) 40(6) *Quadrant* 10–14. I wonder if, in Mrs McLeod's memory of this conversation, there is not possibly evidence of an unconscious association for her between Topsy's name and rabbits?

⁹³⁴ *Cubillo* para 802.

⁹³⁵ *Cubillo* paras 801–2.

⁹³⁶ *Cubillo* para 809. It is also important to point out that McLeod's diary included entries for Thursday 17 November 1950 where it was noted that Peter was very sick, that the doctor had been called, given him medication and that 'He seems to have had a stroke': Transcript, Opening speech by the respondent, 3 March 1999. This suggests that rather than infanticide, Gunner's near death experience was the result of serious illness.

⁹³⁷ *Cubillo* para 838.

with the proposition that she consented to his removal'.⁹³⁸ To O'Loughlin's eyes, it proved to be incontrovertible evidence, in the *absence* of testimony to contradict this interpretation, of her informed consent to sending her son away even though *not one* witness gave evidence that this was the case.

The inference that Topsy consented to his removal was available and is more readily acceptable because of Mr Gunner's failure to call Molly, Polly, Kathleen and Angeline. He could have also called Minnie and Florrie Ware; they were said to have been present when he was taken away. I am satisfied, and I find, that patrol officer Kitching took Peter from Utopia Station in May 1956, that he transported Peter to the Bungalow Settlement in Alice Springs and that even though Peter did not want to leave his mother and his extended family, his mother had consented to his leaving and had requested Mr Kitching to take Peter away.⁹³⁹

But the form of consent tells us nothing about the nature of the relationship between Kundrilba and her son. It provides no evidence as to her position as a mother, her relationship with her family and community, her skin or the law governing who she may have married. We cannot know the specific circumstances and conditions under which she is alleged to have applied her mark. It is impossible to know if she understood why or where her son was to be taken away from her.

CONCLUSION

O'Loughlin's interpretation of the document, his determination of the significance of the mark, the sign of the signature, is an attempt to attribute to it the power to provide a transparent window on the truth—evidence of the truth of Kundrilba's consciousness, of her intention. It is to invest in the mark of her body the function of writing and the claim of her presence to consciousness. It derives from Derrida's metaphysics of presence, 'which longs for a truth behind every sign', the attempt to 'pass through the signifier to the meaning that is the truth and origin of the sign and of which the signifier is but the visible mark, the outer shell'.⁹⁴⁰ Like Austin's treatment of the performative speech act, as Spivak points out, it assigns to the mark, itself also a performative, a 'totalizable and homogenous intention and context',⁹⁴¹ and a trans-historic meaning. But the mark is a floating signifier, orphaned from its context. How may we characterise

⁹³⁸ Ibid.

⁹³⁹ Ibid.

⁹⁴⁰ Jonathan Culler, *Structuralist Poetics: Structuralism, Linguistics and the Study of Literature* (Routledge & Kegan Paul, London, 1975) 19.

⁹⁴¹ Gayatri Chakravorty Spivak, 'Revolutions That As Yet Have No Model: Derrida's "Limited Inc."' in Donna Landry and Gerald MacLean (eds), *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Routledge, New York, 1996) 91.

this longing for an origin in juridical discourse? According to Jonathan Culler, “[s]ome texts are more “orphaned” than others because the conventions of reading are not so firm as to provide a stepfather.”⁹⁴² Here the juridical conventions of reading function as evidence of an attempt to provide a stepfather in the form of the judicial subject. It is to this subject—the body of law—that I will turn in the next chapter.

⁹⁴² Culler (1975) 132.

CHAPTER 8

THE WHITE FATHER-IN-LAW: THE QUESTION OF JUDICIAL SUBJECTIVITY

*To speak as a judge is to speak in the certainty that one's subject position is always potentially relevant and, as a consequence, always potentially open to question. ... The judge must speak and must be seen to speak with the authority of the law, as the embodiment of law or, more precisely, as the body of law.*⁹⁴³

INTRODUCTION

Who is the judicial subject and how are we to account for this embodiment of the law? Theorisations of the self, of the formation of the subject and of agency often highlight the productive nature of power and the emergence of the subject through subjection. Commonly, contemporary accounts of subjectivity draw on Louis Althusser's theorisation of the interpellation of the subject, Michel Foucault's account of the production of subjectivity through disciplinary modalities of power, and psychoanalytic frameworks, particularly Jacques Lacan's theories of the formation of the psyche. Significantly, each of these theorisations postulate the subject as the subject of 'law': Althusser's subject is hailed by the authoritative voice of the police;⁹⁴⁴ Foucault provides an account of the subjectivation of the prisoner through panopticism,⁹⁴⁵ and Lacan theorises the constitution of the subject in the symbolic order.⁹⁴⁶ However, these theories of the formation of the subject tend to focus on the subject of subjection, rather than the powerful subject. The authoritative subject who commands—such as the judicial subject—has received minimal attention within critical theoretical frameworks.⁹⁴⁷

The lack of an account of subjectivity in the Western juridical tradition, 'of who or what it is that thinks or produces law',⁹⁴⁸ is, I would argue, more than a simple absence of

⁹⁴³ Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate, Aldershot, 1999) 90.

⁹⁴⁴ Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)', *Lenin and Philosophy and Other Essays* (NLB, London, 1971).

⁹⁴⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York, Pantheon, 1977).

⁹⁴⁶ See Jacques Lacan (trans Bruce Fink), *Écrits: A Selection* (W W Norton, New York, 2002) and (ed Jacques-Alain Miller, trans Alan Sheridan), *The Four Fundamental Concepts of Psychoanalysis: The Seminars of Jacques Lacan*, Book XI, (W W Norton, New York, 1981).

⁹⁴⁷ For example, while Pheng Cheah, David Fraser and Judith Grbich (eds), *Thinking Through the Body of the Law* (Allen & Unwin, St Leonards, 1996), a key Australian text in critical legal theory focussing on the subjected body of positive law, contains many fine pieces, it does not include a contribution which provides an account of judicial subjectivity. Note, however, Berns (1999).

⁹⁴⁸ Pierre Schlag, 'The Problem of the Subject' (1990–1) 69 *Texas Law Review* 1627, 1629.

analytic attention. It is resistance to analysis and evidence of denial of subjective embodiment in law. Indeed, the question of judicial subjectivity, commonly associated with agency in the form of judicial activism, is seen to be a threat to legal integrity and to produce uncertainty and inconsistency in legal decision making. As feminist analyses have demonstrated, such denial of subjectivity obscures the real subject of law—the white, middle-class, Christian, heterosexual male who overridingly dominates the legal profession and judiciary—the citizen Margaret Thornton has nominated ‘benchmark man’.⁹⁴⁹

As Judith Butler elaborates, the central paradox of theories of subjectivity is that the process of becoming a subject is necessarily a result of subordination *by* power, but it is this subjection which provides the subject’s continuing condition of possibility.⁹⁵⁰ If the subject is produced by power, how can we begin to theorise the subjectivity of he or she who has the power to subjugate? If subjectivity is produced in discourse, what does this say about the power of those who produce the language of the law? What, as Sandra Berns asks, does it mean to speak as a judge?

In this chapter, I will begin by outlining the way in which the question of judicial subjectivity, indeed the question of the legal subject at all, is erased by the dominant jurisprudence of legal positivism. I will then draw on Pierre Bourdieu’s concept of the juridical field as the social site for the production of juridical authority and the operation of power within the law to argue that it is through the use of his concepts of the *habitus* and bodily *hexis* that this subjectivity can be recognised. Following Butler, I will argue that subjectivity is both socially and discursively produced, and that juridical power is reflexive—the subject of law is produced in and productive of the juridical field. Drawing on Aileen Moreton-Robinson’s concept of the possessive logic of patriarchal whiteness, I will go on to argue that the decision in *Cubillo* functions to reaffirms the assumed ‘right’ of the white nation to steal Aboriginal children and that this theft is performed in the name of the father.

Berns claims that to speak as a judge is to embody the law. I will argue that it is the performative force of law, the specific power to speak as a judge, the power to ‘create the things named’, in which the function of interpretation, and its potential violence, can

⁹⁴⁹ Margaret Thornton, ‘Embodying the Citizen’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) 200. This is the normative mark of ‘personhood’ in law.

⁹⁵⁰ Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, Stanford, 1997).

be elucidated. The inscription of race is crucial to the performative function of the decision in *Cubillo*, acting as a mechanism for the interpellation of subjects, including the judicial subject. In particular, I will argue that the decision replicates an economy of colonialism in which the Indigenous figure functions as the trope of the child and the law as the white father. The archetypal figure of the father as law remains the dominant paradigm in the western juridical tradition and is nowhere more apparent than in the figure of the judicial subject. I will argue that in *Cubillo*, the law functions metonymically, acting *in loco parentis*, standing in the place of the absent white father.

According to Jacques Lacan, the Name-of-the-Father—the *symbolic* father—‘constitutes the law of the Signifier’, where the term ‘signifier’ means that which represents a subject for another signifier.⁹⁵¹ For Lacan, the symbolic order—the unconscious order—constitutes the subject. As such, the subject is constituted by language. Where, in the decision in *Cubillo*, the law stands in for the absent white father, it reveals the law’s signifying function as the Name-of-the-Father, the symbolic father, and its capacity to inaugurate subjects in language.

THE QUEST FOR THE SUBJECT OF POSITIVE LAW

Legal positivism identifies the knowing subject and the object of knowledge as discrete entities. According to positivist jurisprudence, ‘the law’ is a system of pre-existing rules which are grounded in empirical knowledge and the role of the judge is to objectively apply these rules to the specific circumstances of the case. The authority of judicial decision-making derives from the origin of the rule and its content is thus accorded the status of ‘fact’. The law exists as an identifiable ‘body of doctrine’,⁹⁵² contained and capable of being documented, communicated and understood by those who are empowered within its operation. Judges act as ‘institutional agents’,⁹⁵³ obliged through their position of authority to act as impartial arbiters to disputes which are brought before them. Positivism requires that judges do not ‘make’ the law, but make objective assessments about the veracity of arguments presented. They are responsible for the application and enforcement of the law, as determined by the legislature and decisions of previous courts. As such, the judge is seen as a disembodied medium through which

⁹⁵¹ David Caudill, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory* (Humanities Press, New Jersey, 1997) 34.

⁹⁵² Valerie Kerruish, *Jurisprudence as Ideology* (Routledge, London, New York, 1991) 47.

⁹⁵³ Sandra Berns, *Concise Jurisprudence* (The Federation Press, Sydney, 1993) vi.

the law passes. As Thornton argues, this is one of the defining features of legal positivism:

Legal positivism, by its nature, affirms the idea of lawyer as conduit, for it privileges technocratic knowledge over contextualised knowledge, particularly that involving the subjective, the corporeal, and the affective. Despite instability at the methodological margins of adjudication, the 'neutral' judge who interprets legal texts, continues to be the paradigmatic agent of legality ...⁹⁵⁴

Judges are chosen on the basis of a belief that they embody that which society accords with the power and authority to determine the sanctioned response to particular disputes. They occupy positions deemed neutral and impartial, from which they are expected to refrain from expressing their personal opinions on political, social or moral issues. Judges speak from positions where their subjectivity is considered to have been erased. They are regarded as adjudicators and mediators of legal truths, capable of separating fact from opinion, rhetoric from reality. In the western juridical tradition, the judge is posited as the ultimate transcendental subject of the post-enlightenment tradition: the sovereign subject capable of possessing knowledge and imparting certainty in judgment.

Judicial subjectivity requires both a recognisably human face and a capacity to rise above human frailty. Judges sit apart from and are elevated above those who come before them, this position symbolically indicating their separateness from, and lack of contamination by, everyday experiences. Their position and garb is intended to reflect their superior status. Chosen by representatives of the community on the basis of perceived knowledge, wisdom and capacity to adjudicate with impartiality, the judicial subject is nevertheless an unmistakably human subject. It is a role which assumes a level of supra-human potential, a position, as Sandra Berns points out, which as a society we know to be 'beyond comprehension'.⁹⁵⁵

Raising questions about judicial subjectivity is commonly equated with notions of 'judicial activism', where judges are viewed as usurping the role of the legislature, potentially threatening democratic principles. Similarly, the call to broaden the elite base from which judges are recruited is met with anxiety about the possibility of a more

⁹⁵⁴ Margaret Thornton, "'Liberty, Equality and ?': Endowing Fraternity with Voice' (1996) 18 *Sydney Law Review* 553, 553.

⁹⁵⁵ Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate, Aldershot, 1999) 86.

representative judiciary being the precursor to ‘forum shopping’.⁹⁵⁶ However, as feminist and critical race scholars have pointed out, these debates can actually serve to reveal the normative subject of law: the privileged, white, masculine, heterosexual, able body of law. Interrogating judicial subjectivity is seen as a threat to the dominant paradigm of legal positivism because it undermines the overriding need for the law to be seen as fixed, rule and procedure bound, and ‘scientific’. It raises the question of who and what determines the law and goes to the heart of the issue of interpretation, of the possibility of uncertainty, unpredictability and ambiguity in law.

While accounts of the subject of positive law—the judicial/legal subject; the ‘legal thinker (judge, academic, lawyer)’⁹⁵⁷, author and interpreter of legal texts—are limited, it is nevertheless at least the case that some recent contributions attest to this absence as a *problem*. James Boyle, for example, argues that critical legal theory has overly concentrated on critiques of objectivity and insufficiently problematised subjectivity.⁹⁵⁸ Boyle’s contribution focuses on an examination of the relationship between structuralism, to which he attributes the theoretical basis of much critical legal scholarship focusing on a critique of epistemology based on the subject/object dichotomy, and subjectivism, which he claims is the ‘phenomenological side of the story [which] exalts the importance of personal experience and the immediate moment’.⁹⁵⁹ He argues that within structuralism, subjectivity becomes just as much a construct as objectivity, that the subject is “‘loaded up,” consciously or unconsciously, with a particular set of qualities or attributes’ and then ‘reflexively produces a kind of society, a legal decision, or a professional practice’.⁹⁶⁰

Boyle argues that the ‘critical legal studies critiques of legal neutrality often sound as though they are being directed to a subject who is as pure in her capacity for rational, liberated subjectivity as the words of the law were supposed to be in their rational, self-revealing objectivity’.⁹⁶¹ Identifying the professional subject as actively constituted as a social subject through a set of reified roles which are imagined, rehearsed and then played out, Boyle argues that we should examine the way ‘the creation and maintenance

⁹⁵⁶ Ibid 96, n 3.

⁹⁵⁷ Caudill (1997) 71.

⁹⁵⁸ James Boyle, ‘Is Subjectivity Possible? The Postmodern Subject in Legal Theory’ (1991) 62 *University of Colorado Law Review* 489.

⁹⁵⁹ Ibid 493.

⁹⁶⁰ Ibid 518.

⁹⁶¹ Ibid 520.

of the “purified” fantasy persona that confronts and receives legal knowledge⁹⁶² is constituted. Boyle’s contention is that postmodernism has much to offer legal theory; indeed, he goes so far as to suggest that the legal subject has ‘seemed distinctly postmodern for a very long time indeed’.⁹⁶³

I am in agreement with Boyle’s argument that the question of legal subjectivity deserves considerably more attention than it has had, to date, in critical legal theory;⁹⁶⁴ this is clearly demonstrated by my focus in this chapter. However, Boyle’s conclusion that the subject of law is already postmodern, and the sites in which he exemplifies this argument, is considerably more contentious. It is true that developments in feminist and gay and lesbian jurisprudence point to the potential for new legal paradigms, and have even, in some ways, succeeded in chipping-away at the ubiquitous privileged, white, heterosexual, masculine legal subject. However, the problem so often encountered by such developments—in law reform and within the profession—is that of overwhelming opposition, invariably involving considerable compromise and necessarily remaining marginal and exceptional to the dominant tradition. This is not simply the aesthetic of ‘ironic juxtaposition’.⁹⁶⁵ Boyle does not address the question as to how the subject of such conflicting forces is produced. While I agree that postmodernism may have something to offer, given the current hyper-conservative political climate, I find his thesis unduly optimistic and ultimately lacking in rigorous critique. For my purposes, Boyle fails to take up his own questioning of the subjectivity of “the purified” fantasy persona that confronts and receives legal knowledge’, the ‘bizarre mechanisms by which a fancy formal discourse produces the felt necessity of a “real life” persona—a false subject for a false objectivity’.⁹⁶⁶

Another contributor to the debate, Pierre Schlag, also argues that the problem presented by the question of subjectivity in law is actually an eclipsing of the problem of the subject, the avoidance of confronting the question of ‘who or what it is who thinks or

⁹⁶² Ibid 517.

⁹⁶³ Ibid 521. Citing recent developments in feminist legal theory in relation to the battered spouse defence which have argued for an extension of the time frame traditionally attached to self-defence, ‘a temporal stretching ... of the legal subject’, and arguments for gay marriage, which simultaneously claim legal rights at the same time as they destabilise conventional notions underpinning marriage, he argues that in such sites of legal practice, a postmodern paradigm ‘simultaneously using and challenging tradition,’ functioning in ‘ironic juxtaposition’, is evident.

⁹⁶⁴ I am not so convinced by his argument that it is a matter of too much attention to objectivity at the expense of subjectivity; to my mind, both areas of critique deserve considerable attention.

⁹⁶⁵ Boyle (1991) 503.

⁹⁶⁶ Boyle (1991) 517.

produces law’.⁹⁶⁷ Focussing specifically on jurisprudential traditions in the United States, Schlag argues however that, rather than a postmodern subject, modes of contemporary legal thought depend upon a ‘quintessentially liberal individual subject’.⁹⁶⁸ In a book-length article, he interrogates the problem of the subject for a range of modes of legal thought: ‘rule of law’ thought, critical legal studies, neo-pragmatism and cultural conservatism, arguing that each of these jurisprudential frameworks actually relies upon a subject constituted so as to be invisible.

In rule-of-law thought—which we might otherwise know as legal positivism—Schlag argues that there is an abandonment of any attempt to locate meaning entirely in either the subject or the object and that this avoidance is achieved through the ‘rubric of *craft*—a professional way of doing things that cannot be reduced to any formula, algorithm, or theory’.⁹⁶⁹ In this way, law is viewed as a set of doctrines, principles and policies which can only be understood by trained and competent members of the legal profession. Correct application of the law by members of the profession through their craft of understanding is seen to lead to sound and predictable decision-making. Schlag argues that such thinking generates the paradigm of ‘inside’ and ‘outside’ the law, where judges and other legal professionals are seen to occupy the internal perspective, whereas those of us who are not members of the profession remain external to law. Sociologists, social observers and philosophers may have a perspective on legal doctrine, but according to rule-of-law thinking, it is not legally authoritative and can only exist outside the legal domain.⁹⁷⁰ According to Schlag, the ‘effectuation and maintenance of this distinction between the internal and external perspective creates a domain—the internal perspective on the rule of law—that is autonomous from the rest of social life and that is implicitly the rightful dominion of the rule-of-law thinker and his projected alter ego, the judge.’⁹⁷¹ As Schlag points out, rule-of-law thinking—positivist jurisprudence—relies upon a clear demarcation between what is and what is not law, where those with access to the knowledge considered necessary to determine the law, the rule-of-law thinker or knowing subject, police the boundaries of what is internal to law’s domain.

Schlag argues that while rule-of-law thinkers depend heavily on the notion of law as a craft, or performance, their focus is nearly exclusively on ‘the articulation, improvement,

⁹⁶⁷ Pierre Schlag, ‘The Problem of the Subject’ (1990–1) 69 *Texas Law Review* 1627, 1629.

⁹⁶⁸ *Ibid* 1631.

⁹⁶⁹ *Ibid* 1662.

⁹⁷⁰ Schlag does not refer to the work of Pierre Bourdieu, but it is possible to see his influence here.

⁹⁷¹ Schlag (1990–1) 1664.

and perfection of legal doctrine’—the object of law—thus avoiding the problem of the subject, and specifically the question as to what kind of subject is necessary to practice law as a craft.⁹⁷² On the contrary, he points out, these accounts assume ‘an epistemically and normatively competent subject’, and in this way, actually assume away the problem of the subject.⁹⁷³ This assumed subject is, according to Schlag, an idealised version of the appellate judge operating in a ‘field of legal doctrine’.⁹⁷⁴

Legal positivism’s elision of the question of judicial subjectivity contributes to sustaining its currency as the dominant jurisprudential framework. Through its insistence on normative, rational decision-making grounded in empirical knowledge, positivism avoids the question of subjective agency and of how this agency is constituted. By positing normative universality as the basis of its authority, positivism evades the question of the operation of power, and of the force of law. Schlag’s assumed subject in the field of legal doctrine and Boyle’s loading up of the subject are attempts to account for positivism’s failure to address the issue of subjectivity in law. However, neither actually provides an account of the constitution of subjectivity in law or of its effect of power.

Not surprisingly, it is feminist theorisations which have provided the most productive accounts of, and challenges to, the gendered subjectivity of law. Margaret Thornton points out that feminist critiques have tended to focus on judges and legislators, with scant attention to legal practitioners. She draws on the concept of fraternity and its manifestation within the culture of the legal profession—through activities such as clubs, sport, eating and drinking—to argue that the masculinist function of ‘brotherhood’ serves to deny women access to seniority and mobility within the law.⁹⁷⁵ Thornton draws on the metaphor of aphonicity to account for fraternity’s unspoken influence, arguing that it is the embodied and relational characteristics of fraternity which assist in revealing the assumed ‘claim of the imagined masculine to the neutral subject position’.⁹⁷⁶

Berns also takes up the notion of speech as a site for an investigation of the gendered authority of the judicial subject. She interrogates the judicial subject from a critical legal theoretical perspective, concerned with the concept of judicial speech and its

⁹⁷² Ibid 1664.

⁹⁷³ Ibid 1667.

⁹⁷⁴ Ibid 1668.

⁹⁷⁵ Margaret Thornton, “‘Liberty, Equality and ?’: Endowing Fraternity with Voice’ (1996) 18 *Sydney Law Review* 553, 559.

⁹⁷⁶ Ibid 567.

relationship to difference, specifically gendered difference. Berns asks whether it is possible to speak as a judge and as a woman—if, in speaking, the judge is spoken *by* the law. ‘The question’, she elaborates, ‘is not simply whether there is room in the law for women’s voices, but whether the law allows room for any voice that has not been woven into its fabric’.⁹⁷⁷ Deploying a highly rhetorical mode of questioning, Berns attempts to problematise the assumed authority of the masculine judicial subject. She argues that to interrogate judicial subjectivity is to call into question the authority of legal judgment and that investigation of the nature of judicial speech leads inevitably to the revelation that ‘to interpret is *always* to *supplement*’.⁹⁷⁸

Once the boundary between supplementation and interpretation was revealed to be, not a impenetrable barrier safeguarding ‘the law’ against judicial law making, but a mirage, the judge *qua subject* is necessarily always already contaminated. There is no perspective from which judicial decision making can be described as the act of one whose ‘subject position’ is irrelevant.⁹⁷⁹

Pointing out that the voice of the judicial subject is masculine, yet unmarked, while a woman who speaks as a judge is ‘inevitably heard as woman’, Berns concludes that ‘[t]he orality of the trial can, therefore, never be entirely authentic, the voice of the woman/judge, within the rhetorical context of adjudication, becoming its own dangerous supplement (woman/judge)’.⁹⁸⁰ However, while Berns’ work makes a significant contribution to the field, and is unique in its focus on the relationship between judicial subjectivity and the rhetoric of judgment, I would argue that it is marred by a failure to adequately interrogate the unmarked whiteness of judicial speech. This is an aspect of judicial subjectivity which I will investigate in this chapter.

LOCATING THE SUBJECT OF LAW: THE JURIDICAL FIELD

Pierre Bourdieu offers, I believe, an account of the social and linguistic practices that are generative of social power which may be useful for further development of a theory of the formation of the judicial subject in his concept of the ‘juridical field’. In his significant contribution to contemporary social theory, Bourdieu commonly focuses on linguistic and cultural practices as sites, or ‘fields’, for the operation of symbolic power. He elaborates his conceptualisation of the field of social power in relation to law,

⁹⁷⁷ Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate, Aldershot, 1999) 13.

⁹⁷⁸ Ibid 89.

⁹⁷⁹ Ibid 90.

⁹⁸⁰ Ibid 203.

describing it as the ‘juridical field’, and argues that juridical authority is essentially an interpretative power.⁹⁸¹ Bourdieu’s conception of the juridical field is that of an ‘entire social universe’ in which juridical authority is both produced and exercised. He argues that an understanding of the social significance of law can be pursued through an examination of two aspects of the juridical field: the specific power relations or competitive struggles which occur between actors within the field—the ‘conflicts over competence’—and ‘the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions.’⁹⁸² According to Bourdieu, the juridical field is not independent of other social fields or practices. However, it may struggle with those outside the field in an attempt to resist external influence, to pursue acceptance of the relationship between the law and the social whole and in this way, sustains the beliefs and self-conception of the actors within the field.⁹⁸³

Bourdieu argues that the juridical field is essentially the site of competition between actors—the legal profession, judges and legal academics—over the interpretation of texts. Those who have the socially recognised technical competence to interpret legal texts compete with each other for monopoly of the right to determine the law. A division of labour exists, determined by structurally organised competition between actors and institutions. As Richard Terdiman, the translator of Bourdieu’s article puts it: ‘Much of this structuring and competition happens in the strange linguistic, symbolic and hermeneutic world in which the struggle for authorised or legitimised interpretation of the texts of the legal corpus, and also the texts of *legal practice*, takes place.’⁹⁸⁴ Bourdieu’s conception of the text does not simply refer to conventional written legal texts but is a semiotic notion which incorporates those behaviours and procedures which are characteristic of the field. He claims that while the practice of interpretation is not an end in itself, ‘[r]eading is one way of appropriating the symbolic power which is potentially contained within the text’, and ‘control of the legal text is the prize to be won in interpretive struggles’.⁹⁸⁵

⁹⁸¹ Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805.

⁹⁸² Ibid 816.

⁹⁸³ We can observe here a similar point to that made by Schlag in relation to law’s investment in sustaining the pretence of autonomy.

⁹⁸⁴ Richard Terdiman, Translator’s Introduction to Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805, 808.

⁹⁸⁵ Bourdieu (1987) 818.

Bourdieu's theorisation is clearly derived from a Marxist-inspired conception of social relations. He utilises terminology derived from economics in his description of the field as a 'market' in which subjects compete for the accumulation of 'capital'. It is a field of power where judges, lawyers and academics, each having different levels of 'wealth' or cultural capital as a result of the resources they are able to draw upon—such as education, qualifications, authority, valued knowledge, reputation and prestige, in addition to their social or familial position and connections—struggle to acquire the prize of symbolic wealth within the field.

Bourdieu argues that the social cohesion of legal interpreters generates the appearance of a transcendental basis for legal norms and reason and for the application of that vision to the social whole. He elaborates this process as it specifically applies to the juridical field through an explication of the linguistic procedures which characterise juridical language, producing the rhetoric of autonomy, neutrality and universality, the mastery of which is the basis for entry into the field.⁹⁸⁶ He claims that,

... what we could call the 'juridical sense' or the 'juridical faculty' consists precisely in such a *universalizing attitude*. This attitude constitutes the entry ticket into the juridical field—accompanied, to be sure, by a minimal mastery of the legal resources amassed by successive generations, that is, the canon of texts and modes of thinking, of expression, and of action in which such a canon is reproduced and which reproduce it. This fundamental attitude claims to produce a specific form of judgment, completely distinct from the often wavering intuitions of the ordinary sense of fairness because it is based on rigorous deduction from a body of internally coherent rules.⁹⁸⁷

This technique is characteristic of legal positivism, where law is regarded as separate from any, and all, other potential frameworks for the consideration of justice. It is clearly apparent in the *Cubillo* decision where O'Loughlin discusses the *Bringing Them Home* report and the question of a national apology to members of the Stolen Generations.⁹⁸⁸ This is a relatively brief section early in the judgment, a paragraph of which is reproduced in the summary which was read by O'Loughlin on a national television broadcast when the decision was brought down.⁹⁸⁹ O'Loughlin expresses concern that there may be 'readers of this judgment who are not legal practitioners' who

⁹⁸⁶ Bourdieu gives examples of the type of linguistic constructions which characterise juridical language, such as the use of the passive voice, designed to 'mark the impersonality of normative utterances and to establish the speaker as a universal subject, at once impartial and objective': 820.

⁹⁸⁷ Bourdieu (1987) 821.

⁹⁸⁸ The section of the judgment is entitled 'Bringing Them Home', paras 64–81.

⁹⁸⁹ The Federal Court began broadcasting summaries of reasons for decisions in cases considered by the court to be of public interest as part of its public affairs strategy in the late 1990s. To date, it is the only Australian court to do so.

may, therefore, wonder why he has not made reference to the contents of the report. He explained that ‘the report was not referred to during this trial by any counsel; it was not tendered in evidence and a Court of Law is bound to decide the case that is before it upon the evidence—and only upon the evidence—that is placed before it by one or other of the parties to the litigation.’⁹⁹⁰ In support of this conclusion, O’Loughlin cites the full bench decision in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*, a full Federal Court decision which was regarded to be of public interest, a summary of which was also read by Justice Wilcox on national television, and where Justices Wilcox, von Doussa and Finkelstein ‘considered that it would be helpful to explain the lines of demarcation between matters that may be known to a judge personally and matters that are before a judge formally as part of the evidence in a trial’.⁹⁹¹ In that case, the judges thought that it would be useful to explain what the case was ‘not about’, and in particular to distinguish between the personal views each of them may hold from the legal question before them. They pointed out that while each of them would undoubtedly have had an opinion about the efficient and economical operation of the Australian waterfront, ‘the court, as a court, has no view about such matters. ... The business of the court is legality’. They stated that ‘this judgment should be seen only as a judgment about legal issues, not a view about the social, economic and political arguments’.⁹⁹²

Justice O’Loughlin justifies the brevity of his discussion of the *Bringing Them Home* report, and subsequent dismissal of its relevance to the decision, on the grounds that it was not raised by either party to the case. Nevertheless, he is at pains to point out that he is personally aware of the contents of the report and has read substantial parts of it. However, O’Loughlin makes a clear distinction between the matters concerning the inquiry and the matters before the court. This case, he affirms, is about the personal history of two litigants. The conditions of the removal of Cubillo and Gunner were not matters which fell into the terms of reference of the inquiry. O’Loughlin proceeds to explain that his role as a judge is not to express an opinion on the call for a national apology because it may not be one which is shared by the community of legal interpreters, the collegiate body of the judges of the Federal Court, and was not raised in the case. In pointing out that, as a member of the judiciary, he is restrained from

⁹⁹⁰ *Cubillo* para 67.

⁹⁹¹ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 626, 628-9, cited in *Cubillo*, para 68.

⁹⁹² *Ibid.*

expressing a personal opinion on the subject of a national apology—and distinguishing this from his decision as a judge—the basis of the judgment he goes on to articulate acquires a different status, namely *law*.

It would not be proper for me, as a judge of this Court, to express a personal view about the call for a national apology. I have a view on the subject as, no doubt, most Australians have. However, my view is only that of another member of the community; it may or may not be a view that is shared by other judges of this Court and the Federal Court, which as a collegiate body, deliberately refrains from expressing a view on social, moral or political issues unless, of course, they are identified as subjects for judicial consideration. The question of an apology to the members of the Stolen Generation was not an issue that arose in this case. That factor is sufficient to restrain me from stating a view on the issue.⁹⁹³

Justice O'Loughlin has created a set of binary distinctions which he has drawn on to establish an arena which is identified as the legitimate concern of the law, indeed, *is the law*, from that which is outside the concern of the court, and is, therefore, 'non-law'. These may be represented as: personal views versus disputes to be decided in accordance with the law; matters known to a judge personally versus matters before a court formally; materials placed before a court versus issues for a court's determination; matters of regret and social conscience versus legal disputes with causes of action; members of the stolen generations versus individual litigants; forcible removal versus removal with consent. In this way, the arena identified as 'law' is characterised by a rhetoric of rationality, formality and impartiality, whereas the arena identified as non-law resonates with the language of uncertainty, affectivity and partiality.⁹⁹⁴

Ghassan Hage utilizes Bourdieu's concept of the field of power in his theorisation of the function of 'whiteness' as a field of governmental belonging and national power in Australia.⁹⁹⁵ Hage argues that actors in the field of national power aspire to and compete for accumulated capital which will position them with maximum prestige in the claim as governmental white Australians. The field of whiteness, like all fields of power, is not a static entity but changes with fluctuations in the value of different forms of capital, which vary according to different historical conjunctures, and the struggle within the

⁹⁹³ *Cubillo* para 74.

⁹⁹⁴ It is worth noting that as a judge, O'Loughlin is apparently entitled to express affectivity, in the form of empathy, only to foreclose it, in the name of positive law. Nevertheless, expressions of affectivity on the part of witnesses are open to scrutiny and interpretation by the court and may well be regarded as indicating lack of rationality. For a more detailed discussion of evidence and affectivity, see Chapter 3.

⁹⁹⁵ Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Pluto Press, Sydney, 1998).

field as particular forms of capital are attributed more or less prestige. ‘The totality of such struggles to determine and accumulate what is “really” Australian or what is “more” Australian, gives the Australian field of national power its particular historical characteristics.’⁹⁹⁶ Hage highlights the usefulness of Bourdieu’s conceptualisation of the field of power to his analysis of dominant national culture because of its capacity to account for unequal and varying levels of cultural capital within the dominant group.⁹⁹⁷

In drawing on Bourdieu’s concept of the field of power, it becomes clear that not only are fields of power not static entities, neither do they exist in isolation from each other. Fields of power will overlap; but rather than eclipsing each other, such combinations will produce locations where power is most intensely focused. I would argue that such a location must occur where the juridical field overlaps with the field of whiteness and that one way of viewing this congruency is through the *habitus* of legal interpreters.

RECOGNISING THE SUBJECT OF LAW: THE LEGAL *HABITUS* AND BODILY *HEXIS*

The field may also recognise particular personal ‘qualities’ or attributes, such as ambition, drive and style, which Bourdieu defines as part of an individual’s *habitus*.⁹⁹⁸ His concept of the *habitus* is based on the notion that our different positions in the social world, as a result of factors such as education, professional status and regional location give rise to forms of behaviour we share with other members of the group which both bind us to that group and distinguish us from members of other groups. It is a system of internalised dispositions which generate and organise practices; our habitual, patterned ways of understanding, judging and acting.⁹⁹⁹ According to Bourdieu, material conditions and the sexual division of labour contribute to produce the *habitus*. While behaviour varies between individuals, the *habitus* is what ultimately determines the group’s practices. It gives a group consistency and its sense of identity and self-recognition.¹⁰⁰⁰ Drawing on structuralist linguistics, it is sometimes described as the ‘deep structure’ of behaviour.

⁹⁹⁶ Ibid 57.

⁹⁹⁷ Ibid 56.

⁹⁹⁸ The concept of the *habitus* was first elaborated by Bourdieu in *Outline of a Theory of Practice* (Cambridge University Press, Cambridge, 1977). Richard Terdiman describes the *habitus* as ‘the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social “fields”, and from our particular trajectory in the social structure.’: 811.

⁹⁹⁹ Bourdieu (1977) 82.

¹⁰⁰⁰ Terdiman (1987) 811–12.

Bourdieu emphasises that the *habitus* is the ‘product of history’, producing individuals and collective practices,¹⁰⁰¹ arguing that it is through a process of inculcation, and particularly as a result of our childhood experiences, that we acquire our dispositions.¹⁰⁰² He uses the concept of the *habitus* in relation to legal interpreters in the juridical field, claiming that:

...the juridical field tends to operate like an ‘apparatus’ to the extent that the cohesion of the freely orchestrated *habitus* of legal interpreters is strengthened by the discipline of a hierarchized body of professionals who employ a set of established procedures for the resolution of conflicts between those whose profession is to resolve conflicts.¹⁰⁰³

Within the juridical field, the *habitus* of lawyers and judges is patterned by a range of factors, including academic training, traditions and customs, and professional etiquette. If we consider the *habitus* as emphasising the interface between the individual and society—where one cannot be separated from the other—the ‘mutually penetrating realities of individual subjectivity and societal objectivity’,¹⁰⁰⁴ the legal *habitus* is what constitutes the membership of the profession, and its own self-recognition. It is what underpins the authority and privilege accorded to those deemed members of the profession, *and* the prerogative accorded to them to speak simply by virtue of this credentialing.

While it is the *habitus* which inclines us to behave in certain ways, Bourdieu refers to its embodied manifestation as that of ‘bodily *hexis*’, which he describes as ‘political mythology realized, *em-bodied*, turned into a permanent disposition, a durable way of standing, speaking, walking, and thereby of feeling and thinking.’¹⁰⁰⁵ As embodied phenomena, the bodily *hexis* is reflected in our posture, the way we walk, how we eat and drink, laugh and talk.¹⁰⁰⁶ Language, including accent, intonation and the way we speak, is central to bodily *hexis*. ‘The linguistic *habitus* is ... inscribed in the body and forms a dimension of the bodily *hexis*.’¹⁰⁰⁷

¹⁰⁰¹ Bourdieu (1987) 82.

¹⁰⁰² John B Thompson, ‘Editor’s Introduction’ to Pierre Bourdieu (trans Gino Raymond and Matthew Adamson) *Language and Symbolic Power* (Polity Press, Cambridge, 1991) 12.

¹⁰⁰³ Bourdieu (1987) 818–9.

¹⁰⁰⁴ David Swartz, *Culture and Power: The Sociology of Pierre Bourdieu* (University of Chicago Press, Chicago, 1997) 96.

¹⁰⁰⁵ Pierre Bourdieu (trans R Nice), *The Logic of Practice* (Cambridge, Cambridge University Press, 1977) 69–70.

¹⁰⁰⁶ Thompson (1991) 13.

¹⁰⁰⁷ *Ibid* 17.

Given this embodied nature, bodily *hexis* must reflect our gendered and raced identity and experience, and the way these characteristics of our subjectivity are inculcated upon us and performed by us throughout life. Bourdieu's notion of bodily *hexis* may be exemplified with reference to the gendered and class-identified performance of physical being: how certain ways of eating or talking are perceived as masculine or feminine, bourgeois or working class. Similarly, I would argue, whiteness may be seen as a feature of bodily *hexis*, a 'political mythology realised' in embodied performance, in deportment and manner of speaking and listening; even in the way one thinks and feels.

THE CONSTITUTION OF THE SUBJECT OF LAW

Judith Butler critically engaged with Bourdieu's deployment of the concepts of the field and the *habitus*. She claims that Bourdieu distinguishes between the *habitus* as the site of the determination of subjective practices, while objective determinations mark the field, and that this distinction is portrayed by him as analogous to that of the linguistic and the social.¹⁰⁰⁸ Arguing that Bourdieu's distinction between the field and the *habitus* is a tenuous one, Butler claims that the relationship between the *habitus* and the field is actually mutually formative. She argues that the *habitus* is formed through a mimetic and participatory process in accordance with the field. 'Indeed, the rules or norms, explicit or tacit, that form that field and its grammar of action, are themselves reproduced at the level of the *habitus* and, hence, implicated in the *habitus* from the start.'¹⁰⁰⁹ The *habitus* is both formed and formative, 'not only a site for the reproduction of the belief in the reality of a given social field—a belief by which that field is sustained—but it also generates dispositions which are credited with "inclining" the social subject to act in relative conformity with the ostensibly objective demands of the field.'¹⁰¹⁰ As she goes on to ask: '[I]s there a subject who pre-exists its encounter with the field, or is the subject itself *formed* as an embodied being precisely through its participation in the social game within the confines of the social field?'¹⁰¹¹ Butler elaborates in her more well-known theoretical work on subject formation:

To say that the subject performs according to a set of skills is, as it were, to take grammar at its word: there is a subject who encounters a set of skills to be learned, learns them or fails to learn them, and then and only then can it be said either to have mastered those skills or not. To master a set of skills

¹⁰⁰⁸ Judith Butler, 'Performativity's Social Magic' in Richard Shusterman (ed), *Bourdieu: A Critical Reader* (Blackwell Publishers, Oxford, 1999).

¹⁰⁰⁹ Ibid 117.

¹⁰¹⁰ Ibid 116.

¹⁰¹¹ Ibid 119.

is not simply to accept a set of skills, but to reproduce them in and as one's own activity. This is not simply to act according to a set of rules, but to embody rules in the course of action and to reproduce those rules in embodied rituals of action.¹⁰¹²

If we accept Butler's critical reworking of Bourdieu's conceptualisation of the field and its relationship to the *habitus*, I would argue that this provides a useful point from which to begin to consider the way participation in the juridical field is formative of subjects—lawyers, judges and legal academics—embodying and reproducing the rules and rituals characteristic of the field. The juridical field, the 'legal universe', is patterned according to a range of social, economic, psychological and linguistic practices, which underpin and determine the law's functioning.¹⁰¹³ As a result of holding the required amount of juridical capital, both social and linguistic, actors are enabled to enter the field, where they compete in the struggle of interpretation. Within this formulation, participation in the field results in reproduction of the practices, norms and values which sustain the field's operation, generating the *habitus* which functions to incline subjects to continue to behave in ways, including the performance of bodily *hexis*, which reproduce the field. As such, the juridical field appears to operate as a self-sustaining normative universe, reproducing its own currency and legitimating its power.

However, the juridical field fundamentally operates through processes of inclusion and exclusion. Potential participants in the field must hold certain capital; it is not possible for just anyone to enter the field. Bourdieu describes this cultural capital as the 'socially recognised capacity to interpret a corpus of texts sanctifying a correct or legitimised vision of the social world'.¹⁰¹⁴ As such, access to the capital gives rise to the capacity to interpret the canon, the discursive function of the field. In this way, the juridical field is determined by what it excludes, by what is not authorised to enter its domain. Similarly, as Butler points out, all subjects are constituted through exclusion, by what is displaced and through the creation of a 'domain of deauthorized subjects, presubjects, figures of abjection, populations erased from view'.¹⁰¹⁵

¹⁰¹² Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, Stanford, 1997) 119.

¹⁰¹³ Terdiman (1987) 807.

¹⁰¹⁴ Bourdieu (1987) 817.

¹⁰¹⁵ Judith Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism"' in Seyla Benhabib, Judith Butler, Drucilla Cornell and Nancy Fraser (eds), *Feminist Contentions: A Philosophical Exchange* (Routledge, New York, 1995) 47.

If the juridical field provides the site for the formation and reproduction of the judicial subject, how is this subject constituted? Bourdieu asserts the significance of the linguistic and social in his theorisation of the juridical field, however, he does not, as Butler points out, take account of the question of interpellation of the subject, the way subjectivity can itself be inaugurated discursively. Butler is drawing on Louis Althusser's well-known theorisation of subject formation,¹⁰¹⁶ in which, as she points out, the subject who comes into being does so 'as a consequence of language, yet always within its terms.'¹⁰¹⁷ I would argue that the juridical field does not pre-exist the subject, but is formative of judicial subjectivity—the embodied subject is produced discursively and emerges through participation in the field. It is the law which calls forth the subject in Althusser's formulation. What do we know of the subjectivity of the person who is in the position to make this call—he or she who hails?

Sandra Berns conceptualises the question of judicial subjectivity as one of voice, raising the question as to whether to speak the law is also to be spoken *by* the law. Berns argues for a hermeneutic-inspired feminist understanding of subject formation 'in which readers and texts constitute one another through interpretation' and an understanding of the judicial subject 'both as narrator and as narratee'.¹⁰¹⁸ She argues that it is the relationship between judge and text, law and legal text, text and meaning, which creates the web of law which binds together judge, text, law and meaning.¹⁰¹⁹ Pointing to the dual character of judgment as both decision and choice, a product of subjective discretion, but also carrying the 'shadow of the inevitable',¹⁰²⁰ Berns argues that to raise the question of interpretation is inevitably to point to judicial subjectivity. 'The judge must speak and must be seen to speak with the authority of law, as the embodiment of law, or more precisely, as the *body* of law.'¹⁰²¹

If to speak as a judge is to embody the law, then it is in this performance that subjectivity is produced. The performativity of the law, its dual and ambiguous capacity to both inaugurate subjects and engage in subjection destabilises its own claim to certainty in meaning. Indeed, it is interpretation and the possibility of supplementation

¹⁰¹⁶ Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)', *Lenin and Philosophy and Other Essays* (NLB, London, 1971). Butler suggests that Bourdieu's notion of the *habitus* may well be read as a reformulation of Althusser's notion of ideology.

¹⁰¹⁷ Butler (1997) 106.

¹⁰¹⁸ Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate, Aldershot, 1999) 83–4.

¹⁰¹⁹ Ibid 59–60.

¹⁰²⁰ Ibid 28.

¹⁰²¹ Ibid 90.

which gives rise to the question of judicial subjectivity and the embodiment of law. I would argue that participation in the juridical field necessitates submission to the linguistic rules which determine the judicial subject's capacity to speak as a judge. This mastery is, however, itself a form of subjection within which the judicial subject is constituted. The law authorises only certain forms of speech, requiring, in particular, stability, certainty and the absence of error or ambiguity in meaning. Judicial speech is a form of performative speech—its articulation effects its own meaning. As such, it is one of the 'powerful and insidious ways in which subjects are called into social being, inaugurated into sociality by a variety of diffuse and powerful interpellations.'¹⁰²² The law calls forth the judicial subject, who, in recognising the law, also recognises the self as subjected to the law.

THE PERFORMATIVE FUNCTION OF JUDICIAL INTERPRETATION

Bourdieu himself argues that legal judgment represents the quintessential form of performative speech.¹⁰²³ Performative speech is a form of speech which articulates its own meaning. Commonly exemplified by utterances which obligate or declare, such as 'I promise', performatives are closely associated with ceremonial and institutional discourse. Bourdieu argues that the efficacy of performative utterances is inseparable from the existence of the institution which defines the conditions which must be fulfilled in order for it to be effective. As such, only those speakers who are endowed with the appropriate power or status to express the utterance can effect its meaning. Bourdieu refers to the power of the performative as 'social magic' and argues that the judgment is the quintessential form of the symbolic power of naming that creates the things named:

These performative utterances, substantive—as opposed to procedural—decisions publicly formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized. They thus succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.¹⁰²⁴

¹⁰²² Judith Butler, 'Performativity's Social Magic' in Richard Shusterman (ed), *Bourdieu: A Critical Reader* (Blackwell Publishers, Oxford, 1999) 125.

¹⁰²³ The concept of the performative speech act was first developed in J L Austin, *How to do Things with Words* (Clarendon Press, Oxford, 1975). Distinguishing performative utterances from those which describe or report, Austin described performative utterances as those which, while neither describing nor reporting, are neither true nor false and where their uttering is, or is part of, the doing of an action which would not usually be regarded as 'just' saying something: 5. I have also discussed performative speech acts in Chapter 4.

¹⁰²⁴ Bourdieu (1987) 838.

Robert Cover also draws on the notion of judicial interpretation as performative, arguing that it has an inextricable relationship with violence. Legal interpretation is, he claims, incomplete without its capacity to impose socially-legitimated violence. His claim that '[l]egal interpretation takes place in a field of pain and death' is the evocative opening statement to a paper which has given rise to the theorisation of a 'jurisprudence of violence'.¹⁰²⁵ Cover claims that judicial interpretation, unlike other forms of interpretation, must be distinguished by its practical capacity both to impose violence upon others and to sanction violence which has or is about to occur.¹⁰²⁶

Cover uses the figure of the martyr under torture to explicate his thesis that legal interpretation is realised 'in the flesh'.¹⁰²⁷ The law is a 'normative world building activity' which violently imposes its meaning on those who are subject to its interrogations. He argues that in this situation, it is the unshareability of pain and in particular, its resistance to language, which exposes the violence of law. Cover argues that if legal interpretation is a practice which is incomplete without violence, then it must be related to the psycho-social mechanisms which usually inhibit people's capacity to inflict pain and violence on others. The violence of judicial interpretation is, however, transformed into violent acts through the 'agentic' behaviour of both the judge and the officials entrusted to carry them out. As such, judicial interpretation can never be rendered intelligible without taking account of its bonds, both to its practical implementation and to the institutional structure which confers meaning. This is, according to Cover, the performative function of judicial interpretation.

Cover's thesis draws principally on the paradigm of criminal law, where the violence of the law and its relationship to interpretation is most readily apparent in the role of the judge in imposing a sentence. Here, judges have the institutionally-sanctioned power to

¹⁰²⁵ See, for example, Austin Sarat and Thomas R Kearns, 'A Journey Through Forgetting: Toward a Jurisprudence of Violence' in Austin Sarat and Thomas R Kearns (eds), *The Fate of Law*, Amherst Series in Law, Jurisprudence and Social Thought (The University of Michigan Press, Ann Arbor, 1991) and Austin Sarat and Thomas R Kearns (eds), *Law's Violence*, Amherst Series in Law, Jurisprudence and Social Thought (The University of Michigan Press, Ann Arbor, c1992).

¹⁰²⁶ Robert Cover, 'Violence and the Word' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (The University of Michigan Press, Ann Arbor, 1993) 203.

¹⁰²⁷ Ibid 208. Pheng Cheah and Elizabeth Grosz point out that for Cover, violence is constitutive of the meaning of law itself; that it is ontological, not historical. They point out that Cover's argument is drawn from Nietzsche's theorisation of the role of the body in the constitution of social and juridical formations. In particular, Nietzsche stressed the importance of pain and corporeal inscription in the formation of memory, the constitution of the subject and the establishment of world-building legal systems.: 'The Body of the Law: Notes Toward a Theory of Corporeal Justice' in David Fraser, Pheng Cheah and Judith Grbich (eds), *Thinking Through the Body of the Law* (Allen & Unwin, St Leonards, NSW, 1996) 16.

deprive an individual of their liberty by imposing prison sentences or, in some parts of the United States at least, their life, through the death penalty. What power, however, does the trial judge in a civil proceeding have to impose socially-legitimated violence through interpretation? While criminal law provides the most readily apparent examples of the violence of legal interpretation, the violent potential of interpretation is apparent in all arenas of law.

The violence of law is inherent in its capacity to impose meaning, to choose one interpretation of events over others, in what Cover describes as the *jurispathic* function of judicial office. Law is, Cover claims, ‘the projection of an imagined future upon reality’.¹⁰²⁸ The function of judicial interpretation is to impose a normative universe on the lived experience of individuals and communities. As Cover points out, meaning is also created for the event, and the role of the judge in the acts of interpretation which serve as justification for the violent deeds which emanate from them.¹⁰²⁹ Cover refers to the creation of legal meaning as *jurisgenesis* and argues that the normative universe which we inhabit is held together by the force of interpretive commitments which determine what law means and what it should be.¹⁰³⁰ This is the symbolic power of legal interpretation, its capacity to impose meaning, to determine what is legal and what is not legal. It is its performative function, the power to produce its effects, to do things with words.

THE EMBODIMENT OF JURIDICAL SUBJECTS

If, as Berns points out, to speak as a judge is to embody the law, important questions must be raised about the specificity of this embodiment. How, in particular, is the judicial subject inscribed by difference, by race, by ethnicity, by sex and by sexuality? And how does the subject qua judge inscribe the law on the bodies of those who come before her?¹⁰³¹ Basing my interrogation on the theoretical framework outlined earlier in which subjectivities are both socially and discursively constituted, I will argue that in Anglo-Australian legal discourse, the creation of legal meaning, Cover’s *jurisgenesis*, replicates the economy of colonialism and relies on the construction of racialised oppositions. This binary structure parallels the adversarial structure of the law and the structure of western metaphysics on which it is based. If, as Elizabeth Grosz and Pheng

¹⁰²⁸ Cover (1993) 207.

¹⁰²⁹ Ibid 212.

¹⁰³⁰ Ibid 98–9.

¹⁰³¹ Berns (1999) 95.

Cheah argue, the law is a productive force which passes through and informs the body to constitute the consciousness of a subject, it must inform the embodiment of the judicial subject, Berns' contaminated speaking subject. In this way, the body of law cannot be regarded as detached or dispassionate and must certainly be inscribed with characteristics of social and political significance.

In their own analysis of judicial reasoning in the cases of *Kruger* and *Cubillo*, Elena Marchetti and Janet Ransley argue that the privileging of legal positivism over Indigenous narratives of history in the decisions is evidence of the 'unconscious racism' of Australian courts.¹⁰³² However, they go on to say that in *Cubillo*, 'the judge was, to a certain extent, constrained by legal doctrine and rules,'¹⁰³³ suggesting a level of inevitability in the performance of racism within the rule of law. In support of their argument, Marchetti and Ransley point to a series of stereotypes through which they argue O'Loughlin assessed the credibility of witnesses. However, they do not interrogate the way this interpretative performance is a function of the juridical field, nor how it is embodied in the judicial subject. I believe that a more useful framework for an analysis which takes account of these issues may be found in the concept of jurisgenesis and in the notion of possessive whiteness.

JURISGENESIS AS THE LOGIC OF POSSESSIVE WHITENESS

In an analysis of the High Court decision in the Yorta Yorta native title claim, Aileen Moreton-Robinson argues that the decision is characterised by the possessive logic of patriarchal white sovereignty which serves to 'naturalise the nation as a white possession'.¹⁰³⁴ She deploys the notion of 'possessive logic' to explain the ideological and epistemological assumption of white sovereignty—'a regime of power that derives from the illegal act of possession ... most acutely manifested in the form of the Crown and the judiciary'.¹⁰³⁵ The 'legitimation' of white ownership of land, Moreton-Robinson argues, is based on a discourse of common sense assumptions which circulate within the text of the decision. The majority of the justices of the High Court upheld the full Federal Court's decision not to recognise the Yorta Yorta people's native title rights to country by reaffirming and privileging white patriarchal understandings of Indigenous

¹⁰³² Elena Marchetti and Janet Ransley, 'Unconscious Racism: Scrutinizing Judicial Reasoning in "Stolen Generation" Cases' (2005) 14(4) *Social & Legal Studies* 533.

¹⁰³³ Ibid 545.

¹⁰³⁴ Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3(2) *borderlands e-journal* para 5.

¹⁰³⁵ Ibid.

traditional law and customs. She claims that the majority of the justices¹⁰³⁶ relied on the definition of native title contained in the *Native Title Act 1993* and refused to uphold the common law recognition of Indigenous sovereignty contained in the landmark *Mabo* decision. Moreton-Robinson argues that the judges demonstrate a form of white patriarchal logic where they assumed the ‘epistemological privilege of defining who Indigenous people are and that to which we are entitled’.¹⁰³⁷ Justice Callinan, in particular, deployed an overt form of possessive logic, where Moreton-Robinson argues that he determined that ‘signifiers of white possession are imputed as the only measure of Indigenous possession’.¹⁰³⁸ Significantly, she points out that when Callinan concluded that the trial judge had found no written evidence of Yorta Yorta tradition and custom, ‘the lack of evidence becomes evidence in itself’.¹⁰³⁹

A manifestation of Moreton-Robinson’s concept of the possessive logic of patriarchal whiteness is also apparent in the decision in *Cubillo*. Here, the assumption of the Commonwealth’s ‘right’ to—and the rightness of—the removal of Aboriginal children, on the grounds of the legislative definition of their race, was affirmed by O’Loughlin through the judge’s privileging of a patriarchal white understanding of the relationships between the children and their mothers and extended families. In the absence of any evidence that either Cubillo or Gunner were children at risk within a care and protection framework, and contrary to eyewitness testimonial evidence that this was indeed not the case,¹⁰⁴⁰ O’Loughlin assumed the veracity of white understandings of Indigenous familial relations by stating that the children had been removed on the basis of a sense of paternalism and care. O’Loughlin took up the argument made by the Commonwealth in its opening address that

if it were thought by the director that a child, born illegitimately ... in a native camp of a mother perhaps very young, the father’s deserted, and he

¹⁰³⁶ In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, the majority joint judgment was by Gleeson, Gummow and Hayne JJ, with individual judgments by McHugh and Callinan JJ rejecting the appeal. Justices Kirby and Gaudron gave a joint dissenting judgment which upheld the Yorta Yorta’s appeal.

¹⁰³⁷ Moreton-Robinson (2004) para 12.

¹⁰³⁸ Ibid para 17.

¹⁰³⁹ Ibid para 17.

¹⁰⁴⁰ For example, as I have already discussed, when Bunny Napurrula, sister/cousin to Cubillo, who knew her as a young child before she was taken away, was asked whether ‘those half-caste kids were treated any differently by Aboriginal people’, she replied, ‘No, they loved them as their own families. Like in Aboriginal way, all we love. Doesn’t matter what tribe you belong to, what colour, you loved your family’: Transcript, 27 August 1999, p 1961. Similarly, Johnny Skinner, who lived at Utopia Station when Gunner was a young child, gave evidence that Gunner’s ‘grandfather and all his uncles, aunties and grandmother’ loved him when he was there: Transcript, 31 August 1999, p 2164.

though that child would be better off in an institution where it would be educated and well looked after ...¹⁰⁴¹

In an analysis of the concept of ‘best interests of the child’ and its contemporary application in child welfare to First Nations peoples in Canada, Marlee Kline argues that it functions as a standard which privileges an understanding of children as ‘*decontextualized individuals* whose interests are separate and distinct from those of their families, communities, and cultures’.¹⁰⁴² She claims that the infusion of liberalist notions of individuality functions to conceptually separate the child from the culture such that the actual removal is seen to be unproblematic.¹⁰⁴³ As she points out, this rhetorical move makes the law appear impartial and ‘obfuscates its role in the reproduction and reinforcement of racism, thereby rendering its racist structures unassailable.’¹⁰⁴⁴ Similarly, Philip Lynch argues, in an analysis of the application of the principle to Indigenous peoples in Canada and Australia, that

... given the extent to which culture is constitutive of Indigenous identity and the capacity of Indigenous peoples to be free to conceive and pursue meaningful lives, and given the fundamental importance of children to the survival of First Nations and Aboriginal culture, the ‘best interests of the community’ must inform the ‘best interests of the child’ in placement and custody decisions.¹⁰⁴⁵

The inscription of race is crucial to the performative function of the judgment in *Cubillo*. It is also an important mechanism for the interpellation of subjects, including the judicial subject. By discussing the concept of race as a discursive strategy at work in legal discourse, I am not, however, wanting to suggest that race, as embodied experience, is simply discursive, that it is not lived ‘in the flesh’. However, I do want to argue that the way the particular construction of race as a white/black binary, and, the function and circulation of whiteness and blackness, reflect and replicate colonial modes of operation in which blackness is the marked, othered, term, but is always defined in relation to unmarked whiteness. It is this economy of colonial representation which, I will argue, is not only reflected in the judgment in *Cubillo* but is also affirmed by the interpretative strategy employed.

¹⁰⁴¹ Transcript, opening address by the Commonwealth, 1 March 1999, p 205.

¹⁰⁴² Marlee Kline, ‘Child Welfare Law, “Best Interests of the Child” Ideology, and First Nations’ (1992) 30(2) *Osgoode Hall Law Journal* 375, 395 (italics in original).

¹⁰⁴³ Ibid 396.

¹⁰⁴⁴ Ibid 415.

¹⁰⁴⁵ Philip Lynch, ‘Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia’ (2001) 23 *Sydney Law Review* 501, 506

Cubillo and Gunner claimed that their removals and detentions were effected under a policy of forced removals and institutionalisation of ‘part Aboriginal’ children. They claimed that the policy was based on race, that it was applied indiscriminately to all ‘half-caste’ children and that it was not concerned with the welfare or individual circumstances of the children.¹⁰⁴⁶ While there has never been a definition of the racial identification of a ‘white’ person in Australia—reflecting its normative, de-raced status—at least 67 definitions of ‘Aboriginality’ have been identified in over 700 pieces of legislation across jurisdictions.¹⁰⁴⁷ The legislation relevant to the removals and detention of Cubillo and Gunner were the *Aboriginals Ordinance 1918* (NT) and the *Welfare Ordinance 1953* (NT). Under the *Aboriginals Ordinance 1918* (NT), an ‘Aboriginal’ was defined as any person who was:

- (a) an aboriginal native of Australia or of any of the islands adjacent or belonging thereto; or
- (b) a half-caste who lives with an aboriginal native as wife or husband; or
- (c) a half-caste, who, otherwise than as the wife or husband of such an aboriginal native, habitually lives or associates with such aboriginal natives: or
- (d) a half-caste male child whose age does not apparently exceed eighteen years; or
- (e) a female half-caste not legally married to a person who is substantially of European origin or descent and living with her husband.¹⁰⁴⁸

Under the *Aboriginals Ordinance 1918* (NT), the term ‘half-caste’ was defined to mean:

... any person who is the offspring of parents, one but not both of whom is an aboriginal and includes any person one of whose parents is half-caste.¹⁰⁴⁹

Section 4 of the Ordinance provided for the appointment of a Chief Protector of Aborigines, later the Director of Aboriginal Affairs to be ‘responsible for the administration and execution of this Ordinance’ who had the power

... to undertake the care, custody, or control of any aboriginal or half caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half caste for him to do so, and for that purpose may enter any premises where the aboriginal or half caste is or is supposed to be, and may take him into his custody.¹⁰⁵⁰

¹⁰⁴⁶ *Cubillo*, para 162.

¹⁰⁴⁷ John McCorquodale, *Aborigines and the Law: A Digest* (Aboriginal Studies Press, Canberra, 1987) 9.

¹⁰⁴⁸ *Aboriginals Ordinance 1918* (NT) s 3.

¹⁰⁴⁹ *Aboriginals Ordinance 1918* (NT) s

¹⁰⁵⁰ *Aboriginals Ordinance 1918* (NT) s 6.

However, the *Welfare Ordinance 1953* (NT) amended the 1918 Ordinance, removing the term ‘half-caste’, together with all references to it and amending the definition of ‘Aboriginal’ to mean:

- (a) a person who is an aboriginal native of Australia or of an island which, being subject to the laws of the Commonwealth, of a State or of the Northern Territory, is adjacent to Australia;
- (b) a person who lives after the manner of, follows, adheres to or adopts the customs of persons described in paragraph (a) of this definition and at least one of whose ancestors was a person described in that paragraph;
- (c) a person, being under the age of eighteen years, at least one of whose ancestors was a person described in paragraph (a) of this definition, and -
 - (i) whose care, custody, or control has been undertaken by the Director under section six of this Ordinance before the date when the *Aboriginals Ordinance* (No 2) 1953 comes into operation; or
 - (ii) whom the Director has caused to be kept in a reserve or an aboriginal institution under section sixteen of this Ordinance, before the date when the *Aboriginals Ordinance* (No. 2) 1953 comes into operation; or
- (d) a person, at least one of whose ancestors was a person described in paragraph (a) of the definition, in respect of whom a declaration is made under section three A of this Ordinance ...

In addition, the 1918 Ordinance was amended in 1953, empowering the Director of Native Affairs to declare a person to be an ‘Aboriginal’ if one of his or her parents fell within the statutory definition of ‘Aboriginal’, the Director considered it to be in the best interests of the person, and the person requested the Director to make the declaration.¹⁰⁵¹ According to O’Loughlin:

Whether a part Aboriginal person would or would not come within the definition of ‘Aboriginal’ after the introduction of the 1953 amendment would be a question of fact to be determined in respect of each person by having regard to the parameters that were set out in the new definition. The 1953 Amendment was most significant in that it removed from the ‘section 6 control’ of the Director those part Aboriginal people (who formerly fell within the definition of ‘half-caste’) but who did not come within the new definition of the word ‘Aboriginal’.¹⁰⁵²

The claimants in *Cubillo* argued that the policy under which they had been removed specifically concerned ‘half-caste’ children and was to be distinguished from the policy of assimilation which began in the 1950s and which applied to all Aboriginal people.¹⁰⁵³ Justice O’Loughlin, however, disagreed, stating that while the term ‘assimilation’ may not have been in currency until the 1950s, its meaning, ‘in the sense of integration’,

¹⁰⁵¹ *Cubillo* para 138.

¹⁰⁵² *Cubillo* para 137.

¹⁰⁵³ *Cubillo* para 162.

dated back to the early days of the 20th century and that it was a policy based on a sense of paternalism and care, concluding that ‘the Aboriginals Ordinance and the Welfare Ordinance are not to be regarded as examples of punitive legislation. Rather, they were intended to be items of welfare or caring legislation.’¹⁰⁵⁴ Furthermore, he claimed that

... integration of part Aboriginal children was not based on race; it was based on a sense of responsibility—perhaps misguided and paternalistic—for those children who had been deserted by their white fathers and who were living in tribal conditions with their Aboriginal mothers. Care for those children was perceived to be best offered by affording them the opportunity of acquiring a western education so that they might then more easily be integrated into western society.¹⁰⁵⁵

In a discussion of the policy of assimilation in Australia, Henry Reynolds states that ‘[f]or 150 years white Australia openly discussed the impending, and, many thought, the inevitable extinction of the Aborigines’ and that ‘[u]nderpinning all discussion of the matter was the practically universal belief that indigenous culture was inferior, primitive and of little value’ and that ‘[m]any of those who were most concerned about the fate of the Aborigines, who were compassionate and distressed about the immorality of the colonial venture, were deeply committed to the idea of converting the victims both to Christianity and to all those characteristics thought essential to civilisation’.¹⁰⁵⁶ He identifies the attempt to control children and to break their ties to family and culture as central to this task.¹⁰⁵⁷ As Reynolds points out, the conviction that removal of children would benefit the children and that it was a humane practice which was so powerful that it enabled the Chief Protector of Aborigines in the Northern Territory, Dr Cecil Cook’s program to ‘breed out the colour’ to be pursued under the 1911 Ordinance and that while his scheme never received formal endorsement from the federal government, tacit approval remained with no official hindrance.¹⁰⁵⁸

Anna Haebich argues that the 1918 Ordinance ‘embodied a policy of segregation and control under the guise of protection’, that it ‘purposefully acted to limit the “half-caste” population through strict controls over the women’s sexual contacts and by removing

¹⁰⁵⁴ *Cubillo* para 164.

¹⁰⁵⁵ *Cubillo* para 162.

¹⁰⁵⁶ Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia’s History* (Viking, Melbourne, 2001) 155.

¹⁰⁵⁷ *Ibid* 158.

¹⁰⁵⁸ *Ibid* 152. Reynolds cites the work of Tony Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911–1939* (NTU Press, Darwin, 1997) 197 and Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne University Press, Carlton, 1997) 173.

and institutionalising their children'.¹⁰⁵⁹ Barbara Cummings, who was herself institutionalised in the Retta Dixon Home, and whose mother had been an inmate at the earlier Kahlin Compound, points to the apartheid function of the legislation, where 'a curfew was established to ensure that people on the reserve were off the streets between sunset and sunrise' and where 'censorship was imposed in the form of attendance at the movie theatre'.¹⁰⁶⁰

Of the *Welfare Ordinance 1953*, Haebich states that while it attempted to introduce a welfare model for all regardless of race, it embodied the policy of assimilation of Aboriginal people because it 'turned on the category 'ward', which was determined by a person's lifestyle, their ability to manage their own affairs, standards of behaviour and personal associations. ... People of mixed descent no longer came under special welfare legislation. They were to be assimilated into European society'.¹⁰⁶¹ Cummings argues that by reversing the criteria which had operated under the old Act, such that it was presumed that all people were exempt except those who were declared as wards, the reforms 'actually reinforced the authoritarianism and paternalism which had become characteristic of the administration of Aboriginal affairs in the Territory'.¹⁰⁶² She points out that while it was assumed that only Aborigines of 'full descent' would be declared wards, it was open to the Director of Native Affairs to declare someone a ward on any number of grounds, including 'manner of living; inability, without assistance, to adequately manage personal affairs; standard of social habit and behaviour; and personal associations', and a person who was exempt but had 'committed some misdemeanor'.¹⁰⁶³

In having erased all references to the category of 'half-caste' and introduced a legislative framework which deployed the rhetoric of care and protection, any person of mixed descent was, largely at the discretion of the Director of Native Affairs, able to be declared to be 'Aboriginal'. In this capacity alone, the Director, acting on behalf of the state, exerted a power to determine the racial status of a person which functioned not unlike that of a biological parent whose racial status a child inherits. However, the bitter irony of the legislative provisions contained in the Welfare Ordinance was that in having been declared an 'Aboriginal', any person of mixed descent potentially came under the

¹⁰⁵⁹ Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Freemantle Arts Centre Press, Fremantle, 2000) 18.

¹⁰⁶⁰ Barbara Cummings, *Take This Child: From Kahlin Compound to the Retta Dixon Children's Home* (Aboriginal Studies Press, Canberra, 1990) 19.

¹⁰⁶¹ Haebich (2000) 20–1.

¹⁰⁶² Cummings (1990) 92.

¹⁰⁶³ Cummings (1990) 91–2.

care and control of the state, which acted as their legal guardian, irrespective of the existence of a parent. This meant that they were effectively regarded as parentless with a legal status akin to that of an orphan, and the state acting as father. In fact, Patricia Grimshaw et al conclude that '[b]ecause Aboriginal marriage was not recognised, and because they were black in a white Australia, all Aboriginal children were in a sense considered illegitimate. The state rather than their families had ultimate control over them.'¹⁰⁶⁴ They go on to say, however, that 'the state was a callous and authoritarian father. Institutionalisation or a servile status alienated rather than civilised.'¹⁰⁶⁵

However, apparently oblivious to the well-documented account of the policy of assimilation exemplified by the work of Reynolds and Haebich, O'Loughlin proposes that the impetus for the policy was that of 'a sense of responsibility' for the children of white men. This interpretative manoeuvre—its jurisgenesis—effectively elides the basis of the claim. Not only was the policy of assimilation not based on race, it is asserted, but was rather the expression of a sense of responsibility for the welfare of children, but additionally, this sense of responsibility was specifically for the children of white men.

Within a juridical framework, the question of responsibility is usually related to whether a respondent in a trial should be held liable, or not, for the impugned conduct. The Commonwealth, the respondent in this trial, rather than being liable for the possibly illegal removal of children, was, according to this logic, actually taking responsibility for children who had been negligently deserted by their white fathers. The fact that these were also children of Aboriginal women who had not deserted them has become insignificant to the question before the court. Who is assuming responsibility for whom? Here, we see the state taking responsibility for white men, in turn, being taken responsibility for by the white male body of the law.¹⁰⁶⁶ This is the logic of colonisation and of assimilation. It is a form of Moreton-Robinson's possessive logic of patriarchal whiteness, where the children of white men are considered the property of the dominant culture and where the question of the impact of the removal on the children

¹⁰⁶⁴ Patricia Grimshaw, Marilyn Lake, Ann McGrath and Marian Quartly, *Creating a Nation* (McPhee Gribble/Penguin Books, Ringwood, Vic, 1994) 289.

¹⁰⁶⁵ Ibid 295.

¹⁰⁶⁶ This is a situation akin to Hannah Robert's description of 'white Anglo-Australian men congratulating white, Anglo-Australian men on their judgments in decisions regarding Aboriginal peoples' lives.' Robert is here referring to the situation of the then federal Solicitor-General, David Bennett QC, describing the *Cubillo* trial as 'very careful compassionate and sensitively considered', which she argues 'almost perfectly echoes O'Loughlin's own assessment of the Director of Native Affairs' decision to remove Peter Gunner from his family': Hannah Robert "'Unwanted Advances": Applying Critiques of Consent in Rape to *Cubillo v Commonwealth*' (2002) (16) *The Australian Feminist Law Journal* 1, 1.

and their families and communities is erased via the invocation of the rhetoric of individual child welfare.

The applicants in *Cubillo* argued that the policy of removal and detention of children was implemented in relation to what was described as the 'half-caste problem' and was based on fear, 'a fear by the Administrators, on behalf of European or white settlement, that in some way they will be out-numbered and overcome by the half-caste Aboriginal birth rate'.¹⁰⁶⁷ As such, they argued that they were subject to conduct which was based on a policy 'that was founded in fear and eugenics', which, judged 'by any standards' was 'unreasonable'.¹⁰⁶⁸ Justice O'Loughlin, however, does not identify the practice as a mechanism of colonial power relations, asserting, rather, that the 'actions must be resolved by having regard to the standards, attitudes, opinions and beliefs' prevailing at the time of the removals, which he regards not to have been motivated by race, but by a sense of paternal responsibility on the part of administrators for the children of absent white men.

I would argue that there is an economy of colonialism at work in the narrative of the trial which necessitates that the 'blackness' which is marked in the profusion of legislative definitions of 'Aboriginal' and 'half-caste' is constructed in relation to unmarked but pervasive whiteness. The construction of this dualism parallels the adversarial structure of law, reflecting the binary structure of western metaphysics on which law is based. In *Cubillo*, it is the undefined 'Commonwealth' against which blackness acquires its definition, and, I believe, it is the figure of the 'white father' which achieves this agency.

LAW AND THE NAME-OF-THE-FATHER

The significance of the notion of the 'father' and its relationship to the 'law' is well established in jurisprudential theorisations, particularly those which draw on a psychoanalytic framework. The mutually constitutive relationship between the concepts of paternity and legality and the iconic representation of the law as father and the father as law lie at the heart of some of the most pervasive of European myths. Sigmund Freud regarded the foundational myth of the human psyche and of the social order as that of the transgression of the authority or law of the father through the story of Oedipus. The recognition of the law of the father was later developed by Jacques Lacan

¹⁰⁶⁷ Transcript, opening speeches for applicants, 1 March 1999, p 142.

¹⁰⁶⁸ Ibid, p 6.

as the moment when the subject enters the social or symbolic order. As Peter Goodrich points out, there are cogent reasons for drawing on psychoanalysis as a framework for reading legal texts and subjectivity—where texts, psyche and culture are all regarded as texts which lend themselves to interpretation. ‘Whether analysed in terms of a judicial subject or author, or in terms of an institutional or cultural subject that can be treated as if it were an author, psychoanalysis offers a method for reading legal texts in the symptomatic terms of their latent meanings.’¹⁰⁶⁹

Over 70 years ago, Jerome Frank described the commonly held idea that law is certain and invariable as a basic legal myth.¹⁰⁷⁰ In attempting to explain the function of this pervasive belief, Frank suggested that law performs a role in our unconscious desire to recapture a childish belief in the omnipotence and infallibility of the figure of the father.

The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge.¹⁰⁷¹

Further and more developed psychoanalytic theorisations of legal subjectivity have emerged more recently in the context of critical legal theory and the burgeoning interest in the intersections of law and literature. David Caudill has provided one of the few texts devoted specifically to the relevance of Lacan’s work to critical legal theory, focussing on the value in this work as ‘both a sustained critique of conventional presumptions concerning, and a strikingly original account of, subjectivity.’¹⁰⁷² Lacan focuses on the structure of language as constitutive of the subject, arguing that the unconscious is structured *like* a language. While Lacan specifically did not offer a theory of the social, Caudill, and others, argue that his work provides a framework for an analysis of law ‘*as*, and not simply *in*, culture and language’.¹⁰⁷³

For Lacan, the “figure” of law, the so-called Name-of-the-Father¹⁰⁷⁴ takes on a profound resonance. Caudill points out that at the most obvious level, law—‘legal processes and institutions’—function within Lacan’s symbolic order, the order of

¹⁰⁶⁹ Peter Goodrich, ‘Maladies of the Legal Soul: Psychoanalysis and Interpretation in Law’, Symposium on Lacan and the Subject of Law (1997) 54 *Washington & Lee Law Review* 1035, 1038.

¹⁰⁷⁰ Jerome Frank, *Law and the Modern Mind* (Stevens & Sons, London, 1949) Chapter 1.

¹⁰⁷¹ *Ibid* 18.

¹⁰⁷² David Caudill, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory* (Humanities Press, New Jersey, 1997) 23.

¹⁰⁷³ *Ibid* 102. Other critical legal theorists drawing on Lacan include David Carlson, Costas Douzinas, Peter Goodrich, Shaun McVeigh, Dragan Milovanovic, Austin Sarat, Renata Salecl and Jeanne Schroeder.

¹⁰⁷⁴ *Ibid* 102.

language.¹⁰⁷⁵ On a deeper level, the structuring law and logic of language is a feature of the symbolic order ‘so that specifically legal structures and other social codes and conventions share in the constitution of the subject by language, ... including conscious and unconscious “discourse”’.¹⁰⁷⁶ He goes on to say:

At an even more foundational level, the Law is associated by Lacan with the Name-of-the-Father, a master signifier upon which the entire signifying network of culture and language relies—the fundamental Law of the Name-of-the-Father divides and differentiates, thereby supporting the unconscious representation and grammatical structures in thought and speech. The place (or locus or field) of the chain of determinative signifiers, as well as the Name-of-the-Father metaphor, is the Other—Lacan’s ambiguous term for the paradoxically exterior field in which the subject appears and on which the subject is dependent for its very constitution.¹⁰⁷⁷

So, for Lacan, the Law, the Name-of-the-Father, the *symbolic* father, is the source of the constitution of the subject, the ‘passage or point of entry into cultural subjectivity’, providing access to the symbolic order.¹⁰⁷⁸ Of course, in many ways, we already recognise this. From a feminist perspective, the name of the father signifies the law of patrilineal identity and patriarchal law, ‘language as our inscription into patriarchy... the fact of the attribution of paternity by law, by language.’¹⁰⁷⁹

The figure of the father and of the father as law has significant agency in the narrative of the judgment in *Cubillo*. For both Cubillo and Gunner, paternity is identified as the source of their status as ‘part-Aboriginal’ people, and hence their subjection to the legislative provisions of the law. The metaphor of the father is dominant in legal discourse, where it functions to signify authority and legitimacy. In asserting the significance of this figure in the narrative of the trial, in utilizing an interpretative strategy which posits the law as the surrogate, but legitimate, white father, O’Loughlin is revealing the function of the law, the Name-of-the-Father, in the constitution of the subject and its role in providing access to the symbolic order. Here, I would argue, we can also see the constellation of sex and race in law’s power to engender subjectivity.

¹⁰⁷⁵ For Lacan, the symbolic order, the order of language, is not language as a means of communication between individuals, but ‘a structure of governing signifiers, often unconscious in their operation and effects’: Caudill (1997) 102.

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ Ibid 102–3. For Lacan, the ‘Other’ appears to have various meanings, but ‘generally refers to that which is exterior to and determinative of the subject, variously designated as the place of the parents and later the law (which is internalized), and as an unconscious discourse analogous to the discourse of dreams—the place of truth in Freudian terms’: Caudill n 2, 159.

¹⁰⁷⁸ Caudill (1997) 107. It is important to point out that for Lacan, this does not necessarily require a real father, but is a paternal metaphor.

¹⁰⁷⁹ Jane Gallop, *Feminism and Psychoanalysis: The Daughter’s Seduction* (Macmillan, Hampshire, 1982) 47.

THE WHITE FATHER-IN-LAW

The trope of the child in imperial representations, and the discursively constructed relationship between primitivism and childhood, have long been recognised in historical and post-colonial theorisations. As Bill Ashcroft points out, the invention of childhood as a concept in European society was coterminous with the invention of race. He claims that the mutual importance of the two concepts to imperial discourse, and in particular the way the ontological gap between childhood and adulthood paralleled that between civilised and barbarous, literate and illiterate, enabled imperialism to be represented as a task of civilising and educating. While the existence of the concept of race is contingent on the establishment of a 'hierarchy of difference', the concept of childhood 'dilutes the hostility inherent in that taxonomy and offers a 'natural' justification for imperial dominance over subject peoples.'¹⁰⁸⁰

According to Haebich, while from the mid-nineteenth century there had been a move away from institutionalisation for non-Aboriginal children who were subject to welfare laws and policies, Aboriginal people continued to be institutionalised because they were constructed as a 'child race' who required constant 'parental' supervision and who were aligned with other groups believed to require institutionalisation. 'In particular, Aboriginal families were perceived as dangerous for the physical and moral well-being of their children.'¹⁰⁸¹ She goes on to point out that the specific construction of race and gender manifest as an anxiety about Aboriginal girls and sexual promiscuity which also led to institutionalisation. However, institutionalisation was not intended to prepare Aboriginal people for assimilation, but as a source of free or cheap labour for the emerging middle-class in Australia. 'Aboriginal people were not being groomed for citizenship but were being trained to become docile, semi-enslaved and disenfranchised domestic and rural workers, either in the wider community or in permanently segregated Aboriginal communities.'¹⁰⁸²

The construction of a connection between the concepts of childhood and primitivism is readily apparent in discursive portrayals of Indigenous child removal in Australia.

¹⁰⁸⁰ Bill Ashcroft, *On Post-Colonial Futures: Transformations of Colonial Culture* (Continuum, London, 2001) 37. Peter Read also makes the point that '[i]n the early years of the colonies, when there were very few children of part-Aboriginal descent, the whites seized upon the children as potentially different from their parents. ... Most of the separations carried out in the early decades of the colonies were made on the supposition that children represented innocence and hope while, the adults represented reaction and superstition': *A Rape of the Soul so Profound* (Allen & Unwin, St Leonards, NSW, 1999) 18.

¹⁰⁸¹ Haebich (2000) 155.

¹⁰⁸² Ibid.

Representations of Aboriginal children as orphaned or abandoned has not been uncommon in literature and other cultural products.¹⁰⁸³ Indeed, I would argue that in this practice, and as exemplified in the decision in *Cubillo*, there is a confluence in the two concepts: the ‘primitive’ is in fact a child and the colonial power, the Commonwealth and its agents, are represented as acting in place of the absent white father, *in loco parentis*, in the place of the parent. In this construction, the violence of colonial power relations is reinscribed as a filial relationship between the colonial subject as child and the Commonwealth as father. It is a narrative construction in which the absent father is replaced by the Commonwealth, which, in removing children who do not have fathers, is seen to be acting responsibly and with authority.

According to documentary evidence written by patrol officer Kitching when visiting Utopia Station in April 1955, Peter Gunner’s ‘alleged father’ was a man of the same name.¹⁰⁸⁴ Peter gave evidence that he did not know who his father was and said that he spent a lot of time as a child at Utopia Station with his uncle, Motorcar Jimmy.¹⁰⁸⁵ As I discussed in the previous chapter, he said that he was given the name of Peter Gunner and acknowledged that he had seen a man in Alice Springs called Peter Gunner who he thought looked a ‘bit like myself’.¹⁰⁸⁶ Peter, who would have previously been known by his family and community at Utopia Station by his traditional Aboriginal name, was given the name of his white father once he was removed under the law. Not only was Peter Gunner physically removed from his community, but his identity was also effaced and he was re-named with the patronym of the man alleged, under the law, to be his father.

In the western legal tradition, patrilineal naming practices serve to authorise an individual’s agency in the law. However, for Peter Gunner, being given the name of his white father did not provide him with legitimacy. On the contrary, when questioned during cross-examination in relation to his date of birth, Peter Gunner highlighted the difficulties he had after leaving St Mary’s Hostel as a result of not having a birth certificate, pointing out that there are a number of possible dates which have been given

¹⁰⁸³ Grimshaw et al (1994) point to Jeannie Gunn’s children’s story *Little Black Princess* in which a “‘nigger” “orphan girl”, who was not an orphan at all, but was adopted by a white woman appears. They also identify the ‘abandoned picanninny image’ commonly used on domestic artifacts such as wall plaques and ashtrays: 279.

¹⁰⁸⁴ *Cubillo* para 774.

¹⁰⁸⁵ Transcript, examination of Peter Gunner, 16 August 1999, p 1493.

¹⁰⁸⁶ Ibid, 17 August 1999, p 1519. This man, who was one of the witnesses for the Commonwealth, gave evidence that he was Peter’s father.

to him on various forms and that while it was ‘pretty hard’ to accept something that was put there by the government, he had needed to in order to access services which were essential to his life as an adult:

All I'm putting to you, Mr Gunner, is that as far as you know, as you sit here in the court today, you were born around 1947 or 1948—around that time. Do you agree with that? --- Well, that's—that's what the government agreeing on. I didn't agree on that birth certificate; that's what the government saying I was born in 1947 or '48 or 1950. See, if I say that to the court, I'm more or less giving evidence here that is the correct birth of my date.

Mr Gunner, I understand that none of us probably actually remembers the date of our birth in the sense of - - -? --- You have. You got a birth certificate because you born in hospital.

No, if you listen to the question, Mr Gunner; I'm drawing a distinction between whether you can now remember what date of birth you have, or whether you have a belief, someone has told you, when you were born. Do you understand that distinction? --- When—when I left St Mary's, I had a hard time; I had no birth certificate. When I went to get a licence I was turned away; I went to hospital, I was turned away, so a property owner gave me another birth certificate. Today my certificate has 9/9/48, that I use on my driver's licence so it—everything was changed around, you know.¹⁰⁸⁷

Significantly, the lengthy cross-examination of Peter Gunner by Elizabeth Hollingworth in relation to possible inconsistency between the evidence he provided in his witness statement and that given orally during the trial is clearly intended to discredit his claim and to point to his possible confusion of events—in particular, those relating to his testimony that the boys at St Mary's were flogged and that he had subsequently tried to run away. In making a claim that he had suffered as a result of his forcible removal, the absence of authoritative documentation of his birth, and therefore of his paternity, is evoked to discredit his evidence.

Indeed, in order to launch a legal action at all, it is necessary to be able to state, under oath, one's name and date of birth. This information is the vehicle through which one has legal agency. Clearly, Gunner was pointing out that for subjects such as himself, who do not have birth certificates to verify this information, authority before the law is invalidated. The condescension with which Hollingworth proceeds to question Gunner can be seen as an indication that for her, who, as he points out, no doubt does have a birth certificate, this point is incomprehensible.

¹⁰⁸⁷ Transcript, cross-examination of Peter Gunner, 18 August 1999, p 1623–4.

The issue of Peter Gunner's paternity was again raised in the trial in relation to the form of consent which was presented as evidence of his mother, Topsy Kundrilba's, request that he be taken to St Mary's Hostel. The form was utilized by the administration after the 1953 amendments to the 1918 Ordinance which removed the power previously conferred on the Director of Native Affairs over people then defined as 'half-caste' but who did not later come within the definition of 'Aboriginal'. It declared Peter 'to be an Aboriginal within the meaning and for the purposes of the said *Aboriginals Ordinance*' for reasons including that he is 'of Part-European blood, his father being a European'.¹⁰⁸⁸ Ironically, Peter is thus declared to be an Aboriginal under the law by virtue of his white father. But it is also as a result of his being declared an Aboriginal under the law that he is removed from his family and community. In this way, his subjection to law, in the form of the institutional authority of St Mary's, can be seen as a consequence of his white father. Contrary to the argument extrapolated from the existence of the form of consent, which is taken by O'Loughlin as evidence of his mother's wish that he be 'educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste',¹⁰⁸⁹ it was Gunner's paternity which determined his fate. Here we can see the significance of whiteness in defining his racialisation—if Gunner had not been assumed to have had a white father,¹⁰⁹⁰ he would not have been subject to the law in this way.

When asked about her father, Lorna Cubillo said that '[f]rom my earliest childhood I understood my father was Horace Nelson' and that her mother had told her that he was a soldier.¹⁰⁹¹ She also gave evidence that her mother, Maudie, was married to Mick, a Warumunga tribal elder whom she 'called dad', that he 'treated me like a daughter' and that '[h]e was my father as far as I was concerned'.¹⁰⁹² Justice O'Loughlin, however, found that this was an area of confusion in Cubillo's evidence, asking 'Why did she regard him as a father figure when she did not know that he had been married to her

¹⁰⁸⁸ Exhibit #A9, Pro Forma Consent Document, tendered 4 August 1998, p 67.

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ As I discussed in the previous chapter, evidence was given in the trial that Gunner's father was possibly not Peter Gunner, but another man, Sid Kunoth.

¹⁰⁹¹ Transcript, Examination of Lorna Cubillo by Mr Rush QC for the applicants, 10 August 1999, p 1076. During opening submission, counsel for the applicants claimed that Nelson was the son of the first federal member of parliament in the Northern Territory—truly a white founding father-of-the-nation-in-law: 1 March 1999, p 186.

¹⁰⁹² Transcript, Examination of Lorna Cubillo by Mr Rush QC for the applicants, 10/8/99, p 1061. Dr Ann McGrath, a historian who gave evidence as an expert witness, also discussed the fact that Aboriginal husbands commonly took responsibility as fathers of children whose biological fathers were white men, and were regarded by the children as their fathers, even if the children also knew the identity of their white fathers: Transcript, cross-examination of Dr Ann McGrath, 24 September 1999, p 3359.

biological mother?’ Significantly, O’Loughlin fails to recognise that while Mick may not have been a father ‘in law’ to Lorna, unlike her absent father, it was his treatment of her as a daughter which determined the nature of her relationship with him.

There are many occasions in the trial where considerable confusion is seen to arise over the nature of familial relationships in central Australian Indigenous cultures. A number of witnesses refer at various points to a range of people as their mothers, fathers, sisters, brothers, aunts and uncles, who would not, according to terminology used to describe western European kinship networks. During evidence, Cubillo points out that ‘[i]n the Aboriginal law our mother’s sisters are our mothers and our father’s brothers are our father’.¹⁰⁹³ The linguistic conventions for the naming of familial relationships, forming the basis of kinship, is one of the foundation stones of cultural identity. The inability to conceptualise these relationships as other than that which is familiar is one of the ways in which cultural incommensurability is apparent in the trial.

According to O’Loughlin, ‘[w]e know that Mrs Cubillo was taken away but we do not know why.’¹⁰⁹⁴ In discussion of Cubillo’s admission to the Retta Dixon Home, he said that ‘[v]iewed through the eyes of the missionaries, there was the possibility that she would have been treated as an orphan. ...Her father was a white man but it is reasonable to assume that the missionaries would have proceeded on the premise that he had abandoned her.’¹⁰⁹⁵ The policy of removals and detention of children utilised illegitimacy and desertion by white fathers to establish a rationale for state intervention. In 1939, the ‘Commonwealth government policy with respect to Aboriginals’ referred to as the McEwen policy, differentiated between children ‘born in wedlock of half-caste parents’ and ‘those born of an aboriginal mother and a non-aboriginal father’, the latter of whom were, according to the Minister for the Interior, the Hon J McEwen, ‘the responsibility of the administration’.¹⁰⁹⁶ On the basis of government policy documents tendered as evidence, O’Loughlin concludes that there was a policy, from about 1911 onwards, of removal of some ‘part-Aboriginal’ children in the Northern Territory, stating, however, that ‘the policy was intended for those illegitimate part Aboriginal

¹⁰⁹³ Transcript, examination of Lorna Cubillo, 10 August 1999, p 1094.

¹⁰⁹⁴ *Cubillo* para 9.

¹⁰⁹⁵ *Cubillo* para 441.

¹⁰⁹⁶ *Cubillo* para 192.

children who were living in tribal conditions whose mother was a full blood Aborigine and whose father was a white man.’¹⁰⁹⁷

Significantly, in *Cubillo*, the court re-performs the filiate relationship through O’Loughlin’s determination that the practice of child removal was not ‘based on race’ but on a sense of ‘responsibility—perhaps misguided and paternalistic—for those children who had been deserted by their white fathers and who were living in tribal conditions with their Aboriginal mothers.’¹⁰⁹⁸ Within this narrative construction, the law takes the place of the absent white father, acting *in loco parentis*, standing in the place of the white father.¹⁰⁹⁹ In the absence of a white father, the child is seen as lacking, as illegitimate, irrespective of his or her relationship with a mother or other family and community members. The Commonwealth and its agents the missions are characterised as saviours of the children, rescuing them from the fate of illegitimacy, from a ‘primitive’ life in tribal conditions with mothers. The children’s white fathers had deserted them, but the law is seen to have acted responsibly.

Austin Sarat argues that the association between law and fatherhood is a metaphorical association which serves to mythologise the law and through which ‘fantasies and anxieties about law are expressed’.¹¹⁰⁰ Sarat identifies the importance of the story of Abraham and Isaac in the Judeo-Christian tradition as a ‘paradigmatic exemplification of law’s claims and its powers, of the presentation of law as the father but also the father as law’.¹¹⁰¹ He goes on to remind us that ‘[i]t is also a story of fatherly failure before the

¹⁰⁹⁷ *Cubillo* para 200.

¹⁰⁹⁸ *Cubillo* para 162.

¹⁰⁹⁹ The concept of ‘*in loco parentis*’, literally means ‘in place of a parent’ (Latin). According to the *Australian Legal Dictionary*, it is traditionally considered the source of authority of school teachers, in addition to their duty to take physical care of children. It is also used in succession law when a guardian is appointed to care for a deceased person’s child. While the concept is a fundamental common law principle in relation to the area of care and protection of children, the only state in which it is specifically used and defined in legislation is WA: ‘A person shall be taken to stand *in loco parentis* to a child if that person, whether male or female, is a person—(a) responsible for providing for the day to day needs of the child as required having regard to the age of the child, and whether or not financial support is provided from any other source; or (b) with whom the child habitually resides, notwithstanding that the child may at any relevant time be in the custody of the law or living away from that person for the time being for educational or other reasons, and the fact that a person stands *in loco parentis* to a child shall not be taken to derogate from the rights which the Director-General might otherwise exercise in relation to that child’: *Child Welfare Act 1947* (WA) s 4(4); *Halsbury’s Laws of Australia*, 17.10:4[4]

¹¹⁰⁰ Austin Sarat, ‘Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter’ (2000) 34 *Law & Society Review* 3, 3.

¹¹⁰¹ *Ibid* 11.

law, abandonment of a child, and a father's failure to protect an innocent in the face of an arbitrary and unjust threat.¹¹⁰²

Justice O'Loughlin determined that the policy of removal and detention of children was based on a 'sense of responsibility' and that it was in accordance with the law. However, what his decision does not acknowledge is that the testimony provided by witnesses in *Cubillo*, in addition to that documented in the *Bringing Them Home* report and in other sources, provides overwhelming evidence that as a practice, the law failed. It failed to protect children from the pain of the loss of their mothers, families and communities; from the loss of their language and culture. Many claimed that it failed to provide them with adequate sustenance and care. There is very little evidence that the children received a standard of European-style education which prepared them for anything other than servitude in white homes and on stations. There was also evidence acknowledged by O'Loughlin that both Cubillo and Gunner were sexually assaulted during their detention in the institutions. Cubillo described the impact of her removal as one of despair which continues to affect her to this day, during which time she has on more than one occasion come close to suicide:

I want to ask you now for you to describe if you can the impact of being removed from your family to ...to Retta Dixon, how you'd describe that removal and the effect that it had on you over those years and since? --- I've lived in despair. I've been overawed with pain and anxiety and that, I'm still anxious to this day and many time I suffered in silence because there was no one there to help me and I still suffer to this day. ...

How have you dealt with that, that pain and the hurt that you describe? Have you been to doctors - - -? --- I did a mental thing, I used to switch on and off. Sometimes when I was in extreme pain I blocked out things and I managed to deal with my problem that way....

Have you ever had any thoughts of suicide, Mrs Cubillo? --- I attempted suicide after the cyclone and I've come close to that on a couple of other occasions.¹¹⁰³

Gunner explained that it was not until he returned to Utopia Station to live, in about 1990, that he began to feel happy again.¹¹⁰⁴ However, despite having been elected by the community at Utopia Station as Chairman of the Urapuntja Council, Gunner was not allowed to making decisions concerning traditional law; he was therefore disempowered before his own law. The disenfranchisement in the world of white law that he described as resulting from his institutionalisation is compounded by the powerlessness which he

¹¹⁰² Ibid.

¹¹⁰³ Transcript, examination of Lorna Cubillo, 11 August 1999, p 1136.

¹¹⁰⁴ Transcript, examination of Peter Gunner, 17 August 1999, p 1552.

also experiences as a result of having been denied the opportunity to go through the laws of Aboriginal culture.

Justice O'Loughlin points to this failure of the law, which he constructs as his inability to address the harms perpetrated on the basis of a feeling of 'sympathy' for the applicants. He points to the limits of the law, of positive law, while at the same time affirming a necessity to maintain those limits. Despite the testimony given by Lorna Cubillo and Peter Gunner that the law had failed to act in their 'best interests', it is they who are constructed as having 'failed' before the law, failed to satisfy the law, to meet the burden of proof.

In each case, the applicant has failed in an essential respect—they have failed to satisfy the Court that, when (or if) the Director removed and detained them, he did not have the necessary opinion about their interests. It is very disappointing to arrive at this conclusion.¹¹⁰⁵

Disappointed by the failure of the applicants to satisfy him, O'Loughlin nevertheless claims that he is unable, 'out of a feeling of sympathy'¹¹⁰⁶ to make a determination in their favour. Taking on a patronising register, he points to the limits of the law, of positive law, while at the same time affirming a necessity to maintain those limits. The law is in this way defined by its lack, its inability to address the claims of those who have been harmed by its operation. It is, as Sarat, following Freud points out, the other side to fatherhood and to law, framed mythologically through the stories of God's command to Abraham and Oedipus's tragic drama as 'fate, an all-powerful force, operating unpredictably, incomprehensibly, unaccountably, imposing loss without explanation.'¹¹⁰⁷

The law with which we live, the positive law, is a mere shadow of law as fate, awesome in the power it can deploy, but shackled by the need to justify the power it deploys and unable to forestall or undo the fate that befalls Abraham, Oedipus, or we less-storied figures.¹¹⁰⁸

In O'Loughlin's decision, the law does not call to account the Commonwealth, nor those white men—missionaries, patrol officers, protectors, welfare officers, ex-army officers and directors—who were its agents. In failing to name the racist basis for the removal of children from their families and cultures, and in attributing to this action a sense of paternalism and care, O'Loughlin ensures the reinscription of white paternity as

¹¹⁰⁵ *Cubillo* para 1245.

¹¹⁰⁶ *Cubillo* para 1245.

¹¹⁰⁷ Austin Sarat, 'Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter' (2000) 34 *Law & Society Review* 3, 14.

¹¹⁰⁸ *Ibid.*

the foundation of legal authority and the reproduction of the nation. I have argued that the decision demonstrates the performance of the possessive logic of patriarchal whiteness through the reaffirmation of the right of the white nation to steal children. O'Loughlin's decision essentially affirms the case presented by the Commonwealth as respondent in the trial. His interpretation of the evidence presented in the trial—his jurisgenesis—reproduces the economy of colonialism under which the children were removed. The law, previously embodied in the white agents of the Commonwealth, acting as guardians of the children, *in loco parentis*, in place of the absent white father, is subsequently re-enacted in the white male judicial subject, the white father-in-law.

CONCLUSION

The failure of white fathers is taken up by Fiona Probyn, who argues that there is a silence surrounding the white fathers of the children of the Stolen Generations, a 'dissociation from "bad white fathers"' whose stories, despite the proliferation of personal narratives, have 'remained relatively *invisible*'.¹¹⁰⁹ She claims that this dissociation facilitates the resurfacing of the "'good" white paternal figure' in the contemporary political climate of John Howard's 'imaginary "Australian community"'.¹¹¹⁰ At the time the *Cubillo* trial decision was brought down, there were other narratives circulating in Australia around notions of paternity which are clearly related to the desire to recuperate the white nation through the figure of the father.¹¹¹¹ Pertinently, Judith Bessant has highlighted the potential conflict of interest in the appointment of leading counsel for the Commonwealth, Douglas Meagher QC, whose father was Chairman of the Aborigines Welfare Board and Minister for Aboriginal Affairs in Victoria between 1960–72. She questions the public interest in the Commonwealth appointing as leading counsel a man who has publicly declared his partisan position, 'a devotee to revisionist history and a man with such a vested interest in winning the case'.¹¹¹²

¹¹⁰⁹ Fiona Probyn, 'The White Father: Denial, Paternalism and Community' (2003) 9(1) *Cultural Studies Review* 60, 63.

¹¹¹⁰ *Ibid* 61.

¹¹¹¹ For example, Barbara Baird points to the media representations of the then Governor-General, Peter Hollingworth's, mismanagement of child sexual abuse claims in his ministry when he was Anglican Archbishop of Brisbane as a failure to take on the mantle of paternal leadership of the white nation: 'Father and Child: Stories of Whiteness and National Reproduction', paper presented at Whiteness and the Horizons of Race Conference, Australian Studies Centre, University of Queensland, Brisbane, 7–9 December 2005.

¹¹¹² Judith Bessant, 'Procedural Justice, Conflict of Interest and the Stolen Generations' Case' (2004) 63(1) *Australian Journal of Public Administration* 74, 82. Bessant argues that this appointment was contrary to the

Not long after the decision in *Cubillo* was brought down, Meagher published a response to the *Bringing Them Home* report, on the basis of his intimate knowledge of the trial, in the conservative magazine, *Quadrant*—the principal vehicle for the publication of the denial of the Stolen Generations.¹¹¹³ In the article, Meagher commits himself to redeeming the reputations of men such as his father, returning them to ‘their rightful place in our history’.¹¹¹⁴ He categorically dismisses the findings of the HREOC inquiry, arguing that the evidence presented in the *Cubillo* trial ‘refuted the Wilson report’s views and the applicants’ [Cubillo and Gunner] allegations as to policy’ ‘comprised documents and evidence of patrol officers, senior officers of the Native Affairs Branch, and missionaries’, who were exposed to cross-examination.¹¹¹⁵ Meagher evinces an unqualified belief in the courtroom as a site for the production of historical truth. His significant role in the litigation was certainly testament to his concern to redeem his father’s reputation. Indeed, his notoriously aggressive style of cross-examination, described by one witness in the trial as ‘bullying’,¹¹¹⁶ suggests that he felt the weight of responsibility for the reputation of the entire patriarchal white nation. Meagher sustained his crusade through the appeal case to the full bench of the Federal Court, which affirmed O’Loughlin’s decision,¹¹¹⁷ thus ensuring that it could not serve as a catalyst, in the form of precedent, for the hundreds of other potential claims by members of the Stolen Generations.

Of course, the decision of the full bench could only overturn that of the trial judge on a point of law—Justices Sackville, Weinberg and Hely were not exposed to the wealth of evidence presented to Justice O’Loughlin. Over a period extending through three years, O’Loughlin was confronted by extensive evidence of sustained policies and practices of

Commonwealth’s obligation to comply with the model litigant rules, which require the Commonwealth, as a party to litigation, to ensure a high level of propriety, fairness and professional standards. Robert Manne also provides an analysis of Douglas Meagher’s involvement in the case, and the obvious way in which he felt driven to vindicate his father’s reputation: In *Denial: The Stolen Generations and the Right*, (2001) 1 *The Australian Quarterly Essay*, 86.

¹¹¹³ Douglas Meagher, ‘Not Guilty’, (November 2000) 11 *Quadrant* 26. In an extraordinary demonstration of the rationalist logic characteristic of legal positivism, and despite his exposure to the extensive testimonial and documentary evidence presented in the trial, Meagher argues that the evidence presented in the official documents as to the number of half-caste children in the Northern Territory relative to the number held in institutions demonstrates conclusively the absence of a policy of forcible removal: 30.

¹¹¹⁴ *Ibid* 34.

¹¹¹⁵ *Ibid* 30.

¹¹¹⁶ Ann McGrath, the historian who was an expert witness described Meagher as ‘basically a bully’, saying that he used a ‘ridiculing tone’ and that she felt like a ‘pawn in a chess game’ during cross-examination. She also said that he wanted to ‘turn everything into very simplistic types of argument’ where things are either ‘black or white with no nuances in between’: Interview, Australian National University, Canberra, 22 November 2004.

¹¹¹⁷ *Cubillo and Gunner v The Commonwealth* [2001] FCA 1213.

Indigenous child theft perpetrated by the state and its agents. He was exposed to undeniable testimonial evidence of Cubillo and Gunner's non-consensual removal, yet claimed that there was a void in the evidence. I have argued that in the decision, a discursive manoeuvre occurs whereby O'Loughlin identifies this void as absent white paternity and subsequently fills it with the explanation of benevolent paternalism, thus exonerating the state and its agents of responsibility. However, as himself the embodiment of archetypal white western paternal agency, the white-father-in-law, this sleigh-of-hand actually reveals O'Loughlin's own complicity in the perpetuation of colonial race relations. When O'Loughlin determined that the Commonwealth was not legally responsible for the pain and suffering Cubillo and Gunner have experienced, he was also deflecting responsibility away from the law, and therefore from himself as the embodiment of law. And when O'Loughlin brought down his decision, there was a sigh of relief that echoed through many of the chambers of white Australian legal and political power.

CHAPTER 9

CONCLUSION: LAW AND RESPONSIBILITY

Well, the fact is that we are responsible for some things we have not done individually ourselves. We inherit a language, conditions of life, a culture which is, which carries the memory of what has been done, and the responsibility, so then we are responsible for things we have not done ourselves, and that is part of the concept of heritage. We are responsible for something Other than us. ... If I go on drawing some benefit from this violence and I live in a culture, in a land, in a society which is grounded on this original violence, then I am responsible for it. I cannot disclaim this history of colonial violence, neither in Australia nor anywhere else.

*That's the difficulty of the concept of responsibility.*¹¹¹⁸

INTRODUCTION

The decision in *Cubillo* demonstrates law's ambivalent relationship to responsibility and justice. As Jacques Derrida has elaborated elsewhere, an understanding of law as justice can only be viewed as a paradox, for in order to be just, or responsible, law must appeal to a pre-given norm, or rule, and is therefore not an appraisal of the unique conditions in question.¹¹¹⁹ In his significant and influential deconstruction of legal positivism, Derrida points out that a call to responsibility which does not grapple with the experience of *aporia*—the impossibility of meeting the request simply by recourse to rules—cannot be justice.¹¹²⁰ As I highlighted towards the beginning of this thesis, Derrida's deconstruction of law and justice, and Drucilla Cornell's 'ethical reading' of deconstruction in the context of justice and legal interpretation,¹¹²¹ provides an apt theoretical foundation for my argument and informs my methodological approach. In this concluding chapter, I will identify the key themes which have emerged in my analysis of the *Cubillo* case and link them to the concepts of responsibility, the ethics of reading and the *aporia* of justice.

The question of responsibility goes to the heart of the case and resonates in a number of fundamental ways. The practice of Indigenous child removal raises crucial questions

¹¹¹⁸ Jacques Derrida, 'What is Owed to the Stranger', interview with Penelope Deutscher in Paul Patton and Terry Smith (eds), *Deconstruction Engaged: The Sydney Seminars* (Power Publications, Sydney, 2001), published in (August–September 2002) 60 *Arena Magazine* 5–7.

¹¹¹⁹ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, New York, 1992).

¹¹²⁰ Ibid 947.

¹¹²¹ Drucilla Cornell, *The Philosophy of the Limit* (Routledge, New York, 1992).

about collective responsibility for the impact of colonialism and is closely connected to notions of national identity. It concerns the relationship between the past and the present, the responsibility of white Australians for the actions of our forbearers and our racial and cultural identity. As Derrida, and others, have asserted, the concept of responsibility presents a particular difficulty because of the way it extends beyond our own individual actions and because the memories of the past imbue our culture, language and ways of life, and because, as he argues, in the context of a colonial history, settler Australians have a particular responsibility because we continue to derive benefit from the original violence of colonisation.¹¹²²

In the case, Lorna Cubillo and Peter Gunner took action against the Commonwealth, arguing that it should bear legal responsibility for the wrongs they had suffered as a result of being forcibly taken away from their families and communities as children and incarcerated in mission institutions. They argued that their removal was the result of policy, endorsed by successive federal governments, to take ‘part-Aboriginal’ children and place them in institutions where they were trained in order, as adults, to perform menial work on stations and in domestic homes. Arguing that the Commonwealth, through its officers, owed them a duty of care, they claimed that it had failed to provide them with an education, appropriate health care and opportunities to visit their families, and to protect them from the assault they each experienced, perpetrated by employees of the mission institutions. Cubillo and Gunner both gave evidence that they had suffered pain and suffering, including serious psychological harm and argued that the Commonwealth was vicariously responsible for their loss of enjoyment of life and loss of cultural heritage, including potential to be recognised as native title holders to their traditional country.

While Justice O’Loughlin accepted much of the evidence presented by the applicants, he claimed that they had each failed to establish that the Commonwealth was responsible for their removals and detentions. In attempting to summarise the primary judge’s decision, the judges in the appeal to the full Federal Court stated that ‘[t]he issue was not therefore whether **anyone was liable** to the appellants for what they had experienced, but whether **the Commonwealth was liable**.’¹¹²³ In particular, O’Loughlin emphasised the overriding problems experienced in the trial due to the

¹¹²² Derrida (2001) 102.

¹¹²³ *Cubillo v Commonwealth of Australia* [2001] FCA 1213, Sackville, Weinberg and Hely JJ, Summary (bold in original).

length of time which had elapsed since the events occurred. However, despite the judicial power to use his discretion, O'Loughlin refused to grant an extension of time to the applicants in relation to the two common law causes of action, wrongful imprisonment and breach of duty, necessary due to the lapse of time, on the grounds that the Commonwealth would suffer 'irremediable prejudice' in defending the claims because so many potential witnesses had died or were too ill to give evidence. This issue of limitations proved to be highly significant to the failure of the action. When Cubillo and Gunner appealed the decision of the primary judge to the full Federal Court, this issue was described by the judges as one of two key reasons for the rejection of the claims.¹¹²⁴

Statutes of limitations which place time restrictions on when legal actions may be taken, relevant to the events in question, highlight the importance of temporality in law.¹¹²⁵ As I discussed in Chapter 2, the significance of time, and specifically the relationship between the past and the present, is also evident in the important function of judicial precedent. However, in limitations, we might say that the future is also implicated. When, in his interlocutory judgment, O'Loughlin refused to grant an extension of time to hear the common law aspects of the claims, this served to deny the applicants any potential right they might otherwise have had, at any time in the future, to a hearing, because they had taken 'too long' to institute the proceedings. It may be characterised as: 'If you had taken action previously, you might now be entitled to the possibility of justice in the future' and demonstrates Drucilla Cornell's point that judges (and lawyers and legal academics) are responsible not only for what the law is, but also for what the law 'becomes'.¹¹²⁶ In refusing to grant Cubillo and Gunner an extension of time, O'Loughlin denied them, and potentially hundreds of other people in similar circumstances, the right to have their common law claims heard before the law.

¹¹²⁴ *Cubillo v Commonwealth of Australia* [2001] FCA 1213, Sackville, Weinberg and Hely JJ. The other reason identified by the judges was that on the evidence presented, the applicants had failed to establish any of the causes of action. In summary, they identified O'Loughlin's findings as: at the relevant times, there was not a general policy in force in the Northern Territory of indiscriminate removal and detention of part-Aboriginal children, irrespective of their personal circumstances; Cubillo had failed to establish that at the time of her removal she was in the care of an Aboriginal adult whose consent had not been obtained to her removal; Gunner's mother, Topsy Kundrilba, had given her informed consent to her son's removal; and the Commonwealth had not actively promoted or caused the detentions: Summary. In concluding the appeal decision, in which they had at times been critical of the trial judge's judgment for its lack of clarity and ambiguous reasoning, the justices stated: 'Although we have not agreed with all aspects of the primary Judge's reasoning, we have found no appellable error in the conclusions he reached': para 474.

¹¹²⁵ One area of law where statutes of limitations have been successfully challenged is in relation to time limits attached to actions taken by adult survivors of child sexual assault. See the recent High Court decision in *Stingel v Clarke* [2006] HCA 37 (20 July 2006).

¹¹²⁶ Cornell (1992) 120.

RESPONSIBILITY BEFORE THE LAW

In the decision, Justice O'Loughlin acknowledged that Cubillo and Gunner had suffered great trauma and loss, yet he claimed that they had failed to meet the law's burden of proof in demonstrating that the Commonwealth was responsible. In concluding his lengthy judgment, O'Loughlin stated:

I have great sympathy for Mrs Cubillo, for Mr Gunner and for others who, like them, suffered so severely as a result of the actions of many men and women who thought of themselves as well-meaning and well intentioned but who today would be characterised by many as badly misguided politicians and bureaucrats. Those people thought that they were acting in the best interests of the child. Subsequent events have shown that they were wrong. However, it is possible that they were acting pursuant to statutory powers or, perhaps in these two claims, it would be more accurate to say that the applicants have not proved that they acted beyond their powers.¹¹²⁷

O'Loughlin invoked the rhetoric of responsibility, highlighting its importance to the issues in the case, only to disavow the possibility of responsibility before the law. He acknowledged that Cubillo and Gunner, and others, had been wronged, but because these injuries were performed within the law, by people who believed that they were acting responsibly, determined that the injustices cannot be recognised by the law. Here is one example of Derrida's concept of the *aporia* of justice—the failure of law to deliver justice through recourse to preordained norms and values, but the necessity of legal judgment to be performed within the law. However, as Derrida elaborates, in order to be just and responsible, a decision must involve 'fresh judgment', 'be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case'.¹¹²⁸

In this thesis, I have chosen to focus on the way the *aporia* of justice is manifest in the law's reception of evidence and testimony. Despite its determinative role, evidence law remains a somewhat neglected area for analysis of law's hermeneutic foundations. As the basis of my analysis, I have argued that evidence law functions as an epistemology because it attempts to mediate the relationship between proof and truth. The thesis is essentially a critique of the function of legal positivism within the Anglo-Australian legal system. Within legal positivism, rationalist and empiricist approaches to evidence are

¹¹²⁷ *Cubillo* para 1562.

¹¹²⁸ Derrida (1990) 961. Derrida attributes the term 'fresh judgment' to Stanley Fish, 'Force', *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Duke University Press, Durham, 1999).

privileged over knowledge derived from subjective locations and affective understandings and universality is privileged over particularity. However, I have argued that all forms of evidence are evinced in discursive context and are most commonly performed in language. Rather than providing access to objective and verifiable truth, my use of critical perspectives on evidence reveals the extent to which truth is actually produced in discourse. Moreover, contemporary theorisations of rhetoric highlight the power of language to interpellate subjects within discursive and ideological regimes. In my analysis of key sites of evidence and testimony, I have been particularly attentive to the function of whiteness as a signifying system, arguing that whiteness functions as more than skin colour, that it can be revealed discursively, as an ideological framework.

DECONSTRUCTION OF LEGAL POSITIVISM

Notwithstanding its manifest power to impose norms and physical violence, my thesis is based on an understanding of law as fundamentally a rhetorical discipline which wields its power through language and interpretation. This was recognised by Derrida, whose critique of the violence of law concerns acts of interpretation as the ‘founding and justifying moment that institutes law [as] a performative force, which is always an interpretative force’.¹¹²⁹ The violence of law as rhetoric is particularly apparent in civil law cases and where collective and historical claims are made, and this is demonstrated in *Cubillo*. For this reason, I have provided a textual analysis of the transcript of trial and judicial decision. The thesis is a critical reading, or deconstruction, of law’s claim to authority through interpretation. I have chosen to concentrate on three key sites where law’s truth claims are evident—the reinstatement of legal principles via the use of precedent; epistemological claims to truth via evidence law; and the interpretative power of the judicial subject.

The decision in *Cubillo* clearly demonstrates the function of legal positivism within the Anglo-Australian legal system. One of the fundamental principles of legal positivism is that law operates within an enclosed and self-referential system, separate from other areas of knowledge. As Cornell points out in her elaboration of Derrida’s deconstruction of legal positivism, which she names the ‘philosophy of the limit’:

¹¹²⁹ Derrida (1990) 941. Drucilla Cornell, in commenting on Derrida’s paper, ‘Force of Law’, describes this as violence masqueraded as the rule of law: ‘The Violence of the Masquerade: Law Dressed up as Justice’ (1990) 11 *Cardozo Law Review* 1047.

For the legal positivist, the Law of Law of a modern legal system can only find its grounding in its own positivity. But in order for the Law of Law to be reduced to the mechanism of the perpetuation of legal rules ... the legal positivist must postulate a self-enclosed system.¹¹³⁰

As the methodological basis for my analysis, I have employed an interdisciplinary approach which assumes the permeability of epistemological boundaries. I have argued that the separation of law from other areas of knowledge and other frameworks for understanding responsibility serves the ideological purpose of protecting legal truth claims from critical gaze. The use of contemporary critical theoretical approaches which are characterised by interdisciplinarity serves as a key component of my critique of legal positivism.

What responsibility did O'Loughlin have to judge within the *aporia* of law and to go through Derrida's 'ordeal of the undecidable'?¹¹³¹ While it may be denied by positivism, the adjudicative process always involves incorporation and exclusion, legitimation and delegitimation, interpretation, supplementation and the production of meaning. The 'double movement' of deconstruction which Derrida describes involves 'responsibility towards memory', including the memory of the founding violence of the law.

RESPONSIBILITY TOWARDS MEMORY

I began my inquiry with the intention of investigating the rhetoric of the discourse of reconciliation, which, in the wake of the landmark *Mabo* decision, occupied a prominent position in Australian public life during the 1990s. Broadly speaking, the purpose of my project has been to investigate the relationship between law, language and race. In particular, I wanted to interrogate the way the discourse of reconciliation, despite its alleged potential to recognise and affirm difference and plurality, rather, maintains whiteness at the centre of discursive and political power.

A key site in which this privileging of whiteness and failure to recognise the Indigenous Other is performed is in legal discourse. While the release of the HREOC *Bringing Them Home* report demonstrated a significant level of recognition of Indigenous people, this was not reiterated by the law when Lorna Cubillo and Peter Gunner pursued their claims against the Commonwealth government. In *Cubillo*, the applicants challenged the Commonwealth government to account for its past actions, in the present. For this

¹¹³⁰ Cornell (1992) 93.

¹¹³¹ Derrida (1990) 963.

reason, the case was central to the discourse of reconciliation in Australia, and was part of the movement which had the potential to propel the nation into what might have resembled something approximating a ‘postcolonial’ state. However, I have argued that rather than assuming responsibility for the impact of colonial violence on Indigenous people, the decision in *Cubillo* affirmed a will-to-forget, a form of postcolonial amnesia. The imperative for law to remember the past—a requirement entrenched in the principle of precedent and in the court’s determination that the case should be judged in accordance with the legal norms in force at the time of the children’s removals—failed precisely at the threshold of responsibility. In *Cubillo*, the law failed, as Derrida has said, in the ‘responsibility towards memory’, to recall the history of law and the limits to the concept of justice, and in the responsibility to interrogate the ‘origin, grounds and limits of our conceptual, theoretical or normative apparatus surrounding justice’.¹¹³²

In my examination of the reception of evidence in the trial, I have focused on the three key evidentiary forms: oral testimony, expert witnesses and documentary evidence. First focussing on the oral testimonial form, I have interrogated a key segment of evidence provided by Lorna Cubillo in which she describes the occasion of her removal from her family and community at Banka Banka station. While O’Loughlin accepted some aspects of Cubillo’s memory of events, he ultimately determined that she had not met the law’s standard of proof, alleging that she had engaged in a ‘process of reconstruction’ of events. However, I have argued that the importance of Cubillo’s memory of this occasion lies not in whether she was able to recall the precise details according to law’s conventional positivist paradigm for evidentiary standards, but rather in an understanding of her testimony as deriving its authority from its embodied truth. Drawing on theorisations of *testimonio*, the truth of Cubillo’s testimony lies in her experience of bearing witness to a history of collective racialised oppression. I have argued that her testimony should be viewed as the voice of the subaltern, and with the authority to tell the truth to which we do not otherwise have access. Moreover, I have argued that O’Loughlin’s failure to listen to Cubillo’s testimony of traumatic memory exemplifies law’s inability to respond justly to the Indigenous Other of colonial violence. It is a failure ‘to address oneself to the other in the language of the other’, which Derrida describes as the ‘condition of all possible justice’.¹¹³³

¹¹³² Derrida (1990) 955.

¹¹³³ Derrida (1990) 949.

When Cubillo recounts her memory of being abducted as a child, she describes what might be characterised as a primal scene, for it also occasions her first memory of being called a ‘half-caste’ by the law. I have argued that the importance of Cubillo’s testimony lies in the way it reveals the power of language to inaugurate racialised subjectivity. It is one of a number of sites I have examined in an investigation of the force of the performative speech act, and specifically the function of law to interpellate subjects. In a discussion of the function of hate speech, Judith Butler has argued that ‘[t]he name one is called both subordinates and enables, producing a scene of agency from ambivalence, a set of effects that exceed the animating intentions of the call’.¹¹³⁴ I have similarly argued that the responsibility of the law lies in recognising the rhetorical power of Cubillo’s memory of being named within a racist discourse and the political significance of her testimonial survival.

Law’s resistance to knowledge derived from other epistemological paradigms is also demonstrated in the reception of expert evidence, particularly when this expertise is derived from non-positivist methodologies. In *Cubillo*, anthropologists and historians were called as expert witnesses by both applicants and respondent. However, the evidence of the historian, Professor Ann McGrath, attracted particularly aggressive cross-examination by the Commonwealth because it did not meet the law’s empirical evaluative standard for ‘fact’. I have argued that the contentiousness of McGrath’s expert historical evidence lies in its competing status with law as an interpretative discipline. However, unlike positive law, contemporary historiography, influenced by contemporary critical theory, tends to recognise the interconnection of knowledge derived from different epistemological frameworks and the power of interpretation in ascertaining truth claims.

LEGAL INTERPRETATION AND RESPONSIBILITY

The documentary evidence relied upon in the trial provided a rich site for interrogation of law’s interpretative power. In my analysis of the court’s reception of over 2000 pages of policy documents, I have drawn on Michel Foucault’s theorisation of the genealogy of historiography, arguing that O’Loughlin’s interpretation of this documentary evidence fails in its responsibility towards history because it assimilates heterogeneous narratives of child abduction into an account which privileges the singular rhetoric of benevolent paternalism. Describing this as the ‘jurisgenesis of assimilation’, I have

¹¹³⁴ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, New York, 1997) 163.

argued that O'Loughlin's reasoning replicates, at the level of judicial interpretation, the ideological framework on which the contested practice of child removal was based. Rather than recognise the overtly racist basis of the policies in operation, O'Loughlin's interpretative manoeuvre denies law's role in establishing the framework under which the practice occurred. In this way, the law disavows the history in which Indigenous people were legally disenfranchised and in which the State had the legislative power to remove them. However, such a genealogy, as Cornell explains, 'demands no less than this responsibility, to expose the limits of what has been established as law through the perpetuation of the legal system'.¹¹³⁵

I have used as a site for a detailed analysis of the law's interpretative power and responsibility, the key item of documentary evidence identified by O'Loughlin as central to his decision to reject Gunner's claim, the 'form of consent by a parent', containing the purported thumbprint of his mother, Topsy Kundrilba. O'Loughlin's positivist reading of this exhibit determined that it constituted evidence, sufficient to reject his claim, that his mother had given her informed consent to her son's removal to St Mary's Hostel. I have argued, however, that rather than providing evidence of consent, the document confronts us with a hermeneutic site which exemplifies Gadamer's theorisation of the historicity of meaning, and an arguably unsurpassable horizon of understanding. As O'Loughlin himself acknowledged, he was unable to verify that the thumbprint was Kundrilba's nor what she might have intended by this act. However, in focussing on the possibility of communicative intention, the judge also fails to recognise the significance of the function of the form in declaring Gunner to be an 'Aboriginal' within the meaning of the Aboriginals Ordinance, legislatively necessary at the time because his father was 'a white man'. In this way, O'Loughlin fails in his responsibility to recognise the racist basis of the provisions of the legal document. While O'Loughlin may be seen to have acknowledged his confrontation with Derrida's *aporia* of the 'ghost of the undecidable',¹¹³⁶ he failed to act responsibly in offering 'fresh' judgment, by judging in the present with reference to contemporary standards of justice.

In his reading of the form of consent, O'Loughlin relies upon an understanding of the thumbprint as a signature and therefore as the performance of a speech act which communicates the intention of the speaker. However, I have argued that an ethical

¹¹³⁵ Cornell (1992) 150.

¹¹³⁶ Derrida (1990) 963.

reading of the thumbprint must recognise the colonial context in which it was produced and the way in which meaning is embedded in ideology. My semiotic reading of the thumbprint identifies it not as the sign of a signature, but rather, as empty of signification. Further developing my analysis, I have argued that rather than pre-existing a speech act, intention is a juridical construct which is discursively produced and attributed to a prior authorial subject. O'Loughlin's reading of the mark as a communicative act with intention demonstrates Derrida's notion of the metaphysics of presence—the desire for an original source for meaning and a belief in the possibility of language providing access to transcendental truth. Contrary to O'Loughlin's reading, I have argued that the form of consent tells us nothing about Kundrilba's communicative intention. Rather, it is the trace of the body at the scene of writing; the trace of illiteracy and of indigeneity. It is evidence of both Kundrilba and her son's subjection before the law.

JUDICIAL SUBJECTIVITY

While theories of subjection have been developed by critical theory, there has been scant attention to the question of the judicial subject, which is largely erased by the dominant paradigm of legal positivism. In my examination of judicial subjectivity, I have drawn on the work of Pierre Bourdieu, and the critical reworking by Judith Butler, using the concepts of the juridical field, legal *habitus* and bodily *hexis*. I have argued that subjectivity is both discursively and socially produced and that juridical power is reflexive—the judicial subject is both produced in and productive of the juridical field.

The law's rhetorical power lies in its performative force, its power to interpellate subjects, including the judicial subject, whose power to speak as a judge is to embody the law. I have interrogated the potential for theorisations of performative speech acts to reveal the racialised character of judicial interpretation, and specifically the discursive function of whiteness. In his judgment, O'Loughlin concluded that 'part-Aboriginal' children were not removed from their families on the basis of race, but on the basis of a sense of responsibility for the children of white men. I have argued, however, that what O'Loughlin reveals in his rationale replicates the logic of colonialism in which the Indigenous represents the child and the law functions metonymically, acting *in loco parentis*, in the place of white father. Drawing on Lacan's concept of the Name-of-the-Father, which constitutes the law of the signifier, I have argued that in O'Loughlin's

decision, the law stands in the place of the absent white father and reveals the power of law to inaugurate racialised subjectivity.

As I write this conclusion, the federal Minister for Health, Tony Abbott, has announced his belief in the need for ‘a form of paternalism’ by the state in addressing the issues of dysfunction and child sexual abuse on remote Indigenous communities.¹¹³⁷ Abbott’s declaration that ‘this time’, the paternalism should be ‘based on competence rather than race’ resonates uncannily with the decision in *Cubillo*. Deploying the colonial metaphor I have discussed, he describes the past treatment of Aboriginal people as ‘wayward children’, and defends the work of missionaries as one of ‘service’, ‘personal responsibility’ and ‘sense of calling’.¹¹³⁸ The unarticulated, yet unmistakable, invocation of the fate of the Stolen Generations in Abbott’s rhetoric aptly exemplifies the propinquity of the institutions of the state, the church and the law in occupying the position of patriarchal white father.

CONCLUSION

I began this thesis with an investigation of the concept of amnesia in ‘postcolonising’ Australia, arguing that the discourse of reconciliation which circulated in this country during the 1990s, providing the context for the action taken by Cubillo and Gunner, took a rhetorical form characterised by the trope of absence. In the decision in *Cubillo*, this absence was represented as a ‘void’ in the evidence and the subsequent failure on the part of the law to offer justice to the applicants. Throughout the thesis, I have interrogated textual sites in the transcript, documentary evidence and judgment in an attempt to reveal the specificity of this void, arguing that what positive law views as absent is ultimately an epistemological construction, which reflects the function of whiteness as a signifying system.

In focussing on an absence of evidence relevant to the individual cases of Cubillo and Gunner, Justice O’Loughlin failed to hear the testimonial voices of those who bear witness to histories of racist oppression. His decision functioned as legal denial of the evidence embodied in generations of people stolen from their families and cultures. The opportunity occasioned by the action bravely taken by Lorna Cubillo and Peter Gunner

¹¹³⁷ Tony Abbott, ‘Misplaced tact stands in the way of help’, *Sydney Morning Herald*, 21 June 2006, p 15.

¹¹³⁸ The ‘calling’ to religious service is something of which Abbott himself has first hand experience: between 1984–7 he studied to become a priest at St Patrick’s Seminary: Know your Politicians Information Series <www.bewareofthegod.com>.

against the Commonwealth to recognise the overwhelming evidence of state-supported policies and practices of kidnapping and incarceration and to serve as the basis of a form of ‘memory-justice’,¹¹³⁹ with a view to the future—a ‘postcolonial’ future, perhaps—was foreclosed.

¹¹³⁹ W James Booth, *Communities of Memory: On Witness, Identity, and Justice* (Cornell University Press, Ithaca, 2006) 119.

APPENDIX 1

CASE SUMMARY: *CUBILLO v COMMONWEALTH*¹¹⁴⁰

INTRODUCTION

In *Cubillo v Commonwealth*, Mrs Lorna Cubillo and Mr Peter Gunner took action against the Commonwealth, arguing that it was vicariously liable for their removals from their families and communities as children and subsequent detentions, respectively, in the Retta Dixon Home and St Mary's Hostel in the Northern Territory during the 1940s and 50s. There were four causes of action: wrongful imprisonment and deprivation of liberty, breach of statutory duty, breach of duty of care and breach of fiduciary duty. They argued that under the legislative regime in force at the time, the Commonwealth, via the Director of Native Affairs and his officers, was liable for the acts of its employees. The causes of action pleaded by Cubillo and Gunner were identical, aside from the fact that during Gunner's detention, a different legislative regime came into force, and so the actions were joined together.

Cubillo and Gunner claimed damages for loss of cultural, social and spiritual life in addition to loss of rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). They also claimed aggravated and exemplary damages as a result of the Commonwealth's 'conscious and contumelious disregard for' or 'wanton cruel and reckless indifference to' their welfare and rights,¹¹⁴¹ arguing that they had been removed under a general policy of removal of 'part-Aboriginal' children from their families, without regard for their individual circumstances.

Justice O'Loughlin, the trial judge who heard the case in the Federal Court of Australia, found that the Commonwealth was not vicariously liable on the grounds that section 6 of the *Aboriginals Ordinance 1918* (NT) gave the Director of Native Affairs the power to undertake the care, custody and control of a 'part-Aboriginal' child if, in the Director's opinion, it was necessary or desirable, in the interests of the child, and section 17 of the *Welfare Ordinance 1953* (NT) gave the Director of Welfare the power to take a 'ward' into custody and to order that he or she be removed to and kept within a reserve or

¹¹⁴⁰ For a detailed case note see Jennifer Clarke, 'Case Note: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 225.

¹¹⁴¹ *Cubillo* para 17.

institution. This finding of an absence of vicarious liability was subsequently applied in detail to each of the four causes of action.

Cubillo and Gunner acknowledged that the Director had the power of removal, but argued that the relevant Directors had not acted in their interests as children and therefore that their removals and detentions constituted wrongful imprisonment and deprivation of liberty. The applicants argued that the power and discretion conferred on the agents of the Commonwealth under the legislation required it to be used for welfare and for care but that, as far as Cubillo and Gunner were concerned, it had ‘failed miserably’.¹¹⁴² They argued that during this time, the Commonwealth implemented a general policy of forcible removal of part-Aboriginal children from their families, without regard to the welfare or individual circumstances of the children.

The Commonwealth denied liability in both cases, arguing that there was no duty of care owed by the Commonwealth, and that the powers and duties under the legislation were conferred on the statutory officers which could not give rise to a civil claim for damages against the Commonwealth. It also argued that the removals of Cubillo and Gunner were conducted lawfully and in accordance with the Ordinances in force at the time and that ‘there is no basis in law for a court to go behind those ordinances’.¹¹⁴³ It denied that it had, or had implemented, a general policy of removal and also denied that the Director had applied or acted pursuant to any such policy. The Commonwealth argued that it experienced an overriding prejudice in attempting to defend the claim as a result of the action being taken so long after the events in question, when so many potential witnesses had died and documentary evidence could not be located.¹¹⁴⁴

Justice O’Loughlin found that there was neither enough evidence to support a general policy of removal of ‘part-Aboriginal’ children ‘and if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants.’¹¹⁴⁵ O’Loughlin found that there was a *prima facie* case of wrongful imprisonment of Lorna Cubillo, but that the Commonwealth was not liable because the burden of proof had not been satisfied. He highlighted the incompleteness of the history and the lack of documentary

¹¹⁴² Transcript, opening address for the applicants, 1 March 1999, p 8.

¹¹⁴³ Transcript, opening address for the respondent, 1 March 1999, p 194.

¹¹⁴⁴ The Commonwealth claimed that of the 56 people referred to by name or title in Cubillo’s pleadings or witness statement, 37 were dead at the time of proceedings and that of the 70 people referred to by Gunner, 33 were dead: Transcript, opening address for the respondent, 3 March 1999, p 535.

¹¹⁴⁵ *Cubillo* para 1160.

evidence. In the case of Peter Gunner, however, O'Loughlin said that there were several pieces of documentary evidence which 'pointed strongly to the Director, through his officers, having given close consideration to the welfare of the young Peter,'¹¹⁴⁶ in particular, a form of consent with the purported thumbprint of his mother, Topsy Kundrilba, which he interpreted as a request that Peter be removed to St Mary's Hostel.

The following is a summary of key evidence presented and Justice O'Loughlin's findings.

THE APPLICANTS

Lorna Cubillo

Lorna Cubillo took action against the Commonwealth in relation to her removal from Phillip Creek native settlement near Tennant Creek in 1947, when she was approximately eight years old. Phillip Creek was run by the Aborigines Inland Mission (AIM), an interdenominational body, for the Commonwealth Native Affairs Department. Cubillo was detained at the Retta Dixon Home in Darwin until 1956 when she turned 18.

Lorna Cubillo, nee Nelson, was probably born at some time in the 1930s. Her tribal name is Napanangka, her tribal connections are Warumungu and Walpiri and as a child she spoke these languages. Cubillo said that she spent her early childhood at Banka Banka Station, near Tennant Creek in the Northern Territory. She has no recollection of her mother, Maudie, who died when she was very young. She was raised by her maternal aunt, Maisie Nampijimpa, who, under Aboriginal law she said she regarded as her mother, and her grandmother, Alice. Maudie had two other children, Jack and Margaret, and was married to Mick, a Warumungu tribal elder. Cubillo said that Mick treated her as a daughter and that she regarded him as her father. She did not know her biological father, probably Horace Nelson, who her grandmother told her was a soldier. She said she had a happy childhood, and spent a lot of time with her grandmother while her mother worked. Maisie died on 7 January 1979 in Tennant Creek Hospital, but there is no record of Maudie's death.

At some stage, probably in the early 1940s, while in the care of her grandmother, Lorna claimed she was removed from Banka Banka Station by two men and taken to the ration

¹¹⁴⁶ *Cubillo*, summary of reasons for judgment, para 11.

depot at Seven Mile Creek (also known as Telegraph Station). In late 1942, the community at the depot at Seven Mile Creek was moved to a depot at Six Mile Creek. In 1945, a settlement was established on the banks of Phillip Creek (near the Manga Manda waterhole) by the AIM and the people and resources at Six Mile Creek were relocated. The Phillip Creek settlement was run by the missionary Mr Ivor Thomas and his wife, with a school teacher Mr Colley. The older children lived in dormitories and the adults and younger children lived around the perimeter of the settlement. The Native Affairs Branch of the Northern Territory had a significant financial involvement in the settlement and made regular inspections.

Cubillo said that her grandmother followed her to Seven Mile Creek and then moved to Phillip Creek. It is unclear whether Maisie lived there or continued to work at Banka Banka Station, whilst visiting sometimes. At Phillip Creek, Cubillo lived with other children in dormitories. The children were divided according to whether they were regarded as 'Aboriginal' or 'half-caste'. Her grandmother and sister, Eileen, lived 'beyond the fence line'. She attended some school at Phillip Creek which was conducted in English. Within a short period of arriving at Phillip Creek, Cubillo's grandmother died.

In 1947, Cubillo said she was forcibly removed, together with 15 other children, from Phillip Creek Native Settlement and taken to the Retta Dixon Home, located in the Bagot Aboriginal Reserve in Darwin. Miss Amelia Shankelton, Superintendent of the home, now deceased, and Les Penhall, cadet patrol officer of the Northern Territory administration, removed the children one morning, possibly a ration day, in a green Bedford truck. Penhall gave evidence in the trial. He said that he remembered being instructed to go to Phillip Creek to pick up some children and that when he arrived, Miss Shankelton was already there. He said that he did not speak to any of the adult Aboriginals, that Miss Shankelton had said that she had discussed the removal of the children with the parents and that she had said that the children had been told that they were going on a picnic for two or three days and that then they would go to live in a house and go to school in Darwin.¹¹⁴⁷

Cubillo said that the children were not told what was happening or where they were going. She said that there was a tussle over a baby and that she remembered her aunt

¹¹⁴⁷ *Cubillo* para 449.

calling her by her traditional name and handing her the baby, asking her to look after it. She said that she remembered that there was a lot of commotion and people were crying and hitting themselves with sticks and bleeding. Cubillo said that she was very worried and thought they may be killed. She said that the children were all on the back of a truck, that the trip took three days and two nights and that she tried to care for the baby by dribbling it water from a 44-gallon drum on the back of the truck.

Evidence was given by Bunny Napurrula who lived at Phillip Creek at the time of the removals that some of the people locked themselves away and wept and that it had caused such grief that afterwards some of the people moved away for quite a while.

In relation to the removal of Cubillo, O'Loughlin J found that:

Lorna Nelson Napanangka was removed from the Phillip Creek Native Settlement and was taken to the Retta Dixon Home as part of a joint exercise that involved both the Aborigines Inland Mission and the Native Affairs Branch. However, I further hold that Mrs Cubillo has failed to establish that she was, at that time, in the care of an adult Aboriginal person (such as Maisie) whose consent to her removal was not obtained. I also find that Mrs Cubillo failed to prove that the Director did not form the opinion that was referred to in s 6 of the 1918 Ordinance.¹¹⁴⁸

Cubillo said that her life at the Retta Dixon Home was lonely, hard and cruel and that she craved attention and care. There was a highly institutional routine at the home and corporal punishment was used. When she arrived, she spoke Walpiri and Warumungu languages and some pidgin English. She claimed that the children were beaten with a strap on their legs if they spoke in their own languages. She said that primarily the children were taught Christian religion and that they were also taught that Aboriginal traditions were evil. The only member of her immediate family she saw while at the home was Polly Kelly, a sister. She said that when she asked about her family, she was told that she should forget about them.

Evidence was given by witnesses that conditions at the home were inadequate and that there was overcrowding.¹¹⁴⁹ However, O'Loughlin found that such conditions were not adequate to justify a finding that there was a breach of a duty owing to Cubillo. He did find that the children were subject to corporal punishment, but that that they were not 'flogged', as Cubillo claimed, and that the reason for the punishment for speaking in

¹¹⁴⁸ *Cubillo* para 511.

¹¹⁴⁹ *Cubillo* para 541.

language was probably one of practicality with the intention of fostering communication in a common language.¹¹⁵⁰

The children went to local schools. Cubillo said that she enjoyed school and got on well with the teachers. She did well in her studies, but said she purposely failed some subjects so as to avoid being sent to Singleton School, a missionary college. Lorna said she had a difficult relationship with Miss Shankelton, whose attention she sought. She said that her life at the home was harsh and that she lacked affection. On a couple of occasions, she attempted to run away with other children. A number of people gave evidence as to the conditions at the Retta Dixon Home, including Mr Jimmy Anderson, Mr Willy Lane and Mrs Mai Katona, who had been residents there, and missionaries, including Sister Johnson and Mrs Christine Dora Treloar.

O'Loughlin was satisfied that Cubillo's time at the Retta Dixon Home was an unhappy one, and that she craved, but did not receive the love and affection that she needed.¹¹⁵¹ However, he attributed her experience as more likely to be the result of her 'personality and character' than the fault of the missionaries.¹¹⁵²

Cubillo said that she was sexually assaulted by one of the staff members, Mr Des Walter one day when he drove her to basketball training and that on another occasion he beat her very severely with the buckle of a strap to the upper part of her body, which resulted in her having many cuts, including a cut to her nipple. She said she had trusted Mr Walter, a missionary, and she felt betrayed by him. She ran away to a relative, Polly Kelly, but did not tell anyone what had happened. She was taken back to the home and was not punished. Mr Walter left a few months later. Mr Walter gave evidence at the trial that he believed in corporal punishment but denied Cubillo's accusations of sexual impropriety. O'Loughlin found that Cubillo had been assaulted by Mr Walter, stating that:

I am satisfied that an incident such as that described by Mrs Cubillo and Mrs Katona occurred. Mr Walter did not impress me as he gave his evidence. He presented as a man with supposedly deeply rooted Christian convictions, but with a dogmatism that I found disturbing. I formed the impression that Mr Walter was a religious zealot who would have been

¹¹⁵⁰ *Cubillo* para 593.

¹¹⁵¹ *Cubillo* para 635.

¹¹⁵² *Cubillo* para 729.

offended by the thought of young girls engaging in playful activities on the Sabbath.¹¹⁵³

O'Loughlin said that this might have led to an award of damages against Walter and his employer, but that the applicants would need to apply the Briginshaw Test in relation to the conduct of a person who is not a party to proceedings.¹¹⁵⁴

During the school holidays, Lorna said that she was not sent home, unlike some of the other students, and that she was sent to do housework for government employees in Darwin, payment for which she gave to Miss Shankelton. On one occasion, she went with Polly Kelly to visit some relatives in Tennant Creek and then on to Phillip Creek where she saw her mother. She said that this was a very emotional experience and that it was particularly difficult because she could not speak to her mother in her language. She did not see her mother again after that occasion. O'Loughlin found that Cubillo's mother was not prevented from visiting her, although there was no evidence as to why she did not.¹¹⁵⁵

Lorna went to school until Year 8 and was an inmate of the home until 1956 when she was about 18. She then went and worked as a domestic for a few months in Darwin and married Joseph Cubillo in 1957. She had six children between 1958 and 1972. Cubillo did a lot of casual cleaning work to support her family; in 1972 she got a permanent job as a cleaner and in 1980 a job in an office of a childcare centre. She went to night school to learn office work. Cubillo said that she had suffered poor health for much of her life. In 1988, she experienced a neck injury at work and suffered severe pain which required surgery. She attempted to go back to work but was unable to and has been in receipt of workers' compensation. She also has been diagnosed with cancer and has had radiotherapy. She has primary responsibility for two of her grandchildren.

Cubillo said that she would have liked to find out more about her Aboriginality, however, this evidence was not wholly accepted by O'Loughlin, who said that she had had the opportunity to investigate whether she wanted to return to the 'tribal life to which she originally belonged, or as would more likely be the case, to an Aboriginal life

¹¹⁵³ *Cubillo* para 687.

¹¹⁵⁴ *Cubillo* para 1255.

¹¹⁵⁵ *Cubillo* para 637.

within an Aboriginal community that enjoyed fundamental aspects of western civilisation. But she has elected to stay wholly in an urban environment’.¹¹⁵⁶

O’Loughlin said that the absence of witnesses ‘is a gap that is so huge that it means that the Court has not been able to make numerous findings of fact that would have otherwise had a significant bearing on Mrs Cubillo’s claim’ and that ‘the position has been exacerbated by the absence of contemporaneous documentation’.¹¹⁵⁷

Peter Gunner

Peter Gunner took action against the Commonwealth in relation to his removal from Utopia Station, about 250 km north-east of Alice Springs, in 1956, when he was approximately seven years old. Gunner lived at Utopia with his mother and extended family. The pastoral station was run by Mr Alec McLeod and his family during the 1950s. There was a camp about half a kilometre from the homestead which was used for ration day and general camping and another camp about 25 kilometres away which was used for hunting.

Peter Gunner was born at or near Utopia Station possibly in 1948. It was claimed that his mother was Topsy Kundrilba, who was a member of the Anmatyrr Alyawarra tribal group. There is uncertainty as to who his father was—a man, also called Peter Gunner, who was at the time working on the station as a stockman, gave evidence that he was Peter’s father, but counsel for Gunner also claimed that his father was Sid Kunoth, a local ‘part-Aboriginal’ man. Gunner said that he did not know where he was born or who his parents were. He said that he did remember that during his early years he spent a lot of time hunting and with his uncle, Motor Car Jimmy, and that he learnt a lot from his older sisters, maternal uncles and maternal grandmother. He said he did not remember being treated differently, ever being sick or going hungry.

Gunner said he had a strong memory of the day of his removal and that it was the morning of a ration day when they were at the homestead. He said that there had been other attempts to remove him, including one occasion when his grandmother and aunts had hidden him under a blanket. He said a white man in khaki clothes took him away in a khaki ute which had a canopy on the back. He said he remembered many of his family, including his mother, crying and screaming and that no one had spoken to him before

¹¹⁵⁶ *Cubillo* para 656.

¹¹⁵⁷ *Cubillo* para 736.

that day about his being taken away. He said he did not remember any white men talking to his mother or any other member of his family. He said that he did not know where he was being taken, that no one else was on the back of the truck and that he cried most of the way. He was taken to Bungalow Telegraph Station and then later to St Mary's. Two witnesses, Johnny Skinner, who was present that day, and Lena Pula, who was not, gave evidence of forced removal.

O'Loughlin found that Gunner was in the care of his mother when he was removed, probably by patrol officer Harry Kitching, in 1956 and admitted to St Mary's Hostel in Alice Springs. There was documentary evidence that Gunner and another child, Florrie Ware, had come to the attention of patrol officers Ted Evans and later Harry Kitching. In a report dated 6 April 1955, Kitching documented the names and details of 'half-caste' children, with a note that:

On the appearance of any Commonwealth vehicle both mother and child flee, and no contact by officials has been made during past 5 years. ... The majority of children on Utopia all disappear as quickly as possible, and I have made no attempt to chase them but have tried to build the confidence of the remainder in Native Affairs Officers, bearing in mind the coming census and the need for an accurate count. It might be noted that they are all frightened that they will be taken away to the Bungalow School.¹¹⁵⁸

Kitching had recorded a visit to Utopia where he stated that Gunner and Ware 'were seen with their parents and it now appears that they will both be willing to attend school and go to St Mary's in the coming year' and that '[o]ne consideration which I promised, and which should be honoured, is that they should be allowed to return home for the school holidays'.¹¹⁵⁹ There was also a 'Form of Consent by a Parent' with the purported thumbprint of Topsy Kundrilba which requested that Gunner be declared an Aboriginal under the Aboriginals Ordinance and that he be educated and trained in accordance with accepted European standards.¹¹⁶⁰ Harry Kitching gave evidence in the trial, although he said he did not remember Gunner's circumstances nor the day of his removal. He also said that he did not recognise the consent form.¹¹⁶¹ While acknowledging that 'there was ... no way of knowing how the contents of the document were explained to Topsy', O'Loughlin J concluded that the 'line of documents that were

¹¹⁵⁸ *Cubillo* para 774.

¹¹⁵⁹ *Cubillo* para 778.

¹¹⁶⁰ *Cubillo* para 782.

¹¹⁶¹ *Cubillo* para 784.

compiled in the Native Affairs Branch favours a positive conclusion that Topsy gave her informed consent to her son going to St Mary's'.¹¹⁶²

St Mary's was established in 1946 as a hostel for 'part-Aboriginal' children by the Australian Board of Missions (ABM) under the auspices of the Anglican Church. Sister Eileen Heath, the head of St Mary's until 1955, gave evidence that she believed that all children who were brought to St Mary's by patrol officers and welfare officers were wards of the state who either had no-one to care for them, were neglected, abandoned or at risk, or had been brought at the request of their parents.¹¹⁶³ The institution was substantially subsidised by the Commonwealth and the Anglican Church.

Gunner said that he was given the name Peter Gunner when he was at St Mary's and that when he arrived, he spoke Luritja, Anmatyerre and Alaridja languages. He said that there was another boy, Teddy Nicka, who was a member of his family. Gunner said that he and the other boys were flogged by Mr Malcolm Bald and later Mr Kevin Constable with a strap or garden hose when they spoke in their languages, ate food with their hands, when they wet their beds or moved the bedding to the floor. He said that the food at St Mary's was basic and that the children were often hungry at night and that they often went to the rubbish dump to look for food. He said that it was very cold in winter, that the children did not have any shoes and that their feet got very sore and cracked. He said that they worked on a farm at St Mary's.

The children attended local schools. Gunner said that he was initially placed in kindergarten with much younger children but that he did not understand and that when he left St Mary's he could not write, only print, nor read. He said that he got on well with a couple of the teachers and that he particularly enjoyed sport and artwork. He said he felt uncomfortable being in a class with little children and that he was embarrassed that he could not read or write. Gunner said that he never went home for holidays, although other children did and some mothers came to visit their children. O'Loughlin said that there was no evidence as to why Gunner's mother did not visit him, or why he did not return home for holidays, as had been promised.¹¹⁶⁴

Documentary evidence in relation to the conditions at St Mary's and the management of Captain Steep and Mr Constable expressed 'grave concern as to the mishandling of

¹¹⁶² *Cubillo* para 787.

¹¹⁶³ *Cubillo* paras 738–9.

¹¹⁶⁴ *Cubillo* para 793.

young people'¹¹⁶⁵ and 'stinking slum conditions'.¹¹⁶⁶ Gunner said that he tried to run away on three occasions, sometimes with another boy, Colin Kunoth. He said that he was trying to get back to his mother and that on one occasion he hid in the bush for a month before the police tracker found him. He said that he was taken interstate to Adelaide and Sydney for holidays.

Gunner said that once, when he was sick with the mumps, he had to stay in the dormitory at St Mary's and that Kevin Constable had sexually assaulted him. He said that he had never told anyone else about this, that he had felt a lot of hatred over the years and that he had not gone back to the St Mary's reunion because of his anger. Photographic evidence was used to identify the man who had assaulted Gunner, although he retracted the initial identification (which was published the subsequent day) for Constable. Four other ex-inmates of St Mary's gave evidence of sexual assault either by Kevin Constable or Malcolm Bald. O'Loughlin found that Gunner had been sexually abused by Mr Constable.

O'Loughlin summarised his findings in relation to St Mary's by stating that:

The evidence of Mr Gunner and others of children searching for food in rubbish bins and dumps, the lack of social contact with children outside the Hostel, the failure to return him to his family during school holidays, the shocking conditions of the Hostel as depicted in the reports from Mrs Ballagh and others, the quality of its staff and the conduct of Mr Constable add up to a damning indictment of St Mary's. The documents that were received into evidence were sufficient; they revealed a failure on the part of St Mary's to staff and administer the Hostel appropriately. St Mary's failed in its management and its care for the children; it also failed in that it did not provide proper and adequate facilities based on the standards of the day. What it provided may have been better than that available for the part Aboriginal children in native camps. But that was not the test. St Mary's was offering those children the opportunity to enter European society and to learn European standards. A spartan existence for the children might have been acceptable and understandable. Lack of hygiene was not.¹¹⁶⁷

Gunner left St Mary's in 1962, when he was about 14. He said that he was taken by a white man to Angus Downs, a cattle station owned by the Liddle family where he worked. Although documentary evidence was tended which stated that he was paid 4 pounds per week, Gunner said he did not receive the money. He does not remember how long he worked at Angus Downs, but he was then taken back to Alice Springs

¹¹⁶⁵ *Cubillo* para 1041.

¹¹⁶⁶ *Cubillo* para 1056.

¹¹⁶⁷ *Cubillo* para 1073.

where he picked up work at Killarney as a stockman. He later worked at Mt Ebenezer, at the Mt Isa mines and then in Darwin. He worked for the Aboriginal Task Force when he met his wife, Eunice, a Walpiri woman. After marrying, he got a job with the Aboriginal Legal Aid Service as a Liaison Officer between 1986 and 1990.

At the time of the trial, Gunner spoke four Aboriginal languages: Pitjantjatjara, Luritja, Matutjara and Western Aranda which he said he had picked up working on stations. He said that when he visited Utopia once he had to explain to the station owner why he wanted to visit. He went back to Utopia in 1990 and at the time of the trial, was chairman of the Urapuntja Council, an elected position which involved administrative work and liaison with government. He said, however, that he could not participate in or make any decisions on anything related to traditional issues, such as land, laws, ceremonies, dreamings or songs because he was not taken through initiation when he was a boy. He said that he was then too old, and married, and that he was angry about this.

Gunner said that when he went back to Utopia, his mother and grandmother were still alive, although at the time of the trial, they had both passed away. O'Loughlin found that Gunner could have mitigated his loss of decision-making power by undertaking a lesser form of initiation as an adult.¹¹⁶⁸

Peter Gunner passed away in April 2005.

LEGISLATION

Aboriginals Ordinance 1918 (NT)

The legislation in force at the time Cubillo and Gunner were removed was the *Aboriginals Ordinance 1918 (NT)*. This Act gave the Director of Native Affairs the power to undertake the 'care, custody or control of any aboriginal or half caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half caste for him to do so and for that purpose may enter any premises where the aboriginal or half caste is or is supposed to be, and may take him into his custody' (s 6) and to act as their legal guardian until they turned 18 years, notwithstanding the existence of a parent (s 7). Section 3 defined the meaning of the term 'Aboriginal' and section 13 specified the type of institutions that could be approved as 'aboriginal institutions' and the powers of the

¹¹⁶⁸ *Cubillo* para 1520.

superintendents. O'Loughlin made the following assessment of the legislation, stating that:

... [t]he powers of the Director under the 1918 Ordinance were exceptionally wide. He was the legal guardian of every Aboriginal: s 7 and his extensive powers under s 6 of the Ordinance enable him to enter upon premises without a warrant and to take the person into custody—again without a warrant. Any decision of the Director was based on his opinion; there was no obligation on the part of the Director to refer to any third party; his power was almost without restraint.¹¹⁶⁹

Welfare Ordinance 1953 (NT)

The *Welfare Ordinance 1953* commenced in May 1957, repealing the *Aboriginals Ordinance 1918*. Amendments were made to the Ordinance in 1953 which redefined 'aboriginals' to exclude 'half-castes' but a new section 3A was introduced which empowered the Director of Native Affairs to declare a person, one of whose ancestors came within the statutory definition of 'Aboriginal', to be an Aboriginal if the Director considered it to be in their best interests and the person requested it. O'Loughlin concluded that as Gunner was himself only a child, the authorities had perceived the need for his mother to request the declaration.¹¹⁷⁰ The 1953 Ordinance also introduced the concept of a 'ward' and there was a power vested in the Director under s 17 to take a ward into custody. Following the introduction of the Welfare Ordinance, the Administrator declared Gunner to be a ward under s 14, although there was no evidence that the Director had made an order for his continued detention.¹¹⁷¹ Cubillo had left the Retta Dixon Home by the time the Welfare Ordinance came into effect in May 1957.

Drawing on the High Court decisions in *Namatjira v Raabe*¹¹⁷² and *Kruger*,¹¹⁷³ O'Loughlin stated that:

I believe that these decisions of the High Court have established that the Aboriginals Ordinance and the Welfare Ordinance are not to be regarded as examples of punitive legislation. Rather, they were intended to be items of welfare or caring legislation.¹¹⁷⁴

¹¹⁶⁹ *Cubillo* para 144.

¹¹⁷⁰ *Cubillo* para 139.

¹¹⁷¹ *Cubillo* para 155.

¹¹⁷² *Namatjira v Raabe* [1959] 100 CLR 664.

¹¹⁷³ *Kruger v Commonwealth* (1997) 190 CLR 1.

¹¹⁷⁴ *Cubillo* para 164.

POLICY

The applicants claimed that during the time of their removals and detentions, the Commonwealth instituted a general policy of removal of ‘part-Aboriginal’ children without regard to their individual circumstances. They submitted that there were four identifiable purposes behind the policy, namely:

- destruction of the children’s association and connection with their mothers, families and cultures;¹¹⁷⁵
- assimilation of ‘part-Aboriginal’ children into non-Aboriginal society;¹¹⁷⁶
- provision of domestic and manual labour for the European community;¹¹⁷⁷ and
- to ‘breed out’ ‘half-caste’ people and to protect the primacy of the Anglo-Saxon community.¹¹⁷⁸

O’Loughlin said that there were two important considerations in the case: firstly, whether there ever was a Commonwealth policy ‘for the removal of part-Aboriginal children from their environment and placement in homes, orphanages, missions or institutions’ and if so, whether it was legislatively authorised and how it was implemented,¹¹⁷⁹ and secondly, whether the removal and detention of Cubillo and Gunner ‘occurred in circumstances where they now have maintainable causes of action against the Commonwealth.’¹¹⁸⁰

O’Loughlin limited his consideration of the policy to its application to Cubillo and Gunner. He assessed the documented policies by what he considered to be the standards of the time, stating that a ‘benign policy might have been harshly applied against the interests of a particular child by a public servant for whom the Commonwealth was responsible: a harsh policy might have been benignly applied in the best interests of the child.’¹¹⁸¹ He was particularly impressed with the attitudes of many of the people who administered the policies, highlighting their ‘dedication and

¹¹⁷⁵ *Cubillo* para 1145.

¹¹⁷⁶ *Cubillo* para 1146.

¹¹⁷⁷ *Cubillo* para 1147.

¹¹⁷⁸ *Cubillo* para 1148.

¹¹⁷⁹ *Cubillo* para 165.

¹¹⁸⁰ *Cubillo* para 169.

¹¹⁸¹ *Cubillo* para 166.

commitment for the welfare and betterment of the Aboriginal and part Aboriginal people.¹¹⁸²

O'Loughlin found that since about 1911, the Commonwealth had pursued a policy of 'removing some part Aboriginal children and placing them in institutions in Alice Springs and Darwin' but that there was not sufficient evidence to sustain a finding that this policy applied to all part Aboriginal children. He said that '[t]he probabilities are that the policy was intended for those illegitimate part Aboriginal children who were living in tribal conditions whose mother was a full blood Aborigine and whose father was a white man'¹¹⁸³ and that:

... integration of part Aboriginal children was not based on race; it was based on a sense of responsibility—perhaps misguided and paternalistic—for those children who had been deserted by their white fathers and who were living in tribal conditions with their Aboriginal mothers. Care for those children was perceived to be best offered by affording them the opportunity of acquiring a western education so that they might then more easily be integrated into western society.¹¹⁸⁴

He said that while destruction of family and cultural links may have been a consequence of the policy, he found 'no documentary records or oral evidence from competent witnesses that could justify a finding that such a purpose existed' when Cubillo was removed, and that the existence of the 1952 Hasluck Principles at the time Gunner was removed 'refuted' that claim.¹¹⁸⁵

O'Loughlin found that while the evidence was limited, the removals of Gunner and Cubillo were consistent with the policies which were in force at the time. He concluded that Cubillo would have been perceived as an 'illegitimate' child of a white man who appeared not to have been in the care of an adult and that at the time, consent was not required. On the basis of the evidence of a series of documents, and particularly a form of consent with the purported thumbprint of Gunner's mother, O'Loughlin concluded that Gunner was removed for educational purposes with his mother's consent.

The applicants claimed that the Commonwealth was vicariously liable for the actions of the Director of Native Affairs and later the Director of Welfare. O'Loughlin found that the Directors and patrol officers had a high degree of discretion under the legislation in

¹¹⁸² *Cubillo* para 737.

¹¹⁸³ *Cubillo* para 200.

¹¹⁸⁴ *Cubillo* para 162.

¹¹⁸⁵ *Cubillo* para 1145.

the decision to remove children. The three men who were Directors between 1939 and the 1960s were all dead and therefore unable to give evidence as to their interpretation of the legislation and how it was applied. O'Loughlin also found that the missions were not agents of the Commonwealth.

LIMITATIONS

Limitations were a key factor in the case, which was brought more than 30 years out of time. The Commonwealth had initially made an application to have the case struck out, arguing that Cubillo and Gunner had no cause of action and that as there had been such a significant time lapse that it would be unfair to the Commonwealth if the applicants were granted an extension of time. However, in an interlocutory decision, O'Loughlin declined the application, stating that:

It seems to me, with respect, that these cases are of such importance—not only to the individual applicants and to the larger Aboriginal community, but also to the Nation as a whole—that nothing short of a determination on the merits with respect to the competing issues of hardship is warranted.¹¹⁸⁶

The applicants said that they did not become aware of their psychiatric injuries as 'material facts'¹¹⁸⁷ until they were assessed by medical practitioners in 1996. However, on the basis of the evidence presented, O'Loughlin found that the limitations in relation to psychiatric or psychological illness for negligence and breach of statutory duty expired either three or six years after the applicants turned 21 years of age because the injuries occurred when the applicants were first removed. He refused to exercise his discretion under the *Limitations Act 1981* (NT) to grant an extension of time, highlighting the 'irremediable prejudice'¹¹⁸⁸ to the Commonwealth.

CAUSES OF ACTION

The applicants claimed that the Commonwealth was vicariously liable for their forcible removals and detentions. There were four causes of action in relation to each of the applicants: wrongful imprisonment and deprivation of liberty, breach of statutory duty, breach of duty of care and breach of fiduciary duty.

In relation to Cubillo, O'Loughlin found that there was a prima facie case against the former Director of Native Affairs, Mr Moy, former patrol officer, Mr Penhall, the estate

¹¹⁸⁶ *Cubillo v Commonwealth* [1999] FCA 518 (30 April 1999) para 203.

¹¹⁸⁷ *Cubillo* para 1312.

¹¹⁸⁸ *Cubillo* para 1421.

of the former superintendent, Miss Shankelton, and the Aborigines Inland Mission for false imprisonment, but that this was not a cause of action against the Commonwealth because '[v]icarious liability does not ... attach to the Commonwealth if the Directors were acting in the exercise of their independent statutory duties.'¹¹⁸⁹

In relation to Gunner, O'Loughlin found either that the Director did not participate in the removal and that patrol officer Harry Kitching was acting on behalf of Gunner's mother, or 'if contrary to that finding, the Director did participate, it is possible he was acting within the umbrella of s 6 of the Aborigines Ordinance', adding that if 'he somehow lost the protection of that section, the Commonwealth is not vicariously liable'.¹¹⁹⁰

The applicants claimed that there was a statutory duty owing to them under the Ordinances which applied to the Director of Native Affairs, and later the Director of Welfare, acting as their legal guardian. O'Loughlin agreed that the legislation in force at the time resulted in the Director acting as guardian, but that there was 'nothing to be found in either Ordinance that purports to impose any duties in consequence of that appointment'.¹¹⁹¹ O'Loughlin pointed out that: 'It is beyond the jurisdiction of this Court to challenge the policies that were to be found in the relevant legislation. The limit of the functions of this Court was an examination to ascertain whether there was conduct or omissions that did not come within the purview of the legislation'.¹¹⁹²

O'Loughlin concluded that the 'Commonwealth did not owe either applicant a duty of care'; and that nor did the Director of Native Affairs owe either applicant a duty of care, 'so long as he was acting within the parameters of s 6 of the Aborigines Ordinance'; similarly, he found that the Director of Welfare did not owe Mr Gunner a duty of care. As a proviso, O'Loughlin also stated that 'if, contrary to these findings, one or other of the Directors did owe an applicant a common law duty of care there were no breaches of that duty' and nor would the Commonwealth be vicariously responsible. He also concluded that with 'respect to the conditions of the two institutions' the Directors did have duties of care but that 'in the case of Mrs Cubillo there was no breach of that duty' and 'in the case of Mr Gunner, there was a breach of that duty' but this breach was not

¹¹⁸⁹ *Cubillo* para 1123.

¹¹⁹⁰ *Cubillo* para 1133.

¹¹⁹¹ *Cubillo* para 1192.

¹¹⁹² *Cubillo* para 1187.

by the Commonwealth and nor was it vicariously responsible for the breach by the Director.¹¹⁹³

O'Loughlin said that he did not believe that there were fiduciary relationships between the Commonwealth and the applicants and that he did not believe that 'the Commonwealth was knowingly a party to any breach of any fiduciary duty that a Director of Native Affairs might have owed to an applicant.'¹¹⁹⁴

O'Loughlin found that there was no evidence of 'reckless indifference' or 'contumelious disregard' for the applicants. He did find that there were potential damages for loss of cultural heritage and loss of entitlements to be considered as a traditional owner in any land rights claim. He said that Cubillo had failed to mitigate her losses, but that had her claim been successful, she would have been entitled to an award of \$110,000, and that Gunner had attempted to mitigate his and therefore would have been entitled to \$125,000.

CONCLUSION

In conclusion, O'Loughlin J said that:

The evidence that I have heard throughout this trial from the witnesses who were called by the Commonwealth has established to my satisfaction that there was a school of thought prevailing at the times that are relevant to the claims of Mrs Cubillo and Mr Gunner. At the forefront of that school of thought was the belief that it was in the best interests of part Aboriginal children to assimilate them into the European mainstream and that the best way to do that was through a western style education. In pursuing that school of thought, those who were in authority concerned themselves only with the fact that the child was part white. Having made the decision to remove the child, there was a total disregard of the fact that the child was also part Aboriginal, of the fact that the child's mother or family with whom the child was living was or were Aboriginal and of the fact that the child had been brought up only aware of Aboriginal culture and unaware of European culture. That was where those in authority stand condemned on today's standards. Today most Australians realise that the Aboriginal people have a rich and diverse culture that is to be encouraged and preserved. However, the writings that were tendered in the trial and the oral evidence showed that such thinking was not the mainstream thinking of people in earlier times.¹¹⁹⁵

¹¹⁹³ *Cubillo* para 1269.

¹¹⁹⁴ *Cubillo* para 1433.

¹¹⁹⁵ *Cubillo* para 1560.

O'Loughlin said that he had 'great sympathy' for Cubillo and Gunner and others like them who had 'suffered so severely as a result of the actions of many men and women who thought of themselves as well-meaning and well intentioned but who today would be characterised by many as badly misguided politicians and bureaucrats' and that while subsequent events had shown that they were wrong, it is possible that they were acting pursuant to statutory powers or, perhaps in these two claims, it would be more accurate to say that the applicants have not proved that they acted beyond their powers.¹¹⁹⁶

¹¹⁹⁶ *Cubillo* para 1562.

APPENDIX 2

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FORM OF CONSENT BY A PARENT

I, TOPSY KUMDRILLA being a full-blood Aboriginal (female) within the meaning of the Aborigines Ordinance 1918-1953 of the Northern Territory, and residing at UTOPIA STATION do hereby request the DIRECTOR OF NATIVE AFFAIRS to declare my son PETER GUNNER aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said Aborigines Ordinance. MY reasons for requesting this action by the Director of Native Affairs are:-

1. My son is of Part-European blood, his father being a European.
2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
3. I am unable myself to provide the means by which my son may derive the benefits of a standard European education.
4. By placing my son in the care, custody and control of the Director of Native Affairs the facilities of a standard education will be made available to him by admission to St. Mary's Church of England Hostel at Alice Springs.

SIGNED of my own free will

this

day of

in the presence of

1956

her

TOPSY

mark

KUMDRILLA

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