

**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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