'POSTCOLONISING' AMNESIA IN THE DISCOURSE OF RECONCILIATION: THE VOID IN THE LAW'S RESPONSE TO THE STOLEN GENERATIONS

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> … a judge's 'responsibility toward memory' … is not to an accurate repetition through the recollection of legal norms, but to a refutation that what has been can *ever* be conflated with Justice.**

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. While ostensibly the most recent in a series of official government policies for 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 and statement of the 'national legacy of unutterable shame' of colonisation,[1] 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 article, I will investigate the usefulness of 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. Drawing on Leela Gandhi's notion of 'postcolonial amnesia',[2] 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'.[3] What has been the law's response to the silence at the heart of the white nation?

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** Cornell Drucilla *The Philosophy of the Limit* Routledge New York 1992 p 118.

1 *Mabo and Others v The State of Queensland No. 2* (1992) 175 CLR 1 at 104 (Deane and Gaudron JJ).

2 Gandhi Leela *Postcolonial Theory: A Critical Introduction* Allen & Unwin St Leonards NSW 1998 p 4.

3 Ahmed Sara *Strange Encounters: Embodied Others in Post-Coloniality* Routledge London 2000 p 10.

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 not just of memory, but also of forgetting. In *Kruger & Ors v Commonwealth*,[4] four of six High Court Justices drew on the rhetoric of 'best interests of the child' to find the question of genocide 'unnecessary to answer'. Two years later, in *Cubillo v Commonwealth*,[5] 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 twenty-seventh of May 1997 marked the occasion of the thirtieth anniversary of the referendum in which white Australians voted to give the Commonwealth power to legislate for Indigenous 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'.[6] On this day at the convention the Human Rights and Equal Opportunity Commission (HREOC) launched its report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 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 reconciliation for the benefit of all Australians',[7] 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.[8] 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.[9] 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

4 *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 146 ALR 126 hereafter *Kruger*.

5 *Cubillo v Commonwealth* [2000] FCA 1084 hereafter *Cubillo*.

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

7 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 p 4, hereafter *Bringing Them Home*.

8 As above at 651.

9 As above Recommendations 18 and 19 at 654.

and policies over which they had no control'.[10] The federal 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 North Australian Aboriginal Legal Aid Service took action in the Federal Court of Australia on behalf of Lorna Cubillo and Kwementyay Gunner,[11] 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. Rejecting the argument on behalf of the Commonwealth 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:

> 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.[12]

The trial took two years, over 50 witnesses were called to give evidence and the litigation is estimated to have cost between $15–20 million.[13] When, in August 2000, the long awaited judgment was handed down in the Darwin courtroom, many, including counsel for the applicants,[14] were optimistic that it would inaugurate restitution not only to Lorna Cubillo and Kwementyay 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 [Kwementyay] 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.[15]

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10 Text as appears in Howard John 'Practical Reconciliation' in Grattan Michelle (ed) *Essays on Australian Reconciliation* Black Inc. Melbourne 2000 p 88 at 90.

11 With sadness, I acknowledge that Mr Gunner passed away in April 2005. He was a man of courage and dignity, whose struggle, along with Lorna Cubillo, in seeking justice for members of the Stolen Generations was of great significance. In accordance with Central Australian Aboriginal law, I will use Kwementyay as the substitute for his first name in this article.

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

13 Rush John T 'Righting the Wrong: Achieving Reparations for the Stolen Generations' (2002) 27(6) *Alternative Law Journal* 257 at 261.

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

15 *Cubillo* Summary of Reasons for Judgment para 1.

It could be argued that if there were to be a context in which Australia might be able to begin to imagine itself as a potentially 'postcolonial' nation, this would be represented by the project of reconciliation. I will argue, however, that the project of reconciliation has manifest as something more closely connected to a form of what Leela Gandhi has referred to as 'postcolonial amnesia'[16]—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 v Commonwealth*[17] 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 Kwementyay Gunner.

1. RECONCILIATION AS A 'POSTCOLONIAL' DISCOURSE

Much has been written about the troubled relationship between colonialism and the possibility, or otherwise, of its 'post',[18] 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/invader Australia. I would argue that the discourse of reconciliation conflates these two distinct conditions, contributing to its contradictory and ambivalent rhetoric. It is 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 the same time, political, social and, most relevantly for my purposes, legal institutions use physical and discursive power which re-inscribes the violence of colonialism.[19] Largely, criticism of postcolonialism has centred around the suggestion inherent in

16 Gandhi above note 2 at 4.

17 *Cubillo v Commonwealth* [2000] FCA 1084.

18 See, for example, Hall Stuart 'When was "the post-colonial"? Thinking at the Limit' in Chambers Iain and Curti Lidia (eds) *The Post-Colonial Question: Common Skies, Divided Horizons* Routledge London 1996 p 242; Frankenberg Ruth and Mani Lata 'Crosscurrents, Crosstalk: Race, "Postcoloniality" and the Politics of Location' (1993)7(2) *Cultural Studies* 292; McClintock Anne *Imperial Leather: Race, Gender and Sexuality in the Colonial Contexts* Routledge New York 1995, particularly the Introduction for specific discussions of the 'Pitfalls of the Postcolonial'.

19 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,

the use of the prefix 'post' of a 'diachronic sequence of periods in which each one is clearly identifiable',[20] or even more problematically, 'the … sense of a state where the process of colonisation has reached its goal of fully neutralising the colonised'.[21] 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.'[22] 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.'[23] 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:

> 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.[24]

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',[25] 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*

contemporary land rights and rights to self-determination: Cunneen Chris *Conflict, Politics and Crime: Aboriginal Communities and the Police* Allen & Unwin Crows Nest NSW 2001 p 8.

20 Lyotard Jean-François *The Postmodern Explained to Children: Correspondence 1982–1985* Power Publications Sydney 1992 p 90.

21 Hage Ghassan *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society* Pluto Press Annandale NSW 2003 p 94.

22 Gelder Ken and Jacobs Jane M *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* Melbourne University Press Melbourne 1998 p 22.

23 As above at 13.

24 As above at 24.

25 Frankenberg and Mani above note 18 at 300.

relations with one another.'[26] 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.'[27]

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, indeed denial,[28] 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'. 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. **[29]**

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 'postcolonizing', rather than 'postcolonial', as a way of conceptualising Australia's contemporary landscape, as an 'ongoing process', but one in

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26 As above at 307.

27 As above at 299.

28 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 per cent. John Cash makes the insightful point that embedded in 'the very repetition of that phrase "no more than 10 per cent", 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': Cash John 'The Political/Cultural Unconscious and the Process of Reconciliation' (2004) 7(2) *Postcolonial Studies* 165 at 173.

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

which 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.'[30] 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.

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.'[31] 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'.[32] 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',[33] 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'.[34] 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.'[35]

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, of the essential 'forgetting' described by Ernest Renan over 100 years ago, in the creation of a nation.[36] 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.

2. 'POSTCOLONIAL AMNESIA' IN THE WHITE NATION

In attempting to interrogate the complex terrain of postcolonial studies, Leela Gandhi distinguishes the *theory* of postcolonialism, which she advocates as 'a disciplinary project devoted

30 As above at 24.
31 Ahmed above note 3 at 10.
32 As above at 11.
33 Hall Stuart 'A Conversation with Stuart Hall', (2002) 7(1) *The Journal of the International Institute* <www.umich.edu/~iinet/journal/vol7no1/Hall.htm>.
34 Hall above note 18 at 247.
35 As above at 253.
36 Renan Ernest 'What is a Nation?', reproduced in Bhabha Homi (ed) *Nation and Narration* Routledge London 1990 p 8 at 11.

to the academic task of revisiting, remembering and, crucially, interrogating the colonial past', 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.[37]

Gandhi 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 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.[38]

Using Gandhi'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'.[39] 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-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 contributors to the journal *Quadrant*, to discredit this work and to present it as a deceptive and fabricated version of history. Much of this debate has

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37 Gandhi above note 2 at 4. It is important to point out that Gandhi does not focus her theoretical framework on the context of Australian Indigenous and settler/colonial relations. Nevertheless, given the existence of events such as the symposium which gave rise to this article, I would argue that if we are to attempt to engage with a questioning of postcolonising Australia, we could take Gandhi's conceptualisation as a starting point.

38 As above at 10. Gandhi 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': Lyotard above note 20 at 90.

39 As above. 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, Anna Haebich, Rosanne Kennedy, Marcia Langton, Robert Manne, Ann McGrath, Stuart Macintyre, Peter Read, Henry Reynolds, Lyndall Ryan and Patrick Wolfe.

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.[40] 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'.[41]

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.[42] 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".' 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 'white nation … comes to stand in for the whole.'[43] 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'.[44]

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

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40 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. See Macintyre Stuart and Clarke Anna *The History Wars* Melbourne University Press Melbourne 2003 pp 128–9.

41 Bhabha Homi *The Location of Culture* Routledge London 1994 p 63.

42 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* above note 7 at 266.

43 Schaffer Kay '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>.

44 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': Birch Tony 'The Last Refuge of the Un-Australian' (2001) 7(1) *UTS Review* 17 at 20.

> fuel our perceptions of ourselves as Australian so as to be unrecognisable. … And so we engage in an active, willed forgetting.[45]

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'.[46] What role does the law play in this willed forgetting? In the second part of this article, 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 the law.

3. 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 to the use of a therapeutic model for 'postcolonising' Australia, namely, that 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 Gandhi'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.'[47] 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.'[48] 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.'[49]

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, 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'[50] and I read the law and the way history and memory are represented in law as a critical hermeneutic

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45 As above.

46 Birch above note 44 at 17.

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

48 As above.

49 As above at 215–6.

50 Sarat Austin and Kearns Thomas R 'Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction' in Sarat Austin and Kearns Thomas R (eds) *History, Memory, and the Law* The University of Michigan Press Ann Arbor 1999 p 1 at 2.

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 epistemology, 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.'[51]

When Lorna Cubillo and Kwementyay Gunner brought legal action against the Commonwealth Government, arguing that it was vicariously liable for their forcible removal from their families and communities as children and subsequent detention in the Retta Dixon Home and St Mary's Hostel, respectively, in the Northern Territory during the 1940s and 50s, they presented a serious challenge to the collective memory of the white nation.[52] 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 have 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,[53] leaving those who had suffered as a result of this widespread practice and

51 As above at 3.

52 *Cubillo v Commonwealth* [2000] FCA 1084.

53 Subsequent to the limited response to the recommendations of the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families from the federal 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

who wanted to pursue claims with no alternative but to do so in the juridical arena. The legal action bravely taken by Lorna Cubillo and Kwementyay Gunner against the Commonwealth government had immense personal and symbolic significance and 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.[54]

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.[55] 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.[56] She argues that '[w]hat has to be heard in court is precisely what cannot be articulated in legal language.'[57]

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,[58] 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*,[59] nine plaintiffs challenged the constitutional validity of the *Aboriginals Ordinance 1918* (NT), claiming damages for false imprisonment and deprivation of liberty, arguing that they had been forcibly removed from their families in the

acknowledgement, self-determination, access to redress and prevention: Cornwall Amanda *Restoring Identity: Final Report of the Moving Forward Consultation Project* Public Interest Advocacy Centre Sydney August 2002 p ix.

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

55 Felman Shoshana *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* Harvard University Press Cambridge Massachusetts 2002 p 84.

56 As above at 5.

57 As above at 4.

58 Over 2000 pages of evidence was presented of documents relating to the policy and practice covering the period 1911–67, the period relevant to the claim.

59 *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997) 146 ALR 126. The solicitors instructing counsel for both the *Kruger* and *Cubillo* actions were the North Australian Aboriginal Legal Aid Service, in the latter case, under the auspices of the Stolen Generations Litigation Unit.

Northern Territory between 1925–49 and had been institutionalised, for periods the last of which ended in 1960.[60] The plaintiffs claimed that the *Aboriginals Ordinance 1918* (NT)[61] was constitutionally invalid, on a number of grounds, including, importantly, that it authorised acts of genocide.[62] They argued that it was contrary to an implied constitutional right to freedom from laws which authorised the crime against humanity of genocide, as a result of Australia being 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'.[63]

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 that 2% of the general Australian population. What is behind this marginalisation of a population which just over 200 years ago was 100% of the population, if not genocide?[64]

In *Kruger*, a majority of four of the six Justices[65] did not find the Ordinance constitutionally invalid, thus determining the question of genocide 'unnecessary to answer'. In considering the validity of the legislation in terms of the potential for it to authorise acts of genocide, all six Justices of the High Court drew on the requirement that removals be conducted in the interests

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60 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.

61 And as amended in 1953.

62 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.

63 *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.

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

65 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 it 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': *Kruger* (1997) 146 ALR 126, at 182.

of the children, and could not therefore be held to have authorised acts of genocide. It was, as Valerie Kerruish has pointed out in a critique of the decision in this journal, for each of them 'an an easy case of statutory interpretation',[66] 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'.[67] 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".'[68]

In rejecting the claim of genocide, the High Court drew on the language of another international instrument, the United Nations *Convention on the Rights on the Child*,[69] which 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'.[70] 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.[71]

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.[72] The concept of 'best interests' of the child does not exist in the

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66 Kerruish Valerie 'Responding to Kruger: The Constitutionality of Genocide', (1998) 11 *Australian Feminist Law Journal* 65 at 69. See also Behrendt Larissa '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.

67 *Kruger* (1997) 146 ALR 126 at 161–2 (Dawson J).

68 At 188 (Gaudron J).

69 Australia ratified the Convention 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).

70 *Convention on the Rights of the Child* Article 9 <www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>.

71 *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.

72 *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;

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', and to create a servile labour force. 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'.[73] 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'.[74] 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'.[75]

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',[76] 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'.[77] But the hermeneutic framework from which the Justices of the High Court nevertheless drew on their understanding of the principles of 'best interests' is not that of colonial relations, but is rather the contemporary discourse of 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 find the claim 'unnecessary to answer'. While not unanimous, the decision of the High

(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.'

73 Haebich Anna *Broken Circles: Fragmenting Indigenous Families 1800–2000* Fremantle Arts Centre Press Fremantle 2000 p 18.

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

75 As above s 7(1). As Justice O'Loughlin said in *Cubillo*: 'The powers of the Director under the 1918 Ordinance were exceptionally wide.': at para 144.

76 *Kruger* (1997) 146 ALR 126 at 134 (Brennan CJ).

77 At 135 (Brennan CJ).

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.

4. LEGAL VOID IN *CUBILLO V COMMONWEALTH*

When, a year later, Lorna Cubillo and Kwementyay 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 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. Cubillo and Gunner argued that the Commonwealth was vicariously liable for their unlawful and forcible removals from their families as children and subsequent detentions in the Retta Dixon Home and St Mary's Hostel in the Northern Territory during the 1940s and 50s, claiming damages for loss of cultural and other aspects of Aboriginal life, in addition to loss of rights under land rights legislation. They said that during this time, the Commonwealth had 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.

In his decision, Justice O'Loughlin found that the Commonwealth was not vicariously liable on the grounds that section 6 of the *Aboriginals Ordinance 1918* (NT) and section 17 of the *Welfare Ordinance 1953* (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. This finding of an absence of vicarious liability was subsequently applied in detail to each of the four cause of action: wrongful imprisonment, breach of statutory duty, breach of duty of care and breach of fiduciary duty. In his decision, Justice 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.[78] On the basis of evidence of his mother's purported thumbprint on a form of consent, he concluded that Kwementyay Gunner was removed at his mother's request. Justice O'Loughlin found that the burden of proof had not been satisfied by the plaintiffs, specifically stating that there was neither enough evidence to support the claim that there was a general policy of removal of 'part-Aboriginal' children, 'and if, contrary

[78] *Cubillo* Summary of Reasons for Judgment para 9.

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'.[79]

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.'[80] 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', pointing out that even if those who removed Gunner and Cubillo believed that they were doing so 'in the best interests' of the children, they would 'stand condemned on today's standards',[81] many would regard them as 'badly misguided', and that 'subsequent events have shown that they were wrong'.[82]

Precedent is the law's own history, and memory. In the common law, the past is seen 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'.[83]

> 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 the form of judicial opinions law reconstructs its own past, tracing out lines of precedent to their 'compelling' conclusion.[84]

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

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79 *Cubillo* para 1160.

80 At para 96 citing *Kruger* at 36–7.

81 *Cubillo* para 1560.

82 At para 1562.

83 Sarat Austin '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 at 86.

84 As above at 87.

considered invalid'".[85] 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.[86]

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.'[87] In comment, 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 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?[88]

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'[89] 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.[90] 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.[91]

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85 *Cubillo* at para 97.

86 Goodrich Peter and Hachamovitch Yifat 'Time out of Mind: An Introduction to the Semiotics of Common Law' in Fitzpatrick Peter (ed) *Dangerous Supplements: Resistance and Renewal in Jurisprudence* Duke University Press Durham 1991 (published in the UK by Pluto Press) p 159 at 174.

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

88 *Cubillo* at para 107.

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

90 As above at 223.

91 As above at 223–4.

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'.[92] 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 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.'[93]

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 'since the very first days of colonisation', 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.'[94]

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.'[95] 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 what he regards as the benign 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

92 *Cubillo* at paras 918, 986, 1075, 1246.
93 *Cubillo* Summary of Reasons for Judgment at para 9.
94 *Bringing Them Home* above note 7 at 11.
95 Evidence of Lorna Cubillo cited in *Cubillo* at para 423.

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 organise the relations between indigenous and non-indigenous citizens within the discourses and practices of the nation'. 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.[96]

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'.[97] 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 Court[98]
>
> …
>
> 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.[99]

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96 Cash above note 28 at 165.

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

98 *Cubillo* at para 74.

99 At 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 reinstituting act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case. [100]

In an ethical reading of deconstruction, which she renames 'the philosophy of the limit', Drucilla Cornell points out that:

> 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.[101]

Importantly, Cornell also claims that as part of this responsibility, the system is 'called to remember its own exclusions and prejudices'.[102] What future was promoted when Justice O'Loughlin determined that there was insufficient evidence to support a finding that Lorna Cubillo and Kwementyay 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'?[103] 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, perpetuating the dynamics of colonial

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100 Derrida Jacques 'Force of Law: The "Mystical Foundation of Authority"' in Cornell Drucilla, Rosenfeld Michel and Carlson David Gray (eds) *Deconstruction and the Possibility of Justice* Routledge New York 1992 p 3 at 2–3.

101 Cornell Drucilla *The Philosophy of the Limit* Routledge New York 1992 p 148.

102 As above at 149.

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

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.'[104]

In contrast, when I met with Lorna Cubillo last year, 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 the site of their kidnapping, as a ceremonial act of healing. Lorna 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'.[105] Lorna Cubillo said that the government had remained in denial about a dark period in Australia's history. Jimmy Anderson, one of the people taken with Lorna Cubillo, was reported to have said: 'You have to keep moving on or else the traumas of the past will eat you up.'[106] 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 'remember[ing] the future'.[107] ●

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

105 Lorna Cubillo, personal communication, Darwin, 25 September 2004.

106 Murdoch Lindsay 'Stolen Children Decide Time for Apologies is Past' *The Age* (Melbourne) 4 June 2004 p 8.

107 Cornell above note 101 at 120.