CUBILLO V COMMONWEALTH: CLASSIFYING TEXT AND THE VIOLENCE OF EXCLUSION

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I INTRODUCTION

C*ubillo v Commonwealth* is a Federal Court judgment handed down in August 2000 by Justice O'Loughlin (hereafter, *Cubillo*)[1] and the Cubillo hearings held prior to this from 1998 to 2000. I introduce you to the case through the now public stories of Lorna Cubillo and Peter Gunner, whose lived experiences constitute the events and meaning that are contested in *Cubillo*. A range of theoretical frameworks underpins my analysis, including the notion that classification can in itself be a subject of analysis, but I point also to the usefulness of Jean-François Lyotard's notion of the differend for a reading of this case. I address in this context the function and politics of classifications within texts, particularly legal texts, arguing a case for exploring systems of textual classification in *Cubillo*. I suggest specifically that application of the *Evidence Act* 1995 (Cth) pushes legal, conceptual and textual notions in *Cubillo* into formal, bounded categories, which one might frame as artificial or constructed genres, in tension with the narrative wholeness associated with other kinds of genres (seen to stake a present but lesser claim). The hierarchical nature of colonial law and its terms, including its underlying classificatory framework, are linked to studies of 'Whiteness', as the testimonies of Indigenous and non-Indigenous witnesses were assessed and located in *Cubillo* according to a 'hierarchy of credibility'[2] that privileges white and/or official voices. I read O'Loughlin J's marking of limits and exclusions elsewhere in the judgment as an unintentional acknowledgment that there are sources beyond the evidence in the hearings which reflect on the stories told within them, and argue his avowed endeavour to prevent misreading by a naïve audience is simultaneously an attempt to delimit the range of meaning. I argue overall that, in his unquestioning application of the rules,

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1 (2000) 103 FCR 1.

2 Howard S Becker, 'Whose Side Are We On?' (1967) 14 *Social Problems* 239, 241.

classifications and assumptions of the law to the genres of discourse before him in *Cubillo*, O'Loughlin J denies the authority of texts and voices embedded in Indigenous world-views. Moreover, the nature and content of his own 'interpretive commitments'[3] can be seen to shape his reading practices in *Cubillo*, reflecting a normative universe[4] that is often at odds with the perspectives of the applicants.

By focussing on the structuring of hierarchies of prestige and value within the classificatory framework of the *Evidence Act* in particular[5] and of the legal process more generally, I demonstrate that the hearings and judgment function as hybrid genres through which the organisation of knowledge produces key effects.[6] I suggest that these effects can be understood through the notion of the differend, which Lyotard claims takes place when 'the "regulation" of the conflict' that opposes two parties 'is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom'.[7] Robert Cover claims that interpretations of the law by judges are inherently acts of violence.[8] I argue that in *Cubillo* this violence is connected to the violence – and language – of the law as a system of classification.

II THE CASE

In *Cubillo* the two plaintiffs are Lorna Cubillo and Peter Gunner, removed and detained, in 1947 and 1956 respectively, at the ages of eight and seven, under the Northern Territory of Australia's *Aboriginals Ordinance* 1918. As adults, they sought damages from the Commonwealth for their removal from their families and culture, for their detention in church-run missions, for their experiences of abuse in those missions, and for the trauma, illness, loss of culture and rights to land said to result from these events. They sued the Commonwealth for false imprisonment and deprivation of liberty and for breaches of fiduciary duty, statutory duty and duty of care. They alleged that the Commonwealth promoted or caused their detention as children through a policy of removal without regard to their individual circumstances, and that it acted 'with a conscious and contumelious disregard for the welfare and rights of the Applicant[s] or with a wanton cruel and reckless indifference to [their] welfare and rights'.[9] It is a case that held, and still holds, considerable symbolic value: it was and is broadly known as a test case for the

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3 Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 7.

4 Ibid.

5 *Evidence Act* 1995 (Cth).

6 Joseph Pugliese, '"Fighting with Our Tongues": The Politics of Genre in Aboriginal Oral Histories' (2001) 28 *Oral History Review* 85.

7 Jean-François Lyotard, *The Differend: Phrases in Dispute* (Georges Van Den Abbeele trans, 1988) 9.

8 Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

9 Holding Redlich, Statement of Claim (further amended) for Lorna Cubillo, 17 May 1999, cited in (2000) 103 FCR 1, [16]. The same paragraph also appears in Peter Gunner's Statement of Claim (further amended), 17 May 1999; ibid.

stolen generations.[10] The Commonwealth 'chose to fight',[11] and vigorously contested, this 'stolen generations' claim. The case was dismissed, in August 2000, on a variety of legal grounds.

A *Lorna Cubillo*

Lorna Cubillo was born on 8 August 1938, around Tennant Creek, to an Aboriginal mother and a white father. Her mother died when she was young and she was cared for by her mother's sister and the sister's husband, as well as by her grandmother. In 1945 she was taken to a settlement at Phillip Creek, which was jointly managed by the Northern Territory Administration and the Aborigines Inland Mission (AIM),[12] where she attended a small school. In 1947, at the age of eight, Cubillo was one of 16 children taken from Phillip Creek to AIM's Retta Dixon Home in Darwin. The children were carried on the back of a truck that was driven by Les Penhall, a Patrol Officer under the direction of the Native Affairs Branch. Cubillo has described the scene as she remembers it: 'There was a commotion, a lot of people crying, people were hitting themself with hunting sticks and blood was pouring down their faces.'[13] She was given control of a breast-feeding baby: its mother struggling first, then giving up and throwing herself on the ground, asking Cubillo to take care of the child.[14] Cubillo remembers she was scared: 'I wasn't even sure if I'd be killed. I didn't know what was happening. I was in a state of confusion and so were the other children.'[15] The adults chased after the truck.[16]

The children were taken to the Retta Dixon Home, which was run by the Superintendent Amelia Shankelton, an employee of AIM. Retta Dixon was declared an 'aboriginal institution' in December 1947, licensed under the *Aboriginals Ordinance* 1918.[17] The Commonwealth provided most of the funding and its employees, officers of the Native Affairs Branch, conducted occasional inspections. Cubillo was detained until 1956, when she commenced work in domestic service in Darwin. She was physically assaulted by one of the missionaries in the Home, who also made two sexual advances. Cubillo remembers being strapped for speaking her language and says it was preached from the pulpit that Aboriginal traditions were 'the work of the devil'.[18] On return to Tennant Creek she could not communicate

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10 Jennifer Clarke, 'Case Notes: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 218, 219.

11 Geoff Clark, 'Aboriginal and Torres Strait Islander Commission Annual Report 1999-2000: Chairman's Report', 6 (2000, Aboriginal and Torres Strait Islander Commission), <http://www.atsic.gov.au/about_atsic/Annual_Report/Previous_Annual_Reports/annual_report_1999_00/Chapter_2.pdf> at 10 November 2004.

12 Final submissions of the Applicants, vol 1, s 1, 'Introduction' 3.

13 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 11 August, 1999) 1102.

14 Ibid 1101.

15 Ibid 1102.

16 Ibid.

17 Final submissions, above n 12, 3.

18 Transcript of Proceedings, above n 13, 1112.

with her mother because she could not speak her language: 'it was very difficult to let her know how I felt and to understand what she was saying to me'.[19]

B *Peter Gunner*

Peter Gunner was born on 19 September 1948. His mother was Aboriginal and his father was either of European or part European descent. Gunner lived a traditional Aboriginal life until he was seven, on Utopia Station in Central Australia. In May 1956 he was taken from his mother at Utopia Station and removed to St Mary's Hostel in Alice Springs. He reported hiding from government officers on two previous attempts: 'I'm under the blanket while this bloke was looking – looking for me and they just hid me till he went away'.[20] He remembers when he was taken: '[The man] just grabbed me and put me back of the truck.'[21] He remembers also the response of his community: 'A lot of them was crying and yelling in Aboriginal language.'[22]

The Australian Board of Missions (ABM), an Anglican organisation, ran St Mary's, with successive Superintendents living off-site. In December 1946 it had been declared an 'aboriginal institution' under the Ordinance.[23] As with the Retta Dixon Home, the Commonwealth contributed most of the funds for, and conducted inspections, of St Mary's. There were frequent concerns, expressed by officers of the Commonwealth while Gunner was detained, about 'the number, turnover and suitability of staff … [and] poorly maintained, dirty physical amenities'.[24]

Gunner was detained until 1963. A Patrol Officer's promise to his mother made in 1955 – that Gunner would return to her in the school holidays – was not honoured. Gunner struggled academically, just starting to learn English on his arrival at the school. The school system was 'ill-equipped' to assist children in Gunner's position.[25] In 1963 he started work on a pastoral property, as arranged by the Welfare Branch. When Peter left the Hostel he could no longer speak his languages. As an adult, like Lorna, he was unable to speak to his mother.

> 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.[26]

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19 Transcript of Proceedings, above n 13, 1136.

20 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 16 August, 1999) 1506-7.

21 Ibid 1504.

22 Ibid 1505.

23 Final submissions, above n 12, 5.

24 Final submissions, above n 12, 6.

25 Ibid.

26 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 17 August, 1999) 1545.

People in his community had believed that he was dead.[27]

III DIFFERING ACCOUNTS

> It is in the nature of a victim not to be able to prove that one has been done a wrong. A plaintiff is someone who has incurred damages and who disposes of the means to prove it. One becomes a victim if one loses these means. One loses them, for example, if the author of the damages turns out directly or indirectly to be one's judge.[28]

In this paper I am concerned with the violence of the law as a system of classification. Geoffrey Bowker and Susan Leigh Star draw attention to how moral, political and semantic conflicts are managed within or through classification systems, and the processes through which categories perceived as real become real in their consequences.[29] This speaks to the legal and bureaucratic systems of racial classification applied to Aboriginal children in the Northern Territory historically, schemes that informed the practice of child removal and in attempts to access those histories through legal and literary texts. This in turn reflects the fact that the author of the damages addressed within *Cubillo* – the state, the law and the violence of classification – is also in this instance the judge.

My interpretation of the stolen generations history, gleaned in part from documents I have read, is not the same as the interpretation put forward by the court. But the reliance of the court on evidence drawn from historical records and officials of the state regarding the administration of Territory laws is more significantly disturbing 'for the apparent lack of fit between most of these accounts and those of many affected Aborigines, including the applicants'.[30] The notion of the differend, put forward by Lyotard, aptly illuminates the nature of the split between the authorised and legitimised accounts of child removal as told through the *Cubillo* judgment, and Indigenous-led accounts told in a range of other genres, including *Bringing Them Home*,[31] fiction and life writing, as well as stories told in more private forms and spaces. For Lyotard, the differend applies to cases where:

> the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages. A case of differend between two

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27 Ibid 1544.

28 Lyotard, above n 7, 8.

29 Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (2000) 53.

30 Clarke, above n 11, 222.

31 *Bringing Them Home* is the report of the Human Rights and Equal Opportunity Commission's inquiry into the separation of Aboriginal and Torres Strait Islander children. 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* (1997). Online with associated documents at <http://www.hreoc.gov.au/publications/index.html#social_justice> at 'Aboriginal and Torres Strait Islander Social Justice' / 'Stolen Children' [20 April 2006].

> parties takes place when the 'regulation' of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.[32]

The reality of a referent can only be established – and thus truth-believing can only take place – if the referent both exists and can be signified, and if 'there is someone to signify the referent and someone to understand the phrase that signifies it'.[33] If these conditions are not met, the reality of the referent – in this instance the experience and nature of systematic child removal and institutionalisation – can be negated. If the *Cubillo* trial is taken as the 'regulation' of the conflict that opposes Aboriginal people and the state, it has taken place in the idiom of one of the parties – the law, the specific idiom of the state – in which the wrong suffered by the other is not adequately signified.

Cover claims that judicial interpretations are themselves acts of violence.[34] He argues that legal interpretation is distinguished from the interpretation of literature, political philosophy and constitutional criticism because it is embedded – as political text – in institutional modes of collective action.[35] The operation of the law is a system of cues and signals to a range of actors which ensures that responsibility for its violence is collective and shared, which thus enables it to bypass a general resistance to violent deeds.[36] The social organisation of this violence 'manifests itself in the secondary rules and principles which generally ensure that no single mind and no single will can generate the violent outcomes that follow from interpretive commitments'.[37] Cover writes largely of criminal sentencing, where incarceration or capital punishment results directly from an act of judicial interpretation. But his framework can be seen to apply both to the bureaucratic implementation of Northern Territory Ordinances in the 1940s, 50s and 60s, linked to the violent acts of removal and incarceration of Indigenous children, and to the distancing effects achieved by O'Loughlin J in his judgment, which enable him to hand down and justify a finding loaded with considerable symbolic and material violence.

IV CATEGORIES OF READING

Bowker and Star show that medical classifications tend to 'split up the world into *useful* categories'.[38] These categories do not simply describe the world as it is, they necessarily model it; it is 'analytically always possible to act otherwise, to carve the

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32 Lyotard, above n 7, 9. A differend is distinguished from litigation but can exist simultaneously: 'the one who lodges a complaint is heard, but the one who is a victim, and who is perhaps the same one, is reduced to silence.' Ibid.

33 Lyotard, above n 7, 16.

34 Cover, above n 8.

35 Ibid 1606.

36 Ibid 1628.

37 Cover, above n 8.

38 Bowker and Star, above n 29, 101.

world up differently'.[39] Further, where formal characteristics are built into wide-scale bureaucracies they acquire considerable power to persuade or compel but the tracks of the struggles surrounding them 'do not disappear completely'.[40]

> Traces of bureaucratic struggles, differences in world-view, and systematic erasures do remain in the written classification system, however indirectly. The trick is to read the classification itself, restoring the narratives of conflict and compromise as we do so. … our emphasis is on reading the system, our argument being that one can read a surprising amount of social, political, and philosophical context from a set of categories – and that in many cases the classification system in practice is all that we have to go on.[41]

In Australia, the legal system can be seen to both embody and enact the formality (and the power to compel) of the categories it internally employs. This does not mean however that there are no stories, or struggles contained in practices of classifying within a legal framework. All texts 'are structured and determined by genres, with their rules, laws, codes and conventions'.[42] Crucially, in the context of the law, while all texts (oral, written, visual etc) are constituted by genre, 'not all genres are equal' but rather 'structured by hierarchies of value and prestige'.[43] Linking Bowker and Star's approach to the concept of 'genre', it can be seen that processes of textual classification within *Cubillo* were deeply fraught – both materially and historically loaded, and yet naturalised, applied without apparent question.

I suggest that exploring systems of textual classification in *Cubillo*, including the differences in world-view, systematic erasures and traces of struggle underlying the sets of categories employed in both the transcript and the judgment, tells us a great deal about some of the processes the case itself was destined to explore. The inter-textual, multi-generic nature of this case in particular ensures that the structuring of hierarchies of prestige and value among the multiple texts invoked authorises genre as a form of 'cultural capital' in which a working knowledge of different generic forms determine different subjects' access to 'the particular social sphere in which [they] operate'.[44] The location of this system of weight and prestige *within* the classificatory framework of the legal system generally and the *Evidence Act* in particular suggest that the form of the court hearings itself activates 'specific ranges of meaning in a culture' through which it functions to 'organize knowledge' in a way that produces particular political and ideological effects.[45]

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39 Bowker and Star, above n 29, 101-2.
40 Ibid, 53-5.
41 Ibid, 55.
42 Pugliese, above n 6, 95.
43 Ibid, 96.
44 Ibid, 97.
45 Ibid, 99.

V LEGAL GENRE: RULES FOR INTERPRETATION

In their discussion of the International Classification of Diseases (ICD), Bowker and Star discuss how the World Health Organisation provides not only a set of possible stories but also 'rules for the interpretation of those stories'[46] which 'sit on top of the [ICD] and nudge its categories along prepared, legitimate pathways'.[47] In *Cubillo*, rules for interpretation contained within the *Evidence Act* perform this same function: they sit on top of the witness testimonies, the lawyers' questions, the voir dires, the judge's findings and so on, and nudge legal, conceptual and textual categories along determined pathways.

In some sections, the *Evidence Act* operates hierarchically, creating a category for instance for 'matters of official record'.[48] But there are other kinds of rules as well, underpinned similarly by a classificatory framework. Section 26 of the Act provides that the court may make orders in relation to the way in which witnesses are to be questioned, including the production and use of documents and objects.[49] Whether or not it is explicitly referred to, section 26 plays a role in determining which documents are included or excluded (crucial categories), as well as the uses to which they may be put (producing a number of sub-categories). Similarly, sections 166 and 167 define the term 'request' and then set out the circumstances in which this classification may be employed.[50]

'Request' appears in the *Cubillo* hearings[51]; it is a classification, but also a genre operating within the genre of the hearings. In Derrida's terms, it signals its membership with an explicit mark[52]; it is a typology, non-natural, a genre which depends on laws or orders according to values associated with '*techne*', which can be taken in opposition to the 'natural' genres of the category *phusis*.[53] *Techne* can be equated to an art, skill or craft, which suggests that a genre of this kind is constructed or made, as 'request' is activated here. *Phusis* in contrast translates to nature or growth, implying a more organic, emergent category or class. Derrida argues that both types of genre elicit a limit – 'as soon as genre announces itself, one must respect a norm, one must not cross a line of demarcation'– and yet it is from within the limit between them, where one may appear in the figure of the other, that 'the whole enigma of genre' may spring.[54]

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46 Bowker and Star, above n 29, 102.
47 Ibid, 106.
48 *Evidence Act* 1995 (Cth) ss 153-8.
49 Section 26 (a), (b).
50 Sections 166-7.
51 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 18 October, 1999) 3923.
52 Jacques Derrida, 'The Law of Genre', trans Avital Ronell in Derek Attridge (ed), *Acts of Literature* (1992) 221, 229.
53 Ibid 224.
54 Ibid 224-5.

In the hearings there is an exchange regarding an oral telling by Lorna Cubillo of her removal from a place called Banka Banka, an incident that occurred prior to her later, more complete, removal from Phillip Creek. Acting for the Commonwealth, Hollingworth draws on sections 135 and 136 of the *Evidence Act* to argue that the judge should use his discretion to ensure that this story is excluded from the broader story that *Cubillo* will tell. It is 'not relevant to the cause of action' and, perhaps more significantly, 'the prejudice to the respondent is utterly overwhelming' because there is no means of cross-examining or leading any contrary evidence. [55] The 'real vice' of letting the evidence in, as Hollingworth puts it, is that 'all of the relevant witnesses from the Commonwealth's point of view are dead'.[56] The reason, I suspect, that this is isolated as the 'real vice' is because it appears to fit neatly within the category offered by ss 135 and 136 of the *Evidence Act*, which enable the court to exclude or limit the use of evidence if its use might be unfairly prejudicial, misleading or confusing, or if it might cause or result in an undue waste of time.[57] O'Loughlin J, however, suggests that the argument could be held over to concluding submissions, as the story has relevance to the 'overall story', to the 'completeness' of the narrative.[58]

> HIS HONOUR: Ms Hollingworth, don't you see it as part of the overall narrative, the completeness of the story? … the witness is entitled to be led into telling the whole story which, as it would seem from what you have just said, would lead, supposedly, to the establishment of a cause of action with the removal from Phillip Creek, the incident at Banka Banka which we're about to hear, as I assume, being an earlier part of the narrative to give a complete story. That's all.
> …
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> [Hollingworth] With the greatest respect the Commonwealth says that how she got to Phillip Creek is utterly irrelevant and the prejudice from these sorts of wild allegations of men on horseback swooping in, which is how it is put in the witness statement …[59]

Hollingworth's objections do not succeed, and O'Loughlin J declines to use his discretion.

> As I said during the course of dialogue with Ms Hollingworth, I see the circumstance under which Mrs Cubillo left Banka Banka Station and went to Phillip Creek, and indeed to Six Mile Creek and Seven Mile Creek, as part of the overall story.
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> Mr Rush refers to it as the res gestae. Well, perhaps technically it may be, but certainly if it's not the res gestae it is overall a narrative leading up to the alleged cause of action.[60]

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55 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 10 August, 1999) 1067.
56 Ibid.
57 *Evidence Act* 1995 (Cth) ss 135-6.
58 Transcript of Proceedings, above n 55, 1067-71.
59 Transcript of Proceedings, above n 55, 1068-9.
60 Transcript of Proceedings, above n 55, 1070-1.

The 'narrative' here appears to have formal weight, yet in the judgment its status pales: 'No one else has been identified as a person who could have given evidence about the circumstances of her removal and no documentary evidence addressed the subject.'[61] But in O'Loughlin J's immediate desire for the 'overall story' we might discern a limit between *techne* and *phusis*, as the categories and rules imposed by the *Evidence Act* are set unfavourably against the story's more 'natural' content and structure.

VI PRIVILEGED VOICES

In a paper on the 'hidden whiteness' of the law in Australia, Janet Ransley and Elena Marchetti argue that 'despite the liberal ideal of a neutral and culturally unbiased legal system, concepts of race have shaped the law and its interpretation in Australian courts', and that the legal system's 'inherent assumptions of Whiteness' operate as a fundamental barrier that affects both the content and procedures of the law.[62] 'Whiteness' here refers to a racialised position of privilege that, like maleness, becomes the norm for 'human'.[63]

Ransley and Marchetti argue, building on work by Lisa Strelein, that the difficulty begins in the framing of a claim 'which requires the compartmentalising of a shared experience based on culture into individual claims and evidence with a focus on economic elements'.[64] The underlying assumptions of Whiteness meant that the applicants in *Cubillo* had to frame their objection 'not in terms of Indigenous law and culture, or even basic human rights, but in terms of causes of action recognised by the legal system'.[65] O'Loughlin J's rejection of broader considerations – his acceptance that 'the business of the courts is legality'[66] – required the translation of the claimants' action 'from one of rights, morality and principle to one of economic loss and damages',[67] fitting it into the law's classificatory framework. Strelein points out that Indigenous people asserting rights through colonial law 'must frame

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61 (2000) 103 FCR 1, [7]. 'In fact, there was no allegation that she was unlawfully removed from the care of her family at Banka Banka Station. The absence of such an allegation was, in my opinion, a paradox. Her story, dramatic and frightening, of a small child being forcibly taken from her grandmother's care by two strangers on horseback would be, if true, outrageous. Mrs Cubillo's counsel fought to lead that evidence against the objections of the Commonwealth; yet having succeeded in establishing its relevance, he did not thereafter pursue the removal as the basis for any cause of action.' (2000) 103 FCR 1, [732].

62 Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law' (2001) 1 *Griffith Law Review* 139, 139.

63 Ibid 141.

64 Ibid 140; Lisa Strelein, 'The "Courts of the Conqueror": The Judicial System and the Assertion of Indigenous Peoples' Rights' [2000] 5 *Australian Indigenous Law Reporter* 22 <http://www.austlii.edu.au/au/journals/AILR/2000/22.html>.

65 Ransley and Marchetti, above n 62, 146.

66 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 626, cited in (2000) 103 FCR 1, [68].

67 Ransley and Marchetti, above n 62, 146.

what are essentially historical, moral challenges to the legitimacy of assertions by the state in terms acceptable to an arm of the state'.[68]

The judgment also shows a strong preference for documentary evidence over the oral histories provided by Aboriginal witnesses,[69] an approach which disregards relative access to literacy in written English, taking the written word as an achievable and desirable norm. R A Brown points out that while oral testimony has historically been the principal source of evidence before common law courts, 'a trend has [long] developed whereby documents of various kinds have come first to supplement oral testimony, and then, in many instances, to supplant it'.[70] In *Cubillo*, the most striking example is the acceptance of a document marked with a thumbprint as evidence of maternal consent to Gunner's removal.[71] This was accepted over the oral testimony of witnesses that Gunner was hidden from patrol officers, had his skin blackened with ash and 'did not voluntarily leave his community'.[72]

In the judgment of O'Loughlin J, different voices were positioned at different levels on an implicit hierarchy. As Ransley and Marchetti point out, the testimonies of Indigenous and non-Indigenous witnesses were assessed very differently.[73] For instance, a passage in the judgment regarding the 'calibre' of the former officers of the Native Affairs / Welfare Branch appears in a description of the witnesses for the Commonwealth:

> The calibre of the former officers of the Native Affairs Branch and the Welfare Branch who gave evidence in this trial was exceptionally high. Many of them were highly educated and many subsequently achieved high postings in Government in later life. Their achievements are noted later in these reasons. My reason for mentioning this factor is to identify them as people of intelligence and experience who might be expected to have knowledge and awareness of the policies that existed in relation to Aboriginal and part Aboriginal people and the manner in which those policies were implemented. As the summaries of their evidence will reveal, all of them denied the existence of a general or widespread policy of removal of part Aboriginal children and most of them insisted that no child was removed without the consent of the mother of that child.[74]

This can be contrasted with the brevity of earlier passages describing witnesses appearing for Cubillo and Gunner. In the latter, one description stands out: that of Reg Worthy, a former senior officer in the Welfare Branch in Darwin, and the only former government employee to appear for the plaintiffs. In contrast to the other witnesses – fellow inmates of the homes, psychiatrists, anthropologists and

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68 Strelein, above n 64.
69 Ransley and Marchetti, above n 62, 146.
70 R A Brown, *Documentary Evidence in Australia* (1996) 1.
71 Ransley and Marchetti, above n 62, 146.
72 Ibid 146.
73 Ibid 146.
74 (2000) 103 FCR 1, [28].

witnesses to the removals, each accorded a brief mention – Worthy warrants an extensive description, with a detailed work history that reads as though drawn from a curriculum vitae.[75] All the others who received substantial treatment by O'Loughlin J were witnesses for the Commonwealth, such as Colin Steep, former warden of St Mary's Hostel, and Creed Lovegrove, who worked at different stages as a patrol officer, superintendent, district welfare officer in Alice Springs and eventually chief welfare officer in Darwin. No explanation is provided for the differential treatment, and implicit meanings are left to hold sway. Of Lovegrove, who was awarded an MBE for his work in the advancement of Aboriginal Welfare, O'Loughlin J says 'I am happy to accept his evidence, without qualification, as his personal experience, understanding and perception on matters of both policy and practice.'[76] O'Loughlin J bases this specifically on his opportunity to listen to and observe Lovegrove as he gave evidence in court: 'I came to realise that I was listening to a man who had dedicated the greater part of his working life to the betterment of the Aboriginal people.' [77] The key distinction implied in the degree of communication about the life history of different witnesses, however, was not the level of devotion to Aboriginal causes but their credentials as reliable, recognisable authorities - as subjectively assessed by O'Loughlin J - on 'the policies that existed in relation to Aboriginal and part Aboriginal people and the manner in which those policies were implemented'.[78]

Thus, O'Loughlin J operates within a 'hierarchy of credibility'[79] that privileges white and/or official voices. The attribution of both neutrality and status to these voices is associated with the 'cultivatedly disinterested "exemplary person" … of the modern democratic state: white, suburban, middle class, and male, but also Western and modern, possessed of property and the capacity to speak rationally'.[80] David Goldberg points out that this figure is also the embodiment of the 'reasonable man standard' – more recently the 'reasonable person standard' – which is cited 14 times within O'Loughlin J's judgment.[81]

VII SETTING LIMITS

O'Loughlin J was explicit in excluding some voices from his judgment, as demonstrated in his decision to leave out reference to the contents of *Bringing Them Home*. In giving his reasons, he interpellates readers who are 'not legal practitioners', both acknowledging the case as a source of broader interest and suggesting that 'legal' readers would require no explanation:

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75 (2000) 103 FCR 1, [25].
76 (2000) 103 FCR 1, [40].
77 Ibid.
78 (2000) 103 FCR 1, [28].
79 Becker, above n 2, 241.
80 David Theo Goldberg, *The Racial State* (2002) 151.
81 (2000) 103 FCR 1. I have included in this count citations of authorities and other sources within the judgment. See also Goldberg, above n 80, 150-1.

> It might be that there are readers of this judgment who are not legal practitioners. Should that be the case they may wonder why I have not, in these reasons, made detailed reference to the contents of the Commission's report. The short answer is 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.[82]

Simultaneously, however, O'Loughlin J makes it clear that he has read 'substantial sections' of *Bringing Them Home*, and comments on it. He suggests that much of the Northern Territory material is based on pre- World War II removals, and the stories of institutionalisation it tells would have 'minimal value' in the context of this case. [83] Here then is a distinction he makes elsewhere, that the trial is limited to the personal histories of Lorna Cubillo and Peter Gunner, and to Commonwealth policies and their implementation only 'to the extent to which they concerned part Aboriginal people in the Northern Territory of Australia between 1947 and 1963 or thereabouts and affected the applicants in these proceedings'.[84]

O'Loughlin J also excludes the question of an apology. It has not been put before him in the case, and he and other judges of the Federal Court deliberately refrain, as a collegiate body, 'from expressing a view on social, moral or political issues unless, of course, they are identified as subjects for judicial consideration',[85] a rule of the genre with which the judgment must concord. This does not, however, stop O'Loughlin J from offering a 'record' of what had happened to date in the Parliaments of the States and Territories.[86]

O'Loughlin J says that he mentions both *Bringing Them Home* and the resolutions of the Parliaments 'so that members of the general public may appreciate that the Court has, at all times, been aware of these matters'.[87] At the same time, he adopts the comments in *Nulyarimma v Thompson* that the interest of the Court is in 'what the law is rather than what the law should be'[88] and insists that 'the task of the Court is to examine the evidence – both oral and documentary – in a clinical manner, devoid of emotion' for a specified set of bounded legal purposes.[89] However, in marking these limits and exclusions, O'Loughlin J can be read as acknowledging that, in contrast to the terms of his own explanation, there *are* sources beyond the evidence in the hearings which make claims or tell stories that

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82 (2000) 103 FCR 1 [67].
83 Ibid.
84 (2000) 103 FCR 1, [69].
85 (2000) 103 FCR 1, [74].
86 Ibid. In regard to the question of an apology within the Commonwealth Parliament, s 49 of the Constitution and s 16 of the *Parliamentary Privileges Act* 1987 (Cth) are cited to explain the prohibition of raising in a court anything said or done in the Commonwealth Parliament. It is only that which is on the public record, in sources other than the Hansard, to which O'Loughlin can refer: (2000) 103 FCR 1, [77-8].
87 (2000) 103 FCR 1, [80].
88 (1999) 96 FCR 153, [64], per Merkl J; cited in (2000) 103 FCR 1, [79].
89 (2000) 103 FCR 1, [79].

reflect in some way on the stories told within the hearings. Further, readers who are positioned outside a legal practitioner's reading practice may question, and require explanation for, the limits he has set. Through this acknowledgement, the naturalised nature of the limits is put to the test.

To return to Derrida. O'Loughlin J's approach constitutes a signal or mention of the judgment's membership within a (legal) genre and an exceeding of its own boundaries.[90] In 'the law of genre' lies precisely what Derrida calls the principle of contamination, the law of impurity, which functions as 'the law of the law of genre'.[91]

> In the code of set theories, if I may use it at least figuratively, I would speak of a sort of participation without belonging – a taking part in without being part of, without having membership in a set. The trait that marks membership inevitably divides, the boundary of the set comes to form, by invagination, an internal pocket larger than the whole; and the consequences of this division and of this overflowing remain as singular as they are limitless. … consider the irony … : this supplementary and distinctive trait, a mark of belonging or inclusion, does not properly pertain to any genre or class. The remark of belonging does not belong.[92]

Describing this possibly as the 'limitless field of general textuality',[93] Derrida suggests that a text might not *belong* to any genre: 'every text *participates* in one or several genres, there is no genreless text, there is always a genre and genres, yet such participation never amounts to belonging'.[94] This is because of 'the *trait* of participation itself, because of the effect of the code and of the generic mark. In marking itself generically, a text unmarks itself.'[95] In the examples above, the statements that *Bringing Them Home* and the question of apology are excluded from the judgment *as genre* mark the boundary of the judgment as an identifiable class but cannot be contained within it.

O'Loughlin J's avowed endeavour to prevent misreading by a potentially naïve audience is also an attempt to delimit the range of meaning, to specify the public contexts in which the case may and may not be allowed to signify. This is connected no doubt to the kinds of anxieties generated by the *Cubillo* case, as questions about what is at stake in holding the state accountable in law were made acute for some by the earlier decision in the High Court, *Mabo*, and its rejection of the nation's founding lie, *terra nullius*.[96] Indeed, much can be made of the parallels – and the differences – between *Cubillo* and other high profile cases concerning

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90 Derrida, above n 52, 229-231.
91 Ibid 227.
92 Ibid 227-30.
93 Ibid 228.
94 Ibid 230.
95 Ibid 230.
96 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

Indigenous rights in Australia[97] and even residential school litigations, settlements and dispute resolution processes taking place in Canada, though I do not attend to either in any detail here. In particular, in the High Court of Australia in 1995, Alex Kruger, George Bray and seven others challenged the constitutional validity of the Northern Territory *Aboriginals Ordinance* 1918 (NT), the exercise of which was at question in *Cubillo*. This claim, *Kruger v Commonwealth* (hereafter *Kruger*),[98] lost in 1997, could be accurately described as the first test case for stolen generations against the Commonwealth. However, Michael Schaefer suggests that 'the niceties of constitutional law' in *Kruger* may have prevented assessment 'of the gritty reality behind the Commonwealth practice of child removal and detention', as evidence concerning individual takings and detentions and the physical and psychological effect of those experiences was simply never heard.[99] Instead, the case turned on the question of the constitutional validity of the *Aboriginals Ordinance*[100] and was consequently immersed in legal technicalities, at the expense, arguably, of emotive and historical force. In 1998 Schaefer expressed hope that common law claims such as *Cubillo* – in which his own firm was already involved – would more fully reveal 'the shocking effect of [Commonwealth] practice on innocent Australian children, their families and communities'.[101]

Following so closely also on the heels of *Bringing Them Home*, *Cubillo* held – and still holds – considerable symbolic power. This is not surprising given the gravity of the claims put forward by Cubillo and Gunner specifically, and by the stolen generations more broadly. The realities of Indigenous child removal are such that the perceived legitimacy of both the law and the state could have been deeply undermined by this process of confrontation. By invoking a positivist framework – a focus on what the law is rather than what it should or could be – O'Loughlin J moves to foreclose the judgment's meanings, to diffuse its moral and affective potency and thus restabilise the authority of the state.

Despite O'Loughlin's effort, *Cubillo* may for a number of observers have had the opposite effect, exposing the inadequacy of the law to address such crucial questions of ethics and justice within the state, while also putting forward further evidence about the content of the past. In fact, the day after O'Loughlin handed down the *Cubillo* decision, a journalist in the mainstream *Canberra Times* argued explicitly that 'in the forum of a court, there is no such thing as truth and justice, there is only law and evidence'.[102] At the same time, however, the case meant that the stolen generations 'were finally having their day in court – a day in front of the

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97 Including but not limited to *The Members of the Yorta Yorta Aboriginal Group v Victoria* (2001) 110 FCR 244; *Ward v Western Australia* (1998) 159 ALR 483; *Kartinyeri v Commonwealth* (1998) 195 CLR 337; *Nulyarimma v Thompson* (1999) 165 ALR 621; *Kruger v Commonwealth* (1997) 190 CLR 1.

98 (1997) 190 CLR 1.

99 Michael D Schaefer, 'The Stolen Generations: In the Aftermath of *Kruger* and *Bray*' (1998) 21 *UNSW Law Journal* 247, 252

100 Under *Commonwealth Constitution* s 122.

101 Schaefer, above n 99, 252

102 Crispin Hull, 'No Place to Decide', *Canberra Times*, 12 August 2000.

eyes and ears of many Australians watching on television, listening on radio or reading on the Internet'.[103] Schaefer, who represented the applicants on behalf of Holding Redlich, argued while leaving the court:

> The reasoning in this judgment does not diminish the powerful and emotional evidence of the trial – evidence that is Australian history … Whatever the eventual outcome of legal proceedings, the evidence will stand as testament to conduct of our federal government that cannot be ignored and that demands a national response.[104]

The national response called for by many commentators at the time was the establishment of a reparations tribunal, a means to provide compensation for those affected by removal without the stress of litigation.[105] But Lorna Cubillo still told journalists after the finding: 'I think it's worth it; I think the future generations need to know what we've been through and they will learn from it and become stronger and better persons', stating also: 'I think the world should be aware of our plight; we've suffered for so long and yet we're always being denied justice.'[106]

VIII TELLING AND HEARING

In contrast to *Bringing Them Home*, Barbara Cummings' *Take this Child – From Kahlin Compound to the Retta Dixon Children's Home*[107] achieves direct entry into the hearings (though neither text was tendered formally as evidence).[108] O'Loughlin J positions *Take This Child* as 'a work that dealt with "the Stolen Generation"'.[109] This appears to locate the text in a different category to O'Loughlin J's judgment, which he had limited to the 'personal histories' of Cubillo and Gunner, explicitly disavowing more collective meanings.[110] However, as *Take This Child* focuses on children incarcerated in the Retta Dixon Home, told largely through interviews with former residents, there is considerable crossover in the material covered.

Lorna Cubillo was involved in the preparation of *Take This Child*, not only through her participation as an interviewee but also through mediating interviews held with relatives living around Tennant Creek. 'I went back there because my countrymen and relatives did not want to talk to others. They only wanted to talk with their own

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103 Darrin Farrant, 'Down But Not Out, They Leave Saddened Yet Proud', *The Age* (Melbourne), 12 August 2000.

104 Michael Schaefer, cited in Rod McGuirk, 'NT – Stolen Generation Victory Brings Govt No Cheers', *Australian Associated Press* 11 August 2000, 20:46.

105 See for instance Lowitja O'Donoghue, cited in McGuirk, ibid; and Matthew Storey, lawyer for NAALAS, cited in Rod McGuirk, 'NT – Cubillo Says Failed Test Case Worth the Struggle', *Australian Associated Press* 11 August 2000, 19:07.

106 Lorna Cubillo, cited in Michael Madigan, '"No Justice" in White Man's Law – Battle Rolls on to Right Past Wrongs', *Courier Mail* (Brisbane), 12 August 2000 and McGuirk, ibid.

107 Barbara Cummings, *Take This Child - from Kahlin Compound to Retta Dixon Children's Home* (1990).

108 Ibid.

109 (2000) 103 FCR 1, [646].

110 (2000) 103 FCR 1, [3].

relatives and that was me.'[111] What Cubillo tells Cummings becomes an issue in the hearings, such as comments made about one of the missionaries, framed by the Commonwealth as though to contest Cubillo's testimony in the present day.[112] Similarly, Cubillo's decision to participate in the project is linked in the trial to an alleged discussion for another research project, also by a former Retta Dixon resident, to suggest that Cubillo was not as reticent to speak about her experiences as she claimed to be.[113] This emphasis contrasts with the collective purpose stated by Cummings in the preface to the text: 'our purpose in researching and writing this book was not to express anger towards either the authorities or the missionaries; rather, it was intended to show us our own beginnings'.[114] As the foreword to the book suggests, the genre of this text is unstable, multiple, collective and part of its meaning:

> The material presented in this book is a first. It provides an interpretation of official records alongside the oral history from the people themselves. It will at times appear disconnected between the chapters but as the reader grapples with this, it will compel you to acknowledge the separateness of the two worlds examined – the official world and the Aboriginal world.[115]

The separateness of the worlds examined is posited as both form and content, in which a sense of disconnection – deriving from the combination of genres – is part of the whole, and may be a source for insight.

In the judgment, O'Loughlin J refers briefly to numerous 'writings, both contemporary and historical' that '*tell* tragically of a distressing past', ie texts that are telling some of the history and distress of child removal in Australia.[116] *Take This Child* is only one such text, and I consider a number of others in my broader study of *Cubillo*.[117] For each of these texts, the way they are positioned and read through terms of genre can determine the nature of their reception. O'Loughlin J's emphasis on the 'personal' stories of individuals is consistent with the reading practices associated with the genre of autobiography. As he reads the stories placed before him – brought to him through text, word and testimony – he is perhaps the epitome of a privileged white male reader, interpreting each with the full weight and authority of the law. Simultaneously, he splits his own text from the functions of others, of the 'numerous writings' – they can 'tell' (stories, of distress, of the past) but his text looks for 'facts'.

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111 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 12 August, 1999) 1240

112 Transcript of Proceedings, above n 111, 1277-8.

113 Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 14 September, 1999) 2904-7.

114 Cummings, above n 107, xii-xiii.

115 Pat Turner, 'Foreword', ibid ix.

116 (2000) 103 FCR 1, [3]; emphasis added.

117 Neville, above n.

Telling stories 'is a practice in Indigenous cultures which has sustained communities and which validates the experiences of Indigenous peoples and epistemologies'.[118] Telling and retelling stories, reclaiming the past and providing testimony to the past 'are all ways that Indigenous peoples are engaging the process of recovering from a colonial past'.[119] Indigenous narrative traditions, in Australia as elsewhere, 'are located in myriad texts. They are found within a society's oral traditions, within a diverse range of writings … and, indeed, even within the land itself.'[120] In the North American context, N Bruce Duthu argues that incorporating such texts into federal Indian legal discourse can 'awaken the mind to reconceptualise the place of Native Americans within American society'.[121] It can also encourage or even require lawmakers to cross intercultural boundaries 'to examine the extent to which emergent legal structures and rules respect cultural differences or reveal jurisprudential myopia'.[122] While Australian law has no immediate equivalent to the system of federal Indian law in the USA, it is nevertheless both possible and imperative to conceptualise a framework in which such functions might be realised.

Take This Child is dedicated 'to you from us', which both interpellates readers as active, quite intimate participants and signs the text as collectively authored (despite the solitary appearance of Cumming's name elsewhere). In contrast to the 'interchangeable I' of an autobiography, the plurality of the text's subject calls 'you' – outsiders to its community – in as readers to identify with the text's project and, by extension, the political community to which the authors belong.[123] The collective nature of the endeavour is not distinct from the claim brought by the plaintiffs in *Cubillo*.

> You understood, it's quite clear in the first sentence, that you were instructing Mr David Dalrymple to commence legal proceedings on your behalf against the Commonwealth? --- And I – when you say on my behalf, I understood it was on behalf of people in whole.
>
> Including yourself? --- That's right.[124]

To allow *Take This Child* into *Cubillo* in another way might be to position Cummings's reading of historical documents in contrast to the reading performed in the judgment of O'Loughlin J. This reading, on the terms set by and within the text,

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118 Judy Iseke-Barnes, 'Living and Writing Indigenous Spiritual Resistance' (2003) 24 *Journal of Intercultural Studies* 211, 211.

119 Ibid 213.

120 N Bruce Duthu, 'Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty through the Lens of Native American Literature' (2000) 13 *Harvard Human Rights Journal* 141, 145.

121 Ibid 143.

122 Ibid.

123 Doris Sommer, '"Not Just a Personal Story": Women's *Testimonios* and the Plural Self' in Bella Brodski and Celeste Schenck (eds), *Life/Lines: Theorizing Women's Autobiography* (1988) 118.

124 Transcript of Proceedings, above n 111, 1212.

entails a significant departure from the procedures and methods of verification dominant in positivist genres of the law.

To illustrate: O'Loughlin J positions his reading practice (of both written and oral evidence) 'in a clinical manner, devoid of emotion'.[125] His approach also resonates with a point made about the discipline of 'History' by Raymond Evans and Bill Thorpe, who argue that many academically trained historians 'base their interpretations on the attempt to disclose as much *primary source* material in as representative a range as possible'.[126] For some, a paper that fails to cite 'unpublished archival or primary sources … cannot have any scholarly claims to history'.[127] This is one of a series of hierarchical classifications in which, as Pugliese put it, 'not all genres are equal'.[128] In *Cubillo*, what constitutes a primary as opposed to a secondary source is at issue in the hearings and judgment. In the hearings, historian Ann McGrath is interrogated at length for her selections and decisions in relation to various texts, a critique which had already contributed to the exclusion of her report.[129] In the *Cubillo* judgment, O'Loughlin J did not accept the existence of a eugenicist policy, with the absence of 'primary documents' put forward as the reason.[130] But judges, as Rosemary Hunter contends, 'are particularly powerful historians'.[131] In his unquestioned application of the rules, classifications and assumptions of the law to the genres of discourse before him in *Cubillo*, O'Loughlin J denies the authority of texts and voices embedded in Indigenous world-views.

Cover argues that legal interpretive acts 'signal and occasion the imposition of violence upon others' and 'also constitute justifications for violence which has already occurred or which is about to occur'.[132] The judgment in *Cubillo*, as Duthu says of a successful appeal against the title and fishing rights of the Abenaki Nation in the USA, suggests that 'there are real consequences to producing legal narratives that lack a coherent sense of morality, and view the past through perspectives afflicted with varying degrees of myopia and historical amnesia'.[133]

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125 (2000) 103 FCR 1, [79].

126 Raymond Evans and Bill Thorpe, 'Indigenocide and the Massacre of Aboriginal History' (2001) 163 *Overland* 21, 22; emphasis added.

127 Ibid.

128 Pugliese, above n 6, 96.

129 For instance, from O'Loughlin: 'What Doctor McGrath would be intending to do would be to persuade the court that certain prevailing circumstances and opinions existed. She cannot do that by simply saying that the Soviet and communist press and radio were saying certain things. She has to be far more detailed. She has to present far more source material to vindicate and to justify that statement.' Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 23 September, 1999) 3720

130 (2000) 103 FCR 1, [182].

131 Rosemary Hunter, 'Aboriginal Histories, Australian Histories, and the Law' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (1996) 1, 7.

132 Cover, above n 8, 1601.

133 Duthu, above n 120, 187.

> The consequences for Indigenous Peoples like the Abenaki are the generation and perpetuation of a jurisprudence that suppressed tribal voices – voices that assert and demand nothing less than equal respect for Indigenous-derived visions of justice and political co-existence. The consequences for legal institutions, like the courts, include considerable diminishment of their claims to legitimacy as justice-generating institutions, as well as erosion of the notion that the rule of law, and not of men, pervades in our society.[134]

O'Loughlin J's interpretive strategy in *Cubillo* works to suppress Indigenous voices, ensuring that 'they do not participate in [the] making of history',[135] and diminishes claims to legitimacy by courts in Australia as institutions that are capable of generating justice. While both embedded and invested in textual classifications enabled by evidence and common law, O'Loughlin J's subjectivity further permeates the judgment, crucially shaping the text as an interpretive act. This is consistent with Cover's distinction between legal meaning as the application of formal rules – including classification through legal instruments – and meaning in law more broadly conceived, incorporating a 'normative universe' which is 'held together by the force of interpretive commitments'.[136]

In attending to what Mark Sanders has called the 'reading and listening' practices – otherwise framed as the interpretive strategies - that occurred in the judgment's production,[137] one of the first issues that must be addressed is the difference between reading the transcript as a written text and responding to its content as a material, embodied presence in the courtroom. Where the judgment may be aligned with the western genre of history, the hearings are better aligned with genres in theatre, in performance, where the stories constructed by each set of lawyers, in a format largely of answer and response, draw on a present audience. As Heather Goodall points out, dramatic devices 'are used as tools of persuasion, to evoke feelings of sympathy, hostility or empathy, just as commonly as they are used in any play'.[138] The transcript, in contrast, is viewed 'as a series of data to be separated and dissected, tested, judged upon'.[139] What has been excluded from the transcript – classified perhaps as irrelevant or inadmissible – has disappeared, and 'the role of this sifting process in shaping the content and expression of what remains is no longer visible'.[140] The transcript 'is dealt with as if it has no absences, no context, no referents other than itself', as the legal process transmutes it into 'evidence', to be read 'as if it reflects only and directly the witness' [sic] meaning'.[141]

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134 Ibid.
135 Ibid.
136 Cover, above n 3, 6-7.
137 Mark Sanders, 'Interdisciplinarity as Reading: Truth Commission Journal and Notes' (2001) 5 *Law Text Culture: Special North American Issue* 227.
138 Heather Goodall, '"The Whole Truth and Nothing But ...": Some Intersections of Western Law, Aboriginal History and Community Memory' in Bain Attwood and John Arnold (eds), *Power, Knowledge and Aborigines* (1992) 104, 108.
139 Ibid 111.
140 Ibid.
141 Ibid.

O'Loughlin J does acknowledge some absences in the transcript, citing from an earlier case about receiving evidence by Aboriginal witnesses.

> The difficulties courts face in receiving and dealing with evidence of Aboriginal witnesses is well known, particularly when English is at best a second, or lesser, language and the grasp of it is limited. A transcript cannot convey nuances of gesture, movement or expression that bear upon an understanding of the evidence received in such circumstances. Similarly, a transcript which presents as a seamless continuum of questions and answers may suggest more comprehension of the process by a witness than the court observes.[142]

Elsewhere, the process of reading an oral, embodied genre such as the hearings is reflected in O'Loughlin J's remarks, such as his comments on aspects of individual testimonies. For instance, the statement that 'I found that segment of Mr Gunner's evidence very believable'[143] was contrasted directly with areas of Gunner's evidence 'where he was obviously guessing', for in the latter there was 'a discernible sadness in his voice and his appearance when he gave [his] answer'.[144] Of another Indigenous witness, Daniel Forrester, O'Loughlin J remarks:

> Mr Forrester was not an impressive witness. Because he strongly supported Mr Gunner's case and because he was firmly opposed to the role of the Commonwealth, there were several occasions when he answered questions with a heavy bias in favour of Mr Gunner's case. That may not be so readily apparent from a reading of the transcript as it was from listening to the way in which he responded to the questions asked of him.[145]

O'Loughlin also cited a range of examples to support a contention that 'throughout his evidence, and particularly throughout his cross-examination, Mr Gunner showed signs of being quite obtuse'.[146] He insisted that, in one area, 'Mr Gunner told an entirely different and contradictory story under cross-examination'.[147] There were other times, further, 'when he engaged in open confrontation with the cross-examiner for no apparent reason'.[148] And, 'time and time again' Mr Gunner 'reacted with suspicion to questions that were asked of him in cross-examination. Simple questions that were capable of simple answers were converted into confused ramblings.'[149]

In the context of the Truth and Reconciliation Commission in South Africa, Sanders distinguishes between the text of the final report – 'written in the third person, its genre is history' – and 'the *difficult public verbal space* at the hearings, in the exchange between witness and questioner, between reading and hearing, between

142 *Ward v Western Australia* (1998) 159 ALR 483 at 497, cited in (2000) 103 FCR 1, [418].
143 (2000) 103 FCR 1, [865].
144 Ibid.
145 (2000) 103 FCR 1, [969].
146 (2000) 103 FCR 1, [925].
147 (2000) 103 FCR 1, [922].
148 (2000) 103 FCR 1, [936].
149 (2000) 103 FCR 1, [938].

responsibility and rights'.[150] Reading in this context does not end, Sanders insists, 'as readings do traditionally, with the book', but must find 'a way of thinking reading as radical, and unstable, translation, … a way of taking into account the turns of responsibility [which] the hearings stage and enact'.[151] The *Cubillo* hearings, however, occurred in a different context and, for Peter Gunner, there was no projected reciprocity;[152] yet the space remained difficult, public, in which particular kinds of orality were enabled. To O'Loughlin J, Peter Gunner's voice in this context demonstrated at times 'unreasoning and unreasonable stubbornness'.[153] He cites in particular an exchange concerning the name of Peter's mother.

> Mr Gunner was shown a copy of a document entitled "Register of Births". It recorded his name and his date and place of birth. It was put to him that the person named under the heading "Person Furnishing Particulars", Topsy Kundrilba, was his mother. He denied it, claiming that he did not "recall those names". It was then put to him:
>
> '*Are you aware that your solicitors have agreed with the Commonwealth solicitors that one of the names by which your mother was known is the name that is set out here?"*
>
> He answered:
>
> *"Well, I disagree."*
>
> The cross-examiner persisted:
>
> *"So you think your solicitors have got it wrong? --- Whether they got it wrong or what, but I disagree.*[154]

To position Peter's response as 'unreasoning and unreasonable', as O'Loughlin J does, is to reify a binary between an affective, embodied response to a context, and the superior demands of reason and legality.[155] Moreover, Peter's own, immediate memory of what his mother may have been called is necessarily secondary to the 'particulars' produced (on paper) by his solicitors.

O'Loughlin J's 'interpretive commitments'[156] profoundly influence his reading practices in *Cubillo*, reflecting a normative universe (or *nomos*)[157] often at odds with the perspectives of the applicants. Consider for instance his treatment of two reports written by patrol officer Les Penhall, who was directly involved in the

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150 Mark Sanders, 'Reading Lessons' (1999) 29 *Diacritics* 3, 4; emphasis added.
151 Ibid.
152 Ibid.
153 (2000) 103 FCR 1, [935].
154 Ibid.
155 Margaret Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the "New Corporatism"' (1999) 23 *Melbourne University Law Review* 749, 770.
156 Cover, above n 3, 7.
157 Ibid.

removal of Lorna Cubillo from Philip Creek (though these reports concern other stations). From the first report:

> Half-caste: Out of the 31 coloured people on the Station only two are exempt, namely Gordon Abbott and Kenneth Swan. These were granted as a result of war service. The remainder have been born and brought up on Henbury and are quite satisfied with their conditions. Some of the children have received education at Hermannsburg, but have not progressed very far. The overcrowding of Hostels in the Alice Springs Area, prohibits the children from receiving schooling, so I would suggest that next year if the position has eased, some of the younger, near white kiddies could be brought in. Mr. Pearce is giving all the youths a good training in stockwork, and is keen on educating the others.[158]

O'Loughlin J intervenes before citing from the second:

> The same concerned approach (although strongly flavoured with racial overtones) is apparent from some of [Penhall's] other reports. He discussed the personal circumstances of Alice M-- and her young daughter, Helen, whom he found at Mt Quinn Station. He wrote:
>
> Half-caste: Alice M-- aged 20 daughter of Billy M-- three-quarter black and full-blood living in camp. Helen M-- aged 1 year daughter of Alice M-- and full-blood. I don't recommend any action regarding these two. They are not over endowed with white blood, and no good purpose could be served by removing them.[159]

Given the significance of racial genealogy in both passages by Penhall, and the implications of this kind of thinking for an interpretation of Commonwealth practice and policy at the time, I do not read Penhall's reports as reflecting a 'concerned approach' that is simply, even strongly, 'flavoured with racial overtones'. On the contrary, it reads as clear evidence that scientific racism powerfully informed – directed – the terms of the government officer's gaze. At another point, O'Loughlin J distinguishes between the 'summarised' history that he offers in his reasons and the 'attempt' to 'inject racial overtones' in the applicants' submissions.[160]

It is also necessary to consider the evidence submitted concerning Peter's removal from Utopia Station, including records written by Patrol Officer Kitching indicating that Peter and his mother previously fled at the sight of government officers[161] (which corresponds with Peter's own testimony that he was hidden from them).[162] O'Loughlin J's reading of the 'several pieces of documentary evidence' about the removal – including the 'lengthy prelude' before the removal occurred - does not

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158 (2000) 103 FCR 1, [388].

159 (2000) 103 FCR 1, [389].

160 (2000) 103 FCR 1, [1243].

161 H Kitching, 6 April 1955, Report on visit 4 April 1955, cited in Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O'Loughlin J, 6 August, 1998) 73.

162 Transcript of Proceedings, above n 20, 1506.

include any reference at all to this fact.[163] Some selectivity is inevitable, particularly considering the volume of evidence put before O'Loughlin J. However, this omission is of major significance, and reflects the degree of subjectivity in the interpretive act.

IX CONCLUSIONS

Decisions of this nature have profound implications - for the applicants in this case, for Indigenous communities more broadly, for non-Indigenous understandings and responses, and for the legitimacy of the courts as institutions of justice. They contribute ultimately to O'Loughlin J's assertion that the notion of a Commonwealth policy of removing all part-Aboriginal children from their families – an indiscriminate policy of removal – could not be maintained by the evidence put forward in this trial.[164] Julie Cassidy argues that this finding may effectively bar further claims against the state, dealing at length with the resonances such a claim might set up.[165] Again, the relationship to internal and external genres activates and directs a range of meanings,[166] namely the denial of Commonwealth responsibility for Aboriginal child removal and detention, based on a hierarchical, positivist ranking of written and spoken texts. O'Loughlin J's processing of sources and evidence – through the rules and conventions of two different legal genres but permeated always by O'Loughlin J's subjectivity - is the most crucial determinant of these effects.

If the law is taken to be the specific idiom of the state, then the author of the damages in *Cubillo* was also the judge.[167] The application of hierarchies and classifications of evidence and common law in this case can be seen to extend and legitimate the violence of racial and bureaucratic classifications of the 1940s, 50s and 60s, imposing rules of judgment applicable to the racial state. In the North American context, Duthu argues that it is critically important 'that legal discourse, and particularly the legal discourse that concerns relations between Indigenous and non-Indigenous societies, incorporates the emerging and evolving narrative traditions of Indigenous Peoples'.[168] In Australia, Hunter suggests that we ask what the consequences are 'if Aboriginal histories are not understandable within positivist paradigms: Does this necessarily mean legal non-recognition of Aboriginal claims?'[169] In my larger project I invoke the power of story, as alternative genres and narratives work to resist the effects of dominant voices, and

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163 (2000) 103 FCR 1, [1246].

164 (2000) 103 FCR 1, [300]. It is important to note however that the applicants argue specifically that their case did not turn on the question of the existence or content of a Commonwealth policy. Final submissions, above n 12, 10.

165 Julie Cassidy, 'Case Comment: *Cubillo & Gunner v the Commonwealth*' (2003) 12 *Griffith Law Review* 114, 117-8, 114-36.

166 Pugliese, above n 6, 99.

167 Lyotard, above n 7, 8.

168 Duthu, above n 120, 143.

169 Hunter, above n 131, 6.

dominant power relations.[170] However, O'Loughlin J's investment in a positivist paradigm and his deployment of the law as a system of classification ensures that these stories are divested of the 'means to argue'[171] in the court context and that the *Cubillo* judgment effects a non-recognition of Aboriginal claims. If the differend is 'the unstable state and instant of language wherein something which must be able to be put into phrases cannot yet be',[172] then the interpretive violence of the law in this case is such that the reality of Aboriginal child removal cannot yet be put into its language and be heard.

[170] Neville, above n *.
[171] Lyotard, above n 7, 9.
[172] Ibid 13.