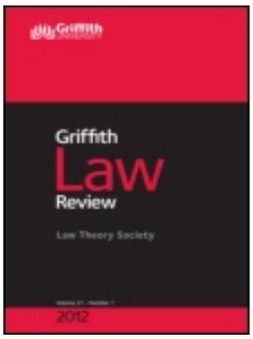

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Reading the Evidentiary Void

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READING THE EVIDENTIARY VOID
The Body at the Scene of Writing

Trish Luker[*]

In *Cubillo v Commonwealth* (2000), a form of consent with the purported thumbprint of Topsy Kundrilba was found to offer sufficiently persuasive evidence to reject the claim of forcible removal of an Indigenous child. In this landmark action in relation to the Stolen Generations, the thumbprint was imbued with the status of a signature which was interpreted as indicating a mother's informed consent to the removal of her son. Drawing on Derrida's concept of iterability, I suggest that the thumbprint cannot be read as a signature, and propose an alternative deconstructive reading. I argue that the form of consent exemplifies colonial documentary practices which were implemented in an attempt to make Indigenous subjects legible and to produce subjectivity which conformed to normative white patriarchal order.

> In order to function, that is, in order to be legible, a signature must have a repeatable, iterable, imitable form; it must be able to detach from the present and singular intention of its production.[1]

> [A person's fingerprint] is not testimony about his body, but his body itself.[2]

Introduction

On 13 February 2008, the recently elected new prime minister of Australia, Kevin Rudd, delivered the National Apology to the Stolen Generations on behalf of the Australian Parliament. In this, the inaugural motion of the new parliament, Rudd deployed the well-known trope of the book of history, describing the removal of Indigenous children as 'this blemished chapter on our nation's history' and committing the parliament to 'turn a new page in Australia's history by righting the wrongs of the past', asserting that in offering the apology as the first step in healing, 'this new page in the history of our great continent can now be written'.[3]

History books have not always served Australian Indigenous people well when making legal claims for injustice. Eight years earlier, on 11 August 2000, Justice O'Loughlin of the Federal Court of Australia handed down his decision in the

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1 Derrida (1982), p 328.

2 Wigmore (1923), p 874.

3 Rudd (2008), p 167.

landmark case taken by members of the Stolen Generations, Lorna Cubillo and Kwementyay Gunner.[4] Cubillo and Gunner argued that the Commonwealth government was vicariously liable for their removals from their families and communities as children and their subsequent detentions in the Retta Dixon Home and St Mary's Hostel in the Northern Territory during the 1940s and 1950s.

In *Cubillo*, Justice O'Loughlin repeatedly highlighted the overriding difficulties the case presented due to the 'incompleteness' of the history and the lack of documentary evidence. In relation to the removal of Lorna Cubillo and the other children from Phillip Creek in the Northern Territory, he stated that 'curiously, neither the applicants nor the respondent could produce a single document in respect of that removal',[5] that 'people are dead and documents, if they ever existed, have been lost'.[6] He concluded, however, that: 'The position concerning Mr Gunner is quite different. In his case, there were several pieces of documentary evidence concerning his leaving Utopia and going to St Mary's.'[7] In particular, O'Loughlin J identified a 'form of consent by a parent'[8] with the purported thumbprint of Gunner's mother, Topsy Kundrilba. Justice O'Loughlin regarded this form as indicating that Kundrilba had requested that her son be removed to St Mary's Hostel, and the presence of a thumbprint or fingerprint on the form was read as an indication of her intention. This, now infamous, exhibit was crucial to O'Loughlin J's decision in relation to Gunner's claim.[9] It functioned to suggest that Gunner's mother consented to his removal to St Mary's Hostel. While the judge determined that it was not possible to make findings of fact about the circumstances of the removal of Gunner from Utopia Station to St Mary's Hostel — and he accepted Gunner's claim that he was forcibly removed against his wishes — O'Loughlin J nevertheless found the form of consent a sufficiently persuasive exhibit that it formed the basis for the court's rejection of the claim. The text of the form is reproduced below:

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4 *Cubillo v Commonwealth* (2000) 174 ALR 97. Sadly, in April 2005, Mr Gunner passed away. 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 Alyawarre and other Central Australian Aboriginal law, I will use Kwementyay as the substitute for his first name in this article. This will necessitate occasional editing of quotations, which I have indicated.

5 *Cubillo v Commonwealth* (2000) 174 ALR 97 at 129.

6 *Cubillo v Commonwealth*, [2000] FCA 1084, Summary of reasons for judgment, para 10.

7 *Cubillo v Commonwealth* (2000) 174 ALR 97 at 488.

8 Exhibit A21 (Interlocutory)/A73, 'Form of Consent by a Parent'. The exhibit was tendered by the applicants but ultimately relied upon by the respondent in its defence.

9 The judicial interpretation of the thumbprint was highlighted in the media coverage and in critical responses, including Watson (2000). For an alternative deconstructive reading of the form of consent, see Parsley (2006).

FORM OF CONSENT BY A PARENT

I, TOPSY KUNDRILBA being a full-blood Aboriginal (female) within the meaning of the Aboriginals Ordinance 1918–1953 of the Northern Territory, and residing at UTOPIA STATION do hereby request the DIRECTOR OF NATIVE AFFAIRS to declare my son [KWEMENTYAY] GUNNER aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said Aboriginals Ordinance.

My reasons for requesting this action by the Director of Native Affairs are:

1. My son is of Part-European blood, his father being a European.
2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
3. I am unable myself to provide the means by which my son may derive the benefits of a standard European education.
4. By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made available to him by admission to St Mary's Church of England Hostel at Alice Springs.

SIGNED of my own free will) TOPSY
this day of 1956 Her mark
KUNDRILBA

in the presence of

The form is undated and unwitnessed. It includes the statement 'signed of my own free will this ___ day of _____1956 in the presence of _____', but the gaps have not been filled in. There is a thumbprint or fingerprint with the typed words 'her' and 'mark' on either side, and 'TOPSY' and 'KUNDRILBA' above and below.

The exhibit was sourced in the National Archives of Australia. While undated, unwitnessed and bearing no official seal or insignia, the form of consent was regarded as a public document, making further evidence as to its authenticity unnecessary.[10] In *Cubillo*, the form of consent functioned as documentary evidence that Topsy Kundrilba had given her informed consent to the removal of her son. However, rather than resolving the issue of liability, the exhibit ultimately raised more questions than it answered, for how do we know that Kundrilba did consent? How, indeed, can we know that the thumbprint is in fact Topsy's? Can we presume to know what she was intending by putting her mark on the form? Do we know whether she understood the result of this action? Did she know that she would not see her son again until he returned as an adult? Was there coercion? Justice O'Loughlin himself acknowledged that many of these questions could not be answered. He stated that there was no way of knowing how the contents of the document were explained or whether they were explained at all — in which case, he asserted, the document would probably be a nullity. On the 'balance of probabilities', however, O'Loughlin J found that the 'line of documents' favoured a positive conclusion that Topsy Kundrilba had given her informed consent to her son going to St Mary's. He said:

10 *Evidence Act 1995* (Cth), s 156.

> In coming to that conclusion, I am aware that there was no way of knowing whether the thumb mark on the 'Form of Consent' was Topsy's; even on the assumption that it was, there was no way of knowing whether Topsy understood the contents of the document. But it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as Topsy the meaning and effect of the document. I have no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document.[11]

Justice O'Loughlin identifies the fundamental question which hermeneutics attempts to address — that is, how do we understand the past in the present? The initial questions provoked by the judge's reading of the exhibit can be traced to Gadamer's significant contribution to hermeneutics in his concept of temporal distance and the challenge presented to communication by our historical situatedness, or horizon of understanding.[12] There is, in this case, a multiplying of hermeneutic contexts which exemplify the challenge to understanding of the relationship between text and interpretation. In the imagined first instance, there is the context of the unidentified patrol officer and Topsy Kundrilba — a socio-linguistic situation of incommensurable alterity. Subsequently, there is the possibility of circulation of the document to other readers, such as the Director of Native Affairs, and its unknown location up until its storage in the National Archives. There is the sourcing of the document as an exhibit and its contested significance within the trial, and the hermeneutic context of its reception by the Federal Court. Of course, there is also now the hermeneutic context here of my, and your, interpretation of the document, and that of any other current or future analysis.

In this article, I investigate the form of consent containing the thumbprint as a somatechnic site. Pugliese and Stryker have argued that the concept of somatechnics offers a framework for analysing the historical and cultural contingency of embodiment and subjectivity.[13] As such, it is a particularly useful conceptual paradigm for interrogating legal constructions of race and the hegemonic function of whiteness in the context of colonialism. I argue that the exhibit is exemplary of the operation of somatechnics, for not only does it reveal the operation of a biotechnology of racial classification, but also, in the thumbprint, an embodied presence is materialised. In this way, the thumbprint may be an example of a 'capillary space' linking the macropolitics of colonial constructions of whiteness and the micropolitics of racially inscribed bodies.[14] Rather than a signature, I will argue that the exhibit demonstrates the operation of historical documentary practices of governance which functioned to produce racialised and gendered subjectivity. My argument will proceed in three stages. Drawing on Austin's theorisation of speech acts,[15] I will first argue that the thumbprint can only

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11 *Cubillo v Commonwealth* (2000) 174 ALR 97 at 344.

12 Gadamer (1975).

13 Pugliese and Stryker (2009), pp 1–2.

14 Pugliese and Stryker (2009), p 2.

15 Austin (1962).

function as a valid signature if it is read as a performative speech act in which intention is communicated. However, as Derrida has demonstrated, a deconstructive reading of the function of intention in signification reveals that it is derived from the metaphysics of presence, the idea that there is an origin of knowledge from which truth can be determined.[16] Rather than intention, Derrida posits the concept of iterability — the capacity to be repeated in the absence of the addressee — as central to interpretation. For Derrida, the concept of iterability incorporates the notions of both repetition and alterity.[17] Using this framework, I argue that the thumbprint fails to conform to the sign of a signature. Nevertheless, the mark and the document on which it appears are open to other significant interpretations — readings that O'Loughlin J failed to take into account in his judgment. Having rejected the juridical interpretation of the thumbprint, I go on to propose an alternative somatechnic reading of the exhibit. I argue that the form of consent exemplifies colonial documentary practices that were implemented in an attempt to make Indigenous subjects legible and to produce subjectivity which conformed to normative white patriarchal order.

Acts of Speech

In his philosophy of language, Austin makes reference to the signature as a performative speech act in terms of its capacity to invoke the '"I" who is doing the action' or 'utterance-*origin*'. Austin points to the importance of 'something which is *at the moment of uttering being done by the person uttering*', arguing that: 'Where there is *not*, in the verbal formula of the utterance, a reference to the person doing the uttering, and so the acting, by means of the pronoun "I" (or by his personal name), then in fact he will be "referred to" in one of two ways … In verbal utterances, *by his being the person who does* the uttering' and 'In written utterances … *by his appending his signature*'.[18]

Using Austin's analysis, the purported thumbprint of Kundrilba can only function as a valid signature on the form if it is read as a performative speech act in which intention is communicated. However, hermeneutic problems emerge with this framework of speech acts when applied to interpretation of historical documents such as that tendered in the trial, in cross-cultural contexts where we are unable to verify comprehension. As O'Loughlin J himself acknowledges, it is impossible to answer the question of whether and how the issues and concepts of the form could be understood by Topsy Kundrilba. He said:

> There was … no way of knowing how the contents of the document were explained to Topsy. Perhaps they were not explained at all — in that case the document would probably be a nullity. Perhaps they were explained with infinite patience and care —

16 Derrida (1982).

17 Derrida points out that the link between iterability and alterity inheres in the etymological connection between *iter*, 'once again', coming from *itara*, 'other' in Sanskrit.

18 Austin (1962), pp 60–61.

always already inscribed by Derrida's *différance* that destabilises univocal conceptualisations of subjective identity on which the technology is premised.[36]

Contrary to the use of fingerprints in criminal investigations or in the context of biometrics, marks on documents such as the form of consent do not function as individual identification. In the trial, there were a number of witnesses who worked as patrol officers in the Northern Territory at the time Kundrilba is alleged to have placed her mark on the form. Not one was able to provide clear evidence about the collection of thumb- or finger-marks in the situation where children were removed from their mothers, or for other bureaucratic processes. Overall, the evidence about this practice was notably sketchy and inconsistent. This was arguably not a simple case of 'memory loss' or 'confusion', as O'Loughlin J concluded, but rather indicative of the fact that, as a practice in the Northern Territory at the time, soliciting marks as signatures when children were removed was irregularly performed. It appears to have begun in the 1930s, possibly as a response to mounting community concern about the practice of child removal and international pressure on the government from humanitarian organisations.

There appears to be more evidence of the use of thumbprints in relation to the withholding and 'management' of Aboriginal workers' wages and other entitlements. Kidd claims that from 1935 thumbprinting was 'mandatory for dealings on Aboriginal accounts with duplicates held at head office', but that it was known by the authorities to have been easily defrauded by employers and protectors, even when handled by the CIB.[37] The state's collection of thumbprints in the analogous contexts of stolen children and stolen wages demonstrates the way it functioned not as individualised authorisation, but as a technology of governance intended to provide a veil of accountability over activities that were recognised at the time to be questionable.

I have argued that to interpret the thumbprint on the form as Kundrilba's signature indicating consent to the removal of Gunner must be contested. The retrospective juridical construction of intention is undermined by a deconstructive reading that highlights the impossible iterability of the thumbprint, and consequently its failure to function legibly as a signature. However, this does not exhaust the potential for understanding the exhibit, for there are indeed other alternative readings. While the thumbprint cannot meaningfully be interpreted as a signature conveying consent, this does not mean that it is devoid of meaning. On the contrary, as I will go on to argue, the thumbprint, as a mark of the body impressed upon a bureaucratic document, presents an exemplary site for a somatechnic analysis which foregrounds the racialised colonial context in which it was produced and through which it acquires meaning.

Making the Subject Legible

The uniqueness of a signature and the impossibility of its authentic reproduction authorises the status of the signer as an autonomous subject within the discourse of Western liberalism. Here we can see a connection between the meaning of the word

36 Pugliese (forthcoming).

37 Kidd (2007), pp 23–24.

'character' as a 'stamped impression', as in a system of writing, and the notion of 'having a self'.[38] Character is that which distinguishes one individual from another and refers to moral constitution or status. The authority to sign a document is regarded within the post-Enlightenment philosophical tradition as a function of the free and self-determined, reasoning subject. It is closely connected to the capacity to make moral judgments, to act within the law and to consent to actions. At the time the form of consent was purported to have been signed, however, thumbprints were not read as individualised identity. On the contrary, the thumbprint signified membership of an illiterate group; it was inscribed with collective identity and in this way the uniqueness of the event is undermined.

The concept of individualised identity and subjectivity is itself tied to the emergence of the modern bureaucratic state and the development of documentary practices which made citizens visible and 'open to the scrutiny of officialdom'.[39] One of the key functions of the emergence of written forms of individualised identification in Western Europe was as a means to record real property ownership, inheritance and exchange through contracts, wills and estates. These are legal documents on which the signatures of parties and testators function as the sign of agreement, obligation or receipt, whose authentic identity is subsequently verified by a witness through another signature or mark. The semiotic function of the signature as the sign of individualised identity is inextricably connected to legal and bureaucratic processes of state control and land ownership.

Scott and colleagues refer to this process of the production of legal identities as 'state projects of legibility', a process they analyse through the historic development and imposition of the permanent family surname.[40] The authors examine the function of fixed personal names, and particularly permanent patronyms, as legal identities carried out as state-making projects of the modern era, 'in which it was desirable to be able to distinguish individual (male) subjects' for purposes such as 'tax collection … conscription, land revenue, court judgments, witness records, and police work'.[41] Pointing out that '[v]ernacular naming practices throughout much of the world are enormously rich and varied' and '[i]n many cultures, an individual's name will change from context to context and … over time',[42] they argue that 'the use of inherited familial surnames represents a relatively recent phenomenon intricately linked to the aggrandisement of state control over individuals and the development of modern legal systems and property regimes'.[43] The deployment of the notion of legibility in the authors' argument serves to illuminate the semantic function of colonial and other state-making naming practices in an attempt to inscribe meaning on contexts that are otherwise illegible to the colonialist: landscapes which seem inhospitable, people who appear unintelligible. It is an attempt to fix the meaning of the Indigenous Other according

38 Connor (2001).

39 Caplin and Torpey (2001), p 1.

40 Scott et al (2002).

41 Scott et al (2002), p 11.

42 Scott et al (2002), p 7.

43 Scott et al (2002), p 6.

to the known and privileged discursive, legal and administrative paradigm of the colonial ruler. As Scott and colleagues point out, the production of legal identities is symptomatic of the desire for 'synoptic, standardized knowledge',[44] and the drive to make subjects legible to the bureaucratic regime.

The form of consent was a pro forma document on which the names of Gunner and Kundrilba were inscribed, bureaucratically inserted *into* the colonial legal framework and racially defined according to an assimilationist and eugenicist discourse. The name 'Topsy' is itself symptomatic of colonial naming practices, and was most likely attached to Kundrilba at some point when she had contact with the bureaucratic processes of the Native Affairs Department or when she began working as a domestic servant. It is resonant with colonial notions of femininity: diminutive and familiar. It is not the name she would have been known by in her own family network. Gunner gave evidence that before he was taken away he used Aboriginal names for the members of his family group,[45] and that he never used his mother's European name.[46] In the trial, Gunner and Cubillo argued that their names had been stolen from them, as part of the theft of their language, culture and relationships with their families. As so many members of the Stolen Generations have testified, the loss of one's name is also the loss of cultural knowledge, identity in terms of skin and kinship relationships, the law governing who one is permitted to marry and the means to retracing these connections; it is the loss of this subjectivity.

Gunner's experience readily illustrates the colonial production of legible subjects and of patronymic legal identity. He said that he had been 'given' his name, the name of his purported father — literally the patronym — when he became an inmate of the institution of St Mary's Hostel. Of course, this would not have been the name he was known by in his family before he was taken away. The imposition of the name of his presumed father was a function of colonial bureaucratic administration, an attempt to make the child legible to the state. As Gunner pointed out, it was also at St Mary's that he was given a date of birth,[47] another important example of hegemonic state-naming identity practices. The date of birth given to Gunner when he was admitted to St Mary's was recorded on a birth certificate, produced some 10 years after he was born, and also containing the purported thumbprint of Kundrilba.[48] In this way, a documentary record and legal identity were created in order to facilitate removal and incarceration.

In the Western legal tradition, patrilineal naming practices serve to authorise an individual's agency in the law. Indeed, in order to launch a legal action at all, it is necessary to be able to state, under oath, one's name and date of birth. Gunner was inscribed with the name of the white father, emblematic of the logic of

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44 Scott et al (2002), p 5.

45 Transcript, 16 August 1999, pp 1496–97.

46 Transcript, 16 August 1999, p 1503.

47 Transcript, 17 August 1999, p 1519.

48 Exhibit R93, Peter Gunner's birth certificate, giving his date of birth as 19 September 1948. The court did not attempt to verify if the thumbprints on the two documents were the same. However, as they appear to have been produced at the same time, and for the same purpose, I would extend my argument to the birth certificate.

assimilation. This naming was an attempt to displace the child of mixed-race parentage's Indigenous identity and specificity of kinship relations evidenced in the name — the only identity previously known to Gunner — and replace it with an identity which conformed to the white Australian normative patriarchal order. This is despite the fact that Gunner's biological paternity was actually unknown to him and subsequently revealed to be uncertain.[49] Gunner's apparent indifference to accurate 'biological' knowledge of his paternity flies in the face of the evident preoccupation on the part of the colonial administration and the mission, and subsequently the law, with the identity of his father as the foundation for production of his legal and racial identity.

The Body at the Scene of Writing[50]

A signature is considered to be a unique identifying mark, yet it does not carry the trace of racial identity. In the context of the form of consent on which Kundrilba is said to have placed her thumbprint, however, the presence of race relations is unmistakable. Signs are produced by the body. A thumbprint is the trace of the body at the scene of writing. In this case, it is the sign of indigeneity, the trace of colonial violence, dispossession and genocide.

Had Kundrilba signed her name cursively, rather than with the sign of her *body*, what might this have signified? The thumbprint is itself a sign of illiteracy. In Western culture, illiteracy is considered a sign of ignorance and is associated with incompetence and with the uncivilised. The form itself explicitly states that the signer, a 'full-blood aboriginal (female) within the meaning of the Aboriginals Ordinance 1918–1953', desires 'my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste' and that she was 'unable myself to provide the means by which my son may derive the benefits of a standard European education'. The discursive framework in which the form circulated was eugenicist, relying on a presupposition that Aboriginal women were incapable of providing the parental care and educational opportunities to which a boy such as Gunner was entitled, by virtue of the status of his 'Part-European blood, his father being a European'. Under the legislative regime in force at the time, Gunner was of a different caste to his mother. Whiteness, with which he was inscribed as a ramification of his white paternity, *made* him, producing him as a subject entitled to an education, and to other rights seen to be part of the civilising project of assimilation.

Van Krieken points out that: 'Civilization was colonialism's most central organizing concept, quintessentially what imperialism and the colonial project was meant to achieve.'[51] He argues that the failure of the earlier colonial strategy of relegating Aborigines into the category of barbaric 'Other', as represented by the increasing population of mixed-race people, 'threatened the very boundaries and

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49 Expert witness Dr John Morton provided evidence that Gunner's father might have been either a white station worker called Gunner or Sid Kunoth, the son of the Utopia Station owners at the end of World War I: Anthropologist's Report re *Gunner v the Commonwealth of Australia* (21 June 1999), p 15.

50 I have appropriated this expression from Kirby (1991).

51 Van Krieken (1999), p 299.

character of civilization itself'.[52] The response to this was a 'civilizing offensive' involving both a legislative regime concerned with the 'protection' of Aboriginal people, including the separation of 'half-caste' and 'full-blood' Aborigines, and the removal of 'half-caste' Aboriginal children through the assumption of legal guardianship by the state.

Using this framework, we can see that the form of consent was part of the legal armoury of bureaucratic governance under which Indigenous people were made visible to the colonial state. Aboriginal children of mixed descent were kidnapped from their families and taken to institutions 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. While Aboriginal people were not accorded the rights of citizenship, the administrative regime apparently made provision for a sufficient level of agency such that a mother was accorded the sovereign power to consent to the removal of her child.

Paradoxically, despite the judicial attention to the form of consent, O'Loughlin J actually found that, 'although every consideration was to be given to the mother's feelings and to her wishes, ultimately, her consent was not required to her child's removal'.[53] The judge came to this conclusion citing the legislative regime in force at the time, under which the Director of Native Affairs had the statutory power to remove children into custody if it was considered in their best interests, irrespective of whether they had a parent,[54] and the High Court's interpretation of the legislation as having been beneficial and protectionist.[55] As the test case for claims of liability made by members of the Stolen Generations against the Commonwealth government, the *Cubillo* decision established a precedent which affirmed the law's resistance to according responsibility for the detrimental effects of generational child abduction.[56] The recourse to legal positivism was supported by the '[l]ine of documents that were compiled in the Native Affairs Branch', which the judge found on the balance of probabilities 'favours a positive conclusion that Topsy gave her informed consent to her son going to St Mary's'.[57]

Conclusion: Responsibility Before the Law

In his reading of the form of consent, O'Loughlin J relies upon an understanding of the thumbprint as a signature, and therefore as the performance of a speech act which communicates the intention of the speaker. It is an attempt to attribute to it the power to provide a transparent window on the truth and to invest in the mark of

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52 Van Krieken (1999), p 305.

53 *Cubillo v Commonwealth* (2000) 174 ALR 97 at 195.

54 *Aboriginals Ordinance 1918* (NT), ss 6, 7 and *Welfare Ordinance 1953* (NT), s 17.

55 *Kruger v Commonwealth* (1997) 190 CLR 1.

56 However, in the first — and to date only — successful action by a member of the Stolen Generations, Bruce Trevorrow succeeded in his claim against the South Australian government, winning $525,000 in compensation for having been removed from his mother's care in 1957 when he was 13 months old: *Trevorrow v State of South Australia (No 5)* [2007] SASC 285. Tragically, Trevorrow died in June 2008, aged 51.

57 *Cubillo v Commonwealth* (2000) 174 ALR 97 at 344.

her body the function of writing. However, I have argued that the form of consent tells us nothing about intention and cannot be used as evidence of consent. Rather, the form of consent was an agent of a disciplinary regime functioning to produce racialised subjectivity which conformed to normative white patriarchal order. It served to interpellate Gunner as subject of the law, while affirming the lawfulness to his removal by deploying the thumbprint as evidence of his mother's illiterate and disenfranchised status. Rather than indicating consent, the thumbprint is evidence of both Kundrilba and her son's subjection before the law.

As Kevin Rudd stated in his National Apology speech: 'The uncomfortable truth for us all is that the parliaments of the nation, individually and collectively, enacted statutes and delegated authority under those statutes that made the forced removal of children on racial grounds fully lawful.'[58] While Rudd was careful not to refer at any stage to the question of compensation to the Stolen Generations, his speech took the government a step closer to recognition of responsibility. The question of responsibility goes to the heart of the *Cubillo and Gunner* case, and the practice of Indigenous child removal raises crucial questions about collective responsibility for the impact of colonialism. It concerns the relationship between the past and the present, the responsibility of white Australians for the actions of our forbears and our racial and cultural identity. As Derrida and others have asserted, the concept of responsibility presents a particular difficulty because of the way it extends beyond our own individual actions and because the memories of the past imbue our culture, language and ways of life — and because, as Derrida argues in the context of a colonial history, settler Australians have a particular responsibility since we continue to derive benefit from the original violence of colonisation.[59] We are yet to see whether the law will now be able to act responsibly in offering 'fresh' judgment, by judging in the present with reference to contemporary standards of justice.

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