

## STORIES OF THE NATION'S CONTINUING PAST: RESPONSIBILITY FOR HISTORICAL INJURIES IN AUSTRALIAN LAW AND ALEXIS WRIGHT'S *CARPENTARIA*

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### I INTRODUCTION

'A nation chants, but we know your story already'.<sup>1</sup> So begins Alexis Wright's novel *Carpentaria*, for which she received the Miles Franklin Award, on 21 June 2007, the day the federal government's Intervention in the Northern Territory commenced.<sup>2</sup> *Carpentaria* provides a deep condemnation of Australian contemporary law and politics, and, as this article will demonstrate, an effective claim for social justice based on a critique of the dominant narratives that produce and support these laws and politics. It challenges the hierarchy that determines both whose stories count, and how those stories come to matter. The

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- 1 Alexis Wright, *Carpentaria* (Giramondo, 2006) 1. Alexis Wright is a member of the Waanyi nation of the highlands of the southern Gulf of Carpentaria. Her first novel, *Plains of Promise*, was published in 1997: Alexis Wright, *Plains of Promise* (University of Queensland Press, 1997). She has published a nonfiction book, and has edited an anthology: Alexis Wright, *Grog War: Shifting the Blame: One Town's Fight against Alcohol* (Magabala Books, 1997; Alexis Wright, *Take Power, Like this Old Man Here: An Anthology of Writings Celebrating Twenty Years of Land Rights in Central Australia 1977–1997* (IAD Press, 1998). *Carpentaria* has won the Miles Franklin Literary Award 2007; the Australian Literature Society Gold Medal 2007 (under the auspices of the Association for the Study of Australian Literature); the Queensland Premier's Literary Awards (Best Fiction Book) 2007; the Victorian Premier's Literary Awards (Vance Palmer Prize for Fiction) 2007; the Australian Book Industry Awards (ABIA) (Australian Literary Fiction Book of the Year) 2007. It was short-listed for the New South Wales Premier's Literary Awards (Christina Stead Prize for Fiction) 2007; the Age Book of the Year Award (Fiction Prize) 2007; the Commonwealth Writers Prize (South East Asia and South Pacific Region, Best Book) 2007.
- 2 Martin Renes, 'Dreamtime Narrative and Postcolonisation: Alexis Wright's *Carpentaria* as an Antidote to the Discourse of Intervention' (2011) 2(1) *Journal of the European Association of Studies on Australia* 102, 110. On 21 June 2007, the Howard Government announced the Northern Territory National Emergency Response to address child abuse outlined in the *Little Children Are Sacred* report: Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Ampe Akekyernemane Meke Mekarle – 'Little Children Are Sacred': Report* (2007). Key components included the seizure of local community land leases by the federal government, the deployment of additional police, restrictions on access to alcohol in the community, removal of customary law and cultural practice considerations from bail applications, and quarantining of welfare benefits. Despite a change to a Labor government in 2007, the Intervention has continued.

novel's interrogation of key narratives in law, and the practices of representation used to tell them, undermine versions of sovereignty, responsibility and subjectivity that privilege the 'white nation',<sup>3</sup> offering a rich, Australian jurisprudence.

The law and literature movement has developed critical methods that provide an important 'way in' to question the law's logics and assumptions regarding Indigenous rights. In particular, the critical move that analyses law as a form of representation offers modes of analysis that are uniquely suited to social justice questions concerning Indigenous rights; as outlined below, questions relating to representation have been a significant area of contestation in both legal and cultural responses to Indigenous rights, and also an important site for critical intervention. The two central problematics to be examined here are sovereignty and responsibility. I will be tracing how the law has imagined Australian sovereignties – both the sovereignty of the white state and Indigenous sovereignties – and how *Carpentaria* provides a critique not only of the substance of these concepts of sovereignty, but also of the ways in which they have been represented. I will examine how sovereignty is central to contemporary formulations of responsibility for historical injuries; the ways in which critical historiography has intervened in the law's dealings with the past by rethinking sovereignty, particularly through the concept of redemption developed by Curthoys, Genovese and Reilly;<sup>4</sup> and how this reading of *Carpentaria* engages with and further develops the redemptive move.

In Part II, I explain the contribution a law and culture approach can make to critical methods, and why this approach offers a mode of inquiry that is uniquely suited to social justice projects concerned with Indigenous rights. I also connect law and culture methods with the emergence of critical historiography, which has been a key mode of intervention in the law's adjudication of Indigenous rights, challenging narratives and concepts upon which the law relies. In Part III, I outline the current thinness of responsibility in legal and cultural domains, and the ways in which *Carpentaria* addresses this problem thematically, focusing particularly on the failure of the discourse of Reconciliation. Part IV entails an examination of the way in which the law has imagined the state and Indigenous sovereignty and the effect this has on the law's understanding of the state's responsibility for past and current wrongs, as well the law's role in adjudicating this responsibility. I provide a reading of *Carpentaria* that focuses on its conceptualisation of sovereignty, and the novel's critique of the ways in which sovereignty is represented. I argue that *Carpentaria* demonstrates new means to answer important questions about the relationship between sovereignty and responsibility, which in turn speaks to the ongoing impact of historical suffering

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3 The term belongs to Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Routledge, 2000).

4 See Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press, 2008); Ann Genovese, 'Metaphor of Redemption, Myths of State: Historical Accountability in Luhrmann's *Australia* and *Trevorrow v South Australia*' (2011) 20 *Griffith Law Review* 67.

on contemporary legal, social and cultural life. In this reading, *Carpentaria* is a critical text that addresses the question of what different forms and discourses make possible (and impossible) regarding the recognition of Indigenous sovereignty and laws, which is a question inherently connected to the recognition of harms inflicted against Indigenous people, and responsibility for those harms. The novel marks the significance of Indigenous sovereignties to ongoing questions about responsibility, by representing what is denied by the Australian state, by law and by contemporary social life. In Part V, I analyse the formulation and evolution of responsibility in key Stolen Generations cases. In particular, I focus on the limitations of the law's imagination in its role adjudicating historical suffering in these cases, as well as the underlying narratives regarding the state upon which these limitations are based. I examine the implications of a different conceptualisation of sovereignty for contemporary law's response to historical injuries. Finally, Part V connects these readings of law and literature with the concept of redemption; I argue that *Carpentaria* suggests that encounters with Indigenous sovereignties should be the next step in the redemptive move.

## II THE METHODS OF JUSTICE

The two dominant approaches in law and literature are to view law *in* literature and law *as* literature,<sup>5</sup> and both these techniques are used here. The first approach examines literature for its thematic treatment of issues relating to law and to social justice. Here, the novel becomes a site for the critique and supplementation of the law's version of justice. In the discussion of *Carpentaria* below, the novel is shown to criticise legal and cultural conceptualisations of sovereignty and responsibility: to represent the failures of Reconciliation and legal processes. The significance of this approach is eloquently described by Wai Chee Dimock in her seminal work on law and literature, *Residues of Justice*,<sup>6</sup> in which Dimock contrasts law's inadequate treatment of justice with literature's account. Dimock argues that for the law:

The search for justice ... is very much an exercise in abstraction, and perhaps an exercise in reduction as well, stripping away apparent differences to reveal an underlying order, an order intelligible, in the long run, perhaps only in quantitative terms.<sup>7</sup>

Dimock argues literature supplements the law through its attention to the 'incommensurate' particularities excluded by the law,<sup>8</sup> and thereby contributes to a more complete version of justice. Dimock looks to literature for 'the abiding

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5 Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton University Press, 2000) 5. Binder and Weisberg comprehensively describe the development of the law and literature movement, with a particular emphasis on the intersection between law and cultural studies: see especially at 3–27.

6 Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (University of California Press, 1996).

7 *Ibid* 2.

8 *Ibid* 10.

presence – the desolation as well as the consolation – of what remains unredressed, unrecovered, noncorresponding’ in the law.<sup>9</sup> The stakes of this comparison lie with questions of social justice, as that which ‘remains unredressed’ does so for reasons that lie outside the question of formal properties. Literature provides an alternate domain and language for justice, one that offers different histories and logics to that upon which the law relies. It can thereby be a domain where that which has been excluded by the law – particularly unjust exclusions due to processes such as colonialism or racism – can become the source of an alternative or supplementary justice. The literary text itself becomes a theory of justice, providing a supplement and corrective to the legal domain.

The second main approach examines law *as* literature. This move means no longer seeing the legal text as transparent, where the text is only a means of ‘delivery’ of an already existing law; rather, law is now seen as an end-effect of processes of representation. This method thereby opens up a new set of critical questions about how the law, as representation, is produced, including the material or historical conditions and politics under which it is produced, and the underlying assumptions upon which legal representations are based. One of the effects of this approach is to flatten or demystify law: similar to literary representations, law is ‘just’ a text, and so it can be pulled apart and examined in the same way as any other text. The advantage of this approach is to reveal what might otherwise be unseen (or even disguised) when we reify the legal text. In particular, this method can show the ways in which the law relies on underlying, unstated narratives and assumptions, that it is shored up by cultural tropes. These stories and metaphors may not be justiciable, but they are nonetheless significant, and can be important points of intervention in projects directed towards social justice. One of the effective strategies here is to draw attention to these narratives and figures, to reveal their effects on legal and social outcomes.<sup>10</sup> This approach potentially offers a more radical conceptualisation of justice compared to the law in literature approach, because it goes beyond thematic explorations to examine, more self-consciously, the implicit claims made through the designation of representation as ‘law’ or ‘culture’, and does not take this separation for granted.

This scholarship ‘recognizes the literary as a constitutive dimension of law’,<sup>11</sup> and here we can begin to see the politics of representational practices. Imagination, for example, is usually coded as being opposed to reality, as well as to the rational, and is typically seen as belonging to the cultural domain, not to the law. By considering the legal text as having imaginative elements, in addition to its rational and logical properties, ‘imagination’ becomes a productive problematic: a concept whose examination reveals the assumptions and entanglements regarding whose realities count in the law. Not only can we see

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9 Ibid 6.

10 For examples of the exploration of the role of narrative in law, and of the connections between law, representation and justice with respect to a range of social justice issues, see the work of Peter Brooks, Peter Fitzpatrick, Peter Goodrich and Austin Sarat.

11 See Binder and Weisberg, above n 5, 19.

law as an imaginative form in this method – reliant upon stories and figurative language, which can be elaborated, challenged and reworked – but we can also begin to examine the law's implicit claims to a true access to reality, and the effects of these claims. This in turn opens up the possibility that other representations might also have an authoritative claim to represent realities, which could have an impact on the law.

This is particularly significant for projects of social justice involving Indigenous rights, as Indigenous laws and claims have been organised through a number of different categories of representation (as fact, fiction and more rarely, as law), and the status of these representations has had significant effects on legal outcomes. Indigenous law tends not to be coded as law in Western legal proceedings, which has meant that courts have not had to meaningfully deal with the encounter of multiple authorities or sovereignties. Rather, Indigenous law becomes relevant through its establishment of particular facts (for example, by forming part of the culture and identity requirements that need to be proved under native title claims<sup>12</sup>). This move does profound violence, because it fails to acknowledge the authority of Indigenous law.

At the same time, it is important to note the differences between legal and literary representations. The law is not the same as a novel; each representation is produced for different purposes, within very different institutional frameworks. But what becomes productive in this method is the tracking of concepts across legal and literary/cultural domains: the ways in which implicit claims are made about reality and authority through their assignation as law, fact or fiction, and the critical justifications for pushing on these processes of categorisation.

It is important for critical legal scholars to examine representations by Indigenous scholars and creative writers as part of re-conceptualising legal frameworks, because these offer not only thematic critiques of law and policy, but also critiques that go to the heart of this question of representation in Australian legal and cultural domains. This is work towards an Indigenous jurisprudence that, as Christine Black puts it, is 'interested in the great narratives that make up the theories of the different realities of the peoples of the world'.<sup>13</sup> The problem is how to intervene in the law's existing logics and narratives, which do not accept multiple realities. This problem is partly one of power,<sup>14</sup> but it is also one of legal thinking, and the practices that have become part of legal (and critical) thinking.

There have been developments in both law and critical legal studies that have begun to put pressure on the status of representation, which has particularly affected the conceptualisation of sovereignty in law. What I am focusing on here, then, are the different ways this approach has been used to challenge the law's treatment of Indigenous rights, and how we might push further on representation

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12 See Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002).

13 Christine Black, 'Maturing Australia through Australian Aboriginal Narrative Law' (2011) 110 *South Atlantic Quarterly* 347, 348.

14 *Ibid* 350.

as a site of intervention in the law's adjudication of matters relating to Indigenous rights.

Australian critical historiography has been a key site of engagement and intervention in the pursuit of Indigenous rights and justice. Critical historians have examined the relationship between law, state and violence, and have used this research to rewrite 'Australia's foundational myths'.<sup>15</sup> Historians have challenged and reworked the myths of the nation-state, including the mythology of peaceful sovereignty, which they have exposed as being grounded in violence against Indigenous people, demonstrating the inherent connection between the development of Australian nationhood and genocide.<sup>16</sup> This work has contributed to public debates about responsibility, and has also had legal effect, since historical practices have been central to the law's role in adjudicating rights and harms. In his exploration of the law's relation to history, Reilly notes that not only has interpretation been central to law's treatment of past events, but also that the law has been self-conscious about the significance of the role of interpretation in its findings; in other words, the law has long abandoned a positivist view of history.<sup>17</sup> Reilly explains that one of the central interventions of *Mabo v Queensland [No 2]*<sup>18</sup> lay not only in its alternative version of Australia's colonial history, but in the Court's recognition that alternative histories could shape legal norms.<sup>19</sup> As Reilly says, '[t]his left open the possibility that History could be a powerful force in shaping legal judgment'.<sup>20</sup> Although dealing with the past, the stakes of these historical practices lie very much in the present, both with respect to the law's conceptualisation of responsibility, and also with respect to the role of the public sphere in its understanding of a wider, social responsibility, where these interventions offer 'a space through which to consider differentiated responses to how the Australian community accounts for and imagines Indigenous presence in our own times'.<sup>21</sup>

Challenging key narratives in law and the public sphere has been central to the project of critical historiography, especially concerning the centrality of violence to the formation and continuation of the Australian nation-state. Genovese explains how critical historiography has involved engagement with stories of the state's origins, as well as its continuing relationship with Indigenous groups: 'stories that had normalised state intervention yet at the same time ignored the subjectivity and experience of Indigenous peoples altogether'.<sup>22</sup> These methods have demonstrated that practices of representation are central to questions of justice; aesthetics are not epiphenomenal or ancillary to justice. The stories the law tells about the continuing past are key to findings of responsibility

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15 Trish Luker, "'Postcolonising' Amnesia in the Discourse of Reconciliation: The Void in the Law's Response to the Stolen Generations' (2005) 22 *Australian Feminist Law Journal* 67, 74.

16 Genovese, above n 4, 74–6.

17 Alexander Reilly, 'How Mabo Helps Us Forget' (2006) 6 *Macquarie Law Journal* 25, 28–9.

18 (1992) 175 CLR 1 ('*Mabo*').

19 Reilly, above n 17, 38.

20 *Ibid.*

21 Genovese, above n 4, 68.

22 *Ibid.* 74.

for harms that continue into the present, and relate to a number of questions central to the determination of responsibility: Does the law view the past as something fixed, and inaccessible? What is its relationship to the record of the past? How are gaps and silences in the record interpreted? These are legal and philosophical questions, but they are also aesthetic enquiries.

As part of this historiography, there has been an emergence of a critical practice that looks to cultural texts to provide alternatives to the status quo.<sup>23</sup> These interdisciplinary engagements between law and culture indicate new directions for the law and public sphere beyond the present impasse in responsibility in two ways. First, the difference between the conceptualisation of responsibility between cultural and legal domains acts as a diagnostic tool to indicate the gaps and inadequacies of responsibility as expressed under the law. Second, formulations of responsibility derived from cultural texts can assist the law and public sphere by providing new languages and frameworks of responsibility, alternative practices of representation that could lead to improved outcomes of social justice. These engagements provide new means to answer important questions about the ongoing impact of historical suffering on contemporary legal, social and cultural life, of understanding the limitations of existing legal forms to properly account for historical suffering, and suggest alternative ways to formulate responsibility.

### III THIN RESPONSIBILITY IN LEGAL AND PUBLIC SPHERES

Responsibility for the injuries suffered by members of the Stolen Generations has nominally been addressed through a number of strategies on the part of law and the state, but these gestures, such as the national apology in 2008, have not led to outcomes of justice. The harms of Australia's policies of assimilation and absorption, including the ways in which traumatic effects of these policies are intergenerational and affect both individuals and communities, were the subject of a national inquiry in 1996, resulting in the *Bringing Them Home Report*.<sup>24</sup> The Inquiry made a number of significant findings, including that 'the removal of children of mixed descent constituted a grave human rights abuse and that removal, in certain cases, could be classified as genocide under the 1948 UN Convention'.<sup>25</sup> It also recognised that 'the actions of the past resonate in the present and will continue to do so in the future' and that 'the alienation of

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23 See, eg. Rosanne Kennedy, 'In an Era of Stalled Reconciliation: The Uncanny Witness of Ray Lawrence's *Jindabyne*' (2009) 15 *Humanities Research* 107; Genovese, above n 4.

24 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).

25 Rosanne Kennedy, 'Australian Trials of Trauma: The Stolen Generations in Human Rights, Law, and Literature' (2011) 48 *Comparative Literature Studies* 333, 338, referring to the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

Indigenous societies today' is a product of 'the laws, policies and practices which separated Indigenous children from their families'.<sup>26</sup> The report made 54 recommendations, the most significant involving reparations, as well as the implementation of specific measures to prevent the state undertaking similar policies in the future. The report could have led to a very different outcome in the public and legal formulation of responsibility for historical harms, particularly if a reparations scheme had been established.<sup>27</sup> Prime Minister John Howard ascribed to a limited, liberal-individualistic view of responsibility when he refused to apologise to the Stolen Generations, on the basis that 'Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control'.<sup>28</sup> Under this view, the time of responsibility lies firmly in the past, separate and isolated from the contemporary moment. Further, past responsibility adheres to the specific acts of specific individuals, which can be parsed from the responsibility of the collective. The subsequent apology to Indigenous Australians made by Kevin Rudd and his Labor government in 2008 appeared to move toward an acknowledgment of collective responsibility, as well as responsibility-in-the-present, and to incorporate elements of a restorative justice approach. The potential of a restorative justice approach is that it stresses the 'civic duty of society to atone for the injustices of the past'.<sup>29</sup> But this was not followed through in practice, since the government has refused to support the apology with a reparations scheme.<sup>30</sup>

The Federal Court denied claims for compensation in *Kruger v Commonwealth*,<sup>31</sup> and then in *Williams v Minister, Aboriginal Land Rights Act 1983*<sup>32</sup> and the Cubillo cases.<sup>33</sup> *South Australia v Lampard-Trevorrow*,<sup>34</sup> in which the Court dismissed the State's appeal against the decision of Gray J in *Trevorrow v South Australia [No 5]*,<sup>35</sup> is the only successful Stolen Generations case, while Tasmania has been the sole state to create a compensation fund. The Stolen Generations cases have challenged the courts to interpret legal doctrines such as tort and equity so that they are capable of adjudicating historical harms

26 *Bringing Them Home Report*, above n 24, 3.

27 The change from a Labor government to a more conservative Liberal government in 1996 signalled that most of these recommendations would not be implemented. The change back to a Labor government in 2007 again raised hope of change, but the Labor government's rhetoric of apology and reconciliation has not been backed by a reparations scheme.

28 John Howard, 'Practical Reconciliation' in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (Black Inc, 2000) 88, 90.

29 Antonio Buti, 'Reparations, Justice Theories and Stolen Generations' (2008) 34 *University of Western Australia Law Review* 168, 181.

30 *Ibid* 187.

31 (1997) 190 CLR 1 ('*Kruger*').

32 [1999] NSWSC 843.

33 *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 ('*Cubillo trial*'); *Cubillo v Commonwealth* (2001) 112 FCR 455 ('*Cubillo appeal*').

34 (2010) 106 SASR 331 ('*Lampard-Trevorrow*').

35 (2007) 98 SASR 136 ('*Trevorrow*').



arising out of past policies and practices.<sup>36</sup> Hocking and Stephenson have noted that, in contrast to countries such as Canada and New Zealand,

Australian property, constitutional, labour and tort law have all failed to compensate and reparate Australia's indigenous communities and individuals, despite the incremental 'pockets' of compensation emerging in these mainstream areas of the law.<sup>37</sup>

Further, Australia lacks a bill of rights to grant protection to Indigenous people, and the *Constitution* is at its most silent on the issue of human rights and race.<sup>38</sup> The re-thinking of legal concepts involves the courts adopting new interpretive practices regarding the treatment of evidence and history, in order to 'fit' concepts to the specific demands of adjudicating historical harms.

The impasse in responsibility on behalf of the state and the common law is partly due to inadequate and failed conceptualisations of responsibility on behalf of lawmakers, the judiciary and the public sphere. The law's concept of responsibility has been underdeveloped, unresponsive and inattentive to historical and political realities. Critical historiographers have made significant interventions in the relationship between responsibility in law and 'myths about the Australian state'.<sup>39</sup> These critical practices have worked to demonstrate the law's complicity in Indigenous suffering, through its interpretation of state actions as exceptional or benign, (particularly in the Cubillo cases, discussed below), and through its silence.<sup>40</sup> This work has involved reinterpreting historical and legal archives to demonstrate that the development of Australian civil society, and the suffering experienced by Indigenous people, are mutually constitutive, of both the past and the present.<sup>41</sup> This relationship has been disguised in the law, as well as in the wider public sphere, which has had the effect of distancing responsibility for past violence on the part of law, state and the public. This article makes a claim for the role of literature as a site for theorising the relationship between law and history, as well as a place from which to challenge the law's interpretive and imaginative habits.

Alexis Wright's novel *Carpentaria* is set on the shores of the Gulf of Carpentaria, in a small town that the bureaucrats call 'Masterton,' and the inhabitants, 'Desperance'. Desperance is a figure for the postcolonial nation, but also one that is significantly particular. The region has a violent, eviscerating history of colonisation. It lies 'in the middle of a warzone',<sup>42</sup> and its Indigenous

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36 See Chris Cuneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) 5.

37 Barbara Ann Hocking and Margaret Stephenson, 'Why the Persistent Absence of a Foundational Principle? Indigenous Australians, Proprietary and Family Reparations' in Federico Lenzerini (ed) *Reparations for Indigenous Peoples* (Oxford University Press, 2008) 477, 521.

38 Ibid 478.

39 Genovese, above n 4, 71. There are a number of critical historians and legal scholars working in this area, including Thalia Anthony, Larissa Behrendt, Tony Birch, Ann Curthoys, Ann Genovese, Ben Golder, Trish Luker, Rosanne Kennedy, Ann McGrath, Stewart Motha, Peter Read, Alexander Reilly and Patrick Wolfe.

40 Ibid 85.

41 Ibid.

42 Wright, *Carpentaria*, above n 1, 203.

inhabitants are exhausted by '[f]ighting, fighting all the time for a bit of land and a little bit of recognition'.<sup>43</sup> The town is divided into a number of communities, dominated by the division between 'Uptown', where the whites live, and the periphery, where the Indigenous people live. For the Pricklebush mob, this means living literally on top of the town's garbage dump. The surroundings of Desperance are polluted with the detritus of white settlement: its sea-reefs are covered in 'thousands of bits and pieces of chipped and broken china – sugar-bears, yellow chickens, spotted dogs, and pink babies of lost cargo',<sup>44</sup> and there are islands of floating debris so large and solid that they now support vegetation and human life.

### A The Despair of Reconciliation

Wright has said that her aim in her work is to represent 'the living hell of the lives of many Aboriginal people'.<sup>45</sup> *Carpentaria* engages with (and challenges) the myths of Reconciliation by depicting the material realities and marginalised, impoverished lives of many Indigenous people, while at the same time asserting a rich and hopeful alternative to current conceptualisations of law and nation. The novel offers a very different reality of white-Indigenous relations from that purported to exist according to the discourse of Reconciliation, which is based on concepts such as 'meaningful coexistence'.<sup>46</sup> *Carpentaria* demonstrates Reconciliation to be empty of meaning: in truth, there is no meaningful coexistence, with few social or economic relationships between Indigenous groups and the white population of Uptown. The only encounters that do occur are eviscerating; whites commit acts of violence and sexual predation on the Indigenous population, who are also exploited by the nearby multinational mine. The authority of the white nation is undermined and satirised by its hypocrisy, violence and vacuity, depicted in the microcosm of Uptown. Here, the white community is based on 'unnaturally acclimatised' rituals;<sup>47</sup> it is dysfunctional, even comical. The mayor, Stan Bruiser, is 'the epitome of the self-made man',<sup>48</sup> who has made money 'selling the necessities of life for a profit of three to four hundred percent after costs'.<sup>49</sup> He has been voted the 'citizen of the year' 'for ten straight years',<sup>50</sup> despite evidence of sustained cruelty, including the rape of Indigenous women, a fact that is commonly known. Truthful, the town's policeman, spends his time cultivating roses in the grounds of the police station, because 'nobody had use for a policeman anymore'.<sup>51</sup> He is also sexually predatory.

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43 Ibid 11.

44 Ibid 16.

45 Alexis Wright, 'Politics of Writing' (2002) 62(2) *Southerly* 10, 13.

46 Wright, *Carpentaria*, above n 1, 8.

47 Ibid 57.

48 Ibid 35.

49 Ibid 34.

50 Ibid.

51 Ibid 71.

These problems are addressed on a number of fronts. The Indigenous people are fighting for their rights using whatever means are available to them. There is a breakaway mob who live in car bodies and who have invented a fictitious history and language to benefit from *Mabo*- and *Wik*<sup>52</sup>-type rights from Gurfurrit, the nearby multinational mining company that is vampirising the region;<sup>53</sup> a group of separatist traditionalists drive to the Northern Territory border in old Holdens and Fords, led by Normal Phantom, the 'rightful, traditional owner' of the land;<sup>54</sup> and Will Phantom, an Indigenous guerilla warrior trying to sabotage Gurfurrit. Mozzie employs rituals 'renewing the strength of the country',<sup>55</sup> and to undermine Gurfurrit. But the underlying violence is shown to be beyond individual actors' capacity to change. The solution Wright offers to the pervasive racism and exploitation operates through the Dreaming narrative.<sup>56</sup> Ultimately, the Indigenous community engages with the Dreamtime to 'sing' the destruction/re-creation of Desperance, a healing act that ends the environmental destruction and infighting of the region.

*Carpentaria* offers white readers an experience of disorientation and reversal that demonstrates the ethic of 'shame' proposed by Ann Genovese as part of the redemption process. It is significant that redemption be distinguished from reconciliation, which can suggest a 'private atonement for guilt',<sup>57</sup> and an emphasis on intentional, individual acts, which disguise the collective nature of past violence. Genovese favours 'shame' over 'guilt,' as guilt is a concept bound up with liberal law, and is located in individual responsibility for intentional acts. The potential of shame is that it is about identification: it acknowledges the other's suffering without relying on what a person might have individually done or not done, and about a relationship to a wider, collective burden of moral responsibility.

In its epic narration of law and society through the Dreaming narrative, and the focalisation of stories through Indigenous points of view, *Carpentaria* posits Indigenous subjectivity as the normative, default subjectivity, thus disorienting the white reader from their usual privileges and entitlements. Further, the novel de-familiarises whiteness, demonstrating the ways in which whiteness exists only in relationship to non-white others. Whiteness becomes an 'object of critique' through the representation of racism and exclusion from Indigenous points of view.<sup>58</sup> Ravenscroft proposes that white readers approach *Carpentaria* in a way that engages with the challenge of being immersed in a world formed through a

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52 *Wik Peoples v Queensland* (1996) 187 CLR 1.

53 Wright, *Carpentaria*, above n 1, 52.

54 *Ibid.*

55 *Ibid.* 150.

56 The term belongs to Frances Devlin-Glass, who uses it to denote *Carpentaria*'s use of literary forms to engage with Western epistemologies and metaphysics through the representation of Indigenous sovereignties and law: see Frances Devlin-Glass, 'A Politics of the Dreamtime: Destructive and Regenerative Rainbows in Alexis Wright's *Carpentaria*' (2008) 23 *Australian Literary Studies* 392.

57 Genovese, above n 4, 72.

58 Anne Brewster, 'Indigenous Sovereignty and the Crisis of Whiteness in Alexis Wright's *Carpentaria*' (2010) 25(4) *Australian Literary Studies* 85, 86.

different foundational law and subjectivity from that which they are used to.<sup>59</sup> This experience of estrangement on the part of white readers is potentially reforming if readers can take seriously the subversion of expectations regarding their position in the world.

Wright's intervention into the question of responsibility is addressed not only through the interrogation of acts of injustice – by representing the great gap between the rhetoric of Reconciliation and the violent, impoverished realities of the Indigenous community in *Desperance* – but also through an interrogation of the narratives, tropes and logics that underlie legal conceptualisations of the state and its role in subjecting/ignoring Indigenous communities. The following Parts of this article outline the role of narrative in the law's conceptualisation of sovereignty and responsibility, and the ways in which *Carpentaria* challenges these underlying stories of the white state and Indigenous sovereignties.

#### IV CARPENTARIA'S CLAIMS TO JUSTICE

##### A Radical, Plural Sovereignty

The novel's representations of Indigenous authority and law, based on principles specific to the Waanyi region, produce an alternative to the sovereignty of the white nation. The opening pages describe the creation of the Gulf of Carpentaria, producing beings including fish, animals and people, and phenomena such as the weather, light and darkness. The serpent is an authority that determines not only such large-scale, metaphysical elements but also daily life and law:

The serpent's covenant permeates everything, even the little black girls with hair combed back off their faces and bobby-pinned neatly for church, listening quietly to the nation that claims to know everything except the exact date its world will end.<sup>60</sup>

The story of the Waanyi region serpent is the key organising narrative of the novel. The serpent's covenant, which 'permeates everything',<sup>61</sup> instantiates the law between Indigenous people, spirit, the land and the waters. The narrative thematises the origin stories that are also part of the white nation's law and culture, the myths that, as outlined above, appear in cases such as *Mabo* and reference Indigenous sovereignty only to limit it. *Carpentaria* turns these myths on their head: the violent history of colonisation is shown to be subject to another authority, relegating the law of the white state to the periphery. The river, created by the serpent, 'spurns human endeavour', and has been transformed from a live body of water during 'the hectic heyday of colonial vigour' to a 'waterless port'.<sup>62</sup> Colonialism in *Desperance* has been based on a kind of knowing that has

59 Alison Ravenscroft, 'Dreaming of Others: Carpentaria and its Critics' (2010) 16(2) *Cultural Studies Review* 194, 197–8.

60 Wright, *Carpentaria*, above n 1, 11.

61 Ibid.

62 Ibid 3.

turned out to be false; the river has changed, perhaps knowingly, leaving the town without its water source. Although colonisation has damaged the region, ultimately its effects are swept away by a larger act of destruction/creation subject to a different and more powerful authority.

The novel's end is an ambivalent apocalypse, as the particular town of Desperance is extinguished, reduced to 'an extraordinary floating island of rubbish',<sup>63</sup> but life, law and culture continue; the destruction is also a journey of creation.<sup>64</sup> The final sequence of the novel involves Will, the guerilla warrior, surviving on an island of debris, which floats in circular currents of the Gulf. The novel ends with a note of hope: 'It was a mystery, but there was so much song wafting off the watery land, singing the country afresh'.<sup>65</sup> The hope of future justice is narrated through this song, not through the white state and its justice but the laws and creative process of the Waanyi. The Western law has passed away in the region, leaving the Waanyi to adjudicate its future.

### B Narrating Indigenous Sovereignties

When they are recognised by the common law, Indigenous sovereignties are firmly confined to the past. Indigenous law is represented as static, supported by a sovereignty that once existed, but which has no authority now. In *Members of the Yorta Yorta Aboriginal Community v Victoria*, the redundancy of Indigenous sovereignties in the present is expressed as follows:

Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.<sup>66</sup>

This understanding of Indigenous sovereignty as finite, and as subject to the white state, is central to understanding the exclusion of Indigenous rights and authority, and has arisen mainly through the regulation of native title, which '[i]n a variety of ways ... refuses a plurality of sovereignty, law and community'.<sup>67</sup> Stewart Motha locates this refusal in *Mabo*, in which, he says, 'a singular, unassailable (non-justiciable) sovereign 'event' is proposed as the foundation of Australian law and society'.<sup>68</sup> This foundational moment was followed in subsequent native title cases, which confirmed 'that there can be only one normative system that gives rise to rights and interests'.<sup>69</sup>

In *Mabo*, the common law narrates the end of Indigenous sovereignty. As Reilly argues, 'contrary to the popular portrayal of *Mabo* as a triumph of

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63 Ibid 490.

64 Ibid 491.

65 Ibid 519.

66 (2002) 214 CLR 422, 443 (Gleeson CJ, Gummow and Hayne JJ) (emphasis in original) ('*Yorta Yorta*').

67 Stewart Motha, 'The Failure of "Postcolonial" Sovereignty in Australia' (2005) 22 *Australian Feminist Law Journal* 107, 108.

68 Ibid 108.

69 Ibid.

remembering, the judgment is in important respects a mechanism for forgetting'.<sup>70</sup> This forgetting occurs through the re-narration of the originary moment of settlement, and produces a tacit (unsought-for) bargain between the law and Indigenous rights: the law's recognition of native title comes at a high price, the exculpation of the law from responsibility for dispossession, as well as the end to claims for Indigenous sovereignty.<sup>71</sup> Further, implicit within the system of 'recognition' of Indigenous sovereignty and law is the idea that it is the Anglo-Australian legal system that acts to organise and select those aspects of the system that it wishes to recognise.<sup>72</sup> Revealing the falsity of this finite sovereign event has a number of radical possibilities: it critiques a significant source of disavowal in the common law, by showing that there is continuity, rather than a break, between acts of colonial and postcolonial dispossession and violence. And it suggests that there are multiple, Indigenous sovereignties currently in existence.

In *Carpentaria*, we receive a representation of exactly what the law has refused: Indigenous sovereignty as continuing, universal, and richly flourishing. It is the Australian state that is exceptional, contingent and finally, extinguished, reversing the logic that has been employed in Australian law regarding Indigenous sovereignty. Further, in contrast to representations of Indigenous law as static or finite (such as in *Yorta Yorta*, described above), the novel represents law as continuously arising through the serpent narratives, which have historical authority but which are also responsive to contemporary problems. The people 'kept a library ... full of stories of the old country stored in their heads ... trading stories for other stories ... what to do ... how to live like proper human beings'.<sup>73</sup> These 'stories' determine the law. Thus, the novel works against an understanding of Indigenous law and culture as being located firmly in the past, and as static. The stakes of *Carpentaria*'s law are located very much in the present, offering a critique of contemporary Western practices, which allow the decimation of the environment brought about by an ethic of exploitation. This world view becomes part of the everyday: it is continually re-made, and is relevant to present, urgent questions of justice.

In the next section, I explore what is especially radical about *Carpentaria*, in addition to its thematic explorations of justice: the Waanyi laws' understanding of legal and ethical obligations in Australia. I suggest that *Carpentaria* does more than offer an alternative, imaginative place to explore possibilities and to supplement the law's version of justice. Rather, it asserts the reality of continuing Indigenous sovereignty, authority and law, challenging the categorisation and placement of law and sovereignty in contemporary Australia.

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70 Reilly, above n 17, 26.

71 Ibid 46.

72 Ben Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' (2004) 9 *Deakin Law Review* 41, 42.

73 Wright, *Carpentaria*, above n 1, 246.

### C The Forms of Recognition

Literary claims for social justice relating to Indigenous rights have been pursued in Australia largely through the genres of life-writing and autobiography.<sup>74</sup> More recently, experimental forms have been employed by writers such as Kim Scott; in both *True Country*<sup>75</sup> and *Benang*,<sup>76</sup> Scott draws on Dreamtime tropes to articulate Australian realities, opening up the question of what kinds of form have the authority to assert ‘the truth,’ and the implications of this claim. Prior to *Carpentaria*, Wright’s *Plains of Promise* addressed the theme of the Stolen Generations, depicting the lives of three generations of Aboriginal women and the traumas they suffer as a result of policies of removal and assimilation. The women try to reunite on an old mission reserve in the Gulf Country, their suffering ambivalently resolved at the level of Dreaming.

In *Carpentaria*, the despair of the community is present, but it is also connected to a radical reconfiguration of authority and responsibility. The story of *Carpentaria* does not focus on the resolution of suffering and trauma but on responsibility: it refuses the assimilation underlying policies from child removal to the Northern Territory Intervention, which implicitly blame the Indigenous population for its suffering, and provide assimilation as the solution. Instead, it points to an alternative source of authority and self-determination.

Wright has explained why she chose to write *Carpentaria* the way she did, referring to the impossibility of writing truths using mainstream forms:

I did not want to write a historical novel even if Australia appears to be the land of disappearing memory ... I have had to deal with history all of my life and I have seen so much happen in the contemporary indigenous world because of history, that all I wanted was to extract my total being from the colonising spider’s trap door. So, instead of picking my heart apart with all of the things crammed into my mind about a history which drags every Aboriginal person into the conquering grips of colonisation, I wanted to stare at difference right now, as it is happening, because I felt the urgency of its rule ticking in the heartbeat of the Gulf. The beat was alive. It was not a relic.<sup>77</sup>

The problem, Wright explains, is how to write of the present, and the continuing effects of the past, without taking on the terms of dominant law and culture. The novel works to escape the ‘colonising spider’s trap door’ – political, legal and historical discourses – by refusing to engage with the usual means by which history and law have been represented. *Carpentaria* denies the authority of the white state, not just in its explication of a different law and justice, but also in the way it tells this story. Its representational forms are central to its arguments concerning sovereignty and justice. *Carpentaria* is not an ‘historical novel’ because it takes a step back from the framework of history; Wright knows that history has been a key site of dispute and often subjection for Indigenous people. The novel disputes the authority of history, of the ‘reality’ claimed not only by

74 See Anne Brewster, *Reading Aboriginal Women’s Autobiography* (Oxford University Press in association with Sydney University Press, 1996).

75 Kim Scott, *True Country* (Fremantle Press, 2009).

76 Kim Scott, *Benang* (Fremantle Press, 1999).

77 Alexis Wright, ‘On Writing *Carpentaria*’ (2007) 13 *Heat* 79, 90.

the coloniser's version of events, but through the framework of expression, the forms through which the story is told. Telling the story of the legal and political present, *Carpentaria* does not start with Western law and frames of reference, but rather starts with an Indigenous genealogy and interprets events in the region using Indigenous law and ethics. These formal engagements and reversals go to the heart of *Carpentaria*'s intervention into questions of law and responsibility.

The novel challenges the ways in which Indigenous law has tended to be interpreted as a form a myth, or as a marker of 'culture', rather than as a source of authority and judgment. Wright has said that she uses literature 'to try and create a truer replica of reality'.<sup>78</sup> One of the key interventions *Carpentaria* makes is to question the ways in which the Dreamtime form has been interpreted within the Western canon. This binary between mainstream forms and the Dreamtime associates the Dreamtime with the irrational, the non-real, whereas dominant legal forms fall on the side of the rational and the real. In the context of the critical reception of the novel, Ravenscroft notes there has been a tendency to tame the text by referring to it as a work of magic realism. The term *magic realism* itself is 'very much the product of a certain white Western critical strategy'<sup>79</sup> in which 'magic' and 'realism' are 'taken to be two distinct, even oppositional, representational codes' that reference 'two distinct worlds or cultures':<sup>80</sup> those of the coloniser and the colonised subject. Such moves 'are surely another way of saying "but we know your story already ... because it is our own."' <sup>81</sup>

*Carpentaria*'s most radical project is its assertion not only of an alternative claim to truth/reality, but a challenge to the modes in which such truth claims are made. *Carpentaria* offers, in addition to answers to questions of justice – an alternative account of the 'truth' – a method of examining the operation of genre in both legal and cultural texts, undermining assumptions that these modes necessarily grant us access to the truth. This is a challenge to practices in which, as Ravenscroft says, Indigenous reality is produced 'as if it were a version of the colonisers' own, only a lesser one: less rational, less logical ... mythic and magical'; that is, as possessing a less authoritative claim to reality.<sup>82</sup> *Carpentaria* is not merely asserting an alternative version of the present, but also making a claim for authority to know that present, to assert a 'reality' for it.

*Carpentaria* reveals that the justice offered by white law is limited, specific, and refers to a universal standard that is not universal. It shows the nation's sovereignty to be contextual, contingent, one version that denies connections and multiplicities, and which is underpinned by a radical unknowing which, if admitted, would demand a very different kind of justice from that which we have at present.

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78 Wright, above n 45, 13–14.

79 Ravenscroft, above n 59, 195.

80 Ibid 196.

81 Ibid 195.

82 Ibid 197.



*Carpentaria* is an authoritative text. Wright claims her writing

follows the original pattern of the great ancient sagas that defined the laws, customs and values of our culture. The oral tradition that produced these stories continued in the development of the epic stories of historical events, and combining ancient and historical stories, resounds equally as loudly in the new stories of our times.<sup>83</sup>

It makes a claim to represent the law, and to instantiate a continuing, Indigenous sovereignty. Indigenous law also holds a different relationship to representation compared to Western law. Christine Black explains, through Mowaljarlai, that Aboriginal cultures and law are based in art and aesthetics, so that ‘symbolism holds as much legal validity as mathematics does for the laws of physics’.<sup>84</sup> Wright produced *Carpentaria* in response to ‘the urgency of [the law’s] rule ticking in the heartbeat of the Gulf’, a beat that is ‘alive ... not a relic’.<sup>85</sup> It contains examples of the exercise of Indigenous law and it also demonstrates the underlying production of, and authority for, this exercise of law, through the serpent’s covenant.

## V FAILURES OF IMAGINATION AND ‘INSTITUTIONAL HALLUCINATIONS’:<sup>86</sup> THE LAW’S RELATIONSHIP TO HISTORICAL SUFFERING

Sovereignty is central to the issue of responsibility for harms suffered by members of the Stolen Generations. Here, it is differently inflected from land rights cases, and concerns the ways in which the law conceptualises the authority of the white state. There has been significant criticism of the ways in which courts have interpreted the operation of state power in relation to the Stolen Generations, essentially distancing specific acts of state actors from the context of Stolen Generations policy.<sup>87</sup> The problematic of responsibility for past (and present) suffering raises important questions about the location of the authority that is empowered to determine responsibility, both past and present, and the appropriate sites for intervention. It also raises questions about the nature and breadth of entities denoted by ‘the state’, the role of ‘the people’ in constituting authority, and the role of Indigenous sovereignties. ‘Sovereignty’, in these different registers, has been imagined by the law in ways that directly produce the forms of responsibility possible.

In this Part I examine the emergence and changing nature of responsibility in key Stolen Generations cases. I examine the assumptions of the law regarding

83 Wright, above n 77, 80.

84 Black, above n 13, 358.

85 Wright, above n 77, 90.

86 Luker, above n 15, 84.

87 Genovese, above n 4, 67; Pam O’Connor, ‘History on Trial: *Cubillo and Gunner v The Commonwealth of Australia*’ (2001) 26 *Alternative Law Journal* 27, 30–1. See also Cuneen and Grix, above n 36, 22–8; Robert van Krieken ‘Case Notes: Is Assimilation Justiciable? *Lorna Cubillo and Peter Gunner v Commonwealth*’ (2001) 23 *Sydney Law Review* 239.

sovereignty and authority in the Cubillo cases (following *Kruger*) and the role of the failure of the legal imagination in conceptualising the state (and the law's relationship to that state). I then turn to *Lampard-Trevorrow*, in which the Court dismissed the State's appeal against the decision of Gray J in *Trevorrow*, which awarded Bruce Trevorrow damages against the government for his removal from his family as an infant, making him the first member of the Stolen Generations to successfully claim.<sup>88</sup> *Trevorrow* and *Lampard-Trevorrow* (hereafter 'the Trevorrow cases') signify a break in the common law's seeming incapacity to adjudicate historical suffering.<sup>89</sup>

#### **A The Limits to Responsibility: Early Cases Regarding the Stolen Generations<sup>90</sup>**

In the *Cubillo* trial,<sup>91</sup> the applicants, Lorna Cubillo and Peter Gunner, claimed that in their removal, the Commonwealth (through its agent, the Director of Native Affairs, by virtue of the doctrine of vicarious liability) committed the torts of negligence, false imprisonment and breach of statutory duty, and also breached its fiduciary duties owed to the applicants. Lorna Cubillo was born in 1938, and at the age of seven, she was forcibly removed by the Aborigines Inland Mission and the Native Affairs Branch to Retta Dixon Home in Darwin, where she remained until she was 18 years old. The second plaintiff, Peter Gunner, was born in 1948 on a pastoral station, and was removed when he was about seven years old to St Mary's Church of England Hostel in Alice Springs. He remained there until he was 16 years of age. The Federal Court of Australia decided against the plaintiffs on the merits of the case.<sup>92</sup> Justice O'Loughlin found there was insufficient evidence of a policy or practice of indiscriminate removal,<sup>93</sup> and no genocidal intent in either the legislation or its implementation by the Director of

88 (2010) 106 SASR 331, 307, 335–42. The Full Court reversed the trial judge's findings in two major respects. First, it found there was no false imprisonment in the circumstances: at 307. Second, it found that no fiduciary duty was owed to Bruce Trevorrow: at 335–42.

89 The Trevorrow cases are dealt with in detail in Honni van Rijswijk and Thalia Anthony, 'Can Common Law Adjudicate Historical Suffering? Evaluating *South Australia v Lampard-Trevorrow*' (2012) forthcoming 36(2) *Melbourne University Law Review*. The article considers the significance of the appeal decision by examining what distinguishes the case from past, unsuccessful claims, and its implications for future claimants. There is also consideration of what the case means in terms of the law's acceptance of a different kind of historical and evidential interpretation from previous cases, particularly how this affected interpretation of the issue of consent. The role and interpretation of consent has broad ramifications for the law's potential to adjudicate responsibility for historical harms and, we argue, is one of the problematic 'myths' that has normalised state intervention, and which also makes successful claiming difficult.

90 This discussion focuses on the narrative of responsibility in the Cubillo cases (following *Kruger*) and the Trevorrow cases; it does not consider *Kruger* in detail, nor *Williams v Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843, or *Williams v Minister Aboriginal Land Rights Act 1983* [2000] NSWCA 255, which were decided on different questions.

91 (2000) 103 FCR 1. A number of aspects favourable to the applicants were reversed on appeal, but all adverse findings were affirmed: *Cubillo* appeal (2001) 112 FCR 455.

92 *Cubillo* trial (2000) 103 FCR 1, 483 (O'Loughlin J).

93 *Ibid* 103–8, 358.

Native Affairs and others.<sup>94</sup> The Full Court of the Federal Court dismissed the appeal,<sup>95</sup> and the plaintiffs were denied leave to the High Court of Australia.<sup>96</sup>

In the *Cubillo* trial, O'Loughlin J found:

The evidence showed that there were people in the 1940s and 1950s who cared for the Aboriginal people ... Those people thought that they were acting in the best interests of the child. Subsequent events have shown that they were wrong. However, it is possible that they were acting pursuant to statutory powers or, perhaps in these two claims, it would be more accurate to say that the applicants have not proved that they acted beyond their powers.<sup>97</sup>

Significantly, contemporary community standards were explicitly rejected as a source of authority for this finding. Despite stating that those who removed the children would 'stand condemned by today's standards',<sup>98</sup> and that 'subsequent events have shown that they were wrong',<sup>99</sup> the Court held these contemporary standards were not relevant to deciding liability. The Court quoted with approval from Chief Justice Brennan's judgment in *Kruger*,<sup>100</sup> in which his Honour stated that 'it would be erroneous ... to hold that a step taken in purported exercise of a statutory discretionary power was taken unreasonably ... if the unreasonableness appears only from a change in community standards'.<sup>101</sup>

Trish Luker argues that this invocation of *Kruger* arose 'in the place of the purported evidentiary void',<sup>102</sup> that is, as an authority to ground the law's finding that the state was not responsible in the absence of evidence. The difficulty in establishing such evidence was compounded by the presumption in favour of the state's own archive.<sup>103</sup> In arriving at this decision, the Court rejected evidence that there was social criticism of the practice of child removal at the time of the removal, instead preferring the evidence of the state's archive.<sup>104</sup> The logic of the findings concerning the absence of policy is also problematic. For example, van Krieken is critical of the way in which the Court moved from the fact that there was no policy to remove all children, and the lack of capacity to fully implement

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94 Ibid 483.

95 *Cubillo* appeal (2001) 112 FCR 455.

96 Transcript of Proceedings, *Cubillo v Commonwealth* [2002] HCATrans 216 (3 May 2002).

97 *Cubillo* trial (2000) 103 FCR 1, 483.

98 Ibid, 482.

99 Ibid, 483.

100 In the *Cubillo* cases, the Federal Court considered the same legislation as in *Kruger*.

101 *Kruger* (1997) 190 CLR 1, 36–7, quoted in *Cubillo* trial (2000) 103 FCR 1, 96–8. Justice O'Loughlin also cited Dawson J in *Kruger* (1997) 190 CLR 1, 52 on this point. In *Kruger*, nine Aboriginal claimants argued the constitutional invalidity of the Northern Territory's *Aboriginal Ordinance 1918*, which purportedly authorised the removal of Aboriginal and 'half-caste' children, and that this cause of action gave rise to damages for breach of express and implied constitutional rights. The High Court rejected claims that the *Ordinance* was enacted for the purposes of genocide, finding instead that it was beneficial in intent: at 158–9 (Gummow J). A majority did not consider whether the *Constitution* would limit genocidal legislation, a question left open to future litigation. The decision also left open the possibility for damages regarding the misuse of powers under the *Ordinance*, the Court emphasising here that such misuse must be judged by the standards of the time, and not by contemporary standards: at 36–7 (Brennan CJ).

102 Luker, above n 15, 84.

103 See *Cubillo* trial (2000) 103 FCR 1, 245–6.

104 See Curthoys, Genovese and Reilly, above n 4, ch 6.

the policy, to the conclusion that there was no policy of removal: 'the mere selective application of a policy does not render its existence logically impossible'.<sup>105</sup> In both the Cubillo cases and *Kruger*, these authoritative, grounding moments were actually *imaginative* acts, forms of 'institutional hallucination'.<sup>106</sup> In these moments, the courts were deciding the standards of responsibility that they imagined to be appropriate to the time. In both cases, the courts made their decisions as a result of interpretative practices in which 'the past is remade in the present'.<sup>107</sup>

In its interpretation, the Court did not critically examine the operation of policies that determined the removals, an approach that was supported by the Court's underlying views of the state. Justice O'Loughlin stated that the 'beneficial interpretation of the legislation must remain paramount',<sup>108</sup> referring to a 'school of thought prevailing at the time' that included 'the belief that it was in the best interests of part Aboriginal children to assimilate them into the European mainstream', and that those who removed Gunner and Cubillo were doing so 'in the best interests' of the children.<sup>109</sup> In making these decisions, the law had a particular concept of the state in mind, its 'own mythologies concerning the role and power of the state',<sup>110</sup> which determined the construction of the state's actions. The law's ideas about the state therefore governed the Court's approach to a number of aspects of the case, which ultimately led to the failure of the claims, including the archive of evidence considered acceptable in determining responsibility; the nature of acts which could be characterised as state acts; how the state is constituted; the construction of the policies as beneficial in intent (if not execution); and the non-applicability of present standards in the evaluation of those policies and practices (whether and in what ways the state is seen to be fixed in time, or continuous). In the *Cubillo* trial, the Court trusted the state's own archive, and the standards of the time as demonstrated by that archive, to the exclusion of critical voices from that time and from the present (which would be more likely to be heard if the law included evidence beyond the state's archive, and also considered present-moment standards in evaluating the state's past actions). The effect was that the law failed to respond 'to the silence at the heart of the white nation',<sup>111</sup> and 'constituted a repetition rather than a resolution of trauma'.<sup>112</sup>

Sovereignty is central to the question of how the law narrates the role of the past in the present. The stories the law has told about the past have turned on particular ways of imagining authority for those past acts. We can see similar logics regarding sovereignty operating in the Stolen Generations cases as were

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105 Van Krieken, above n 87, 246.

106 Luker, above n 15, 84.

107 Ibid.

108 *Cubillo* trial (2000) 103 FCR 1, 53.

109 Ibid 482–3. On the law's unwillingness to examine the record behind beneficial intent in *Kruger* and *Cubillo*, see also van Krieken, above n 87; Genovese, above n 4.

110 Genovese, above n 4, 85.

111 Luker, above n 15, 67.

112 Kennedy, above n 25, 334.

articulated in native title claims. Writing in the context of *Mabo*, Motha's reading of sovereignty makes sense of the lack of responsibility taken for colonial violence. Motha describes the ways in which this violence becomes viewed as exceptional, and relegated to an isolated past: 'Australian "postcolonial" law and society relies heavily on the possibility of a "finite", containable, colonial sovereignty'.<sup>113</sup> Motha explains that the logic of sovereign exceptionality functions in *Mabo* to confine the authority for acts of violence and dispossession to an 'abhorrent' past, while animating the legitimacy of a contemporary sovereignty that is based on different, contemporary values, such as universal human rights, anti-discrimination principles, and the citizenship rights of all people.<sup>114</sup> The law shores up its own, present-day authority at the same time that it distances itself from a role in past acts of violence; the consequences of these past actions are still with us, but they are beyond the scope of the law.

We see a similar logic operating in *Kruger*, in which the Court takes judicial notice of the existence of a policy of child removal,<sup>115</sup> which would be condemned by present standards but to which these standards do not apply, because the state that acted according to these policies is seen as finite, containable and separate from the state of the present day. Under this view, contemporary responsibility does not apply to past harms: colonial sovereignty is responsible for the violence and dispossession that allowed the settlement and occupation of Australia, and a past, misguided state is responsible for acts of child removal; but these entities and their responsibilities belong firmly in the past, separate from the postcolonial state and its more enlightened laws. The story the law tells in both *Mabo* and the Cubillo cases is that the continuing harms experienced today were caused by distant 'events' that took place in different pasts, under different sovereignties from what we have now (and through this characterisation, the common law disguises its own complicity with these acts of violence and dispossession).

### **B A Shift in the Law's Imagination: The Trevorrow Cases**

The recent decisions in the Trevorrow cases signify the opening up of the common law to a new conception of responsibility, in which the law draws on new ways of imagining its relationship to the state. The facts of the case were that on 25 December 1957, 13-month-old Aboriginal infant Bruce Trevorrow was taken to the Children's Hospital in Adelaide, suffering from a stomach complaint. Upon his discharge, and without the knowledge or consent of his parents, the Aborigines Protection Board ('APB') placed him with a foster family. For the following 10 years, he stayed with this family, during which time his mother unsuccessfully requested his return. In 1967, he was returned to live with her, however, within one year he was placed in a boys' home, where he periodically remained until he turned 18. At trial, Gray J awarded \$525 000

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<sup>113</sup> Motha, above n 67, 111 (emphasis in original).

<sup>114</sup> *Ibid* 110–11; *Mabo* (1992) 175 CLR 1, 41–2.

<sup>115</sup> (1997) 190 CLR 1, 40.

damages.<sup>116</sup> Of this amount, \$75 000 was awarded as exemplary damages in respect of misfeasance in public office and false imprisonment, the State having acted *ultra vires*, cognisant of the unlawfulness of Trevorrow's removal from his parents.

The Trevorrow cases demonstrate that the law's mythologies regarding the state are open to challenge. In their decisions, the courts demonstrated a reconceptualised relation of the common law to the state, in contrast to the earlier cases. This meant that the courts took a different approach to key questions that shape responsibility, in contrast to the Cubillo cases. The law accepted a wider range of evidence, beyond the state's own archive, and interpreted that evidence contextually. The law did not take the beneficial intent of the state's actors for granted in the operation of past policies. In contrast to the Cubillo cases and *Kruger*, the South Australian Supreme Court found in *Trevorrow* that standards of evaluation in the present moment were relevant legally, in deciding the issue of damages.<sup>117</sup>

The courts took a more contextual reading of evidence, and accepted a wider range of evidence, in deciding questions of liability. In considering whether the harm caused to Trevorrow was reasonably foreseeable, their Honours concluded that the APB knew of the risk of separating a mother and child, as contemporaneous research indicated that this process may be detrimental to a child's wellbeing. In making this finding, the courts looked outside the state archive, to evidence of general standards of the time; here, the courts relied on the evidence adduced at trial, based on medical opinion, the oral evidence of welfare officers and a substantial body of literature, including publications available during the period of the plaintiff's removal.<sup>118</sup> They concluded that a reasonable person would have examined the likelihood of such harm occurring and would have removed Trevorrow from his mother only if remaining in her custody would have presented a greater risk.<sup>119</sup> The APB, having failed to make reasonable enquiries into the circumstances of the Trevorrow family and the infant's physical state before placing him with foster parents, was found to be in breach of its duty of care.<sup>120</sup> The courts also took a highly contextualised approach to the reading of evidence, especially concerning the issue of parental consent, where the Full Court agreed with the trial judge and interpreted the continued requests of Trevorrow's mother that her son be returned as an indication that the requisite parental consent was absent.<sup>121</sup> In doing so, it relied on evidence concerning general practices concerning consent, as well as evidence concerning Trevorrow's particular case.<sup>122</sup> While the Court in *Cubillo* referred to similar general policies, its finding in relation to Peter Gunner's mother's consent

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116 *Trevorrow* (2007) 98 SASR 136, 393.

117 These issues are dealt with in detail in van Rijswijk and Anthony, above n 89.

118 *Cubillo* trial (2000) 103 FCR 1, 406, 483 (O'Loughlin J).

119 *Ibid* 412.

120 *Ibid* 413.

121 *Lampard-Trevorrow* (2010) 106 SASR 331, 344.

122 *Ibid* 362.

was based on the documentary evidence alone.<sup>123</sup> The Court in *Lampard-Trevorrow* took into account historical context when interpreting the facts at hand. Based on an analysis of correspondence concerning other cases, the Court found that ‘the requirement to obtain parental consent was not always observed’.<sup>124</sup> It also found that the record ‘contemplates a bluff being used to enable the APB to keep the child in question under its control’.<sup>125</sup> The Court was critical of the problematic role of consent in the practice of child removal, problems that were intimated in the Cubillo cases, but which in *Lampard-Trevorrow* are labelled as ‘a pretence of power’.<sup>126</sup>

The Court noted, as courts had in earlier cases, including *Kruger* (where the observation had no legal effect), the following:

The existence of the policy of removing Aboriginal children from their families and the detrimental long term effects of that policy on both those removed and the wider Aboriginal community, is now widely recognised in the community, and was previously the subject of judicial recognition.<sup>127</sup>

In the *Trevorrow* cases, this observation concerning contemporary standards had legal effect. Community standards became relevant in the award for exemplary damages.<sup>128</sup> These standards were also relevant in the Full Court of the South Australian Supreme Court allowing Bruce *Trevorrow* an extension of time to bring his claim, where the Court held that ‘there is a definite public interest in persons like Bruce *Trevorrow* being able to have their claims decided by a court’ and that ‘public interest, in this context, is a question of justice’.<sup>129</sup>

The *Trevorrow* cases signify a change in the courts’ practices of interpreting historical evidence, as well as the ways in which the courts framed this evidence in their conceptualisation of the legal categories. The courts took a different, and critical approach to the contemporary standards in place at the time of the implementation of the policy, in contrast to earlier cases. They also found that present-moment standards were relevant in evaluating certain aspects of the case. The cases introduce methods of interpretation that open up the law to a new relationship to responsibility and the historical record. In many ways, Justice Gray’s judgment in *Trevorrow*, and the appeal that followed it, signify a ‘markedly different ... approach and outcome to what came before it’.<sup>130</sup> At the same time, commentators have pointed to the distinctive nature of the factual and legal basis of the decision, including that it was based on an ‘ideal plaintiff’, and suggested that this may limit its potential.<sup>131</sup> The cases’ potential also needs to be

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123 *Cubillo* trial (2000) 103 FCR 1, 233.

124 (2010) 106 SASR 331, 360.

125 *Ibid* 362.

126 *Ibid*.

127 *Trevorrow* (2007) 98 SASR 136, 239, referring to the judicial recognition in *Kruger* (1997) 190 CLR 1, 40.

128 Genovese, above n 4, 83, 85.

129 *Lampard-Trevorrow* (2010) 106 SASR 331, 426.

130 Antonio Buti, ‘The Stolen Generations Litigation Revisited’ (2008) 32 *Melbourne University Law Review* 382, 383.

131 *Ibid* 420.

balanced against the weight of precedent, including the law's habit in past cases of distancing itself from the role of adjudicating historical wrongs of the state.<sup>132</sup>

### C Rethinking Sovereignty: Redemption

The change to practices of interpretation in the Trevorrow cases is significant, particularly as the cases challenge key myths surrounding the Australian state.<sup>133</sup> Ann Genovese describes this move as an articulation of redemption,<sup>134</sup> a concept that has been key to the critical historiography developed by Genovese, Ann Curthoys and Alexander Reilly.<sup>135</sup> The process of redemption requires, first, recognition by the public sphere of a different role of the state in regards to past violence and dispossession of Indigenous Australians, from that which has previously been accepted; and second, commitments by the public to engagement, 'reparative action and acceptance of moral culpability, on questions of accountability for the past in the present'.<sup>136</sup>

Critical historiography has challenged the idea that the public can be separated from practices of the state; by re-examining the way in which sovereign power has operated, redemption offers 'a re-identification that the state is constituted by its people'.<sup>137</sup> This reckoning means the end of practices that distance responsibility for past acts (and present effects) by quarantining these acts to specific functions of 'the state'. In other words, redemption entails a radical reconfiguration of the state, responsibility, and 'the people', and of what happens (and has happened) in the name of the people. It means an acknowledgment that the suffering caused by colonial violence is close, not only in terms of time (the past continuing in the present) but also in terms of authority (that present legal and social forms are not separated from this violence through structures and institutions, including the state, but are part of these structures, which are continuous with the past). It also means replacing an idea about responsibility that imputes any responsibility to individual actors tangentially related to a discrete state entity that no longer exists (which is the story told in the Cubillo cases, for which responsibility in the present is not meaningful), with the idea of responsibilities generated by collective, continuing entities (which is an

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132 See van Rijswijk and Anthony, above n 89. Thalia Anthony and I argue that the Trevorrow cases both open doors for claimants, based on their broad reading of the legislation and the notion of consent, and close them, given the treatment of a specific factual-legal framework, and the unwillingness of the Court to find false imprisonment or a breach of fiduciary duty arising from the facts.

133 However, the cases perpetuate a problematic myth regarding parental consent. Although the Trevorrow cases challenge the operation of consent in practice, demonstrating that it was frequently quite meaningless, and that the documentary record should not necessarily be trusted concerning consent, the framework of liability still relies on consent, with its attendant assumptions regarding agency and good/bad parenting. The presence of such myths is a key reason why the common law may continue to be a problematic site for the determination of responsibility for historical harms. These issues are dealt with in van Rijswijk and Anthony, above n 89.

134 Genovese, above n 4.

135 Ibid 72.

136 Ibid.

137 Ibid 73.



emerging story in the Trevororrow cases, for which responsibility in the present is meaningful).

The most radical implication of this insight is that it makes available a new idea of sovereignty, which has the potential to transform responsibility. It implies that the public should see what has taken place as having been done in their name, on their authority, and that ‘the state’ instantiates this political power, rather than being separate from it. It disrupts ‘the legal myth that people are external to the desires and acts of the sovereign’, and makes contemporary values relevant to the evaluation of past injuries.<sup>138</sup> This also places responsibility back on ‘the people’, and makes an implicit call for action. It replaces the passive mode with respect to the state, previously supported by the view that contemporary standards are irrelevant to the evaluation of actions by the state, with a potentially more active mode of public responsibility. Significantly, redemption goes beyond the terms of justice and responsibility offered by the law, and ‘suggests a community identification of what is wrong, or unjust, that breaks with the totality of what is legally right or permissible’.<sup>139</sup>

But the question of responsibility has by no means been resolved in either the legal or public domain, and the concept of redemption does not imply that responsibility can (or should) ever be finalised or closed-off. Redemption is most productively thought of as a mode of responsibility, rather than as a method of resolution. *Carpentaria* speaks to redemption in that it provides an implicit critique of the law’s continuing difficulty in conceptualising responsibility, by questioning the status of categories of representation, and challenging the authority of these forms. *Carpentaria* also suggests that the redemptive mode should include an encounter with Indigenous sovereignties and laws.

## VI REDEMPTIVE ENCOUNTERS AND INDIGENOUS SOVEREIGNTIES

The Trevororrow cases mark a change in the common law’s adjudication of claims relating to the Stolen Generations; namely, the Court’s demonstration of a willingness to examine evidence critically and contextually, its critical examination of standards in operation at the time the policies were administered, and its willingness to decide questions of responsibility regarding past acts of the state. These practices of interpretation signify a break from previous litigation in this area, and augur some potential for the common law’s role into the future, although, as discussed above, there continue to be limitations in the law’s conceptual framework of responsibility that are likely to preclude the common law playing a significant role in addressing historical harms. We need to tell new stories about law’s relationship to the past, and its relationship to the state. These new stories require a reworking of white and Indigenous sovereignties. This

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138 Ibid.

139 Ibid.

move involves an acknowledgment that current forms of the white state and its laws are both more contingent than has been imagined in the past, and more continuous with that past. *Carpentaria* supports this critique not through a logic of supplementation, in which the white nation is qualified by an Indigenous version of truth, but rather by radically challenging the legitimacy of the stories about the white state: the forms and narratives upon which the nation is based.

'Indigenous sovereignty' is meaningful through a number of registers in Australia, including a platform for the recognition of rights, a mode for Indigenous people to express self-determination in daily life, and, most radically, as a claim of authority, deriving from the fact that Indigenous groups 'have never ceded their land'.<sup>140</sup> For Larissa Behrendt, 'the notion of sovereignty goes to the heart of the restructuring of the relationship between indigenous and non-indigenous Australia'.<sup>141</sup> As described above, the move from the Cubillo cases to the Trevorrow cases involved changes in the ways in which the state was imagined. One of the important innovations of the Trevorrow cases was the introduction of new practices of interpretation, and the introduction of new questions in the evaluation of injuries, including the judgment of past acts according to contemporary standards, a broadening of the evidence accepted as part of the historical record beyond the state archive, and a willingness to interpret individual acts in the context of the policies of the time.

*Carpentaria* suggests an encounter with Indigenous sovereignties and laws is the next step in redemption. This would introduce new formulations of questions that were asked in the Cubillo and Trevorrow cases: What does Indigenous law say about the authority behind child removals, then and now? What does Indigenous law say about the requirement for reparations? What kind of evidence does Indigenous law require to prove child removals and its impact? How are contemporary standards affected by Indigenous laws? It would be a radical and fundamental move for Australian law to not automatically subject Indigenous law, but to encounter it. The treatment of historical injuries arising out of the Stolen Generations would fundamentally change, and give rise to responsibility based on a 'relational jurisprudence,' in which both white and Indigenous laws shaped responsibility.<sup>142</sup> This is the kind of encounter Wright has in mind through *Carpentaria*; Wright has said that she hopes 'the book is of one heartbeat. Not only for us, but for everybody in Australia as we move towards the future and try to understand better'.<sup>143</sup>

It does not appear that in the present moment there is any space within the common law to raise these questions, for an authentic encounter between white and Indigenous sovereignties to take place. This suggests that the next step in redemption should be statutory: that a reparations scheme should finally be

140 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 95.

141 Ibid 96.

142 Christine Black, 'A Timely Jurisprudence for a Changing World' (2009) 22 *International Journal for the Semiotics of Law* 197, 202.

143 Kerry O'Brien, 'Alexis Wright Interview' (2007) 33 *Hecate* 215, 218.

implemented, and that it should address questions of injury and sovereignty. The common law has been evaluated as ‘a poor forum for judging the big picture of history’.<sup>144</sup> The *Bringing Them Home Report* recommended that a reparations scheme be adopted to deal with compensation arising from harms suffered by the Stolen Generations.<sup>145</sup> In addition to other noted benefits, the advantage of the reparations approach is that it could redress the problematic myths and narratives that are part of common law history regarding the Stolen Generations cases. A legislative approach could include an encounter with Indigenous sovereignties and the implications of these encounters to recognition of historical harms. This is history, and justice, from a *present* position of impossibility, but hopefully not an impossibility that will extend into the future.

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144 O’Connor, above n 87, 30. See also Cuneen and Grix, above n 36; van Krieken, above n 87.

145 *Bringing Them Home Report*, above n 24, 244. See also Andrea Durbach, ‘Repairing the Damage: Achieving Reparations for the Stolen Generations’ (2002) 27 *Alternative Law Journal* 262.