Seasons in the abyss:* reading the void in *Cubillo*

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Two voids

On 11 August 2000, O'Loughlin J of the Federal Court of Australia delivered a summary of his reasons for decision in the matter of *Cubillo and Anor v. Commonwealth*.¹ The judgment was much anticipated. Inevitably, it would be a sign of the times, setting the timbre of Anglo-Australia's voice on the burgeoning issue of the 'stolen generation' of indigenous Australians. But when O'Loughlin J announced, in respect of the forcible removal of Lorna Cubillo from her family in Phillip Creek, that no documents seemed to be available to reveal the reasons for her removal, he did so using words which would resonate; let's face it, not in the ears of every Australian, but certainly in the hearts of those few affected or concerned. In what was to be the next case in a lengthening line of mismatches between indigenous and Anglo-Australian law,² O'Loughlin J's choice of words presented his listeners with an absence: 'There is a huge void. We know that Mrs Cubillo was taken away but we do not know why.'³

* With apologies to Slayer.

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¹ (2000) 103 FCR 1; (2000) 174 ALR 97 ('*Cubillo*').

² It is worth noting that Irene Watson and other indigenous writers maintain that this is how we should see Australian indigenous law at the hands of Anglo-Australian law – as existing not *within* the latter's interstices and recognition spaces, but as entirely autonomous of it and in conflict with it. See for example Irene Watson, 'There Is No Possibility of Rights without Law' (2000) 5(1) *Indigenous Law Bulletin* 4. Note also the scholarship of Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (2003), available from <http://pandora.nla.gov.au/tep/37519> (accessed 1 November 2005).

³ *Cubillo*, 174 ALR 97 at 111 (summary of reasons does not appear in Federal Court Reports).

Picked up immediately by the Aboriginal and Torres Strait Islander Commission (ATSIC) newsroom as the title for a story reporting the result of the case,⁴ this very same dictum became a more general rubric through which to describe the experience of reading the nigh-on-500-page judgment. Emptiness, disbelief, disappointment. This was the judgment of an excessive and garrulous law which nevertheless left the applicants with, in their words, 'a huge void'. O'Loughlin J's void of a documentary not-knowing (a familiar void in the wake of Said's writings on the conditions of a colonial documentary history, and now his untimely departure) was thus, in one textual move, converted by movement of a repetition, into its opposite. Like Derrida's iterable sign, O'Loughlin J's 'huge void' of documents was immediately broken from its context, engendering a new possibility. 'The technical nature of the decision', said the ATSIC report, 'leaves another huge void and no redress for a burning sense of injustice.'⁵ No longer the void constituted from the absence of text,⁶ but the void for indigenous Australia within and in fact *because of* the text.

On the other hand, said O'Loughlin J, the position with respect to the other applicant, Mr Gunner,⁷ was 'quite different'.

In his case, there were several pieces of documentary evidence concerning his leaving Utopia. Mr Kitching's memory has faded and Mr Giese, through ill-health, was unable to give evidence. However, the documents that were available point strongly to the director, through his officers, having given close consideration to the welfare of the young [Mr Gunner]. Most importantly, there was his mother's thumbprint on a form of request that asked that [Mr Gunner] be taken to St Mary's and given a western education. I have concluded that [Mr Gunner] went to St Mary's at his mother's request.⁸

⁴ ATSIC News Room, 'There Is a Huge Void' (September 2000), http://pandora.nla.gov.au/pan/41033/20060106/ATSIC/news_room/atsic_news/September_2000/huge_void.html (accessed 1 November 2005).

⁵ *Ibid.*

⁶ It should be noted that, despite O'Loughlin J's finding that there was 'a huge void' of documentary evidence surrounding Lorna Cubillo's removal, and 'a total absence of any documentary records' (*Cubillo*, 103 FCR 1 at 148; 174 ALR 97 at 247), oral evidence was presented over the course of the litigation which tended to establish, at least, that her removal was without the consent of her family (see for example *Cubillo*, 103 FCR 1 at 144, 152; 174 ALR 97 at 244, 251). O'Loughlin J speculates that the absence of records (kept of course by the Commonwealth) may be due to their destruction by Cyclone Tracy in 1975 (*Cubillo*, 103 FCR 1 at 148; 174 ALR 97 at 247).

⁷ During the course of the preparation of this chapter, one of the applicants, Mr Gunner, died. He will be referred to as 'Mr Gunner' throughout, which has occasioned some editing of quotations.

⁸ *Cubillo*, 174 ALR 97 at 111 (summary of reasons does not appear in Federal Court Reports).

This form of request, 'signed' with the thumbprint of Mr Gunner's mother Topsy Kundrilba, served as key documentary evidence in support of the proposition that Mr Gunner's mother willingly parted with her son. This phenomenon has received a significant and diverse treatment from all walks of legal scholarship, with Irene Watson telling indigenous Australia in 2000: 'Don't Thumb Print or Sign Anything!'⁹

Stolen generations

The *Cubillo* case was not the only litigation on the 'stolen generations' of Australia's indigenous people.¹⁰ It was, however, something of a test case for about 700 other potential plaintiffs. Such litigation concerns the Australian Government's policy of removing so-called 'half-caste' Aboriginal children from their families, in what Robert Manne has called 'the racist belief . . . that "part-white" children had to be "rescued" from the primitive, godless and degraded Aboriginal world'.¹¹ The total number of children removed under this policy is unclear. In 1994, the Australian Bureau of Statistics estimated about 17,000, but Robert Manne in his detailed work of scholarship puts it at between 20,000 and 25,000.¹² Many of these 'removals' were in New South Wales and Western Australia. In the Northern Territory, the jurisdiction most relevant to the *Cubillo* case, Manne estimates that fewer than 1,000 children were removed between 1910 and 1970, although he does state that 'half-caste' children were systematically removed.¹³

The legal basis on which children were removed varied throughout Australia and over time. Taking Queensland as an example, the removal of children was undertaken originally without any official authorization, then from the end of the nineteenth century by legislation specific to Aborigines, or else by general 'welfare' laws.¹⁴ Although assimilative legislation was enacted after the National Welfare Conference of 1937,¹⁵ it was not

until 1965 that assimilation of Australia's indigenous people became the official Queensland government policy.¹⁶

For its part, the *Cubillo* case concerned only two particular removals perpetrated under Northern Territory legislation from 1918 and 1953: the removals of Lorna Cubillo and Mr Gunner.¹⁷ Their statement of claim alleged that they had been 'forcibly removed from their families and detained in institutions against their will pursuant to a state-sanctioned policy whereby "part-Aboriginal" children were removed from their families'.¹⁸ The relevant legislation at the time conferred upon the Director of Native Affairs the power to remove and detain part-Aboriginal children 'if in his opinion it is necessary or desirable in the interests of the [child]'.¹⁹ Lorna Cubillo and Mr Gunner made no attempt to undermine the validity of this legislation or its policy framework. Instead, they argued on the facts that there had been an improper exercise of power because their best interests were not taken into account, and also a breach of statutory duty by the Director in failing to look after their custody, maintenance and education as required under the legislation. For these and some other enumerated breaches, damages were claimed. Since the manner of the exercise of power, and the subjective intention of those carrying out the removals, were in question, the case turned on the presentation of a massive amount of evidence, both oral and documentary.

In the result, O'Loughlin J dismissed all of the substantive claims, finding that the Commonwealth had not breached its 'duty of care' to the claimants. He even dismissed the application to extend time under the Northern Territory's statute of limitations²⁰ – an application which needed to be allowed in order to achieve success on any of the substantive points.

The form of consent

The 'technical nature of the decision' is nowhere better embodied than in the documentary evidence, mentioned above, which precluded

⁹ Watson, 'No Possibility of Rights without Law', p. 4.

¹⁰ See for example the chronology of litigation landmarks set out in Chris Cunneen and Julia Grix, 'Chronology: The Stolen Generations Litigation 1993–2003' (2003) 5(23) *Indigenous Law Bulletin* 14.

¹¹ Robert Manne, 'In Denial: The Stolen Generations and the Right' (2001) 1 *Quarterly Essay* 1, 3.

¹² *Ibid.*, p. 27. ¹³ *Ibid.*

¹⁴ Diana Henriss-Anderssen, 'The "Stolen Generation" in Queensland: A Critical Perspective' (2002) 11(2) *Griffith Law Review* 286 at 292–301.

¹⁵ *Ibid.*, pp. 298–9.

¹⁶ *Ibid.*, pp. 301–6. Note that Manne criticizes the *Bringing Them Home* report into the stolen generations for not distinguishing between the 'pre-war eugenicist and post-war assimilationist chapters of child removal'; Manne, 'In Denial', p. 30. Manne argues that as a result the plausibility of the discussion in that report on the relationship between child removals and genocide was weakened.

¹⁷ For a thorough case note, which is necessarily long, see Jennifer Clarke, 'Cubillo v. Commonwealth' (2001) 25 *Melbourne University Law Review* 218.

¹⁸ As summarized in Cunneen and Grix, 'Limitations of Litigation'.

¹⁹ Aborigines Ordinance 1918 (NT), s. 6(1).

²⁰ Limitations Act 1944 (NT). See *Cubillo*, 103 FCR 1 at 443; 174 ALR 97 at 542–3.

O'Loughlin J from finding credible Mr Gunner's version of events surrounding his removal. I refer again to the 'form of consent' purportedly 'signed' by his mother Topsy Kunderilba. The wording of the form is this:

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 [. . .] 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 a 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	)	her	mark
day of	1956)		
in the presence of	)		
		KUNDRILBA	

The form is 'signed' with the thumbprint of, allegedly (far from apparently), Topsy Kunderilba – in the space bounded by her name and the words 'her mark'. The form is not witnessed, nor is it dated.

O'Loughlin J made explicit reference in the judgment to his possible doubts about, and the fallibilities of, the document. Certainly there was evidence presented which questioned the extent to which the undated, unwitnessed form should be relied upon. This included evidence that Topsy Kunderilba had screamed hysterically while her son was forcibly removed,²¹ and, significantly, that she did not speak English.²² O'Loughlin J refers to these doubts about the plausibility of Topsy having given her

²¹ *Cubillo*, 103 FCR 1 at 252–3, 256; 174 ALR 97 at 351–2, 354–5.

²² *Cubillo*, 103 FCR 1 at 261; 174 ALR 97 at 360.

full and informed consent:²³ he acknowledges that there is no way of knowing if the thumbprint was in fact the mark of Topsy Kunderilba,²⁴ nor whether the obviously complicated legal and institutional language could have been adequately communicated to Topsy (considering that she spoke no English).²⁵ He resolved the matter, nevertheless, with the following statement:

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.²⁶

O'Loughlin J suggests, in this finding, that as long as there is *any* possibility 'not beyond the realms of imagination' that Anglo-Australian officials removing children from their families were 'dedicated' and 'well-meaning', then no further investigation into the notion of consent need be made.²⁷ The trial judge demonstrated, then, a certain unwillingness to go behind the fact of the 'signed' form in order to ascertain its value, assuming instead that its significance was paramount. In the ensuing discussion, I intend to show that this decision is a remark about, and a re-marking of, the being of sovereignty.

²³ For a thorough exploration of the question of 'consent' in *Cubillo*, see Hannah Robert, 'Unwanted Advances: Applying Critiques of Consent in Rape to *Cubillo v. Commonwealth*' (2002) 16 *Australian Feminist Law Journal* 1. Note, however, that many of those associated with the litigation consider the issue of 'forcible' removal and the putative 'consent' of parents to be less crucial to the case than the media and other commentators have made out. The problematic of consent has captured the social and political imagination, yet it played a relatively minor role in submissions at trial. First, the form is difficult to read as a relevant 'consent', because on its wording it is not a consent to removal of the child – and certainly not a total and permanent one. Secondly, in some instances mothers reportedly handed their children over, but in the context this does not make such children any less stolen than those forcibly removed. Forcible removal was not the only species of removal practised under the relevant litigation, and it was not necessary to show that force was used in order to bring a removal within the ambit of the particular claims brought – although this test case did focus the presentation of evidence on people who were forcibly removed.

²⁴ *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344. Other documentation used at trial included a 'Form of Information of Birth' for Mr Gunner, which was dated 17 May 1956, and which stated Mr Gunner's birthdate to be 19 September 1948. This form bears a thumbprint which was used to verify the thumbprint on the form of consent. However, in that both forms were ostensibly printed in the same year, the value of this verification is questionable.

²⁵ *Cubillo*, 103 FCR 1 at 243; 174 ALR 97 at 343.

²⁶ *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344.

²⁷ Robert, 'Unwanted Advances', p. 12, notes that this seems to suggest a criminal rather than civil standard of proof.

The thumbprint, hermeneutics and consent

Faced with the morass of detail in the 500-page trial judgment (and subsequent litigation), many commentators, for the reasons above, have with good cause taken up the issue of the 'thumbprint evidence' either in itself or as a gambit for general analysis. Even those who have attempted a dispassionate summary of the findings in the case have on this topic irrupted into an open question: how can we conceive of consent, in the context of such an unstable and unequal communicative environment?²⁸ Certainly, the thumbprint, with all its attendant illiteracy and criminality, resists easy interpretation as an act of full volition. How can we know that Topsy *intended* to press her thumb to the form, and thus perform the sealing-off of any claim to contest its substance – especially in light of the oral evidence to the contrary? How meaningful then, is the mark made by her hand, and therefore the form on which the mark is made?

The popular language in which this debate is framed, the language I have just used – of intention, meaning and the knowability of Topsy's will in a particular interpretive context – finds a resonance in the hermeneutics of Hans-Georg Gadamer. Casting the hermeneutic question, as Gadamer does, as one of 'avoiding misunderstanding' by 'bridging . . . personal and historical distance between minds', Gadamer hopes we can reveal the secrets of the mind which produce any textual object of understanding²⁹ – here, the thumbprint. He might have us historically reconstruct the world in which this thumbprint had an original meaning or function, even as we acknowledge that what is said to us, for us, in a new context, will 'always [be] more than the declared and comprehended meaning'.³⁰ And this seems instinctual. Certainly, it is alternate evidence about the context of the 'signing' which provides us with the means to probe under and behind the thumbprint to a 'reality' which might have been more faithfully represented in the findings of the trial judge.

²⁸ See for example Cunneen and Grix, 'Limitations of Litigation', p. 21.

²⁹ Hans-Georg Gadamer, 'Aesthetics and Hermeneutics' in Clive Cazeaux (ed.), *The Continental Aesthetics Reader* (London, 2000), pp. 181–6 at pp. 181, 183. It should be noted that Gadamer distinguished between 'vestiges', which are largely non-linguistic 'fragments of a past world that . . . assist us in the intellectual reconstruction of the world of which they are a remnant', and 'sources', which are part of a linguistic tradition and 'serve our understanding of a linguistically interpreted world' (at p. 183). Perhaps this distinction is less important to the discussion here than it might seem, considering that Gadamer believed that many things are hybrids of the two categories (at p. 184) – certainly documents would be a hybrid form – and also considering that this distinction fares poorly under the account of arche-signification offered by Jacques Derrida.

³⁰ Gadamer, 'Aesthetics', p. 184.

Gadamer's dialogical conception of language, in which it is the 'good-will' of the participants which creates the possibility for 'being other' (that is, sharing a space for communication with an other)³¹ seems to falter under the pressure of the context we seek to interrogate here. The documented linguistic impossibility of a 'shared space' between Topsy Kundrilba and the Director of Native Affairs emerges to everyone who reads the text of the form, as a matter of intuition. Perhaps this is hinted at in Gadamer's reference to a historical text saying more than its declared and comprehended meaning. And yet, is what is at issue in the treatment of the thumbprint evidence *really* the ability to reconstruct a hermeneutic world-context by which, from the vantage point of a trial some decades later, we can *understand* why Topsy Kundrilba might have pressed her thumb to the form, and what she was thinking at the time? Of course not, because this is not how or why signatures work.³² In a sense, signatures exist so that the very difficulty of this exercise is circumvented. Signatures are always ready, by the simple virtue of their punctual ever-presence, to put in force a state of affairs which relies for its existence on the creation of a border between the will of their maker and the document which is made; between *a* past and *the* present; but always a past which was once a fully-present present. This process, as I intend to lay out, involves a hierarchy of priorities – a hierarchy which inheres in the Western metaphysics of language and of sovereignty.

Derrida, the signature, the abyss in signification

Jacques Derrida's account of the signature will be a certain opening to the point I wish to make about *Cubillo*: specifically, that the void identified in the 'technical nature of the decision' underwrites all of the priority decisions made in regard to the 'thumbprint evidence', and that this 'performs' a sovereign entity, or more precisely a being of sovereignty and a sovereign Being; thus, a void at the heart of sovereignty.

For Derrida, the signature is a species of the linguistic sign. It participates in and is constituted by the features of what is known as 'writing'. On the way to establishing, amongst other things, that writing breaks from 'the horizon of communication as the communication of consciousnesses or

³¹ Hans-Georg Gadamer, 'Text and Interpretation' in Diane P. Michelfelder and Richard E. Palmer (eds.), *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY, 1989), pp. 21–51 at p. 26.

³² To be fair, Gadamer himself might have said that 'that is not the language of the signature', that is, that the signature communicates the language of the signature.

presences',³³ Derrida sets out the 'essential predicates in a minimal determination of the classical concept of writing'.³⁴ The first is that a written sign is a

mark which remains, which is not exhausted in the present of its inscription, and which can give rise to an iteration both in the absence of and beyond the presence of the empirically determined subject who, in a given context, has emitted or produced it.³⁵

The second is that the written mark 'carries with it a force of breaking from its context'; that is, breaking with 'the set of presences which organize the moment of its inscription'.³⁶ These presences include the presence of the inscripitor, the 'entire environment and horizon of their experience', and, above all, the *intention* of the inscripitor which would, as Derrida puts it, 'animate' the inscription.³⁷ The third, which is perhaps less immediately relevant in the context of the performative signature, as we shall see in a moment, is that the written mark contains within it the force of breaking *internally* from its place in a syntagmatic chain such that it can be combined productively within other chains in a language.³⁸

These points are foundational to understanding how the thumbprint signature can be read as a writing, or mark-making, which takes effect and asserts its presence on its readership. But it is Derrida's presentation and alteration of the arguments of J. L. Austin on the 'problematic of the performative' to which I now turn. Considering the signature as a performative act of meaning, a performance of the pure will of the signatory, Derrida states that 'performative' language is opposite to an 'assertion'. Whereas a constative utterance (assertion) attempts a true or false description of something in the 'real world', or 'outside of language'; a performative utterance involves not some transmission of meaning, but something that is done 'by means of speech itself'.³⁹ This phenomenon has an obvious legal dimension to its character, and all lawyers are familiar with the performative through its frequent incarnations as 'hereby', or 'shall', or the signature itself. The signature means nothing but pure intentionality, and enacts not a transmission of meaning, but the force of an original operation – the production of an effect.

This of course represents a challenge to the most settled structuralist concept of signification: that all of language is signs, which are composed

of a double – signifiers and their signifieds. The disappearance of the signified in the performative produces what Husserl might have called a 'crisis of meaning'.⁴⁰ In the performative use of language, the 'I thee wed', or the signing of a form, there is no referent but only the will itself these uses designate. Now, Derrida remarks that, for Austin, the value of the original 'context' of the utterance is of crucial importance in understanding its effect; that the 'conscious presence of the intention of the speaking subject for the totality of his [sic] locutory act' will affect the act itself.⁴¹ As such, Derrida reads Austin to mean that, once more, even in the context of the performative speech act, communication becomes the communication of an intentional meaning, and it is this meaning and not another which breaks through and achieves transmission. Although it is clear that, for Derrida, the 'will' of the intentional speaker can no longer be the force governing the scene of interpretation of performative 'writing', and that for constative utterances the will has no structural role to play in terms of the most generalizable structure of signification, one more distinction between Austin and Derrida's reading of him is necessary here.

Austin's text concerns itself with the possibility that a performative utterance, trying, as it does, to achieve something in the 'real world' by use of language, may fail in its endeavours. Although Austin had freed his analysis of the performative from the value of truth or falsity, Derrida argues that Austin's analyses 'permanently demand a value of *context*'.⁴² That is, Austin establishes contextual or circumstantial criteria which are necessary for the successful operation of the performative – for example, that the act of naming a ship be carried out by the person appointed to the task.⁴³ In fact, Derrida refers to six criteria for performative success as set out by Austin, and comments that Austin's enterprise is remarkable in that it recognizes the possibility that a performative utterance may fail in its purpose, and even that failure is somehow an *essential* risk, and yet, to quote Derrida directly,

with an almost *immediately simultaneous* gesture made in the name of a kind of ideal regulation, [Austin makes] an exclusion of this risk as an *accidental, exterior* one that teaches us nothing about the language phenomenon under consideration.⁴⁴

⁴⁰ *Ibid.*, p. 319. ⁴¹ *Ibid.*, p. 322.

⁴² *Ibid.*, p. 322 (emphasis in original). ⁴³ *Ibid.*, p. 323.

⁴⁴ *Ibid.* ('*immediately simultaneous*' emphasis in original; '*accidental, exterior*' emphasis added).

³³ Jacques Derrida, *Margins of Philosophy* (trans. Alan Bass, Chicago, 1982), p. 316.

³⁴ *Ibid.*, p. 317. ³⁵ *Ibid.* ³⁶ *Ibid.* ³⁷ *Ibid.* ³⁸ *Ibid.* ³⁹ *Ibid.*, p. 321.

Derrida's reading here can be contrasted with Shoshana Felman's.⁴⁵ Felman reads Austin's text as in fact itself performing or admitting of its own failure, which then demonstrates a ground (a failing, slipping ground) for the performative. For Felman, Austin's performative is brought into a relation not to a ground, but exactly to a loss of ground – thus situating failure within the walls of its condition.⁴⁶ Similarly, for Derrida, this possibility of failure is constitutive. He asks: '[w]hat is a success when the possibility of failure continues to constitute its structure?';⁴⁷ and, in a gesture, he includes the 'void' hitherto lying outside of 'meaningful' language within the grounds of language itself:

Therefore, I ask the following question: is this general possibility necessarily that of a failure or a trap into which language might *fall*, or in which language might lose itself, as if in an abyss situated outside or in front of it? . . . In other words, does the generality of the risk admitted by Austin *surround* language like a kind of *ditch*, a place of external perdition into which locution might never venture, that it might avoid by remaining at home, in itself, sheltered by its essence or *telos*? Or indeed is this risk, on the contrary, its internal and positive condition of possibility? this outside its inside? the very force and law of its emergence?⁴⁸

According to Derrida, this void within language inheres in the very structure of what a sign (as iterable, breakable from its context) is. Spoken signs are no exception, relying for their force and emergence *as signs* for general use in language on the possibility that any particular will of a particular speaker may be absent – the danger of an abyss in every utterance. This structural remark about 'arche-écriture' (the 'graphematic' structure of locution)⁴⁹ will have significant implications for O'Loughlin J's reading of the form of consent and its signature, and for the conception of sovereignty which emerges from it. But permit now a brief diversion from the sovereign horizon of this discussion – a diversion which is yet a continuation of Derrida's reasoning, and which is also a kind of conclusion to the question of the signature.

Of course, the result of a performative failure, in any sense, whether it be in Austin's parasitic or abnormal sense of the signature, is that we

⁴⁵ I am grateful to Anne Orford and Catherine Mills for each drawing this contrast and similarity to my attention.

⁴⁶ Shoshana Felman, *The Literary Speech Act* (trans. Catherine Porter, New York, 1983), pp. 66–7.

⁴⁷ Derrida, *Margins*, p. 324. ⁴⁸ *Ibid.*, p. 325 (emphasis in original). ⁴⁹ *Ibid.*, p. 322.

(finally) pay heed to the potential void within this sign. The signature and everything it authorized becomes 'void', transactions are set aside, legal documentation becomes worthless and unable to sustain any relation to life. Only then will a void, the rigid opposite of meaning and signification, blossom from the mark which is otherwise present and ready to signify. But Derrida makes clear that the sense of the signature is that it captures an assumption about the making of the mark in an intentional present. Although it is necessary that the signature be able to function in the absence of the signer, the signature marks and captures a 'having-been present in a past now', which becomes a 'now in general' ('*maintenance*') – the 'transcendental form of nowness'.⁵⁰ This is 'stapled' to the present in the form of the signature.⁵¹

The art of the signature, though, is to present an illusion of being an absolutely originary event – a representation of a singular and pure will which appears readily, yet which Derrida reminds us is, in a sense, split.

Is there some such thing? Does the absolute singularity of an event of the signature ever occur? Are there signatures?

Yes, of course, every day. The effects of signature are the most ordinary thing in the world. The condition of possibility for these effects is simultaneously, once again, the condition of their impossibility, of the impossibility of their rigorous purity. 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 itself from the present and singular intention of its production. It is its sameness which, in altering its identity and singularity, divides the seal.⁵²

It is through this commonplace of interpretation that Derrida's work on the signature shows the structure of signification and the privileging of the presence of the sign. Even if second-guessing a judge's philosophy of language and evidence is an impossible task (and perhaps makes for irritating reading), it seems from O'Loughlin J's comments on the 'signed' form that he might not entirely subscribe to Austin's ideas of the performative – and instead agree with Derrida that, as a matter of evidence, the signature endures as a singular performance *despite* the crisis of transmission of any kind of hermeneutic 'context'. Remarking on the potential fallibilities of the form as an indication of Topsy Kundrilba's state of knowledge, or of her comprehension of the content of the form, or even of whether it was her thumbprint that marked the page, recall that

⁵⁰ *Ibid.*, p. 328. ⁵¹ *Ibid.* ⁵² *Ibid.*, pp. 328–9.

O'Loughlin J eventually stated that he had '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'.⁵³ O'Loughlin J is finally *unwilling* to consider the prospect of a *failure of communication* – a reading of the Commonwealth's form whereby it signifies nothing but its own lack of mandate to claim consent; performs nothing beyond its own potentially effete presence. As we have seen, this force is one which contains *within it* a void necessary to the structure of signification, and the form thereby produces within itself another void, a fully *present* void, or a void *despite presence*, to match that absence of documentary evidence which marked Lorna Cubillo's removal.

Finding sovereignty

I have said that O'Loughlin J's own performance, the momentary reinstitution of certain hierarchies and privileges of, for example, the reliability of written over oral evidence, and of presence over absence, is a performance of sovereignty. Of course, in two senses, the performance of sovereignty operates because of what I reluctantly call 'pragmatic' considerations. First, O'Loughlin J is bound by a set of rules, procedures and principles in operation in the Federal Court (the less 'pragmatic' perspective being that these rules and procedures are designed by and for the culture of their institution; institution as a putting-in-place, but also institution as the place of having-been-put-in-place).

The second 'pragmatic' way in which O'Loughlin J's findings on the form operate as a performance or re-marking of sovereignty is the structural inevitability of the absence of documentary evidence supporting Mr Gunner's position, or more precisely the inevitability and apparent neutrality attaching to the fact that the Commonwealth, as if it could have been any other way, was able to provide better written support for the Anglo-Australian sovereign position. This has been called by Ransley and Marchetti a 'hidden whiteness', reflecting the idea that the supposedly 'neutral' procedures and categories of litigation in fact contain the values of the white Australian legal culture – to the extent that, for example, the witnesses for the Commonwealth were or appeared to the judges to be better educated, well adjusted and reliable.⁵⁴

⁵³ *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344.

⁵⁴ Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 1(1) *Griffith Law Review* 139 at 146–8.

But there is a third, less pragmatic sense in which O'Loughlin J's findings on the form are a 'performance' of sovereignty – a sense which provides the previous two with their ontological backdrop. The figure of the sovereign in the performative utterance has been taken up by Judith Butler, who remarks that a performative speech act is understood as a 'speech act with the *power* to do what it says'; a speech act 'modeled on the speech of the sovereign state'.⁵⁵ The cadence of this understanding is addressed by the structural version of what Derrida and others have elsewhere handled as an ontotheological question. But the advantage of using the structural account is that it succeeds in elegantly describing an instability *inherent* in the process of all signification; in the structurally necessary *inclusion* of 'failure' in the concept of communication and its sovereignty – a very much *internal* void or abyss at once dwelling within and also enabling signification *and the Being of meaning in general*. That failing enabling is the subject of my analysis.

Although readers of Giorgio Agamben's work on sovereignty (especially the more recent *Homo Sacer* and its sequel *State of Exception*) will recognize here an easy link to his own writing on the nature of sovereignty as *constituted* by its own ban or exception of itself, its own suspension (an internal void);⁵⁶ it is through his earlier *Language and Death* that I will trace this relation between the Being of sovereignty and the abyss at the centre of the sign and of signification. In doing so, I interrogate the conditions instituted by the language of the form together with the signature on the form, proposing that, instead of regarding the instance of sovereignty and the phenomenon of the thumbprint (and its interpretation) as structurally equivalent or *metaphorical* with relation to each other, they should be regarded as *metonymically* linked; as producing each other as parts of a

⁵⁵ Judith Butler, *Excitable Speech* (New York, 1997), p. 77.

⁵⁶ Herein I have mainly avoided the dialectic spatial metaphor of inside and outside as a direct tool through which to understand the sovereign relation at play in the interpretation of the form of consent. This is partly in response to Gaston Bachelard's detestation of the geometrization of the linguistic tissue of the philosophy of being and non-being. But Agamben criticized Derrida's (if that word is appropriate – a most reverent criticism I think) attempt to surpass metaphysics, indicating that 'all' he managed to do was state better than anyone else that this is impossible – that metaphysics is always already *grammatology* in that 'the *gramma* (or the Voice) functions as the negative ontological foundation': Giorgio Agamben, *Language and Death: The Place of Negativity* (Minneapolis, 1991), p. 39. I have found it unhelpful in this context to relate the limit-concept of an inclusionary exclusion necessary to sovereignty, to this discussion, noting only that my conclusion will surely be as Agamben's work sets out – that sovereignty in this tradition is constituted of its own ability to exclude and to suspend itself: a void within.

kind of logical/syntactic metaphysical chain.⁵⁷ The aim of this approach is to try and show that the metaphysics of presence which enable sovereignty produce in *Cubillo* both the object for analysis (the thumbprinted form) and the analysis of that object (O'Loughlin J's faithful application of the priorities of the form). As such, I attempt to draw attention to a sense in which there is a 'paper chain of white Anglo-Australian men congratulating white Anglo-Australian men on their judgments in decisions regarding Aboriginal peoples' lives'.⁵⁸

The pronoun in the form and the form as pronoun

The question at which we have arrived is that of how sovereign being takes place through the form, its signature, and its interpretation at trial by O'Loughlin J. How does the language of the form 'take place' for sovereignty? A potential opening place for this question is Giorgio Agamben's *Language and Death*. The language of this analysis is grounded in the question of the ability of language to refer – which is a convenient language considering the problematic of the signature unfolded so far. As such, I begin by noting Agamben's argument concerning the logical implications which arise from the grammatical structure and categorization of those favoured referring words, nouns.

In *Language and Death*, Agamben remarks that 'at a crucial point in the history of metaphysics – the Aristotelian determination of the *prote ousia*, pronominal forms of referring were distinguished in nature or essence from all other forms of noun.⁵⁹ Whereas the common noun attempts to signify that which it names, the pronoun (for example, 'this' or 'that') takes as its dimension of meaning a 'dimension-limit of signification, the point at which its [signification] passes into *indication*'.⁶⁰ This marks the attempt by human language to grasp being: an attempt which through Aristotle and Hegel is mired in a constitutive negativity. Instantaneously, the 'this' that would be grasped becomes the 'not this'. Of course, Derrida too was aware throughout his analysis of the signature that the signature is always, despite being a 'this', firmly a 'not-this' which was once a 'this'

⁵⁷ See for example Roland Barthes' reference in 'The Metaphor of the Eye' to 'the two major categories (operations, objects or figures) that the science of linguistics has recently taught us to name: arrangement and selection, syntagma and paradigm, metonymy and metaphor': Roland Barthes 'The Metaphor of the Eye' (trans. J. A. Underwood), as reprinted in Georges Bataille, *The Story of the Eye* (London, 2001), pp. 119–27 at p. 20.

⁵⁸ Robert, 'Unwanted Advances', p. 1. ⁵⁹ Agamben, *Language and Death*, p. 16.

⁶⁰ *Ibid.*, p. 17 (emphasis added).

(where 'this' is the will of the mark-maker). But, according to Agamben, in Latin grammar, pronouns were thought to signify 'pure being in itself, before and beyond any qualitative determination [*substantiam sine qualitate*];⁶¹ thus the pronoun came to conflate with the 'sphere of pure being'⁶² identified in medieval ontotheology as the '*transcendentia: ens, unum, aliquid, bonum, verum*'.⁶³ The nature of the transcendentals, shows Agamben, is that they are 'already received in every received object and predicated in every predication . . . they accompany . . . every entity without adding anything real to it';⁶⁴ thus, a kind of condition of being. The link between the pronoun and the *transcendentia* is determined by the medieval grammarians through reference to the ancient Greek grammatical concept of *deixis*.⁶⁵ It is structured and enacted through the *demonstratio*, which represents a supplementary gesture of indication which must accompany the pronoun in order for it to be retrieved from the nullity of the void.⁶⁶ Due to the impossibility of finding 'an objective referent' for words like 'here' and 'now', they are defined 'only by means of a reference to the instance of discourse that contains them'.⁶⁷ The fact that *deixis* is contemporaneous with discourse means that pronouns are language itself; conceived of as 'empty signs' which become full only when put into the service of a particular discourse.

This enables the step to understanding something of the operation of the signature on the legal form. Of course, the pronoun 'I' on the form is given meaning, or fulfilled, only by the completion of the form. It is obvious that the form is in existence prior to the application of the signature, and is yet without significance unless the signature occurs, rendering the form and everything on it part of the broader discourse of Topsy's will as relevant to litigation in what was then a future. But there is something less evident here. This first plane of *deixis* (the signature as a demonstration of the 'I') has something else which is necessary for its existence. Is the fulfilment of 'I' by the signature really the only modality of *deixis* in the form? Intuitively, no. The grammatical language of the form is at once that of the first person singular ('I', 'do hereby request', 'my . . . reasons . . . are'), but it is also haunted by a spectral discursive presence which is covertly signified less in the pronouns of the form and more in the form as a pronoun. This is a different, silent and yet necessary pronominal usage which is more transcendental in the sense of embodying a greater

⁶¹ *Ibid.*, p. 20. ⁶² *Ibid.* (emphasis added).

⁶³ Essence: unity, something, the good, truth.

⁶⁴ Agamben, *Language and Death*, p. 21. ⁶⁵ *Ibid.* ⁶⁶ *Ibid.*, p. 22. ⁶⁷ *Ibid.*, p. 23.

sense of the proximity to the *transcendentia*; that is the aspect of 'that which is always already said in every utterance by the very fact of saying it'.⁶⁸ It is not the pronoun 'I', but the pronominal sense of 'one' as in 'an individual'; or perhaps the pronoun 'you', as a shorthand for the institutional gaze upon Topsy Kundrilba as 'a parent' under the Aboriginals Ordinance. This is the Althusserian interpellative address which, as Butler reminds us, 'may arrive without a speaker – on bureaucratic forms, the census, adoption papers, employment applications'.⁶⁹

This dimension is addressed by Charles Yablon, writing of the legal form: 'This is a form. It has no substance. It is filled with blanks. It is unsigned. It has no names, no places, no times. It is for no one. But it is not for no one. It is for you.'⁷⁰ So, while the 'signature' on the legal form gives a meaning to the pronoun 'I' in the form's wording, it also enforces a second pronominal sense – the sense in which Topsy Kundrilba is or was addressed by the form; an unspoken and far from apparent 'you' which is the term of address 'given form' by the form. The covert shifter which is the form, is the manner in which the sovereign *relation* takes place; and is the manner in which a sovereign discourse refers to its own taking place.

The form taking place

Here it is crucial to note the concept of Voice in Agamben's work. I have already said that it is the sovereign relation which looks institutionally on Topsy Kundrilba as 'you', which enables the overt place of *deixis* ('I') to ground itself. This needs to be unpacked further along two coexisting, mutually reinforcing trajectories. One trajectory is the manner in which the act of signing and the present mark enforced as the *maintenance* of the event constitutes Topsy as a subject who is *capable of signing*. But the second trajectory here is that the Being of sovereignty is established precisely through the lack of overt reference to the conditions of existence of the form as discourse; such that the form (linking with the first trajectory) presents itself as an emanation of will from its signatory. The second trajectory is taken up first.

As Agamben wrote, the conversion at play in the pronoun as an instance of discourse has for more than 2,000 years been called 'being'.⁷¹ That is,

⁶⁸ *Ibid.*, p. 21. ⁶⁹ Butler, *Excitable Speech*, p. 34.

⁷⁰ Charles M. Yablon, 'Forms' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (London, 1992), pp. 258–62 at pp. 258–9.

⁷¹ Agamben, *Language and Death*, p. 25.

language's attempt to fully grasp presence and being, to indicate pure being unsullied by the mediation introduced by the common noun. Where the attempt of discourse is to signify the very conditions of its own being (that is, the conditions of discourse), it is silent; or, ironically, formless,⁷² and yet present in every saying as the condition by which saying can occur. What has been introduced here as a matter of the pronominal is redescribed by Agamben as a substitution of the 'gramma' (the letter of language), for the will of the speaker to signify (through Aristotle this is known as 'voice').⁷³

Agamben, in reference to the *removal* of voice as a condition, the condition of discourse, considers voice as a threshold between pure sound-as-sound, and sound embroiled in or overshadowed by signification. He adopts a capitalization ('Voice') to distinguish this sense of Voice as no-longer-pure-sound and not-yet-meaning, from the sense of voice as pure sound, an *animal* voice. It is only Voice and not voice which could 'open the sphere of utterance', or 'refer to the instance of discourse as such'.⁷⁴ The fact of language taking place relies on 'the Voice, as the supreme shifter that allows us to grasp the taking place of language, [which] appears thus as the negative ground on which all ontology rests'.⁷⁵

Now it is possible to relate Derrida's structural account of the legal signature on the legal form (an account in which the form is mentioned not at all) to this development. In fact, the significance of O'Loughlin J's unwillingness to read the thumbprint on the form as anything other than an ever-ready presence of performative force extends slightly beyond the structural account presented above (which showed so well an order of priorities privileging the present and the presence of the thumbprint). In fact, what can now be understood is that the Voice is that which is not apparent and yet always ready (following Agamben) as the *possibility of signifying*, which is experienced indistinguishably from the act of actual signification such that (as Derrida might say) the negative foundation of (or void within) the process of signification is *concealed from the participant in discourse*.

The form itself is then the sovereign Voice, the possibility of saying, which by definition is structured to appear as laden with presence and signification, and which must appear as a present presence. So the

⁷² This is presented by Agamben in a quotation from the *Regulae theologicae* of Alain de Lille, concerning the issue of a noun being put in service of designating 'the divine essence, pure being' (*Language and Death*, p. 28) – resonating for Agamben with the Hebrew sense of the 'secret and unpronounceable name of God' (p. 30).

⁷³ *Ibid.*, p. 33.

⁷⁴ *Ibid.*, p. 35.

⁷⁵ *Ibid.*, p. 36.

possibility of signifying is precisely a *faith in presence* which is exercised as a performance of interpretation by O'Loughlin J. The pronominal 'you' which is the condition by which the form speaks to the signatory (by which the form institutes a sovereign mode of speech (jurisdiction) over the signatory), also supplies an economy of signification and relation. It is the un-appearance of this phenomenon which is the transcendental condition of the legal discourse in which Topsy Kundrilba's will is constructed: that which is already said by virtue of saying. Sovereignty is, on these terms, a discourse, a condition for discourse, a construction of identities for discourse, and a manner of interpreting those identities. Sovereignty then *accrues from* the order of priorities of the form; and the form is to sovereign language and sovereign Being what the 'ordinary' pronoun is to Being in general; which is to say that sovereignty is an extreme discourse of Being in which all the ontotheological priorities and illusions of truth which are the subject of investigation by Western philosophy, are concentrated or made literal for being *enforceable*.⁷⁶

Reopening the thumbprint

What we see in the thumbprint signature, then, is the same movement of the removal of voice in favour of a signature capable of signifying. Derrida analysed the performative act of signature as having some structural characteristic of an act of pure will, which changes it from a non-significatory mark (a simple act of volition which we might equate with Agamben's 'voice') into an act we *recognize or semantically define* as being a singular act of intention but which in fact is in its condition of being *not at all singular* – a form conforming in its structure to the repeatable or iterable sign of discourse – in other words, in a form which we recognize as the signature-form (or a performative form) more generally. Although the signature is probably already the best example of this phenomenon, Timothy Clark gives the date as an alternative example: 'in idea, [the date is] unique and idiomatic. Yet to be readable at all, a date must, so to speak, have effaced its putative singularity in its repeatability within the calendar.'⁷⁷ According to Clark, a date 'necessarily emerges as the very negation of that which it names in its singularity'.⁷⁸ Were a performative

⁷⁶ That is to say, brought (famously) into an intimate relationship with violence, as Walter Benjamin, Jacques Derrida, Giorgio Agamben and others have made clear.

⁷⁷ Timothy Clark, *Derrida, Heidegger, Blanchot: Sources of Derrida's Notion and Practice of Literature* (Cambridge, 1992), p. 168.

⁷⁸ *Ibid.*

mark to be totally singular, it would be unreadable, and as Derrida puts it, non-iterable.

So iterability is the same as the removal of the voice, and the taking-on of the terms of Voice; that is, the condition of becoming structurally ready to signify and participate in the conditions of discourse. In fact, something about the thumbprint alerts us to its readiness for legal discourse. In no sense can we say that a thumbprint is akin to the animal voice in Agamben's writing, nor the voice in Derrida's writing as close to the *unum* of transcendental, natural writing. This is so since knowledge about its uniqueness (and therefore its potential to function as signature) necessarily involves ontic knowledge of the technologies of human biology or the state of uniqueness or singularity with respect to the body and population. If fingerprints are close to the 'self' it is only a concept of 'self' which is already located with respect to the population at large and as administered by some form of equipped authority. A fingerprint may very well be a physical index of the 'animal' producing it, but its epistemological history is one which is tied up in techniques of what Foucault called governmentality; of management of a population – political life, or *bios*. The fingerprint as a species of legal mark, in the words of Steve Connor, marks an 'absolute coincidence of law and the body' and also 'an absolute break between an epoch of law and an epoch of wanton decoration',⁷⁹ in which an Aboriginal thumbprint might have some other 'voice'; a circulation in another system of meaning. In making this point I am saying only that it is already a sovereign discursive technique to apply the thumbprint as a signification of *will*. And this should be unsurprising, since Goodrich makes clear that the vernacular is inadmissible in legal fora, so it is precisely an 'erasure of voice' which is routinely undergone in order to participate in the 'benefits' of the community of legal language.⁸⁰

How Topsy Kundrilba's will is constructed by the presence of the thumbprint as always already consenting

And, in fact, this is an example of the metonymic distribution of the sovereign discourse. The 'silent' pronominal form-as-Voice which is

⁷⁹ Steve Connor, 'The Law of Marks' (2001), <http://www.bbk.ac.uk/english/skc/marks/> (accessed 1 November 2005).

⁸⁰ Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London, 1990), p. 185. Goodrich points out that the presence of a vernacular might locate the language of the law as just 'one more dialect' which could then be 'weighed in the scales of legitimacy'.

the possibility of sovereign discourse has metaphysical priorities which O'Loughlin J privileges in interpreting the form. But in the thumbprint we also see these same conditions of discourse *producing* the object (a subject) for analysis. The dispersed operation of power, no longer necessarily constrained in the figure of the sovereign state, is here re-imagined (according to Butler) as a sort of marker of the historical loss of the Leviathan. The fantasy of its return takes place in language, she argues, in the figure of the performative.⁸¹ The performative in language credits to the subject of its emanation an assumed power to act in force of its words, in a 'phantasmatic production of the . . . subject' designed to replay the subject as the only possible agent of power.⁸² As John Frow has argued, 'the Western juridical subject is defined as the one who has (always already) the right to sign their name . . . the subject is at the same time constituted in the act of signature, the writing of the proper name'.⁸³ This creates a metaleptic circuit (in which causes are posited as effects and vice versa), established by the ever-ready *maintenance* of the signature.⁸⁴ Topsy appears as a fully volitional subject whose documented will cannot (and will not) be supplanted. If as Butler said, 'consent always and only constitutes the subject',⁸⁵ Topsy is constructed by her signature as already self-aware, knowledgeable and *possessing intention*, in the sense of being *self-possessed*.⁸⁶

⁸¹ Butler, *Excitable Speech*, p. 78. ⁸² *Ibid.*, p. 80.

⁸³ John Frow, 'The Signature: Three Arguments about the Commodity Form' in Helen Grace (ed.), *Aesthesis and the Economy of the Senses* (Nepean, NSW, 1996), pp. 151–200 at p. 177.

⁸⁴ On this metaleptic operation, see Friedrich Nietzsche, 'On the Genealogy of Morals' in Walter Kaufmann (ed. and trans.), *Basic Writings of Nietzsche* (New York, 1968) and Judith Butler's discussion thereof in Butler, *Excitable Speech*, pp. 45–6.

⁸⁵ Butler, *Excitable Speech*, p. 85.

⁸⁶ This attribution of self-possession and contractual awareness is particularly poignant. In a thoughtful handling of Margaret Radin's work, John Frow sets out how both buying and selling property enhance the individual's self-conception of 'freedom', and he also establishes, through Radin, that this is underpinned by a negative conception of liberty (one is free to act unless another is harmed), pointing out that the idea of 'inalienable possession' is marginalized: Frow, 'The Signature', pp. 172–7. As a result, continues Frow, John Stuart Mill had difficulty in arguing against the freedom to sell oneself into slavery because of the absence of a secure locus in the self for a fundamental inalienability. Frow presents Radin's argument as asserting a 'personal' property which attaches to an inalienable core of personhood, which is then asserted against liberalism. But he goes on, at pp. 176–7:

The major weakness of Radin's argument, however, is that in asserting the category of personhood against liberalism she is insufficiently attentive to the central role that personhood already plays there as a category of property. 'The person' is neither a real core of selfhood nor a transcendental principle that inherently resists being

Frow was mainly concerned with the 'signature' as evidence of artistic authenticity – this embodying something exemplary about the nature of the individual. But in his conclusion that 'the form of the person is the juridical basis of all property rights in information, including aesthetic information',⁸⁷ there is the principle that it is the self-possession of the will to create, or to understand oneself, that must exist in order to have something to create or to commit to paper. This rational individuality, which is also the subject of rights, has been lamented directly and indirectly by indigenous scholars. Irene Watson quotes Haunani-Kay Trask who resists the definition of indigenous Hawaiian identities and practices as the holders and contents of 'rights':

[I]ndigenous, Native practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel . . . When Hawaiians begin to think otherwise, that is, to think in terms of 'rights,' the identification as 'Americans' is not far off.⁸⁸

Watson elaborates Trask's sentiment in pointing out that this universalizing attribution of subjectivity on the Western liberal model leads to the position where the relationship between an indigenous person or group and property is conceptualized as the same as that subsisting in Anglo-Australian law – ultimately enabling the treatment of indigenous property as alienable.

Trask's ideas, translated to native title rights, illustrate how the Aboriginal relationship to land and law can be reduced to a commodity or an economic unit and finally extinguishment. Our connections to land are about law and families. It is a spiritual relationship, which speaks of ancient traditional ways of life, ideas, which are in conflict with the state.⁸⁹

But if a well-documented danger exists at large for indigenous people who wish to retain an ancestral relationship to property and the self, and if this danger is clearly present in the assumption that they who 'sign' do so as an already-constituted Western individual, O'Loughlin J seems

alienated in the market, because it is always the product of the social relations formed by the distinction between alienable and inalienable possessions. Nor is it simply the on the side of the latter: what Strathern calls 'Western proprietism' is based on self-possession, a primordial property right in the self which then grounds all other property rights. 'The person' is at once the opposite of the commodity form and its condition of existence.

⁸⁷ Frow, 'The Signature', p. 177.

⁸⁸ As cited in Watson, 'No Possibility of Rights without Law', p. 5.

⁸⁹ Watson, 'No Possibility of Rights without Law', p. 5.

to be blissfully unaware of it. O'Loughlin J appeals instead to our sense of Western liberal equality, supplying Topsy with a 'natural', standard-issue Western sovereign juridical subjectivity. In a remarkable assumption about the nature of the individual and their state of knowledge, he asserts that even though she did not speak English and *we will never know what was actually explained to her*, 'that was no reason for assuming that because Topsy was a tribal Aboriginal, she did not understand what was happening'.⁹⁰ The signature, then, retrospectively constructs a 'decision' to sign.

Prior to, and after, signature

Prior to the advent of the signature, the language of the form is performatively dormant. Although it certainly had a place in the social and linguistic context of its creation, and as such had a certain force (a *relation*; a vestige of sovereignty's jurisdiction), and although its words and phrases of course engaged the regular unstable structure of signification (they meant something), it is obvious that it had no particular performativity for Topsy Kundrilba until it was activated by the touching of the form by the thumb. But, at that point, the signature appears not as an appended afterthought to the form,⁹¹ but as the very embodiment of Topsy's will. It will be Topsy's 'will' which is the *only signification* made by the form. It is crucial to recall here that, as the 'I' of the form has been supplied particularity by a name, so the form is enlivened. But, in a reciprocal movement, the missing referent of the performative act of signature (which we said earlier provokes a Husserlian crisis of meaning) is supplied by the language of the form. In another substitution of cause for effect, the signifying potential of the form is reversed and declared to be the product of the signature. In a sense, the production of the sovereign subject (who is also the subject of sovereignty) hermeneutically seals off the question of the thumbprint's origin from consideration as a 'past' problem due to the signifying force of its presence. But how does O'Loughlin J determine the content, the *significance* of this will? Always and only through the form, of course. On Hannah Robert's analysis, O'Loughlin J sidesteps 'any issues of compulsion, duress or undue influence' raised by the oral and other evidence concerning Mr Gunner's removal – which, recall, was evidence that Topsy

⁹⁰ *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344.

⁹¹ Derrida, *Margins*, p. 328. Derrida refers to the signature as being 'appended', quoting Austin (it is unclear whether with approval or not). The thumbprint on Topsy Kundrilba's form certainly appears contrary and heterogenous to the order of the text it marks.

Kundrilba had previously hidden her son when officials arrived – and that 'the community at Utopia was generally fearful that their children would be taken away'.⁹²

So the form validates itself as a 'request', supplying itself as the very plenum of the will of the signatory and obligingly assisting the carriage of that will – attributing its new mystical origin to the identity it constructs as always already signifying the desire borne out in the form's wording. Thus, through a borrowing of the intentional identity which has been constructed for her (particularly, her *proper name*, or her *name plus signature*), the form attains a perfect unity of saying and meaning. Even as it borrows from the signature to activate its force and significance, the form's words return to fill the signature with meaning. The two (which are after signature inseparable, self-evident) are mutually reinforcing, each giving the other its content.

On the form as the plenitude of meaning, a natural writing

The ideality of the signed form as both an embodiment of a sovereign individual's will and as a giant or supreme 'shifter' providing the ground for the taking place of sovereign language is alluded to by Yablon in his elegant and sparing remark that, when the legal form (he was considering a form of summons) makes a statement, then '[t]his statement is true. It cannot be false'.⁹³ The legal form secures its own interpretation by unifying the conditions of interpretation with the conditions of production, enabling it to become the very ideality of its message, such that its significance becomes its meaning; a natural consequence of its existence.

The form of consent seems to issue naturally and spontaneously as an administrative gesture; there to facilitate the meaning which, after its fact, seems to be self-evident. After its signature, the form means itself – as if there was any other way, as if, once introduced into the trial as evidence, it could ever have been left unsigned. Such moments are foreclosed. The form's communion with a sense of 'natural writing', worked through by Derrida in *Of Grammatology*, lends the form a sense of having been produced with an 'element of ideality or universality'.⁹⁴ The naturalness

⁹² Robert, 'Unwanted Advances', p. 9, referring to the evidence of Mrs Pula (*Cubillo*, 103 FCR 1 at 260–1; 174 ALR 97 at 360), and the general reports of people fleeing when white patrol officers arrived (103 FCR 1 at 240–1; 174 ALR 97 at 340–1).

⁹³ Yablon, 'Forms', p. 259.

⁹⁴ Jacques Derrida, *Of Grammatology* (trans. Gayatri Chakravorty Spivak, Baltimore, 1997), p. 20.

and uncontestability of this production is experienced, Derrida tells us, as the experience of “being”.⁹⁵ As is well known, this is only a starting point for Derrida’s working through of metaphysics as grammatology, in fact of logocentrism, which we can now begin to see in the context of the *Cubillo* decision (that is, in relation to the hierarchies of presence that it engenders) in its status as an ‘original and powerful ethnocentrism’.⁹⁶

The relation between word and being is, in this natural language, unsullied by the arbitrary signifier. And Derrida establishes this kind of writing’s opposite: not a natural, divine, full and perfect meaning, but a fallen, human, technological, finite, exteriorized writing. In similar terms, Benjamin wrote of a fall from pure meaning, as the ‘uncreated imitation of the creative word’, in which the *human* word by its structure, duplicates but fails of course to achieve, the *absolute* relation of name to knowledge. In attempting to *communicate something other than itself*, human language, says Benjamin, is not the creative word but rather, name as reflection of the Word.⁹⁷ But, according to Benjamin, there is one point of communion with the naming power of God:

The deepest images of this divine word and the point where human language participates most intimately in the divine infinity of the pure word . . . are the human name. The theory of proper names is the theory of the frontier between finite and infinite language. Of all beings man is the only one who himself names his own kind, as he is the only one whom God did not name.⁹⁸

This is crucial in understanding how the form of consent in *Cubillo* was able to garner Charles Yablon’s sense that its language ‘is true’, ‘cannot be false’ – that it communicates nothing other than itself. In order to apprehend this sense, a brief summary is required. First, the missing referent (signified) of the performative act of thumbprinting has by now been found – it is the content of the form. But it is the content of the form which has been cycled back through the metaleptically-created pure will of the signature, borrowing from the sense of the willing self. The ‘void’ pronoun of the ‘I’ in the form is not only enlivened by the application of the pure will and the pure name *which mean themselves*, but the entire signification of the form through the signature becomes the illusory product

⁹⁵ *Ibid.* ⁹⁶ *Ibid.*, p. 3.

⁹⁷ Walter Benjamin, ‘On Language as Such and On the Language of Man’ in *Reflections: Essays, Aphorisms, Autobiographical Writings* (ed. Peter Demetz, trans. Edmund Jephcott, New York, 1978), pp. 314–32 at p. 327.

⁹⁸ *Ibid.*, pp. 323–4.

of the will, or rather, the illusory product of the illusory will (remembering that the subjectivity of the will is inaugurated with the act of signature). Thus, the relation which enables the taking place of language (the Voice, or structural readiness to signify) is the will of sovereign Being, a supplied Being that decodes itself perfectly. As such, it achieves a unity of saying and meaning. This is the very sense and meaning of the whole pronominal relation of the form; the nature of the sovereign jurisdictional pronoun ‘You’ which is silent and unspoken and yet assumed in the very fact of the form.

The effect of these illusions of a presence is to create an *uncontestable* writing which is the paragon of Western metaphysical relation. The proper name plus the (partly pronominal) substance of the form read together as inseparable and as activating each other results in a kind of perfect representation whose interpretation is always in maintenance of the same order of priorities. As Hannah Robert has said, discussing O’Loughlin J’s handling of the form, ‘just as a marriage certificate once made women “unrapable” by their husbands, the “form of consent” made “half caste” children “unstealable”’.⁹⁹

The abandonment of Topsy Kundrilba

These fairly complicated descriptions have addressed the foundational possibility of the signifying and/or performative functions of the form and the thumbprint. What is adumbrated by all of these textual operations is Topsy Kundrilba’s *relation* to the sovereign. It has become impossible, using the metaphysics of presence, to explain O’Loughlin J’s approach, to speak of Topsy Kundrilba as a *self*, to speak of her *herself*, in her participation in these processes of signification (the supplied meanings of her subjectivity and its message in the *unum/plenum* of the signed form). Butler describes the idealization of performative speech acts, such as Topsy Kundrilba’s signature, as an imagination of the ‘forceful voice’ of sovereign power.¹⁰⁰ On Butler’s account, and in the manner I have described here, the state sovereign re-emerges as the paragon of the kind of power of which the sovereign speech act has become emblematic. On the other hand, Kundrilba’s identity, described through these definite and particular Western metaphysical rules of being, has at once been included as an identity made ready to signify and participate in the systems of Voice of sovereignty, and also therefore (because of these qualifications) *excluded*.

⁹⁹ Robert, ‘Unwanted Advances’, p. 13.

¹⁰⁰ Butler, *Excitable Speech*, p. 82.

The complicated system above, of construction and supply of meaning, signification and making ready to signify, means that the signed form is *in force* but *without significance*, experienced as a pure force of supplementary meanings. Agamben's now-notorious formulation in *Homo Sacer* of the sovereign relation as that of the 'ban' found a convenient expression thus:

Being in force without significance . . . nothing describes better the ban that our age cannot master than Scholem's formula for the status of law in Kafka's novel [*The Trial*]. What, after all, is the structure of the sovereign ban if not that of a law that *is in force* but *does not signify*? Everywhere on earth men live today in the ban of a law and a tradition that are maintained solely as the 'zero point' of their own content, and that include men within them in the form of a pure relation of abandonment . . .

In Kant the pure form of law as 'being in force without significance' appears for the first time in modernity. What Kant calls the 'simple form of the law' . . . in the *Critique of Practical Reason* is in fact a law reduced to the zero point of its significance, which is, nevertheless, in force as such . . . 'Now if we abstract every content, that is, every object of the will (as determining motive) from a law', he writes, 'there is nothing left but the simple form of a universal legislation' . . .¹⁰¹

This 'abstraction' of 'every determining motive' from a law traces the truth-effect of Topsy's will which is a product of the metaphysics of presence, as set out above. As the sovereignty attributed to her signature replays a model of communication which the sovereign state would like for its own, Topsy thus forms the ground for a taking place of law. So the form of consent in *Cubillo* offers an exemplary instance of the manner in which the logics of sovereignty exert such a being as a being in force. Topsy Kundrilba's position also demonstrates the relationship between being in force without significance, and the ban. As Düttmann writes, being in force without significance 'is a *pure* relation which includes that to which it relates by way of abandoning and excluding it'.¹⁰² Catherine Mills elaborates the idea of the ban, drawing on Nancy through Agamben: 'to be abandoned means to be subjected to the unremitting force of the law while the law simultaneously withdraws from its subject'.¹⁰³ She

¹⁰¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998), pp. 51–2 (emphasis in original).

¹⁰² Alexander García Düttmann, 'Never Before, Always Already: Notes on Agamben and the Category of Relation' (2001) 6(3) *Angelaki* 3, 4 (emphasis in original).

¹⁰³ Catherine Mills, 'Life beyond Law: Abandonment and Hope in Agamben and Coetzee' (2004, unpublished article, on file with author), p. 4.

continues that the 'status of the subject before the law of abandonment is one of absolute exposure, in which the subject of the ban is turned over to the law and simultaneously left bereft by it'.¹⁰⁴ This is an abandonment of Topsy Kundrilba, having 'signed' the form of consent, or having been-found-having-signed the form of consent.

Postscript

The effect of O'Loughlin J finding credible the oral evidence around the existence of the thumbprinted form, at the expense of the form, would not only be the undoing of a sequence of enmeshed priorities of the Western metaphysics of presence, it would also be a failure of the sovereign relation in the present. And this supplies what is missing from my analysis. I have not explained how, if the form is Voice, is sovereign relation and is summed up in the pronoun 'You', it is 'demonstrated' in the sense required by Agamben's account of the Aristotelian determination of the *proteousia*. Some demonstration, some taking hold of (or gesture towards) the non-linguistic would be required in order for the form-as-shifter to refer to sovereign discourse taking place. This demonstration is also called performance, and in law it is a display of 'capturing anomie',¹⁰⁵ or walking and transgressing a boundary between inside and outside the sovereign order. The application of these orders of priority to Topsy Kundrilba in her relation of abandonment and as a 'tribal Aborigine' is, then, a performance of the Anglo-Australian sovereignty.

¹⁰⁴ *Ibid.*, p. 5.

¹⁰⁵ Giorgio Agamben, *State of Exception* (trans. Kevin Attell, Chicago, 2005), p. 60.

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