"I Suspect You and Your Friends Are Trifling With Me":[1] Encounters Between The Rule of Law And The Ruled

Jeannine Purdy[2]

> trifle /'traIfl̩/, n., v., -fied, -fling. ...
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> -v.i. 5. to deal lightly or without due seriousness or respect (usu. fol. by with). 6. to amuse oneself or dally (usu. fol. by with). 7. to play or toy by handling or fingering (usu. fol. by with).[3]

The quote "I suspect you and your friends are trifling with me" is taken from the transcript of a High Court of Australia matter, *Walker v Speechley*, heard before Justice Mary Gaudron on the 17th of August 1998. Denis Walker, a Nunukul man from Stradebroke Island in Queensland, was seeking an order from the High Court that a criminal matter with which he had been charged

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1 *Walker v Speechley*, S133/1997 (17 August 1998), High Court of Australia Transcripts. I am indebted to Gerry Ygosse, who assisted in the presentation of Denis Walker's case, for highlighting this comment by Justice Gaudron. This paper was written for the "Colloquium Program: Positivism and Legal Theory in the End of the Century", Glebe Library, Glebe NSW, 2-3 December 1999, run through the Division of Law, Macquarie University, NSW. A shortened version was presented at the Law & Society Conference, Byron Bay Beach Club, Byron Bay NSW, 7-9 December 1999, run through the School of Law & Justice, Southern Cross University, NSW.

2 My thanks to Valerie Kerruish for editing this article and for much else. My thanks also to Ian Duncanson, Graham Holton, Jennifer Nielsen, John Touchie and Kathleen Walsh for your support and assistance. I can be contacted at jpurdy@ozemail.com.au.

3 The Concise Macquarie Dictionary, 1986.

be heard by a magistrate sitting with the Bundjalung Elders of the area in which the alleged offence occurred, in New South Wales.

The case raised jurisdictional issues both for Indigenous and Anglo-Australian law. The issue in Indigenous law arose because Mr Walker was a Nunukul man subject to the Minjerribah-Moorgumpin Elders of Stradbroke Island, but the alleged offence had been committed in Bundjalung country. Mr Walker had sought and obtained permission from the Minjerribah-Moorgumpin Elders to have his case settled by the Bundjalung Elders.[4] The jurisdictional issue in Anglo-Australian law arose because, in an attempt to have the matter decided in the High Court where the issue of recognition of Indigenous law could be considered, it was argued the matter concerned the recognition of Queensland law (the law of the Minjerribah-Moorgumpin) in New South Wales (Bundjalung country).[5] If successful this would have given the High Court the opportunity to consider the case as it would fall within section 118 of the Constitution. That section requires the laws of one state be given "full faith and credit" in every other state of the Commonwealth and gives jurisdiction to the High Court in inter-state matters.

It was when Mr Walker raised the proposal of being tried jointly by a magistrate sitting with the Bundjalung Elders who would exercise jurisdiction under Nunukul law, that Justice Gaudron stated she suspected him and his friends of "trifling" with her. The transcript reads:

> HER HONOUR: What do you want us to do, punish Mr Walker under Nunukul law as well as under New South Wales law?
> MR LINDON [A lawyer assisting Mr Walker]: That is what is set out in the application document, your Honour.
> HER HONOUR: That is where your argument is going, is it?

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4 Resolution of the Minjerribah-Moorgumpin Elders-in-Council 27th November 1993.

5 The argument was based on the assertion that *Mabo v The State of Queensland [No.2]* (1992) CLR 1 constituted the recognition at common law of Indigenous law, and as such Indigenous law now fell within the provisions of section 118. In general *Mabo [No 2]* confirmed that Indigenous law was not extinguished by the bare assertion of Anglo-Australian sovereignty or jurisdiction. In particular the majority judges considered specific state criminal laws which were enacted to make anyone occupying land other than through a grant of land from the Crown guilty of trespass. The court held these laws did not extinguish Indigenous groups' entitlement to occupy their lands under their own law. To quote Brennan J, the application of such criminal laws to "indigenous inhabitants who were or are in occupation of their land by right of their unextinguished native title" would be "truly barbarian" and could not have been intended. (at p.66).

> MR LINDON: That is right. I will let Mr Walker speak now, having joined the - - -
> MR WALKER: If you look at my letter to the Magistrate on the second page, you will see the second point I have made there, point 2, at the top of the page.
> 2. You adjourn the matter so a joint sitting of both Your Worship and the Bundjalung Elders-in-Council can fulfil the law and have the matter settled.
> That is essentially the argument, that in order for the courts to have proper legal jurisdiction - - -
> HER HONOUR: Now, how does that come into — I suspect you and your friends are trifling with me.
> MR WALKER: No, your Honour, this is a very serious matters as far as - - -[6]

Justice Gaudron eventually dismissed Mr Walker's application on the basis that even *if* Indigenous law was recognised as part of the common law of a state, it did not fall within the High Court jurisdiction because it was not part of the statutory law of a state. Interestingly Justice Gaudron insisted section 118 applied only to public Acts, records and judicial proceedings. The section actually reads:

> Full faith and credit shall be given, throughout the Commonwealth to *the laws*, the public Acts and records, and the judicial proceedings of every State (emphasis added).[7]

There is a striking dissonance in *Walker v Speechley*. The dissonance is not located in Mr Walker's proposal that he be tried by the combined jurisdiction of a magistrate and Bundjalung Elders. Certainly Mr Walker's proposal is innovative in the contemporary Australian context - but it is not unlike developments in Canada.[8] Moreover, Australian courts have previously formally recognised Indigenous Australians are subject to punishment under both Anglo-Australian law and Indigenous law.[9] (Although that recognition was of the punishment as a matter of fact and not as law.)

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6 *Walker v Speechley*, S133/1997 (17 August 1998), High Court of Australia Transcripts.

7 More recently this matter was re-heard before Justices Gummow and Hayne in the High Court. (*Walker v Speechley*, S129/1998 (18 June 1999), High Court of Australia Transcripts) The application was again dismissed on similar grounds: "That section [s 118] does not extend to rules which form part of the common law of Australia" per Gummow J.

8 Neil Löfgren, "Aboriginal Community Participation in Sentencing" (1997).

9 See, for example, *The Queen v Miyatatawuy* (1997) 2 Australian Indigenous Law

Nor is the dissonance located in Justice Gaudron's decision to dismiss, at least to the extent her refusal to recognise Indigenous jurisdiction, sovereignty and law has a long history in Anglo-Australian law.[10]

Even the apparent reason for her refusal is not particularly incongruous. Myths - or what in legal doctrine are known as "legal fictions" - are commonplace in Anglo-Australian law. (It is assumed section 118 can only apply to statutory law because it is accepted there is a unity of common law throughout Australia, although an examination of the common law in the various states would indicate this is not necessarily true.) And although "as a rule" words are to be given their ordinary meaning, this is not inevitably followed when interpreting the Constitution.

The dissonance which struck me is in the suspicions of a High Court judge that a man was "trifling" with her after he had struggled for years to obtain recognition of the joint jurisdiction of Anglo-Australian and Indigenous law over Indigenous Australians. As Mr Walker explained to the Court, and what would appear to be very obvious, is at least for him, "this is a very serious matter". That dissonance is amplified by the incongruity of Justice Gaudron's response with the views she expressed through the "unusually emotive" and "unrestrained" language of her decision, with Justice Deane, in *Mabo [No.2]*.[11]

In that case the Justices referred to "the conflagration of oppression and conflict" between the colonisers and Aboriginal inhabitants of Australia which "spread across the continent to dispossess, degrade and devastate the aboriginal [sic] peoples and leave a legacy of unutterable shame".[12] They also stated:

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain

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Reporter 85.

10 See, for example, *R v Jack Congo Murrell* (1836) 1 Legge Rep 72, *R v Wedge* (1976) 1 NSWLR 581, *Coe v Commonwealth* (1979) ALJR 403, *Walker v NSW* (1994) 182 45, *Coe v The Commonwealth* (The Wiradjuri Claim) (1993) 68 ALJR 110, contra. *R v Bon Jon* Unreported Decision of the Supreme Court NSW, Willis J (18 September 1841).

11 *Mabo v The State of Queensland [No.2]* (1992) CLR 1, to use Justices Deane and Gaudron's own description at p. 120. The majority judges in that decision overturned the doctrine of *terra nullius* as it had applied in Australia and for the first time recognised Indigenous Australians' (limited) entitlement to their lands.

12 *Mabo [No.2]*, above, n 11 at 104.

> diminished until there is acknowledgment of, and retreat from, those past injustices.[13]

On the basis of those views it might have been thought Justice Gaudron would be sympathetic to Mr Walker in his attempt to secure a reprieve both for Indigenous and non-Indigenous Australians from "a legacy of unutterable shame". Instead, Justice Gaudron thought she was being "trifled with".[14]

Theory as Liberatory Practice

In "Theory as Liberatory Practice",[15] Bell Hooks refers to Catherine MacKinnon's reminder that "we know things with our lives and we live that knowledge, beyond what any theory has theorized". Hooks states:

> Making this theory is the challenge before us. For in its production lies the hope of our liberation, in its production lies the possibility of naming our pain — of making all our hurt go away.

This article is about the documentation of pain, a possibility in naming it - and the hope of making the hurt go away, with something more liberatory in its place.

Because the concern is with that pain, this article deliberately records the details of "encounters" between the rule of law and the ruled to a degree which may be regarded as unconventional within academic work. Apart from anything else, it should not be assumed there is already a general awareness of the nature of the legal system in relation to those it oppresses. Of course there is already a whole literature in existence describing the legal oppression of Indigenous and other colonized peoples around the world,[16] but certainly the *practice* of law in Australia appears to be remarkably unaffected by it.

In addressing these issues, my focus has been on the nature of legal reasoning and I re-examine some familiar terrain for critical legal studies. In

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13 *Mabo [No.2]*, above, n 11 at 109.

14 See Valerie Kerruish & Jeannine Purdy, "He 'Look' Honest - Big White Thief" (1998) 4(1) *Law Text Culture* 146 for a discussion of how at the same time that the *Mabo [No. 2]* judgment recognises native title, it enables its extinguishment.

15 (1991) 4(1) *Yale Journal of Law and Feminism.*

16 For just a small sample of such works refer to the bibliography in Jeannine Purdy, *Common Law and Colonised Peoples: Studies in Trinidad and Western Australia*, Dartmouth, England, 1997.

doing so I have faced the problem of how my ambition to create a genre of critical writing that moves out of pain and practice can escape being perceived as theoretically unambitious, even "trite".

For a number of years I have not been particularly engaged with or by "the" academic debate. After completing a doctoral thesis, I was persuaded that as a non-Indigenous woman I needed to engage in a praxis with Indigenous Australians if I was to continue to write in this area.[17] And that praxis with the Indigenous Australians and other colonized peoples who I have worked with not only raised and continues to raise many interesting theoretical issues - but at the same made a great deal of academic debate *appear* out of touch and irrelevant.

Postcolonialism is one example of the divergence between contemporary academic debate and a perspective informed through praxis. My work with colonised peoples in Australia and Trinidad indicated that the idea of the "post-colonial" world did not accord with those people's experiences, which remained in many ways resonant with the kinds of colonization described by authors like Frantz Fanon and CLR James. In "Postcolonialism: The Emperor's New Clothes?" I argued there is a "locatedness" to theory such that, for example, Aijaz Ahmad's analysis of literature in India is likely to lead to different conclusions than my studies of law and economics in Western Australia and Trinidad.[18]

If the result of engaging in a praxis with colonized peoples has been I now find "the possibility of naming our pain" through engaging in a kind of conversation with the writings of someone like James Baldwin this is because I have tried to put into practice the lessons of relational, critical race and feminist theory. It is also because the current state of race relations in Australia has much in common with the pre-1963 race politics of the US,[19] and as such James Baldwin's early insights and writings for me at least possess a profound resonance not available in writings about ambiguity, fluidity, irony.

This view is informed by often-recited Australian/Western Australian demographics, which include: Indigenous life expectancy is 15 to 20 years less than the average; death rates in the 25-54 age group are 6 to 8 times

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17 Purdy, above, n 16.

18 First published in (1996) 5(3) *Social and Legal Studies* pp 405-426 and in *The Laws of the Postcolonial,* E Darian-Smith and P Fitzpatrick (eds) University of Michigan Press, USA, 1999.

19 Lerone Bennett, Jr, *Before the Mayflower: A History of Black America*, 5th ed, Penguin, New York, 1982.

higher than the average; rates of hospital admission are 2 to 3 times higher; hospital admission rates for conditions which are indicators of mental illness, such as self-harm, substance misuse and suicidal behaviour, are double the average; rates of death resulting from conditions which are indicators of mental illness are four times as high; in 1997 19% of the prison population was Indigenous; in 1996 40% of children in "corrective institutions" identified as Indigenous; school participation rates are well below the average; unemployment rates are 3 times the national average; and 42% of Indigenous families compared with 24% of all families, have no employed family members.[20]

It is important to clarify that, like Hooks, I am not here trying to assert any categorical differentiation between theory and praxis; thought and "reality"; activism and intellectualism. Rather my point is more prosaic: the nature of our engagement significantly impacts upon our thinking. In terms of responses to this article, for example, it may be correct to dismiss it as academically trite. After all - hasn't it all been said before? But as an explanation to the grandmother of one of the children whose death is recounted in this article for not telling her family's story, such a response is another version of the "sacrifice" of embodied and lived practice to something more removed which is found in legal reasoning.

This article does re-examine familiar terrain within critical legal theory. This re-covering of familiar territory shows that, yes, law sanitises and legitimates monstrous results; yes, law, or the rule of law, does not respond to people in the fullness of their being but, instead, treats them in limited and limiting legal categories, such as the category of "tenant". This has already been theorised - but nothing has changed. To the interrogation of this stasis I bring pain that I have "known" with my life and which I seek to share with readers through the use of narratives conveying something of the pain of encounters with law. My hope is to meet the challenge identified by Hooks: of making theory as a liberatory practice.

As a result this work may well strike readers as "out of place" within an academic context. It does not address conventional academic debates or issues. Issues which may loom large from other perspectives simply do not spring to mind when you know people whose children are not only killed by the form of reasoning accepted as "law" but which form of reasoning also makes those children's deaths no-one's responsibility. In that respect this

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20 Based on Australian Bureau of Statistics figures and quoted in Tenants Advice Service [Western Australia], "housing for all - a (sub)urban myth" Issues Paper, (November 2000).

work is a continuation of a deliberation about law which began for me years ago. In 1990 I worked for the Royal Commission into Aboriginal Deaths in Custody on the inquiry into the death of John Pat - a 16 year-old boy who died in a police cell after being beaten by off-duty police officers. When the Royal Commission report was released it exonerated the police officers of any deliberate violence, and the local newspaper announced the finding as "John Pat Death - No-one to Blame".[21] I was and remain preoccupied by the peculiar capacity of law to simultaneously be monstrous and to make no-one responsible.

And so I return to the beginning: how are Justice Gaudron's comments about Mr Walker "trifling" with her by raising issues of Indigenous self-determination reconcilable to her views in *Mabo [No 2]*? Perhaps it is simply that these comments indicate nothing more than that good intentions in the law can be fickle.[22] There is something more to legal reasoning and the form of positivist law which explains this apparent contradiction.

Before re-examining how legal reasoning works I want to set the context by fleshing out some more "encounters" between the rule of law and the ruled. These encounters explain my reference to the monstrousness of legal decision and involve legal decisions made by judges and administrators concerning their Indigenous "subjects". Due to the minority status of Indigenous Australians, it may be some would dismiss these encounters as therefore marginal or peripheral to the legal system. These encounters, because they are premised on the assertion of jurisdiction of Anglo-Australian law over Indigenous Australians, are foundational to the "rule of law" in this country.

It is in the starkness of these encounters that a monstrousness at the heart of that legal system is revealed - what Tenganekald woman, Dr Irene Watson, refers to as the *muldarbi*, the "killer of [Indigenous] law, land and people";[23] a monstrousness which also may still teach us all something about the form of our law, and about ourselves.

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21 See "Royal Commissions and Omissions: What was left out of the Report on the Death of John Pat" tabled in the Commonwealth Senate, Canberra, March 31, 1992 and published in (1994) 10 *Australian Journal of Law & Society* 37-66; and on the Deaths in Custody Watch Committee (WA) web site athttp://www.omen.net.au/~dicwc/purdy_paper.html.

22 See *Kruger* ((1997) 146 ALR 126) for an example of how "good intentions" at law constitute the racially based massive and government-sanctioned removal of children from their families and communities as something other than genocide. The significance of good intentions is discussed further at p.xviii.

23 I. Watson, "Power of the Muldarbi, the Road to its Demise" (1998) 11(28) *Australian Feminist Law Journal* 29.

Encounters

The Genocide Case - Nulyarimma v Thompson

The Genocide Case, *Nulyarimma v Thompson*, was in fact two matters heard together. The first concerned an attempt by a number of Indigenous people to have warrants issued for the arrest John Howard (the Prime Minister), Tim Fischer (then the Deputy Prime Minister), Brian Harradine (then a Senator) and Pauline Hanson (then a member of the House of Representatives). The ground asserted, broadly, was that the parliamentarians had committed the criminal offence of genocide through the enactment of the government's "Ten Point Plan" by amendments made to the *Native Title Act 1993* (Cth).

There was extensive publicity and debate about the amendments at the time of their proposal and passage through parliament. Dissatisfaction with the process and outcomes resulted in an application to the United Nations Committee on the Elimination of Racial Discrimination. The Committee found that the amendments were racist and that "the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities".

The second matter concerned a civil action against Robert Hill (Minister for the Environment), Alexander Downer (Minister for Foreign Affairs and Trade) and the Commonwealth of Australia. It was asserted the ministers and government had committed genocide by failing to apply to the UNESCO World Heritage Committee for inclusion of the lands of the Arabunna People (which include Lake Eyre) on the World Heritage List maintained under the World Heritage Convention. Significantly the lands of the Arabunna people are the location of the Western Mining Corporation's (WMC's) Roxby Downs, which includes the largest known uranium reserve in the world and the world's largest deposit of copper and gold. The South Australian government has granted WMC a special licence to extract 42 million litres of water *daily* from the Great Artesian Basin. This water is provided to the mine free of charge. Since WMC commenced its operations, springs in the region have declining water flows and some have ceased flowing all together.

The Roxby project involves some 1.5 million hectares in South Australia which has been made subject to what is known as an indenture agreement entered into by the South Australian Government and the mine developers. That agreement specifies that a number of State Acts are effectively overridden by the provisions of the indenture, and has meant, for example, information on environmental monitoring of the area can only be made

public if WMC is willing to reveal it. In 1998 the State government agreed to make the indenture area exempt from the provisions of the *Aboriginal Heritage Act 1998* (SA).

Central to the two matters argued in *Nulyarimma v Thompson*, both involving the assertion of genocide, was the continuing dispossession of Indigenous Australians from their lands.

In his judgment in the Genocide Case, Justice Wilcox commented:

> Anybody who considers Australian history since 1788 will readily perceive why some people think it appropriate to use the term "genocide" to describe the conduct of non-indigenes towards the indigenous population. Many indigenous Peoples have been wiped out; chiefly by exotic diseases and the loss of their traditional lands, but also by the direct killing or removal of individuals, especially children. Over several decades, children of mixed ancestry were systematically removed from their families and brought up in a European way of life. Those Peoples who have been deprived of their land, but who nevertheless have managed to survive, have lost their traditional way of life and much of their social structure, language and culture.
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> Not surprisingly, this social devastation has led to widespread (although not universal) community demoralisation and loss of individual self-esteem, leading in turn to a high rate of alcohol and drug abuse, violence and petty criminality followed by imprisonment and, often, suicide. Many (not all) communities suffer substandard housing, hygiene and nutrition, leading to prevalent diseases that are rarely experienced by non-indigenous communities. The result of all this, as numerous studies have demonstrated, is that indigenous Australians face health problems of a different order of magnitude to those of other Australians, leading to an expectancy of life only about two-thirds that of non-indigenous people.
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> ...
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> In the case of a dispossession of land and destruction of Peoples that occurred gradually over several generations and stemmed from many causes, it is impossible to fix any particular person

> or institution with an intention to destroy the Aboriginal people as a whole.
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> I mention the matter of intent to destroy an ethnical or racial group because it is something that may have been overlooked by those who instituted the proceedings now before the Court.

Justice Wilcox and two other judges of the Federal Court dismissed both genocide claims[24]

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Inquest into a death in Carnarvon, Western Australia, in June 1997

In 1992 a seven-year-old primary school student was alleged to have been choking two boys. He was taken away from school by two police officers. The police officers put the seven-year-old in a prison cell to teach him a lesson.

Since 1992 the boy was frequently suspended from school for assault and abuse, until his mother decided it was safer to keep him away. Keeping the boy away from school did not solve his problems.

On March 5, 1997, four police officers arrived at his home looking for the young boy for breaking a window. An officer was alleged to have assaulted him with a baton before taking him away.

On April 28, 1997, police saw the young boy carrying a desk lamp, 1994 calendar and a charger for a mobile phone. He was taken into custody

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[24] *Nulyarimma v Thompson* [1999] FCA 1192. See also: Garth Nettheim, "Native Title, Fictions and `Convenient Falsehoods'" (1998) 4(1) *Law Text Culture* 70, Greg McIntyre, David Ritter & Paul Sheiner, "Administrative Avalanche: The Application of the Registration Test under the *Native Title Act 1993* (Cth)" (April/May 1999) 4(20) *Indigenous Law Bulletin* 8, Karen Middleton, "Native title racist: UN" *The West Australian,* 20 March 1999, p 4, Megan Sunders, "Native title laws breach UN race rules" *Weekend Australian,* 20-21 March 1999, p 3, Heinz Schürmann-Zeggel, "UN CERD Committee recommends urgent Government action on Racial Discrimination" (April/May 1994) 4(20) *Indigenous Law Bulletin* 20, *Roxby Downs (Indenture Ratification) Act 1982* (SA), Mineral Policy Institute, *Glossy Reports, Grim Reality. Examining the gap between a mining company's social and environmental record and its public relations ... a case study of WMC Ltd*, Mineral Policy Institute, Sydney, Australia, 1998.
The case was recently taken to the High Court of Australia, where the appeal was dismissed. (*Nulyarimma & Ors v Thompson* C18/1999 (4 August 2000), High Court of Australia Transcripts) discussed further at p.67 below.

because an officer thought the lamp had been reported stolen – there was no such report.

On May 5, 1997 the young boy was "double dinking" on a bike and not wearing a helmet. He was taken in for questioning because an officer thought the bicycle had been reported stolen. There was no such report.

On May 9, 1997 the young boy was taken into questioning because he was wearing a cheap necklace which police thought was stolen. Police seized the necklace.

On May 23, 1997 during a busy street parade an officer grabbed the young boy because he had bumped into an elderly man and abused him. The officer thought there was a bench warrant for the boy's arrest, but there was no such warrant. In front of hundreds of people, police led the young boy to the police station. While he was there police charged the boy with burglary of a vacant house and he was given bail with a 7 p.m. curfew condition.

On June 3, 1997 the young boy and a cousin were play-fighting in the front garden of a house. They ran off and jumped a fence into another property. The boy was charged with two offences of being on premises without lawful excuse.

On June 6, 1997 the young boy went to football training and then to a roller-skating disco. His mother arrived to take him home because he was in breach of curfew. That night the boy hanged himself from the ceiling fan in his bedroom. He was 11 years old and Aboriginal.

The cheap necklace confiscated by police a month earlier was returned to the boy's family after his death.

The Coronial inquest recorded an open verdict - ruling that the boy was probably too young to appreciate the consequences of his actions.

There was no finding as to whether others were responsible for their actions, although the Carnarvon Police stated that the suicide was "something you could not expect or plan for", it was a tragedy which could not have been foreseen. *The West Australian* newspaper reported the tragedy offered "a final ray of hope", including that police would now consider not using batons when apprehending children.[25]

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[25] Refer to Roy Gibson, "Boy's sad end to life of trouble" *The West Australian*, September 18, 1999, p 15, WA Coronial Inquest findings, *Western Australia, Record*

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Deaths in Custody Watch Committee Address, John Pat Memorial, September 1999

On Christmas Day, 1998, prisoners at Casuarina Prison, the high security male prison in Western Australia, rioted after prison numbers reached critical levels. A prison visitor observed the aftermath: prisoners suffering from black eyes, deep lacerations around the ankles (caused by rope hobbles) and lacerations caused by batons or by prisoners having their heads bashed against the walls. The visitor was barred from the prisons after attempting to photograph the injuries. The prison visitor also noted increased use of restraints since the riot including shackles, hobbles, body belts and a device which prisoners call the Hannibal Lector bed, which she described as an instrument of torture.

A lock-down commenced the day after the riot, on Boxing Day. The lock-down consisted of prisoners being confined to cells which, although designed for one, often held two prisoners. Prisoners were confined to these cells for between 22 and 26 hours, allowed outside their cells (but not into the yards) for only an hour and then returned for another 22 to 26 hours. For over half of the prisoners incarcerated at Casuarina that regime continued for more than ten months after it was imposed.

There was also the use of isolation cells. Prisoners are moved to isolation cells by what is known as a "cell extraction". This is described as a procedure by which four to six prison officers rush a prisoner in his cell, the prisoner is slammed face down on the floor, kicked, hit with fists and batons, maced, gagged, stomped on, his feet tied so tightly that the prisoner's flesh is cut, handcuffed, a body belt is applied around the upper abdomen and lower chest and pulled so tight the prisoner is barely able to breath. He is then pulled to his feet and run to the punishment area, where his clothes are cut-off and he is left naked and shackled in the isolation cell. In the isolation cells there is no access to daylight, telephones or visitors. In areas such as the Special Handling Unit of Casuarina prisoners are held in bare cells and forced to eat every meal sitting on the floor because no furniture is permitted in the cell.

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of Investigation Into Death, Ref. No. 48/99, 16 September 1999; Roy Gibson & Mairi Barton, "Tragedy offers a final ray of hope", *The West Australian*, September 18, 1999, p 15.

Many of those who were held in isolation had never been charged with any offences arising out of the prison riot. Some of those who were charged continued to be held in isolation cells but all of the non-Aboriginal prisoners who were charged were released back to the mainstream prison regime. All of the prisoners who continued to be held in the Special Handling Unit at Casuarina in relation to the riot, and whether they had been charged, were Aboriginal.

It was reported by the Deaths in Custody Watch Committee that prison suicides in Western Australia were occurring at the rate of about one per month. The incidents of self-harm - "slashing-up" - had risen dramatically and never more so than in Casuarina Prison. Answering criticisms made by the State Ombudsman about the treatment of prisoners, including being deprived of sunlight for almost a year, Peter Foss, then Attorney General for Western Australia, stated the lockdown "was not intended as a punishment", but was "intended as a protection for prison officers".[26]

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"Bridgewater Crescent", Background Briefing, ABC Radio National, November 1995

The interview concerned an Aboriginal woman who was a tenant of Homeswest, the state public housing commission of Western Australia. The woman had been in a relationship for 15 years with an Aboriginal man, a member of the stolen generations. The relationship was a violent one and the woman asked Homeswest for a transfer. Although the woman was no longer living with her partner, the man had broken into her home repeatedly and beaten her. The woman could no longer lock her home. Neighbours petitioned Homeswest to evict the woman and her children.

> GREG JOYCE (Executive Officer Homeswest): The allegations were many, but it was primarily in respect of anti-social behaviour: fighting, swearing in front of old people, young children and all sorts of other anti-social behaviour that became known to the street. In fact I had one of the complainants who'd

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26 Refer to Kath Mallott, "Deaths in Custody Watch Committee (WA) Address", John Pat Memorial, September 28, 1999, Old Fremantle Prison, 7:00 p.m. ABC Television News, Perth WA, 18 November 1999, Ombudsman (WA), *Annual Report 1999,* Chris Manly, "Casuarina cuts riot risk", *The West Australian,* November 27, 1999, p 14. A report concerning the treatment of prisoners was taken by the Deaths Watch Committee to the United Nations Committee against Torture and other Forms of Cruel, Inhuman and Degrading Treatment or Punishment in November 2000.

> been a um... in public service for 30 years [in fact a retired police officer] come to me in desperation and give me a tape of a big blue that had occurred in the tenancy the night before. Now we investigated it, we confirmed it with the police and as a consequence of that we took action against the tenant. Ultimately she vacated under the pressure of the eviction action and is now residing in other Homeswest with her mother and I might add in a lot better circumstances.
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> HELEN THOMPSON (Interviewer): Do you still have her on your books?
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> GREG JOYCE: Yes and ultimately she's still housed by Homeswest and always will be. I mean the reality is Homeswest will never evict her...

In fact, the woman was not living with her mother, due to overcrowding of her mother's home, but was often homeless. The woman's baby, who was born just prior to the eviction, subsequently died, homeless. Homeswest eventually evicted the woman's mother for nuisance arising from the overcrowding of her home, leaving her with no alternative but to live in a garden shed.[27]

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The Power of the Rules of Law

So what do we have here? A judge who concedes that on the basis of the history and the contemporary statistics on Indigenous Australians it can be "readily perceived" why people think there has been genocide in Australia - but he dismisses this as genocide because no-body meant it. An eleven-year-

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27 Refer to: Interview, Background Briefing "Bridgewater Crescent", ABC Radio National, 26 November 1995, Hannah McGlade & Jeannine Purdy, "From Theory to Practice: Or What is a Homeless Yamatji Grandmother Anyway? Joan Martin v. Homeswest" (1998) 11 *Australian Feminist Law Journal* 135, *Martin v State Housing Commission (Homeswest),* decision of the Equal Opportunity Tribunal of Western Australia, July 25, 1997, *Martin v State Housing Commission (Homeswest),* SJA 1115 of 1997, 18 March 1998, *State Housing Commission (Homeswest) v Martin,* APPEL FUL 45 of 19998, 7 December 1998.
The High Court refused Mrs Martin special leave to appeal. Justice Kirby (somewhat incredibly) ruled that the Tribunal's finding that Mrs Martin had acted as "a mother" and not an Aboriginal person was a finding of fact and not law, therefore effectively precluding an appeal. (*Martin v State Housing Commission* P1/1999 (6 August 1999), High Court of Australia Transcripts).

old boy who is hounded by police until he takes his own life but this was "unforeseeable" and there is - after all - the spark of hope that police will consider not using batons to arrest children. A prison which is filled with suicide and self-mutilation - and Aboriginal prisoners who were kept for almost a year in conditions of deprivation and degradation that are hard to imagine exist and are sanctioned by a government in Australia today. But this is not intended as a punishment - only as a protection of the law's enforcers. A woman who is evicted with her children, including a newborn baby, from her public housing home because the noise made while she was being subjected to serious domestic violence offended her neighbours - because she was judged "anti-social".

"In accordance with the law"

Perhaps the *Genocide Case* provides a clue as to why these encounters are rendered acceptable. Justice Merkel states:

> ... the Court's role is to hear and determine, in accordance with law, controversies arising between parties. It is not within the Court's power, nor is its function or role, to set right all of the wrongs of the past or to chart a just political and social course for the future.[28]

A similar position was adopted by the High Court during the hearing of an application for special leave to appeal the *Genocide Case*. After a barrister had presented the case on behalf of other appellants, Isobell Coe of the Ngarrandjeri people sought to represent herself and her husband at the hearing. The following exchange occurred:

> KIRBY J: What is the substantive thing you want to say to the Court?
>
> MS COE: Well, we want to say that, you know, this war against our people has to end.
>
> KIRBY J: Yes, but –
>
> MS COE: It has been an undeclared war for 212 years.
>
> KIRBY J: Well, this is a Court [sic] of law. We are obliged to conform to the law and there are some very complicated legal

28 [1999] FCA 1192, at par 62.

> questions which are before the Court... Now, is there anything else you want to say relevant to those issues? We cannot fix up every issue in the country. We can only deal with the matters that are before the Court.
>
> MS COE: Well, I appreciate that but someone has to help us stop the genocide in this country against Aboriginal people. Now if we cannot get justice here in the highest Court of this country, then I think that this Court is a party to genocide as well.
>
> GUMMOW J: No, we will not hear that sort of thing.[29]

According to the judges, they only act in accordance or conformity with the law. They "cannot fix up every issue in the country" - in fact if they are implicated in what is happening in their own country, they will not even "hear that sort of thing". This "rule by law and not be men" is not then just a nonsense: it does confer a powerful immunity from responsibility. While the notion of judges simply determining controversies "in accordance with the law" may act to deflect criticism and provide self-justification for judicial officers, as it ignores the interpretive and discretionary content of the rules, there is also another sense in which it is true. There is a particular process which is mandated by the application of rules. And it is in this process that those who implement or administer "the law" are granted immunity from accounting for their decisions.[30]

Familiar territory

As a starting point it is clear that rules rely on simplification - no two incidents, no two people are exactly the same in every respect. To apply a rule to different incidents and to different people necessarily means that only some issues or facts will be considered relevant and others will be ignored. It is the legal process of simplification, of omitting differences, that explains the power of a legal system which is thought of as constituted by a rule-based system. Rules become the expression of the impartiality of the law – "rule by law and not be men [sic]". And the process of applying legal rules

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29 *Nulyarimma & Ors v Thompson*, C18/1999 (4 August 2000), High Court of Australia Transcripts, p 15.

30 Except sometimes being held accountable to those located higher in the legal hierarchy. While in legal doctrine the legal and administrative decisions of all but the highest court is always, at least to some degree, subject to review, in practice few people have the resources to challenge legal and administrative decisions. As a result "the law" is often as it is implemented by primary decision-makers.

requires that all those who are subject to them be judged not as the law finds them, as they are, but as if they are the same in relevant respects.[31] This is the construction of what is known as the legal subject and is fundamental to the procedural right of "equality before the law".[32]

As its advocates emphasise, there is undoubtedly something attractive about this; something that resonates as a counterpoint to arbitrariness, despotism, nepotism and discrimination and as a positive acknowledgment of the fundamental equality of value of each human being. The same quality of legal equality or impartiality also may be characterised as indifference, impersonality - an indifference that can extend to genocide unless it is constructed within the terms of the "very complicated legal questions" which will be "heard" by a court.

In trying to understand this paradox of impartiality and indifference located in the idea of legal equality my focus has been on the writings of James Baldwin, the African-American novelest and essayist. Baldwin was not particularly concerned with legal relations but principally with race relations in the country of his birth. For him, law was just one of the means manipulated in the contradictions between "the necessity of the American white man [finding] a way of living with the Negro in order to be able to live with himself" and the denial of the "[black man's] human reality, his human weight and complexity". A denial "of the overwhelmingly undeniable" which, according Baldwin, "forced Americans into rationalisations so fantastic that they approach the pathological".[33]

Although Baldwin's language is dated by the use of "Negro" and masculine pronouns and collectivities; although his preoccupation is with North American attitudes to a colonised but not an Indigenous people; although aspiring to be "an honest man and a good writer",[34] and not a legal theorist; in my view Baldwin has striking insight into how Western culture works, perhaps gained from his status as "a kind of bastard of the West".[35] It is also

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31 See Watson, "Power of the Muldarbi, the Road to it's Demise" for a discussion of the dangers of an equality which is understood as sameness, above n23.

32 "[T]he kind of procedural equality envisaged by the rule of law" was regarded as so fundamental by Justice Dawson in *Kruger* he held it was the *only* right which was beyond the sovereign power of parliament to destroy; in his view genocide was not beyond the parliamentary power. ((1997) 146 ALR 126, at 158).

33 "Stranger in the Village" [1953] *Notes of a Native Son*, Penguin Books, England, 1995, p 163.

34 "Autobiographical Notes", [1964] *Notes of a Native Son*, above n 33, p 16.

35 "Autobiographical Notes", above, n 34, p 14.

my view that relying upon Baldwin's insights to inform a critical analysis of legal reasoning can and does bring new understanding.

When looking at the application of legal rules to Indigenous peoples in Australia, an imperative has been to "white" or blank out history in the guise of "equality" of the legal subject. In this, an assimilationist predisposition is manifest.[36] Baldwin writes:

> Nothing has succeeded in making [the black face] exactly like our own, though the general desire seems to be to make it blank if one cannot make it white. When it is blank, the past is thoroughly washed from the black face as it has been from ours, our guilt will be finished - at least it will have ceased to be visible, which we imagine to be much the same thing.[37]

Interestingly Baldwin does not believe this "blanking out" can be successfully executed. He continues:

> But paradoxically, it is we who prevent this from happening; since it is we, who, every hour that we live, reinvest the black face with our guilt; and we do this - by a further paradox, no less ferociously - helplessly, passionately, out of an unrealised need to suffer absolution.

The paradoxical reinvesting of "the black face" with our guilt and the ferocious "unrealised need to suffer absolution" provides an alternative basis for analysing the dissonant dynamics of legal decisions such as *Mabo [No.2]* and the *Genocide Case*.

The injustices of rule-based judgment of individuals is as well known to critical legal thinking as its benefits are recognised within conventional legal thinking. The ambivalent harvest of "legal equality" is proportional to the degree of separation between those who are constructed as legal subjects. In the context of such enormous a divide as exists in Australia there is

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36 Even where an Indigenous identity is specifically recognised by law, as in the law of native title, a similar process is at work. See Kerruish & Purdy, above, n 14, pp 161-162: "Re-clothed by the law, 'native' peoples are only those Aboriginal and Torres Strait islander peoples who can display a continuing connection with their land, only those whose law has not been 'washed away'. Because the focus is limited to the issue of 'continuing connection', and not the context in which that connection was maintained - or not - a great deal of the particular history of aboriginal groups is excluded from the history of this nation."

37 "Many Thousands Gone" [1951], *Notes of a Native Son*, above n 33 1995, p 30.

undeniably something of value in the idea each person should be treated the same irrespective of his or her race, power, privilege or wealth. Paradoxically, there is also something terribly malignant in ignoring the substantial differences between people and the benefits or disadvantages those differences carry with them.

The leaching of colour, of difference, in the liberal dream is, in Baldwin's terms:

> ...addressed to those among us of good will and it seems to say ...we will join hands and walk together into that dazzling future when there will be no black or white. This is the dream of all liberal men, a dream not at all dishonourable, but nevertheless, a dream. For, let us join hands on the mountain as we may, the battle is elsewhere. It proceeds far from us in heat and horror and pain of life itself where all men are betrayed by greed and guilt and blood-lust and where no-one's hands are clean. Our good will, from which we yet expect such power to transform us, is thin, passionless, strident: its roots, examined, lead us back to our forebears, whose assumption it was that the black man, to become truly human and acceptable, must first become like us.[38]

For Baldwin the colourless liberal dream may be well intentioned, honourable, but it is incapable of fighting the battle. Far from "the heat and horror and pain of life", perhaps good will is enough - but when the pain of living is overwhelming good intentions are not enough.

Rules and responsibilities

My instinct is that the complacency of those satisfied by their good intentions is not sufficient to explain the power of the rule and rules of law. I return here to the trite point in critical legal thinking that legal process categorises parties to a dispute as legal subjects and then applies the relevant rules. Trite perhaps - but also apparently incapable (so far) of delivering those enmeshed in legal reasoning from its machinations. In relation to the previous example of the woman who was evicted: as a tenant, it was not relevant noises which constituted the so-called anti-social behaviour taped by a neighbour were the sounds of her being terrorised and bashed. As a tenant, the complex gender, racial and historical issues which resulted in these episodes of violence were not relevant. As a tenant it was not relevant

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38 "Many Thousand Gone", above, n 37, p 47.

she was Indigenous and unlikely to obtain any other accommodation, so was effectively being made homeless. As a tenant, it was not relevant she had a newborn baby, whose health would be seriously jeopardised by being made homeless. As a tenant what was relevant was she had contracted to comply with a rule not to permit "anti-social behaviour" on the rental premises.

This brings me to another familiar insight in critical legal theory - individual responsibility is a lynch pin of legal reasoning. Crucially what is at issue is the responsibility of *the legal subject.*[39] It is this technique, which converts a victim of domestic violence into a "tenant", which makes her responsible for the "anti-social behaviour" of "permitting" a nuisance on her rental property and upsetting her neighbours.

Significantly it is not only the parties to litigation who are constructed as legal subjects and held responsible as such. The same is true of the legal decision-makers. In the persona of a judge or administrator, the legal decision-maker's responsibilities extend only to what is owed *the legal subject* they judge. Their responsibility is confined to the application of proper legal process, so that their decisions must not be based on irrelevant considerations - of history, social context or personality except as sanctioned by law. Judges and administrators are not held responsible for the concrete consequences of their decisions, no matter how predictable these would otherwise be.

Again, examples may best explain my point here. The behaviour of police is assessed in terms of their responsibilities to a suspect - not a child. The behaviour of prison officers is assessed in terms of their responsibilities to prisoners - not men. The behaviour of housing authorities is assessed in terms of their responsibilities to tenants - not women and children. In the result, if a child is driven to suicide, if men are driven to self-mutilation, if a woman or her children become homeless and die; and if these processes are multiplied throughout an ethnic/racial group so it is understandable people might think it was genocide they would still be wrong. The suicide, the self-mutilation, the death and what would otherwise be genocide are neither intended nor foreseen.

Baldwin wrote:

> Most people are not naturally reflective any more than they are naturally malicious, and the white man prefers to keep the black at a certain human remove because it is easier for him thus to

[39] Kerruish and Purdy, above, n 14, p 150.

> preserve his simplicity and avoid being called to account for crimes committed by his forefathers, or his neighbours.[40]

The power of the rule of law is that it enables - indeed requires - decision-makers to keep the ruled "at a certain human remove" by constructing them as legal subjects. Significantly, the decision-makers' responsibility for legal decisions is limited to only those consequences which are intended or foreseeable *for the legal subject.*

Beyond legal discourse and legal practice, people of course do not exist within the neat categories ascribed to them as legal subjects. And it is embodied individuals, not legal subjects, who are condemned to bear the actual consequences of legal decisions in all their multiplicity. The particular triumph of law is it renders those actual consequences unforeseeable, unintended - so "no-one is to blame".

Conclusion

The question is: who is trifling with whom? The argument before Justice Gaudron included a complex technical construction which was designed to meet the constitutional requirements enabling the case to fall within the High Court's jurisdiction.[41] Perhaps Justice Gaudron could not take seriously the complexities of Indigenous jurisdiction, with Mr Walker, a Nunukul man, seeking to be tried by the Bundjalung Elders of the area in which the alleged offence occurred. Maybe it was beyond Justice Gaudron's comprehension that what is known in legal doctrine as a conflict of laws issue could apply and be resolved through Indigenous peoples' laws. But if arrogant and racist assumptions can provide an explanation they hardly provide an excuse. And for all its complexity in establishing the High Court jurisdiction in the matter, I can assure you it was a serious if unconventional argument.[42] Admittedly it was seeking to extend the law to enable it to be "used" by the ruled. But perhaps this is finally what Justice Gaudron suspected. And this, of course, is to invert - even pervert - the legal process.

Justice Wilcox in the *Genocide Case* states:

> Many of us non-indigenous Australians have much to regret, in relation to the manner in which our forebears treated indigenous

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40 "Stranger in the Village", above, n 33, p 157.

41 Refer to n 5.

42 Since I developed the argument.

> people; possibly far more than we can ever know. Many of us have cause to regret our own actions.[43]

If it is the ruled who are to be trifled with - handled and fingered according to the rule of law, then the outcomes may be sincerely regretted, but the law and its enforcers are not responsible and there is nothing that can be done.

Baldwin, who understood so well the dynamics of "human separation", states:

> ... it protects our moral high-mindedness at the terrible expense of weakening our grasp on reality... and anyone who insists on remaining in a state of innocence long after that innocence is dead turns ... into a monster.[44]

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43 [1999] FCA 1192, at par 8. Jean-Paul Sartre, in his "Preface" to Fanon's *Wretched of the Earth* (trans. Constance Farrington) Penguin Books, London, 1990, p 23) writes: "A few years ago, a bourgeois colonialist commentator found only this to say in defence of the West: 'We aren't angles. But we, at least, feel some remorse.' What a confession!"

44 "Stranger in the Village", above n 33, p 165.