

COMMISSIONING THE TRUTH

ANNE ORFORD*

This Article was originally written as an invited contribution to a workshop on Gender and Transitional Justice organized by the International Centre for Transitional Justice. My particular assignment for that workshop was to write a discussion paper which addressed the key category of “truth.” The idea of truth has a particularly potent role to play in the world of transitional justice. For many scholars and practitioners in this field, uncovering the truth is understood as a vital task, both at an individual and at a collective level. At the individual level, truth-telling is presented in therapeutic terms, as a means of healing those who have been wounded by the violence of civil war, revolution, or despotism. At the collective level, establishing the truth of a contested history is understood as a necessary basis for moving forward as a nation and creating the conditions for a viable, shared life. The title of this Article indicates a certain distance from this vision of the ends of truth. In particular, the word “commissioning” is there as a reminder. Throughout, this Article makes visible the institutional conditions and productive effects of the commissioning of truth. Testimony or speech becomes part of commissioned truth through institutional mediation—through the institutions of language, of the state, and of liberal internationalism. How should we try to understand what takes place when an international body, a state, or a private organization seeks to write the truth of history? How should we understand the situation of the subject who is called upon to speak her truth in such a context? What does the act of writing a commissioned truth bring into being? What does the commissioning of an official truth mean for the addressees of such performances?

* Professor of Law and Director of the Institute for International Law and the Humanities, University of Melbourne. My thanks for their comments on this Article to the participants at the Gender and Transitional Justice Workshop, convened by the International Centre for Transitional Justice, Rockefeller Foundation Bellagio Study and Conference Center, March 2005, and at the International Studies Association Workshop on The Art of Security: The Relationship of Sex and Gender to Peace and Conflict, Hawaii, March 2005, and particularly to Sheila Meintjes and Kath Weston. I am very grateful to Helen Kinsella, Vasuki Nesiah, and Marysia Zalewski for organizing and inviting me to take part in such engaged and productive feminist events, and to Megan Donaldson for invaluable editorial assistance.

Much critical literature on the current international enthusiasm for the establishment of international criminal courts, war crimes tribunals, and truth commissions in fact does focus on the conditions of production of truth in an institutional context. This literature argues that the juridification of the post-conflict, post-revolutionary, or transitional situation must be understood as part of a broader attempt to create a new world order of liberal democracies in which politics is forever deferred and history comes to an end. Indeed, my initial posture towards the appeal to “truth-telling” in situations of charged international intervention was one of skepticism. My earlier work had explored the arrival of human rights as a justification or alibi for military intervention during the 1990s.¹ In writing on post-conflict reconstruction, I had sought to explore the way in which economic restructuring, exploitation, and management was enabled by humanitarian intervention, particularly in Bosnia-Herzegovina and Timor L’Este. I had wanted to understand how it was that the presence of agents of global market integration alongside the militaries of powerful nations and their corporate investors could be interpreted, so straightforwardly, as benevolent and charitable. This research shaped my response to the post-Cold War project of globalizing transitional justice. My first reaction was to read appeals to truth with an assumption that their address to an audience of liberal internationalists might work to mask ways in which states undergoing “transition” were also being produced as reliable subjects of the capitalist democratic order. At the same time, the operation of transitional justice mechanisms would ask the inhabitants of these countries to articulate their needs, desires, losses, hopes, revolutionary ambitions, and so on in the name of a universal humanitarianism. Yet is the arrival of human rights, here in the form of transitional justice institutions, always accompanied by a particular form of restructuring of the subject? Can the process of internationalization be understood as a simple unity with all its operations coordinated to achieve one set of interests?

In order to address these questions, this Article attempts to suspend judgment about the viability and desirability of the project of producing an official truth through the institutions of transitional justice. More particularly, it seeks to escape the choice between universalism (the notion that transitional justice institutions record the truth of the nation’s history) and skepticism (the notion that there is no one truth available or that it is not possible to establish an impartial account of the past). In order to do so, the Article explores the telling of truth in this kind of institutional context as a

¹ ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003).

performance. Thus, in what is perhaps a perverse turn at the beginning of an Article about the concept of truth, I want to declare that my interest here will not be in whether the reports produced by institutions of transitional justice (war crimes trials, truth commissions) are true or false. Much of the critical engagement with the texts produced by such institutions treats language as “an instrument for transmitting *truth*, that is, an instrument of knowledge, a means of *knowing* reality.”² Language informs, communicates, or describes. Those who criticize the effects of such institutions along these lines are interested in asking whether this truth commission report, or that war crimes judgment, succeeded or failed to establish the truth of events, or more generally whether it is ever possible for the institutions of transitional justice to establish such a truth effectively. According to this view, “what is at stake in an utterance is its correspondence—or lack of correspondence—to its moral reference, that is, its truth or falsity.”³ This Article takes a different view of language. It engages with the texts of such institutions in terms of their performative effect. To focus on the performative aspect of language is to suggest that language involves “*acting* on the interlocutor, modifying the situation and the interplay of forces within it.”⁴ Language acts, does, or accomplishes. In this sense, language cannot be “qualified as true or false, but rather quite specifically as *felicitous* or *infelicitous*, successful or unsuccessful.”⁵ As I will suggest below, much of the literature supporting the work of truth commissions focuses on this question of the success of such commissions at achieving ends such as reconciliation, peace, justice, or a successful transition to democracy. While I also adopt this focus on what the language of truth does or fails to do, my interest here is in exploring the utterances of truth commissions as performances which accomplish the reconstitution of a unified nation and a liberal state.

Finally, in order to avoid an overly generalized assumption about the effects of transitional justice, the Article focuses on one truth commission held in Australia during the 1990s. The choice of an Australian example allows me to write from a position of critical intimacy rather than critical distance—I am better placed to address the effects of truth

² SHOSHANA FELMAN, *THE SCANDAL OF THE SPEAKING BODY: DON JUAN WITH J. L. AUSTIN, OR SEDUCTION IN TWO LANGUAGES* 13 (2003).

³ *Id.* at 14.

⁴ *Id.*

⁵ *Id.*

commissions on political life, collective memory, and national identity when writing about a situation involving my community. Thus, the Article involves the close reading of a report produced by the Australian Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.⁶ This report, released in 1997, was the outcome of an inquiry into the harms done to the “stolen generation” of children forcibly removed by the Australian state during the twentieth century. According to *Bringing them Home*, “between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. . . . In that time not one Indigenous family has escaped the effects of forcible removal”⁷ Attention to this Australian example of the genre of truth commission reporting unsettles the assumption that massive human rights violations are an exceptional problem confronting states in transition from authoritarianism or dictatorship to democracy. *Bringing them Home* documents the everydayness and bureaucratization of genocide and of massive human rights violations in the liberal democratic state within which I live.

Part I of the Article offers an overview of the role that “truth” plays in transitional justice literature. As I have suggested so far, much of the literature oscillates between an idea of the truth as something that can be definitively produced or revealed through the institutionalized process of truth commissions or war crimes trials, and a skeptical approach to truth which points to the partial view of history which is inevitably produced when the past is judged and that judgment inscribed in an official report. A third strand in the literature focuses less on the truth or falsity of the history

⁶ HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM’N, *BRINGING THEM HOME: NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES* (1997) [hereinafter *BRINGING THEM HOME*]. While the inquiry was not described as a truth commission, it did fit the generally understood meaning of “an official investigation into a past pattern of abuses” or an instance of “official truth-seeking, where past horrors are publicly documented and investigated by a special commission.” PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS* 3, 23 (2001). While Hayner treats the Australian inquiry as an example of a “historical truth commission” involving a present-day government commissioning an inquiry into “abuses by the state that took place many years earlier (and that ended years earlier),” the separation of Aboriginal and Torres Strait Islander children from their families is a practice that is very much part of the current child welfare and law and order (or “juvenile justice”) agenda in Australia. *Id.* at 17. This is documented in *BRINGING THEM HOME*, *supra*, at 425-597.

⁷ *BRINGING THEM HOME*, *supra* note 6, at 37.

produced through processes of transitional justice, and instead is concerned with these processes as performances. The language of truth is assessed by these commentators, not in terms of whether or not it accurately describes a given event or history, but rather in terms of what it makes possible, brings into being, or does in the world. I suggest that this mode of analysis can be understood in terms of speech act theory—the idea that particular words or utterances accomplish an act. I draw on this approach to think more generally about what it is that the truth of transitional justice brings into being.

Part II develops this approach to analyzing the effects of commissioning the truth through a reading of *Bringing them Home*. This report can be understood as an attempt to accomplish multiple ends and to make real a series of subjects. In my reading, I trace the ways in which this performance is organized around notions of home, family, debt, inheritance, and faith.

Part III considers the questions of responsibility that are raised by the Australian example in particular and by the project of transitional justice more generally. The moment of truth, like any ritualized moment in a nation's life, reaches back to the past and seeks to be responsible to the human rights victim, and reaches to the future and the community that this ritual seeks to bring into being. Yet the practice of transitional justice also involves a responsibility to those whose testimony is solicited and whose speech or silence may make unanticipated claims.

I. JUDGING HISTORY, WRITING TRUTH

Truth is fundamental to the establishment of transitional justice institutions. This position is powerfully expressed in the introduction to the *Report of the Chilean National Commission on Truth and Reconciliation*:

The truth was considered as an absolute, unrenounceable value for many reasons: In order to provide for measures of reparation and prevention, it must be clearly known what it is that ought to be repaired and prevented. Further, society cannot simply black out a chapter of its history, however differently the facts may be interpreted. The void would be filled with lies or with conflicting versions. The unity of a nation depends on a shared identity, which, in turn, depends largely on a shared memory. The truth also brings a measure of social catharsis and helps to prevent the past from reoccurring. . . . But although the truth cannot really in itself dispense justice, it does put an end to many a continued injustice—it does not bring the dead back to life, but it brings them out from silence; for the families of the “disappeared,” the

truth about their fate would mean, at last, the end to an anguishing, endless search⁸

Transitional justice literature treats the recording of truth as necessary for commencing the healing of individuals and of the community. The public recognition of injustice is seen as a necessary condition for restoring the dignity of the individual, while “[f]acing the truth of its past is a necessary condition to enable a wounded community—a community of perpetrators and victims—to recreate the conditions of viable social life.”⁹ The appeal to truth may be an attempt to move outside the economy of “one death in exchange for another,” to reconcile the past and move into a better future.¹⁰ While this Article focuses particularly on the work of truth commissions, one of the justifications for the establishment of war crimes tribunals is equally that such trials can provide an opportunity for victim-witnesses to speak for themselves and for a history of past events to be recorded.¹¹ Truth, then, offers an agreed and shared basis upon which to move forward as a nation. The ends of transitional justice (peace, reconciliation, healing, national unity) require that the institutions of the state take responsibility for recording and documenting the events, causes, conditions, nature, and extent of acts of genocide and human rights violations. More particularly, the institutions of transitional justice must form “the country’s fragmented ‘collective memory’ into a shared national history.”¹² This production of the truth about a shared national history will involve an act of judgment. “This will not be a history of bare facts but, at a crucial level, a history judged, and thus shaped, according to norms of universal human rights.”¹³ The

⁸ José Zalaquett, *Introduction to NAT’L COMM’N ON TRUTH AND RECONCILIATION*, 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (1993), reprinted in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1221-24 (2d ed. 2000).

⁹ Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 4 (2002) [hereinafter Koskeniemi, *Between Impunity*].

¹⁰ Marjorie Agosin, *The Generation of Disenchantment*, 14 HUM. RTS. Q. 135, 140 (1992).

¹¹ Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT’L L. 151, 152 (2004).

¹² Mark Sanders, *Ambiguities of Mourning: Law, Custom, and Testimony of Women Before South Africa’s Truth and Reconciliation Commission*, in LOSS 77, 79 (David L. Eng & David Kazanjian eds., 2003).

¹³ *Id.*

material upon which such a collective judgment of history will be based includes testimony of victims, perpetrators, witnesses and bystanders, and documentary evidence of state practices.¹⁴

The desirability of recording and judging the facts of a shared history is one of the justifications for the conduct of war crimes trials. As Martti Koskenniemi argues, international criminal law is often represented as “an instrument of truth and memory.”¹⁵ The importance of war crimes trials has been held to lie less in the punishment of individuals than in “establishing the truth of the events”¹⁶ and “establishing an impartial account of the past.”¹⁷ This goal is even more clearly articulated in the context of truth commissions. According to commentators such as Martha Minow, the aspirations of producing a meaningful record of the past and of enabling healing are better met by the methods of truth commissions than by criminal prosecutions. Truth commissions are able to draw on a broader range of evidentiary material than is available to a court, and are able to widen the focus of their inquiries from the actions of particular individuals to “the role of entire sectors of society . . . in enabling and failing to prevent mass violence.”¹⁸ In turn, the gesture of providing a sympathetic and serious hearing in an official setting allows “individuals . . . to tell their stories to someone who listens seriously and who validates them with official acknowledgement.”¹⁹ “When the work of knowing and telling the story comes to an end, the trauma then belongs to the past; the survivor can face the work of building a future.”²⁰ This therapeutic impulse extends to the nation as well as the individual victim. Truth commissions “can help set a tone and create public rituals to build a bridge from a terror-filled past to a

¹⁴ *Id.*

¹⁵ Koskenniemi, *Between Impunity*, *supra* note 9, at 4.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 5.

¹⁸ Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 235, 239 (Robert I. Rotberg & Dennis Thompson eds., 2000).

¹⁹ *Id.* at 241.

²⁰ *Id.* at 244.

collective, constructive future.”²¹ Through instituting such processes, “a state attempts to reconstitute itself through the work of public mourning.”²²

This goal of facilitating healing for individuals requires accepting their testimony as the truth. For example, the processes of the South African Truth and Reconciliation Commission (TRC) were designed to enable victims to feel safe while they told “their stories before sympathetic listeners” and to assist in “documenting atrocities and locating individual trauma in the larger political context.”²³ In the context of a history in which the state and its legal institutions were the purveyors of terror and human rights abuses, this required a distancing of the TRC from the legacy of apartheid law.

To create such trust, the TRC tried to present its hearings with a tone of caregiving and a sense of safety. This meant departing from the neutral and remote tone of a court. Where courtrooms carry memories of repression and indifference, a truth commission carries the burden of creating an immediate sense of a different, welcoming setting. The Human Rights Committee of the TRC particularly avoided giving chilling reminders to victimized people of the hostility and insensitivity of the courts under apartheid. Its task was to treat those who testified about human rights abuses as persons to be believed, rather than as troublemakers or even people with a burden to prove their stories.²⁴

Thus, unlike the approach to testing the truth adopted in an adversarial or inquisitorial legal proceeding, truth commissions adopt a posture of faith towards the testimony of victims. Commissions often require witnesses to swear an oath or make an affirmation, and thus to promise to tell the truth. Yet truth commissions tend not to subpoena witnesses, instead typically hearing testimony from witnesses who have come forward voluntarily or in response to the promise of amnesty for crimes committed. As noted above, truth commissions generally do not engage in cross-examination, at least not of victims of human rights violations. Such inquiries do not have power

²¹ *Id.* at 253.

²² Yvette Christiansë, *Passing Away: The Unspeakable (Losses) of Postapartheid South Africa*, in LOSS, *supra* note 12, at 377.

²³ Minow, *supra* note 18, at 246.

²⁴ *Id.* at 246.

to prosecute or jail people and cannot enforce their recommendations.²⁵ Where courts of law treat “all historical accounts as *prima facie* of equal value” and reach the truth only through an adversarial process,²⁶ commissions trust the testimony of witnesses. The “victim-centered approach” of commissions involves “collecting thousands of testimonies and publishing the results of their findings in a public and officially sanctioned report,” which “represents . . . the first sign of acknowledgement by any state body that their claims are credible and that the atrocities were wrong.”²⁷

Commissioners themselves do not base their authority on a strong notion of impartiality or objectivity. As one judge in South Africa commented of Archbishop Desmond Tutu, Chair of the TRC: “Tutu cries. Judges don’t cry.”²⁸ The institutions and representatives of the state are reoriented towards witnessing rather than producing the suffering of the victims of state terror. The elements of this transformation are captured well by Martha Minow:

When a democratic process selects a truth commission, a people summon the strength and vision to say to one another: Focus on victims and try to restore their dignity; focus on truth and try to tell it whole. Redefine the victims as the entire society, and redefine justice as accountability.²⁹

This necessary reorientation means that, for some, the quality of the truth finally produced is suspect. Much of the critical engagement with the practice of transitional justice has worked in this constative register—the register of truth and falsity. Perhaps the most commonly expressed criticism of the role played by war crimes tribunals and truth commissions is the extent to which they are capable of producing an agreed truth or collective memory. In one sense, this is a question about the authority of such institutions and about the technologies available to them for writing the truth. Truth commissions generally do not make use of, or have available, the techniques for guaranteeing the truth that are part of national legal

²⁵ HAYNER, *supra* note 6, at 16.

²⁶ Koskeniemi, *Between Impunity*, *supra* note 9, at 5.

²⁷ HAYNER, *supra* note 6, at 16.

²⁸ Minow, *supra* note 18, at 247.

²⁹ *Id.* at 251.

systems or traditions. Rather, truth commissions are specifically created to “transcend the limitations of the courts.”³⁰ Thus, while such institutions are usually creatures of the state, their impermanence and lack of judicial technologies means that there is less of a sense that the state is able to guarantee the truth produced in quite the same way that it can guarantee the truths produced in the writing of legal judgments.³¹

While supporters of truth commissions see in this flexibility a strength,³² for others, often including those in political opposition to the new regime, the lack of traditional process detracts from the credibility of the truth produced. To give one example, again taken from the South African context:

When former president Frederik W. de Klerk withdrew his cooperation with the TRC, he cited what he perceived to be unequal treatment; he claimed he had been badgered and disbelieved in his testimony while ANC [African National Congress] officials who testified about their misconduct had not been probed or seriously questioned. Some observers objected that the entire TRC operated as a political witch-hunt designed to discredit the former National Party government.³³

According to this critique, because the truths produced by such institutions are irreparably partial, the process comes closer to that of a “show trial” or the production of “victors’ justice” than a way of achieving true justice. The ability to name what counts as truth is an effect of power, and the search for truth thus signals the likelihood of injustice being done to those without such power. In the context of war crimes trials, Martti Koskenniemi argues that “[t]he ‘criminalization’ of international politics,

³⁰ Richard A. Wilson, *Justice and Legitimacy in the South African Transition*, in *THE POLITICS OF MEMORY* 190, 191 (Alexandra Barahona de Brito, Carmen González-Enríquez & Paloma Aguilar eds., 2001).

³¹ In domestic legal systems, the removal of ambiguity through the writing of facts and determination of relevance is part of the practice of judgment, and the state stands as guarantor of the truth produced. See Nina Philadelphoff-Puren & Peter Rush, *Fatal (F)laws: Law, Literature and Writing*, 14 L. & CRITIQUE 191, 201 (2003).

³² HAYNER, *supra* note 6, at 16 (“Yet despite the more limited legal powers of truth commissions, their broader mandate to focus on a pattern of events, including the causes and consequences of the political violence, allows them to go much further in their investigations and conclusions than is generally possible in any trial of individual perpetrators. Indeed, the breadth and flexibility of a truth commission are its strength.”).

³³ Minow, *supra* note 18, at 251.

whatever else it may achieve, also strengthens the hand of those who are in a position to determine what counts as ‘crimes’ and who are able to send in the police.”³⁴ It is simply not possible to produce a meaningful truth about complex and contested political events, or for such institutions to establish “an impartial account of the past.”³⁵ The initial political decisions made in establishing the terms of reference for an official inquiry, truth commission, or ad hoc war crimes tribunal always frame the nature of the truth to be produced. Decisions about what time period, kinds of actors, or forms of behavior will be the focus of an inquiry influence the nature of the truth produced. In the case of regimes that replace dictatorships or that come to power after a period of armed conflict, such decisions must often be made during a period of peace negotiations or before the new government accedes to power.

Alongside the local truths about human rights abuses in particular countries, the transitional justice literature itself inscribes a broader truth about the nature of genocide and massive human rights violations. The literature gives the sense that large-scale human rights violations are exceptional, so that mechanisms to address them take place in a state of transition from apartheid, dictatorship, or communism to liberal democracy. The focus is not on genocide or human rights violations in liberal democratic states. Truth commissions offer the means to respond “to years of barbarism run rampant, of horrific human rights violations that occurred while countries were caught up in racial, ethnic, class, and ideological conflict over justice and power.”³⁶ They “generally are created after a totalitarian/authoritarian regime has been succeeded by a democratic one,”³⁷ or where “democratic transitions take shape after a period of repressive rule.”³⁸ Such inquiries thus serve a function in the move “toward more participatory government expressing ideals of democracy, power bounded

³⁴ Martti Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, 2 J. INT’L CRIM. JUST. 810, 825 (2004).

³⁵ Koskenniemi, *Between Impunity*, *supra* note 9, at 5.

³⁶ Henry Steiner, *Introduction to Truth Commissions*, in HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM & WORLD PEACE FOUNDATION, TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT (1997), *reprinted in* STEINER & ALSTON, *supra* note 8, at 1217.

³⁷ Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE, *supra* note 18, at 3.

³⁸ HAYNER, *supra* note 6, at 10.

by law, formal legal equality, and social justice.”³⁹ The establishment of transitional justice institutions “has become more common in a world informed by the powerful ideals of the international human rights movement,” part of the forward march of international liberalism.⁴⁰ Despite the fact that “modernity quickly demonstrated that it has a dark side—mass destruction, extreme cruelty, and genocide,”⁴¹ we can still hope that “the plight of indigenous peoples will improve in an era of globalization as nation-states are increasingly reorganized along more pluralist lines.”⁴² As Koskenniemi argues in his analysis of the Milosevic proceedings:

It often seems that the memory for which the trial in the Hague is staged is not the memory of Balkan populations but that of an “international community” recounting its past as a progress narrative from “Nuremberg to the Hague,” impunity to the Rule of Law. This “community” would construct itself in the image of a “public time” (in analogy with “public space”) in which it would contemplate its past and give a moral meaning to disasters such as Rwanda or Srebrenica as implying a promise of a radiant future.⁴³

Equally, the transitional justice literature gives a sense that human rights abuses are an internal problem, to be solved by better governance, reconciliation within the nation-state, and so on. Linked to this focus on particular types of states as the sites of mass human rights violations, we also see in the reports of truth commissions a focus on local actors. This fits within the broader “imaginative geography” of modern international humanitarianism.⁴⁴ According to this cartography, the international community is absent from the scene of violence and suffering until it intervenes as a heroic savior. In order to reinscribe that which is erased by this cartography—the presence of the international community and its

³⁹ Steiner, *supra* note 36, at 1219.

⁴⁰ *Id.*

⁴¹ Alexander Laban Hinton, *The Dark Side of Modernity: Toward an Anthropology of Genocide*, in ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 1, 8 (Alexander Laban Hinton ed., 2002).

⁴² *Id.* at 10.

⁴³ Koskenniemi, *Between Impunity*, *supra* note 9, at 34 n.105.

⁴⁴ ORFORD, *supra* note 1, at 82-125. See also EDWARD W. SAID, ORIENTALISM 49-73 (1991) (discussing the “imaginative geography” of Orientalism and its representations).

representatives at the scene of violence—transitional justice institutions would need to include in their reports the role of international institutions and agencies in countries prior to the outbreak of violence, ethnic cleansing, or genocide. José Alvarez makes a similar point about the way in which international lawyers understand the Rwandan genocide.⁴⁵ Alvarez argues that, for international lawyers, the problem of genocide is defined in state-centric terms; the mass atrocities committed in Rwanda are seen to have resulted from the combination of actions of “state actors who violated fundamental norms of civilized behaviour” and “the failure of other government actors to respond.”⁴⁶ The crimes committed in Rwanda, and by implication the causes of those crimes, are treated as “aberrant or exceptional deviations from the norms of interstate behaviour.”⁴⁷ In this telling, genocide and massive human rights violations become exceptional, a thing of the past to be confronted and moved beyond. The focus on quotidian acts that produce the violence of a system like apartheid, or (as I will argue in Part II) of a liberal democratic state such as Australia, disappear from sight.⁴⁸

The argument that the texts of transitional justice bring into existence truths that cannot be guaranteed and that can (and in some cases should) be contested, does not exhaust what such texts do or perform in the world. A second strand of critical engagement with the work of transitional justice focuses on the performative effects of war crimes trials or truth commissions, and in particular on the ability to achieve the ends claimed for them—individual healing, collective reconciliation, the recording of history. This literature focuses on the success or failure of such processes in achieving the ends of healing, reconciliation, or justice. In the context of South Africa, for example, some commentators have argued that the TRC increased racial tensions.⁴⁹ Many commentators—including, it should be

⁴⁵ José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 370 (1999).

⁴⁶ *Id.* at 370-71.

⁴⁷ *Id.* at 369.

⁴⁸ See Minow, *supra* note 18, at 260 (arguing that the TRC's “charge to investigate gross violations of human rights may prove too narrow to encompass the degradations and humiliations of the pass system, the relocation of homes, and the oppressive living and working conditions of blacks and coloured persons under apartheid”).

⁴⁹ See Rotberg, *supra* note 37, at 19 (citing an AC Nielsen-Market Research Africa survey published in 1998, which found that “two-thirds of the South Africans asked believed that the TRC's investigations had led to a deterioration of race relations”).

noted, the authors of many truth commission reports—point out that reconciliation depends as much upon ending the threat of further violence, addressing structural inequalities, and providing reparation as it does upon the acknowledgement of the truth.⁵⁰ Others who are concerned with individual healing suggest that there is no reason to think that the experience of testifying before such a commission will necessarily have a therapeutic effect.⁵¹ A number of commentators note that these inquiries “are hardly a healing process for those actually responsible for seeking out the truth.”⁵²

In the next Part, I want to explore further this question of what is brought into being or performed at the “moment of truth.” I will develop this through a reading of one such report, produced by the Australian Human Rights and Equal Opportunity Commission, *Bringing them Home*.⁵³ As I suggested in my introduction, this reading will draw on the distinction between constative and performative utterances developed in the influential work of J. L. Austin.⁵⁴ Austin describes a performative utterance such as “I promise,” “I do,” or “I name this ship,” as one that accomplishes an act. “By speaking, by pronouncing these words, I produce the *event* that they

⁵⁰ See HAYNER, *supra* note 6, at 6; Minow, *supra* note 18, at 253. This was noted in TRUTH AND RECONCILIATION COMMISSION, 6 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, at 3 (2003), available at <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf>.

⁵¹ As Sanders, *supra* note 12, at 78, notes of the South African context, “[m]any victims have come forward. Some find the process helpful. Other do not: recalling and re-enacting old traumas is not of benefit to all.” See also BRINGING THEM HOME, *supra* note 6, at 19 (Dr. Jane McKendrick, of the Victorian Aboriginal Mental Health Network, advised the Australian inquiry into the separation of children from their families: “I know people who have become extremely distraught at the thought of this inquiry, because a lot of people psychologically have put that—a lot of what happened—to the back of their minds. Something like this inquiry, where it is expected that you will tell your story, means that it comes to the front of their minds, even if they do not want it to. I have had over the past few weeks, as the inquiry has become closer, many people getting in contact with me, some who are giving evidence, some who are not, who have been very, very distressed.”).

⁵² HAYNER, *supra* note 6, at 6 (reporting that many staff and commissioners of such inquiries often show signs of severe stress and trauma). Both Hayner and Martha Minow comment on the experience of administrative staff who are responsible for collating data and typing up transcripts, noting that they are the most strongly affected by the information. See Minow, *supra* note 18, at 247.

⁵³ BRINGING THEM HOME, *supra* note 6.

⁵⁴ J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

designate.”⁵⁵ Yet having introduced the distinction between constative and performative utterances, Austin then unsettles this distinction by suggesting that performatives may also be implicit. In other words, a constative utterance that explicitly sets forward a statement of fact, such as “Beware of the Dog,” can be translated into a performative utterance, such as “I warn you that this dog bites.”⁵⁶ At the very least, speaking always seeks to make real the being who affirms or declares—I am the promise of any such constative statement. In reading the truth commissioned by the Australian government, I want to explore the ways in which this report produces a “we” that promises, and in so doing attempts to reproduce the institutions of family, nation, state, and economy.

II. HOME TRUTHS

In August 1995, the Attorney-General of Australia requested that the Human Rights and Equal Opportunity Commission launch an inquiry into the separation of Aboriginal and Torres Strait Islander children from their families. This was in response to demands from key Indigenous agencies and communities concerned “that the general public’s ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services.”⁵⁷ Under the Terms of Reference, the Commission was to “trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies.”⁵⁸ The Commission was also directed to examine the adequacy of services and procedures available to people affected by such separation; the principles relevant to determining the justification for compensation for those affected; and whether current laws, practices, and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children complied with the principle of self-determination.⁵⁹

The Attorney-General directed the Commission “to consult widely among the Australian community, in particular with the Aboriginal and

⁵⁵ FELMAN, *supra* note 2, at 7.

⁵⁶ *Id.*

⁵⁷ BRINGING THEM HOME, *supra* note 6, at 18.

⁵⁸ “*Terms of Reference*,” in *id.*

⁵⁹ *Id.*

Torres Strait Islander communities.”⁶⁰ Over the course of the next year, hearings were conducted in every capital city and many smaller regional centers. The Inquiry heard testimony, both in public and in private confidential sessions, from Indigenous organizations and individuals, church representatives, Commonwealth and state government representatives, foster and adoptive parents, and former mission and government employees, and took written submissions from individuals and organizations.⁶¹ The Inquiry process adopted the posture of faith or trust in the evidence of witnesses discussed above. The authors note that “throughout the report we have remained faithful to the language used by the witnesses quoted.”⁶² This process is explicitly distanced from that of the legal trial:

The nature of the Inquiry process and of the information sought and provided meant that evidence and submissions could not be tested as thoroughly as would occur in a courtroom. This applies to all the evidence. Indeed, as this report indicates, much supporting evidence including records has been destroyed. . . . We carefully report what we have heard so that the community generally will know the different perspectives on what has occurred.⁶³

The tenderness with which this state institution reports and recounts intimate stories of dispossession, of homelessness, and of terrible loneliness is in marked contrast to the ways in which other officials, legal institutions, and bureaucrats have responded to this suffering, both in the past and today.⁶⁴ The adoption of this posture towards those giving evidence was designed to allow them a new relationship to the state, and to enable healing.

⁶⁰ *Id.*

⁶¹ *Id.* at 21. The report notes in particular that 535 Indigenous people gave evidence orally or in writing of their experiences of the removal policies.

⁶² *Id.* at 20.

⁶³ *Id.*

⁶⁴ See, e.g., *id.* at 276 (quoting James Isdell, WA travelling protector, 1909: “I would not hesitate for one moment to separate any half-caste from its aboriginal mother, no matter how frantic her momentary grief might be at the time. They soon forget their offspring.”). This quote conveys the chilling encounter between the confidence of bureaucratic rationality and the experience of grieving mothers and children.

The *Bringing them Home* report was released in April 1997. It concluded that

between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time not one Indigenous family has escaped the effects of forcible removal.⁶⁵

The report named these practices as genocide and documented both the terrible effects on children of separation from their mothers, institutionalization, abuses, denigration, and separation from the Indigenous community, and the consequences of removal for the family and community left behind. It made a wide-ranging series of recommendations relating to matters including reparations, provision of services for those affected, and adoption of new policies in the areas of child welfare, family law, and juvenile justice to halt contemporary separations.⁶⁶ The text was widely read, with sixty thousand copies purchased in the first year of its release alone.⁶⁷ An emotional response to the text was widespread—the publication of this report, after the Commonwealth government had changed (and the official climate for its reception had become much chillier), led to an outpouring of public sentiment.⁶⁸

⁶⁵ *Id.* at 37.

⁶⁶ Almost none of those recommendations have been complied with by the Commonwealth Government.

⁶⁷ John Bond, *Time To Say Sorry To 'Stolen Generations,'* FOR A CHANGE, Feb./Mar. 1998, available at <http://www.forachange.co.uk/index.php?stoid=60>.

⁶⁸ The effects of the Inquiry and BRINGING THEM HOME on Australian political life are ongoing. The effects—both positive and negative—could be seen to include: the refusal of the federal government to issue a formal apology as recommended by BRINGING THEM HOME; the issuing of apologies by many other public entities including state parliaments, churches, universities, and missions; the establishment by the general public of a Sorry Day in 1998 to remember the Indigenous children taken from their families, with over half a million Australians signing “sorry books” made available for signature and taking part in ceremonies to mark Sorry Day; the initiation of a sustained challenge to the writing and teaching of this history of genocide by the federal government (Prime Minister John Howard attacked the “black armband view of history”), and the federal government’s disbanding of the Australian and Torres Strait Island Commission (ATSIC), a body which represented Indigenous groups at the federal level. See Australian Human Rights and Equal Opportunity Commission website, <http://www.hreoc.gov.au/bth/resources/index.htm> (discussing the political and public responses to BRINGING THEM HOME). See also Angela Pratt & Scott Bennett, *The End of ATSIC and the Future Administration of Indigenous Affairs*, 4

A. Telling the Truth

On the cover of *Bringing them Home*, a photograph called "Story Time" depicts an Aboriginal woman and a young child clapping hands and smiling beside a body of water lit pink and orange by a glorious sunset. On the inside cover page, written across this same sunset, is the opening dedication, which names the report as a tribute, an acknowledgement, an act of remembering, and a lament:

This report is a tribute to the strength and struggles of many thousands of Aboriginal and Torres Strait Islander people affected by forcible removal. We acknowledge the hardships they endured and the sacrifices they made. We remember and lament all the children who will never come home.⁶⁹

This movement between the peace of homecoming and the grief of loss structures *Bringing them Home*.⁷⁰ Indeed, many of the quotes taken from testimony to the Inquiry reflect this sense of movement, or of a journey:

Just as there are many homes, there are many journeys home. Each one of us will have a different journey from anyone else. The journey home is mostly ongoing and in some ways never completed. It is a process of discovery and recovery, it is a process of (re)building relationships which have been disrupted, or broken or never allowed to begin because of separation.⁷¹

The report is productive because of this sense or idea it gives of movement. It is at once disruptive of the traditions of thinking about the nation and the state that had existed, at least officially, until its publication, and at the same time recuperative, containing the movement that might result. The testimony provided by the witnesses to the Inquiry provides the material for this reconstruction of the Australian state as one that has listened "with an

PARLIAMENT OF AUSTRALIA PARLIAMENTARY LIBRARY CURRENT ISSUES BRIEF (2004), available at <http://www.aph.gov.au/library/pubs/CIB/2004-05/05cib04.htm> (discussing the abolition of the Aboriginal and Torres Strait Islander Commission).

⁶⁹ BRINGING THEM HOME, *supra* note 6.

⁷⁰ Sangeetha Chandra-Shekeran, *Challenging the Fiction of the Nation in the 'Reconciliation' Texts of Mabo and Bringing Them Home*, 11 AUSTRL. FEMINIST L.J. 107, 127 (1998).

⁷¹ BRINGING THEM HOME, *supra* note 6, at 233 (quoting Link-Up (NSW) submission 186).

open heart and mind to the stories of what has happened in the past and, having listened and understood, commits itself to reconciliation.”⁷² The state is envisaged as something artificial, existing across time. Witnesses are called upon to give evidence in the name of this empty universalism. In addition, another entity is constructed through this narrative, that of the nation in the stronger romantic sense. This affective nation is also under construction in this process of imagining a journey home.

So in one way, the report is disruptive of the racist ideology of the colonial state of Australia. The colonial state was built upon the cartographic notion that every race could be sorted properly into its own place with Indigenous people segregated on missions and under the control of Protection Boards.⁷³ Those who were of “mixed descent” were to be “merged” or “assimilated” into the non-Indigenous community.⁷⁴ Yet this orderly system was always impossible, and this impossibility and the anxiety it produced in those who imagined themselves as white was at stake in the practices of separation documented in the report. Bureaucrats and missionaries were concerned with maintaining racial purity. While in South Africa this function was performed by the Immorality Squad, in Australia it was performed by the Chief Protectors and child welfare agencies who removed children described as “half-caste” and so on.⁷⁵ Intimate relations between Aboriginal and non-Aboriginal people were thus punished. Yet this only complicated the attempt to maintain strict racial boundaries. Adopted children had to be taught that they were “white”—yet if whiteness could be taught, what did that mean about its reality?

⁷² *Id.* at 3.

⁷³ *Id.* at 27-29. See Christiansē, *supra* note 22, at 376 (arguing that, in post-apartheid South Africa, “what is at issue is a sense of location or even the desire to possess a place. Apartheid placed everything with a cartographer’s desire for fixity. Everyone was caught up in its fantasy, came to believe that there was a place (apart) for them. Yet, in the question of identity, there can never be the fixity of a place.”).

⁷⁴ See generally BRINGING THEM HOME, *supra* note 6, at 29-35.

⁷⁵ *Id.* at 28-33. Most Australian states had, by the early twentieth century, established a “protectorate system” as a means of governing Indigenous people. Governments assigned the power to control Indigenous people, and responsibility for their welfare, to a Chief Protector or Protection Board. In some states and the Northern Territory, the Chief Protector was made the legal guardian of all Aboriginal children, displacing their parents. Protectionist legislation was enforced by “protectors,” usually police officers. Over time and with variations between states, the dominant policy shifted from segregation, through “merging” and “absorption,” to “assimilation,” all involving the movement of Indigenous people onto reserves and the removal of Indigenous children from their families.

A sense of loss is recounted over and over again throughout the report. Racist ideology and policy inflicts this loss both by marking Aboriginality as negative and pathological and by destroying Indigenous communities and families and dispossessing individuals of their inheritance (language, culture, spirituality, land). For those people who suffered both losses—either through having their children taken from them, or through being raised as white but finding out later that they were Indigenous—the effect of being made to sacrifice relations of love, community, and solidarity because of their marked position as other was extremely traumatic:

All the teachings that we received from our (foster) family when we were little, that black people were bad . . . I wanted my skin to be white.

. . . .

I remember my Aunty, it was her daughter that got taken. She used to carry these letters around with her. They were reference letters from the white fellas in town . . . Those letters said she was a good, respectable woman . . . She judged herself and she felt the community judged her for letting the welfare get her child . . . She carried those letters with her, folded up, as proof, until the day she died.⁷⁶

Throughout the report, the solution to the losses inflicted by these official policies is the return to a safe home, a community of solidarity, and love of family. Home is explicitly named in terms of Aboriginality:

Going home is fundamental to healing the effects of separation. Going home means finding out who you are as an Aboriginal: where you come from, who your people are, where your belonging place is, what your identity is. Going home is fundamental to the healing process of those who were taken away as well as those who were left behind.⁷⁷

The narrative moves from a sense of boundaries transgressed through official and private acts of desire, violence, love, and sacrifice, and of a

⁷⁶ *Id.* at 157 (quoting confidential evidence 132, Victoria: woman fostered at ten years in the 1960s), 213 (quoting Link-Up (NSW) submission 186) (omissions in the original).

⁷⁷ *Id.* at 233 (quoting Link-Up (NSW) submission 186).

resulting network of obligations between the inhabitants of the nation, towards a vision of stable families in which all are sorted back into their proper places and all debts are paid. Many of the report's recommendations focus on the recovering of links with Aboriginal communities. While *Bringing them Home* seeks to make racism a thing of the past, its solution to these racist practices is in part to propose an ordering back into categories, ensuring that everyone has gone home. The question that haunts the report is: can we be sure where home is? For example, some texts about reunion tell of the realization of our deepest longings to have a home that is perfectly our own. As with the image on the cover, these stories of loss and recovery are often figured around the maternal body:

When I first met my mother—when I was 14—she wasn't what they said she was. They made her sound like she was stupid, you know, they made her sound so bad. And when I saw her she was so beautiful. Mum said, "My baby's been crying" and she walked into the room and she stood there and I walked into my—I walked into my mother and we hugged and this hot, hot rush just from the tip of my toes up to my head filled every part of my body—so hot. That was my first feeling of love and it could only come from my mum. I was so happy and that was the last time I got to see her. When my mum passed away I went to her funeral, which is stupid because I'm allowed to go see her at her funeral but I couldn't have that when she requested me. They wouldn't let me have her.

....

When I was 20 years old I was reunited with my mother for the first time shortly before she died. I suppose I had a natural curiosity to meet and know her. I had an urge to see my mother and when I met her she said, "I knew you'd come". I didn't know at this stage I was Aboriginal. My mother was the first Tasmanian Aboriginal person I had met. A few of my natural siblings were with her. I still haven't met some of my natural siblings.⁷⁸

But many people do not find themselves at home in their newly recovered identity or community. The text is haunted by the stories of children who cannot go home:

⁷⁸ *Id.* at 156 (quoting confidential evidence 139, Victoria: removed 1967; witness's mother died two years after their first and only meeting), 236 (quoting confidential evidence 314, Tasmania).

I didn't know any Aboriginal people at all—none at all. I was placed in a white family and I was just—I was white. I never knew, I never accepted myself to being a black person until—I don't know—I don't know if you ever really do accept yourself as being . . . How can you be proud of being Aboriginal after all the humiliation and the anger and the hatred you have? It's unbelievable how much you can hold inside.

. . . .

[Y]our siblings . . . your family—you can never get it back once you've lost it. The people are there, yes, but you can never get it back.

. . . .

I have no legal claim to come back here. I can't speak on the board of management, I'm not a living member out here on this mission. What right have I got to speak out here? And this is the way that a lot of the Aboriginals living on this mission see me—as a blow-in, a blow-through. Yet I've got family that are buried out here on the mission . . . and I have no rights. As an Aboriginal I don't have any rights out here.⁷⁹

In the overall movement of the report and the focus of its recommendations, there is little attention paid to the implications of the many testimonies to the impossibility of recovering that which has been lost as a result of these genocidal practices and of colonialism in general. The effect of this is to present a particular vision of Aboriginality within the Australian nation:

[The] internal inconsistencies within the generic structure of 'home' and Aboriginality are not addressed by the Report, instead it pushes forward in quest for rehabilitation and closure. By suppressing the ambivalent nature of 'home', the Report indirectly authorises the state's mechanisms for redress and recuperation, and translates the wider principles of universal emancipation into the sphere of the individual. Those Aboriginal people who are 'brought home', such as the iconic image of child

⁷⁹ *Id.* at 200 (quoting confidential evidence 152, Victoria), 238 (quoting confidential evidence 321, Tasmania), 207 (quoting confidential evidence 207, Victoria: man whose mother was removed from Lake Tyers as a child; mother buried at Lake Tyers) (omissions in the original).

and mother/family clapping hands on the beach presages, represent the authentic face of public Aboriginality that the nation-state will accommodate. Others, who remain hyphenated subjectivities, unable to forge an all-encompassing alliance with either the Aboriginal or non-Aboriginal communities, become 'problem cases' that the state cannot liberate and hence cannot begin to define.⁸⁰

My uneasiness with the narrative is perhaps because, for those readers who are not Indigenous, there is an unwritten complement to this sense of home. This is that non-Indigenous Australians also have a home, a place apart. Indeed, this sense of two distinct communities was mobilized by the newly-elected conservative Australian government in its response to the report. According to Prime Minister John Howard, whose government was elected in 1996 (and has been re-elected twice since then, most recently in 2004), the Commonwealth government owed no apology for these separation policies because "Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control."⁸¹ In the media, Howard insisted: "I do not believe that the current generations of Australians should formally apologise and accept responsibility for the deeds of an earlier generation."⁸² The report explicitly sought to derive these obligations from international law binding the sovereign state of Australia. It notes that the international legal obligation to make reparation "passes from the violating government to its successors until satisfaction has been made."⁸³ Howard's persistent invocation of familial rather than legal language works overtly to refuse the notion that obligations or debts can be inherited from earlier generations. It also works implicitly to affirm that these ancestors of John Howard and of those he represents are not Aboriginal or Torres Strait Islanders. The slippage in language between that of the family (generations) and that of the state (governments) marks this mapping of whiteness with nation-building. "Now, I think the notion of a formal apology by this generation, this Government, in relation to the acts of earlier generations, I don't think that

⁸⁰ Chandra-Shekeran, *supra* note 70, at 129-30.

⁸¹ The Hon. John Howard MP, Opening Address to the Australian Reconciliation Convention (1997), available at <http://www.austlii.edu.au/au/other/IndigLRes/car/1997/4/pmspoken.html>.

⁸² THE AGE, June 20, 2001.

⁸³ BRINGING THEM HOME, *supra* note 6, at 280.

it is appropriate.”⁸⁴ Thus the nation is descended from white forefathers. And perhaps more importantly, in terms of guarding against the threat posed by the suggestion of an intimate relation with the colonized other, there is no miscegenation, no confusion of boundaries between us and them, black and white, in such an accounting of our inheritance. I know who my ancestors are, Howard seems to declare, and so I can know for sure what I inherit from them. This responsibility belongs not to us but to our parents, our *white* parents.

B. Inheritance, Debt and the Production of Kinship

Yet *Bringing them Home* tells another story of kinship and family. It does this in two registers, the economic and the aesthetic. Economic language recurs persistently throughout the report: in discussions of the failure to pay the wages of the children who were sent to work as farm-hands or domestic servants⁸⁵ and the treatment of children as if they were in a slave market by prospective foster parents or employers;⁸⁶ and in the repetition of themes of the lost inheritance of children and the reparations owed by the state.⁸⁷ Indeed, the colloquial name for this document amongst the Australian public is “the Stolen Children” report. The very gesture of having faith or trust in the testimony of Indigenous witnesses itself works in the register of debt. As John Forrester has written, to place one’s faith in the writing or speech of another, to place one’s trust in another, is to place the other in one’s debt.⁸⁸ “One must give [the other] the benefit of the doubt—and extend this seemingly charitable act indefinitely.”⁸⁹ As I discuss below, this charity is repaid by the use that the Inquiry makes of this material to produce a coherent vision of the past and the future for the nation.

⁸⁴ Interview by Howard Sattler with the Hon. John Howard MP, on Radio 6PR—Perth, Western Australia, (Jan. 27, 1998), *available at* www.pm.gov.au/news/interviews/1998/satjan27.htm.

⁸⁵ BRINGING THEM HOME, *supra* note 6, at 172.

⁸⁶ *Id.* at 90, 114.

⁸⁷ *Id.* at 277-313.

⁸⁸ JOHN FORRESTER, TRUTH GAMES: LIES, MONEY AND PSYCHOANALYSIS 112 (1997).

⁸⁹ *Id.*

In addition, the text marks out obligations owed to those who have been separated from their families or affected by these acts.⁹⁰ The documenting of the suffering, gifts, and sacrifices of Indigenous peoples reveals that the Australian nation is indebted to them. This debt is to be repaid through the making of reparations. Recommendations relating to making reparation include “an acknowledgement of the truth and the delivery of an apology”;⁹¹ the implementation of measures, including the teaching of the history of removal policies in schools, to ensure “the prevention of repetition”;⁹² the provision of monetary compensation and services to people having suffered forcible removal;⁹³ and the restitution of land, culture, and language.⁹⁴ This reference to reparation marks the fact that one party is left in a state of obligation or indebtedness at the end of the report. “It is this residual obligation—this debt—that is the motor of circulation.”⁹⁵ Thus, with the “tracing of history” upon which the Inquiry embarked,⁹⁶ an origin is marked and an economy inaugurated.⁹⁷ The “stealing” of children has economic consequences—it establishes a system of circulation. The report hovers between two kinds of economy in its descriptions of the kinds of reparations required of the Australian nation—a “gift-and-reciprocity based society” in which social bonds are created and reinforced by and through exchange, and a “market-money” economy in which “exchange annihilates all bonds except those embodied in the circulation of money.”⁹⁸ Both forms of accounting create a new sense of inheritance for my generation of readers who are non-Aboriginal—new filiations are posited here.

⁹⁰ BRINGING THEM HOME, *supra* note 6, at 279 (stating that these obligations are derived from international law).

⁹¹ *Id.* at 284.

⁹² *Id.* at 294.

⁹³ *Id.* at 302.

⁹⁴ *Id.* at 296.

⁹⁵ FORRESTER, *supra* note 88, at 155.

⁹⁶ BRINGING THEM HOME, *supra* note 6, at 25-131 (Part 2 of the report is entitled “Tracing the History”).

⁹⁷ JACQUES DERRIDA, OF GRAMMATOLOGY 61-65 (Gayatri Chakravorty Spivak trans., 1976) (discussing the trace and the origin of writing).

⁹⁸ *Id.* at 150, 153.

As I noted above, the reception of the *Bringing them Home* report foundered on this question of indebtedness. At stake for the conservative government in power since the report was published was the sense that part of the non-Indigenous Australian inheritance might come from Aboriginal people. To suggest this possibility was to transgress anti-miscegenation norms. Yet this seems to be what is at stake in this narrative of obligations which bind together all the inhabitants of the Australian nation produced by this history. The government attacked both the recommendations that an apology be made and that monetary compensation be paid, and repeatedly linked the two. This operated as a refusal to recognize the constitution of an economy or the existence of a society in which social bonds were always already in existence. Instead, the conservative government sought to characterize the loss of children and the labor they provided to the families of European inhabitants of the Australian colonies as a pure or gratuitous gift, one that creates no obligations on the part of the recipient. In this model, the receiving of a gift from another “entails no future to our relationship.”⁹⁹ After the gift is given, I am made richer by the gift, the other is poorer, “but we are still quits. We can leave without residual obligation.”¹⁰⁰

My growing sense that this report was about a crisis in the familial narrative of the Australian nation was reinforced by the photographs that are scattered throughout the report. The first photograph within the text, taken in 1887, is of “Biddy,” the Indigenous nursemaid to “Mr. and Mrs. J S Gordon of Brewon Station.”¹⁰¹ She is pictured with “John Gordon,” a baby of perhaps six months. He is sitting in her lap looking away from the camera—she holds his small hand in hers and looks into the lens with a gaze of enormous sadness. The second photograph is of “Brother Luis Arrufat and students, St Mary’s Orphanage New Norcia, WA, c1930.”¹⁰² The European priest is seated in a chair, hands crossed in front of him, with an air of stern authority, while six small Indigenous boys of school age stand behind and sit crossed legged at his feet. In another such photograph, a non-Indigenous nurse dressed all in white sits with two tiny naked Indigenous babies on her lap. The babies look to be in their first months of life. The sense is of a new mother proudly displaying her children for the

⁹⁹ FORRESTER, *supra* note 88, at 156.

¹⁰⁰ *Id.*

¹⁰¹ BRINGING THEM HOME, *supra* note 6, at 24.

¹⁰² *Id.* at 38.

camera.¹⁰³ These serial family photographs are striking for the inter-racial intimacy that they register. The overall effect is of a new truth emerging, one that complicates forever the easy sense of place which the bureaucrats of genocide sought to bring into being. If we think of kinship as a form of doing, we might understand the *Bringing them Home* report as an active engagement in the production of kinship.¹⁰⁴

C. Grounding the Nation

Bringing them Home thus exemplifies the complex commitments required of participants in this transitional justice process. Indigenous peoples are called by a national institution representing the universal goods of human rights and formal equality to testify to their experiences at the hands of the colonial state. In exchange, these stories are translated into accounts of rights violations that give rise to obligations on the part of the nation-state to make reparation. An economy or closed system of circulation is constituted. For their part, Indigenous peoples must allow themselves to be spoken, brought into being as legal subjects, through the language of human rights and equality for the nation. They must be represented in this formalist account of the nation and its history, and yet also identify with the project of returning home in order to benefit from many of the report's recommendations. In much the same way, the doctrine of native title developed in Australia during the 1990s requires Indigenous peoples to demonstrate an ongoing relationship to culture and land if they are to have their property rights recognized by the Australian state. For the non-Indigenous addressees of this report, it offers the promise of a new ground for the nation-state. It is not possible to imagine that the nation-state of Australia could continue on the basis of such a terrible history of dispossession, genocide, grief, loss, and exploitation. Yet perhaps, if the peoples of this nation are reconciled, if debts are paid, if the past is remembered (and remembered "in this form, writing"),¹⁰⁵ and if those who have been denied voice become speaking subjects, perhaps then the nation might be able to move forward into a future of hope and justice.

¹⁰³ *Id.* at 232.

¹⁰⁴ Judith Butler, *Is Kinship Always Already Heterosexual?*, in LEFT LEGALISM/LEFT CRITIQUE 229, 249 (Wendy Brown & Janet Halley eds., 2002) ("[K]inship is a kind of *doing*, one that does not reflect a prior structure, but that can only be understood as an enacted practice. . . . [M]odes of patterned and performative doing bring kinship categories into operation and become the means by which they undergo transformation and displacement.").

¹⁰⁵ Christiansä, *supra* note 22, at 391.

There is a promise and a danger in such a project. The promise is realized in the vision of the past that is made available by the report. The need to articulate the universal through the particular—here through the testimony of Indigenous witnesses—means that something new happens, something that disrupts this “circulation of honest words and things.”¹⁰⁶ We see emerging through the testimony of those who experienced or were involved in perpetrating this violence of colonialism a history of that which escapes the ordered world that colonial administrators and bureaucrats imagined they were bringing into being. The report documents the many desires that structure relations in a colonial state: the desire to be free of the power of the state to normalize and punish; the desire to be desired by the other; the desire to transgress boundaries or borders; the desire to erect or affirm boundaries; the desire to name and categorize; the desire for reconciliation of private self and public community; and the desire to go home. We read in its pages “how deeply the law desires to saturate the everyday discursive and imaginary frameworks of the subaltern with its own shamed and utopian visions.”¹⁰⁷

The danger inherent in the universalizing appeal to and of human rights is in the sense it gives of the destination of this journey home. This is illustrated by the following quote by the Australian Governor-General, which opens the report:

It should, I think, be apparent to all well-meaning people that true reconciliation between the Australian nation and its indigenous peoples is not achievable in the absence of acknowledgement by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples. That is not to say that individual Australians who had no part in what was done in the past should feel or acknowledge personal guilt. It is simply to assert our identity as a nation and the basic fact that national shame, as well as national pride, can and should exist in relation to past acts and omissions¹⁰⁸

The promise that is made to the “we” brought into being by and for this report is: we will find ourselves at home in this liberal, democratic nation.

¹⁰⁶ FORRESTER, *supra* note 88, at 169.

¹⁰⁷ Elizabeth A. Povinelli, *The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship*, in INTIMACY 253, 288 (Lauren Berlant ed., 2000).

¹⁰⁸ BRINGING THEM HOME, *supra* note 6, at 3 (quoting Governor-General Sir William Deane, 1996).

We will recognize ourselves as Australians, and/or as “its indigenous peoples.” The possibilities of the recognition of different forms of kinship that are suggested by the history documented in the report unsettle this sense of a certain destination, yet are not taken up in official recommendations. There are only passing references to the land that is to form the ground of this homecoming.¹⁰⁹ This is an origin story that “cannot interrogate its own origins,” and which refuses to do the work of questioning the legitimization of sovereign authority and possession over the Australian continent.¹¹⁰ The lost certainty of a moral grounding for the nation-state under conditions of colonialism is recovered through the invocation of human rights in this anxious rendering of history.¹¹¹ The attempt here is to enable “some national collective will” to be found and to restore the core institutions and values of democratic liberalism rather than shake them.¹¹² Yet this project is inherently vulnerable. As Elizabeth Povinelli remarks: “After all this history, whose nation is any one nation, after all? Who, after all this history, owns modernity and its hallmarks, humanism and democracy? What groups do humanism, democracy, and the common law serve, protect, and maintain?”¹¹³ *Bringing them Home* seeks to answer this question by making “shame and reconciliation—a public, collective purging of the past—an index and requirement of a new abstracted national membership.”¹¹⁴ This project of transformation places specific demands on Indigenous subjects. They are asked to “orient their sensual, emotional, and corporeal identities towards the nation’s ideal image of itself as worthy of love and reconciliation and at the same time ghost this *being for* the nation.”¹¹⁵ They must speak just enough in the

¹⁰⁹ See Bradley Bryan, *The Constitution and the Program: Haraway and the Politics of Cyborg Emancipation*, 19 AUSTL. FEMINIST L.J. 93, 94-95 (2003) (discussing the tendency to speak of emancipation today “without any reference to land,” and the drive to “be at home everywhere” and thus “be bound to nowhere”).

¹¹⁰ Lee Godden, *Grounding Law as Cultural Memory: A “Proper” Account of Property and Native Title in Australian Law and Land*, 19 AUSTL. FEMINIST L.J. 61, 62 (2003).

¹¹¹ Povinelli, *supra* note 107, at 257.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 258.

¹¹⁵ *Id.*

language of the universal to make themselves understood and to make their claims acceptable, and just enough in the language of authentic culture and suffering to retain their right to recognition and support as a particular group within the nation-state.

III. THE MOMENT OF TRUTH

*I think that the dead, more than justice, demand the truth. They do not want revenge, nor one death in exchange for another. The dead clamor fearlessly for truth, because that is the only way to reconcile memory to the past while still defying the future.*¹¹⁶

*The illocutionary speech act performs its deed at the moment of the utterance, and yet to the extent that the moment is ritualized, it is never merely a single moment. The "moment" in ritual is a condensed historicity: it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of utterance.*¹¹⁷

The opening chapter of *Bringing them Home* states as its only truth-claim: "The truth is that the past is very much with us today, in the continuing devastation of the lives of Indigenous Australians."¹¹⁸ It is with this question of the relationship between past, present, and future that I want now to conclude. As the quotations opening this Part illustrate, much current work exploring notions of performativity and memory insists on the importance of time in assessing the effects of speech acts.¹¹⁹ Transitional justice institutions are centrally concerned with temporality—how past injustices are to be given meaning as political practices, whether this meaning is transformed or interrupted or kept open across time, and the relationship of these questions to responsibility. Indeed, in *Eichmann in Jerusalem*, Hannah Arendt specifically accused post-war Germans of using

¹¹⁶ Agosin, *supra* note 10, at 140.

¹¹⁷ JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 3 (1997).

¹¹⁸ *BRINGING THEM HOME*, *supra* note 6, at 3.

¹¹⁹ See, e.g., BUTLER, *supra* note 117; Jacques Derrida, "Le Parjure," *Perhaps: Storytelling and Lying* ("abrupt breaches of syntax"), in *ACTS OF NARRATIVE* 195, 207 (Carol Jacobs & Henry Sussman eds., 2003); JENNY EDKINS, *TRAUMA AND THE MEMORY OF POLITICS* (2003).

a hysterical sentimentality about past acts to deny their responsibility for the present.¹²⁰

The ways in which transitional justice discourse approaches the question of the meaning of the past is captured well by Ruti Teitel in her description of the appeal to “*bounded change*”:¹²¹

Transitional . . . [justice’s] appeal is that it offers the closure that passage brings. But it does so at a cost. Every act of transition implies an ambivalent resolution. These liberal rites perform political passage by constructing discontinuities and continuity, destruction and reproduction, disappropriation and reappropriation, disavowal and avowal. These rituals attempt to relegate to the past the worst of this century, while also propounding a workable shared narrative for the future. By these practices, a line is drawn delineating the parameters of that collective memory to be preserved: what is to be remembered and what repressed; what is to be abandoned and what validated; what is to be rendered incontestable and what will remain controverted As such, transitional practices have an ambivalent character, the resort to these practices in political flux is in the service of unity; yet, there is also a loss.¹²²

The *Bringing them Home* report works, as do many other commissioned truths, to produce just such a sense of continuity and closure, of a unified past and a shared future within the liberal democratic nation-state. Bounded change is the telos of the rituals of transitional justice. These ritualized performances are never a single moment—as Judith Butler suggests, to the extent that a moment is ritualized it opens out to the past and the future.¹²³ The commissioning of truths is one means by which institutions of transitional justice attempt to narrate or make plausible the movement from one regime to another. As Henry Steiner comments of the creation of such

¹²⁰ HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 251 (1964). In response to the “spurious” nature of “publicized guilt feelings” in the post-war Germany, Arendt wrote: “Those young German men and women who every once in a while—on the occasion of all the *Diary of Anne Frank* hubbub and of the Eichmann trial—treat us to hysterical outbreaks of guilt feelings are not staggering under the burden of the past, their fathers’ guilt; rather, they are trying to escape from the pressure of very present and actual problems with cheap sentimentality.” *Id.*

¹²¹ RUTI G. TEITEL, TRANSITIONAL JUSTICE 229 (2000).

¹²² *Id.* at 229-30.

¹²³ BUTLER, *supra* note 117, at 3.

commissions “at the time of a state’s transition toward more participatory government,” “the term ‘transition’ may understate how radically the successor regime has departed from its predecessor with respect to moral principle and political ideology.”¹²⁴ Such ruptures potentially threaten the modern notion of the empty state which continues over time. The institutional production of a communal account of the past works to make the continuation of the state over time appear less strange. The form of the state that survives is artificial, neutral, and universal, rather than authentic, committed, and particular. For human rights lawyers such as Steiner, this is precisely the goal of institutionalizing human rights as a stage on the path towards liberal democracy.

Attempts to write shared histories and to reconcile the groups within a nation are structured around a faith that authentic communal feeling might be lived within the artificial entity of the modern nation-state. The attempt to trace a journey home, to suggest that everything returns to the same place, suggests a model of perfect circulation, an economy of gifts and obligations or of monetary compensations contained by a state that exists unchanged over time. Yet perhaps, after all, the exchange between those who commission the truth in the language of liberal law and its universal values, and those who are called upon to provide the grounds for this truth, is not a perfect economy.¹²⁵ In the words of Teitel, “there is also a loss.”¹²⁶ Others are still made to bear the burden of being for the nation, and are left to live with the memory of the sacrifices demanded of them to produce the modern state. As the following passage suggests, even when an official truth is commissioned and its authors remain faithful to those who bear witness, it may be that there are some losses that cannot be spoken, or to return to the register of obligation, some debts that cannot be repaid. This silence, this refusal, puts “us” into question:

[W]e found that Aboriginal women were unwilling and unable to speak about the immense pain, grief and anguish that losing their children had caused them. That pain was so strong that we were

¹²⁴ Steiner, *supra* note 36, at 1219.

¹²⁵ See DERRIDA, *supra* note 97, at 157-64 (arguing for a critical practice that is “exorbitant,” following that which is unique, singular, or excessive, that which escapes the circle of exchange, the economy of substitution, or the return of the same). See JANE GALLOP, ANECDOTAL THEORY 7-8 (2002) (discussing the “exorbitant” as a question of method); SHOSHANA FELMAN, JACQUES LACAN AND THE ADVENTURE OF INSIGHT 64-67 (1987) (discussing a similar use of the figure of the ellipsis in the writing of Sigmund Freud).

¹²⁶ TEITEL, *supra* note 121, at 230.

unable to find a mother who had healed enough to be able to speak, and to share her experience with us and with the Commission . . .¹²⁷

Indeed, it was this figure of the other woman who haunted our discussions at the Gender and Transitional Justice workshop I mentioned in the introduction to this Article. This other, who puts us into question, is the victim who refuses to be saved, the subject who will not speak her suffering in the time and place and languages offered to her by the mechanisms of transitional justice. She was a figure who reappeared in other papers presented at the workshop, and in the accounts of women who worked in transitional justice institutions. What protocols do we draw on to interpret her eloquent silence? How should we understand what the other asks of us at such moments? This is a challenge that feminism poses to the project of transitional justice. Feminist engagement with transitional justice sets up a tension or movement between two tasks. Writing the truth of history, marching firmly on towards the destination of liberal democracy—that is one task. Yet while truth commissions and inquiries are established to learn about rights violations, as Mark Sanders has written of hearings before the South African commission, there can nevertheless be heard “somewhere in the soliciting of testimony to human rights violations” another call—perhaps to answer before another tradition or authority, or to make “other, not yet anticipated, claims.”¹²⁸ Responding to this call is the second task that faces feminists as we engage with the mechanisms of transitional justice. Responding to the call of the other may interrupt the process of transition, but it may also give us the opportunity to learn from her about justice.

¹²⁷ BRINGING THEM HOME, *supra* note 6, at 212 (quoting Link-Up (NSW) submission 186, Part III at 30-31) (omission in the original).

¹²⁸ Sanders, *supra* note 12, at 83.

