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Responsibility and the representation of suffering: Australian law in black and white

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Keywords

black, law, australian, suffering, white, representation, responsibility

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RESPONSIBILITY AND THE REPRESENTATION OF SUFFERING: AUSTRALIAN LAW IN BLACK AND WHITE

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Abstract: This article critically analyses the concept of suffering, with particular emphasis on responsibility for and representations of suffering. Suffering is seen as a social relationship, with objective characteristics, classified by Renault as domination, deprivation and the weakening of intersubjective supports (*désaffiliation*). Veitch and Wolcher have inquired into legal responsibility for suffering. The author adds that suffering is also constructed subjectively, through aesthetic, political and legal representations. This theoretical model of suffering is applied to recent political and legal issues in Australia dealing with an apology for earlier policies of removing Indigenous children from their families, and a more recent aggressive “emergency response” to concerns over child abuse in Aboriginal communities. Indigenous Australians have clearly suffered from colonisation and subsequent policies, while representations of their suffering can be seen to have exacerbated their disempowerment and thus increased suffering. The article proposes recognising responsibility while avoiding the disempowerment of “victims”. It concludes by proposing new approaches to domination, deprivation and disempowerment that may open the way to new constructions of political subjectivity, fostering the redevelopment of intersubjective supports, while increasing awareness of the past causes of suffering.

Keywords: Australia, Indigenous people, social justice, law, anti-colonial resistance.

INTRODUCTION

This article¹ explores the sociological and jurisprudential concepts of responsibility and suffering in an effort to evaluate their relevance to current race relations in Australia and to

¹ This article was originally written for presentation at the Centro de Estudos Sociais, Coimbra, with the kind assistance of the Istituto di Ricerca sui Sistemi Giudiziari (IRSIG), Bologna, and the Short Term Mobility Program of the Consiglio Nazionale delle Ricerche (Italy). The author thanks the commentators at CES, Boaventura de Sousa Santos, Silvia Maeso, Paula Meneses, Cecilia MacDowell Santos and José Manuel Pureza, for their insights and suggestions. Another version of the paper was presented at the University of Victoria, BC, Canada, where comments by Louis Wolcher and Benjamin Berger were again most helpful. This article has benefitted from each of these inputs, as well as the comments of an anonymous e-cadernos

clarify their broader relevance to law and society. It is located at the intersection of the ethical and the material. We cannot hope to understand the realities of disadvantage and domination without an appreciation of their historical, political and economic causes. At the same time, our understanding and discourse, informed by ethical considerations, shape the specific conditions of race relations. Moral panics justify troop surges. We engage in, redirect or promote particular responses by the terms in which they are understood and debated. The ethical (*Sittlichkeit*) is itself based in a community. In a multicultural or post-colonial society there is a plurality of ethical communities. Ethical responses consequently work *between* as well as *within* groups, defining the groups even as they construct the relations between them.

The key terms, responsibility and suffering, are connected in colonial and postcolonial debates over responsibility for the suffering of Indigenous people, informed by recent work on the social conditions of suffering and the role of law in alleviating, causing, or legitimating suffering. By building on terms in which Indigenous and settler societies debate their relationship, I hope to better understand how those groups and their relations are constituted, while broadening the terms of the debate.

Australia, inhabited by some two hundred language groups with ties to the country going back tens of thousands of years, was colonised by Britain in the late eighteenth century. The legacy of colonisation continues to influence the polity and civil society of the contemporary multicultural, economically advanced nation. Indigenous people make up only about two percent of the population, yet the unresolved issues of their dispossession and current living conditions mark the relations between the “black” and “white” societies (to use common Aboriginal terms), and the understandings of each about their place in the Australian polity.

While referring to the background of colonial dispossession and Indigenous disadvantage, this study foregrounds two recent policy debates in Australia. The first of these is the recognition of damage caused by policies of removing Indigenous children from their families, which persisted up to the 1970s, and debates over appropriate responses. The second is a policy of intervention in Aboriginal communities in Australia’s sparsely populated Northern Territory, which were initially justified by concerns over child abuse. These two case studies offer an opportunity to examine the constitution of suffering and the question of responsibility for and responses to suffering. Suffering is seen as a social phenomenon, which can only be addressed by reconceiving the settler society, the Indigenous society and the relationship between the two.

reviewer, while the author remains responsible for any remaining omissions, obscurity or errors. All the institutions mentioned above, as well as the University of Wollongong, contributed to the development of this work, through their material support during its writing.

Law is crucial to this analysis, in its role as a means for recognising demands and legitimating powers and possessions. In Australia a dominant western law has been imposed on Indigenous communities, sweeping aside their own law without recognition or recompense. This inequity creates moral and ethical dilemmas that go beyond collective responsibility or retrospective claims, to strike at the heart of the nation's legitimacy and standing. Whether or not my grandparents or I actively participated in the dispossession of the Wadi Wadi people, on whose land I now live, I am a beneficiary of that dispossession. The continuing disadvantage and social disruption caused to the Wadi Wadi and all the other Aboriginal people in Australia is a continuing challenge to the polity. At the same time, traditional law lives on in practices of Aboriginal people, and acknowledgement of that law, vestigial as it may be, challenges the legitimacy of the official, dominant laws of Australia.²

This is not, then, an investigation that seeks to allocate collective responsibility or decide the legitimacy of particular land claims. It is, rather, an exploration of the relationships between the ethical foundations of settler and Indigenous societies, their resort to law, and the social and economic conditions under which we share a continent and imagine it as a nation (Anderson, 1991).

Recent work on law and the social constitution of suffering suggests a promising conceptual framework within which to deal with these relationships and conditions. As will be seen below, the term "suffering" (*souffrance*) has long political traction in France, and it has recently come to the fore in English language discussions of law and jurisprudence. "Suffering" is extremely broad and may be seen to denote passivity, while neglecting the identification of any specific agent of suffering. However, it repays interrogation of just these aspects, since it is one of the basic ways in which people relate to and empathise with each other. The suffering of Indigenous people in Australia can be understood phenomenologically, even before analysis shifts to questions of guilt, blame or responsibility. And while suffering, and the sense in which one can empathise with another who suffers, is a universal part of the human condition, suffering is also expressed and discussed in ways that inform and constitute social, political and legal practices. The word itself does not resonate strongly in Australian political discourse (by comparison with France, for instance), but the concept can be seen to pervade concerns over the living conditions of Aboriginal communities and to have impelled the moral panic

² The prior existence and persistence of Aboriginal law in Australia has been recognised in legal cases from *Milirrpum v Nabalco* (1971) 17 FLR 141 through *Mabo v Queensland (No2)* (1992) 175 CLR 1 to *Commonwealth v Yarmirr* (1999) 101 FCR 171 (Merkel J paras [325-352]) and *Yorta Yorta v Victoria* (2001) 110 FCR 244 (Black CJ paras [35-70]). Its defeats and accommodations in the face of the common law have been discussed by Motha (1998), McNamara and Grattan (1999), Mohr (2002, 2003) and Atkinson (2001).

over child abuse, and subsequent concerns over the safety and well-being of women and children in Northern Territory communities.

The following sections deal with suffering as a concept with social, legal and political consequences. First, I consider which forms of suffering are of relevance to social analysis and political or legal redress. Second, I consider in more detail the relationship between law and suffering, which raises questions of responsibility for suffering. Third, I come to the relationship between suffering and representation, in various senses of that word: aesthetic, political and legal. Each of these stages goes to constructing a picture of the relationships between persons who suffer and the social and legal conditions of that suffering. In particular, the focus on questions of responsibility and representation allows a better understanding of the role of suffering, and reactions to it, in mutually constituting political subjects and identities.

THE SOCIAL CONDITIONS OF SUFFERING

Louis Wolcher criticises the idea that there is a hierarchy of suffering. He identifies certain strands in jurisprudence and moral philosophy that seek to draw lines around legitimate suffering, or suffering that should be addressed by public, legal processes. While we may be concerned with the immoral imposition of suffering, we are not supposed to show "excessive concern and compassion for the suffering of others". He cites Dworkin's distinction between "bare harm" and "moral harm": the former is merely subjective, while the latter is an "objective matter" with which ethical beings should properly be concerned. The unworthy victim or the one who suffers from "bare harm" are not seen, in this jurisprudential view, to be worthy of moral concern or legal redress. Wolcher criticises this approach by comparing it to the "bare life", in Agamben's analysis, "of the concentration camp inmate or terrorist detainee... [T]he possessor of merely bare life experiences suffering that the legal order interprets as wholly 'subjective' and beyond its reach" (Wolcher, 2008: 6).

Wolcher effectively opposes the idea that suffering can be classified according to the sufferer, the subject of suffering. There are no subjects who, by virtue of their position or status, are more or less worthy of having their suffering recognised as such. There are certain tropes and practices that define the *subject* whose suffering is worthy of compassion, solidarity or legal protection, or who can be *expected to* suffer in silence. These will be addressed below in discussing representations of suffering.

Though we cannot distinguish the suffering that must be addressed by law or politics according to the *subject* who suffers, we can distinguish suffering according to its social *object*. Emmanuel Renault elaborates this approach, beginning by distinguishing "social suffering" from other, more corporeal forms of suffering, such as pain. Renault (2008: 41-

45) then distinguishes between “normal” and “abnormal” social suffering. Nietzsche saw a certain suffering as being a normal part of existence. The sort of discontents which Freud refers to as being part of civilisation are undeniably social, but may also be seen as normal because all of us who live under a regime of civilisation may expect to suffer them. We may suffer when we are ill, when we lose loved ones, when we are obliged to do things we dislike doing, or when we are distressed by the state of the world or the meaning of life. Most such forms of psychological or physical suffering require no general public (legal or political) response. We may sympathise with friends, give students more time to submit their essays, allow employees time off to attend a funeral, but we cannot legislate against it.

For Renault, a social and political analysis of suffering can only achieve critical force if it is capable of distinguishing abnormal social suffering from such suffering that may be considered normal, the sort of background level of suffering that any one of us may experience. There are, then, various sorts of suffering that might be abnormal social suffering, so we need a further analysis that can connect the *experience* or the *expression* of suffering to the *real social conditions* that may be held responsible for it. Renault (2008: 56) identifies three dynamic factors that make this connection:

1. domination by means of physical constraints or symbolic violence;
2. weakening of intersubjective supports (*désaffiliation*);
3. unsatisfied needs due to inadequate material resources or material constraints to action.

Social, political or legal responses may properly be limited to addressing abnormal suffering which is caused by domination, *désaffiliation*³ or inadequate or restrictive material resources. This schema can be a guide to determining the types or dimensions of suffering that law or political action might be expected to address. Accepting Wolcher’s conclusion that there are no *subjects* whose suffering is more or less worthy of legal redress, I believe that Renault’s classification of the *nature* of that suffering (its social *objects*) does help to narrow our concerns and to focus our responsibilities.

LAW AND RESPONSIBILITY FOR SUFFERING

In a conventional view, law is expected to provide redress to those who have suffered, even if it cannot actually prevent suffering (*e.g.* by deterrence). Wolcher itemises five ways in which law addresses suffering. These include the conventional view, characterised as a demand for justice on the part of those who have suffered unjustly. The

³ I retain Renault’s expression in French, since there is no concise English equivalent. A certain sense of “alienation” may roughly correspond, but that is impossible to distinguish from the more powerful Marxist sense of the word.

law can then authorise action to redress that suffering, which may lead to the “just suffering” of the party or parties having caused this wrong, whether through action in tort (where the compensation will usually be financial) or punishment for a crime. In authorising such action the law causes other suffering, called by Wolcher “collateral damage”: this is the suffering caused by legal action which affects parties other than the wrongdoer. These may be the families of persons detained or sentenced to death, or they may be bystanders injured as a result of lawful police action.

In addition to these instances of redress and infliction of suffering, Wolcher (2008: 12-13) also notes that “private and public law-doers can and do create two additional forms of suffering: the kind that the formal agents of law do not even notice... and the kind that legal agents notice but nonetheless reject as a basis for intervening.” While this appears to be suffering caused by law, the suffering precedes the law (having possibly been caused by some other agent or circumstance). To the extent that the law causes suffering, it would seem that this is the suffering caused by a lack of redress or of recognition of the harm suffered.

Scott Veitch (2007) takes this lack of recognition, or blindness to legal responsibility, further, to see law playing a more active role in the production of suffering. If the active role of law in causing suffering for Wolcher is simply in punishing wrongdoers while harming the innocent only incidentally or by accident, then for Veitch law sets out to harm the innocent. Veitch’s position can be summed up more accurately by saying that when the powerful set out to harm the innocent they can usually count on the law for ample backing and legitimation.

The mechanisms these two writers ascribe to law’s responses and contributions to suffering provide a fuller picture. Wolcher targets the everyday processes of legal interpretation as a means of organised ethical amnesia. The thrust of his argument is bound up in a theory of meaning that criticises the lack of ethical discrimination in the presumption of objectivity in the interpretation of legal statements. His theory applies more strongly to “easy” than to “hard cases”, since it is in the easy case that the moral implications and ethical penumbras of law are most easily forgotten or concealed. The meanings given to legal statements are not unquestionable, but neither are they questioned in their application. The interpretation of law and of legal and illegal actions is not wholly determined by history.

But history has the last laugh: it winds up mastering reason by conditioning how the expression of reasons’ concepts are received and acted upon. To pretend otherwise is not only bad philosophy – it also amounts to a rank apology for whatever forms of

state violence legal actors and philosophers happen to receive as unproblematic at their particular stage of historical becoming. (Wolcher, 2008: 167)

Wolcher analyses the internal reasoning of the legal decision to arrive at a theory of law's bad faith, or self deception, in regard to how it addresses suffering.

On the other hand, Veitch (2007: 41) encompasses the social conditions of law, seeing that law disperses responsibilities to such an extent that it becomes a technology for "the legitimation of human suffering". Law's "technologies of responsibility", working within the "broader social forms of power, also provide some of the major resources through which dispersals and disavowals of responsibility can occur".

Central to this debate is the nature of the responsible subject. Wolcher specifically refers to "legal actors and philosophers": people like us. Veitch accepts that the law has a social role in the allocation of responsibilities (in the many senses of this word). But in each case the question arises: who qualifies as a person who bears responsibility? This may be a person in the legally fictitious sense of a corporation, nation or state. The very idea of responsible government highlights the importance of this collective sense of responsibility, where the abstract entity of state or government is *responsible to* a people, as another abstraction (Agamben, 2000: 28-34).

Veitch (2007: 34-6) identifies the individual as the repository of responsibility, drawing on Lacey's claim that it is only in modernity that we find the individual moral agent, separated from a richer social milieu, carved out from a community, autonomous with respect to fate and the gods, to whom responsibility can be allocated. An important aspect of his critique involves the contrast between the isolated individual and the dominance of institutions. The individual depends on social institutions for identity, even for existence, and yet is the sole locus of responsible action. "At the same moment as he or she sinks into insignificance, he or she is elevated to the apparent throne of world-shaper" (Beck, 1992 *apud* Veitch, 2007: 54). As this paradox works its way through the legal and social world, it produces a "proliferation of irresponsibilities" resulting in "the irresponsible mentality", fostered in the individual buffeted by illusions of choice, autonomous yet powerless, the *outside* of the institutions and technologies *within* which she must operate (Veitch, 2007: 41, 55-6).

In the analyses of Veitch and Wolcher, the subjects under consideration are the ones who should be held responsible for suffering. In each case, however, they evade responsibility, either through a theory of meaning that buries ethical choice (Wolcher), or through a maze of social structures and institutions, including the law, that dissipate responsibility away from any specific subject (Veitch).

While we have been considering the place of the individual or institution that should take responsibility, it is also important to keep in mind those other people who have been suffering, to see it from the other side, so to speak. Shifting the view from that of the legal subject to the suffering subject brings the relational nature of suffering into clearer focus. Using the verb in its active form, we notice not just abstract suffering, but the fact that it is people who suffer. But how are they constructed as sufferers? It is one thing to be harmed by another, but in the discourse on suffering we also find certain people who are essentialised in their suffering, even defined by it. These are the mirror image, the others, to the responsible subjects, who may cause harm not only by landing the blow, but by the very way in which they represent suffering and its subjects.

REPRESENTATION

Representational practices define and constitute the representative as well as the represented, in a dialectical process. Representation is a rich term with a long history that leaves traces in various related meanings (Pitkin, 1972). There are three main senses of the term to be explored here, which may be called political, legal and aesthetic forms of representation. When rulers are responsible to the ruled, they may be said to *represent* them, in a political sense. In the context of legal practice, we refer to lawyers *representing* their clients. And in the visual arts we say that a painting or photograph *represents* its subject. This aesthetic sense can also refer to media representations of people and events.

Hannah Arendt (1973: 75) pointed out that the new politics of the Jacobins after the French revolution derived legitimacy from their “capacity to suffer with the immense class of the poor”, accompanied by the will to raise compassion to the rank of the supreme political passion and the highest political virtue. This new source of legitimacy replaced other forms of representation, displacing the republic and forms of government (under the Girondins) by the Jacobins’ invocation of “*le peuple, les malheureux*”, in Robespierre’s coupling of the concepts. The continuing appeal of the Jacobin formula in French political rhetoric was seen in the 2007 Presidential election, when both Nicholas Sarkozy and Segolène Royal dedicated their campaigns to “*la France qui souffre*” (Renault, 2008: 151).

In political and legal discourse suffering is reconstructed from an experience of pain or deprivation into a relationship, and this is notably a relationship between those who suffer and those who do not. Renault (2008: 376) reports on Veena Das’s analysis of reactions to the Bhopal disaster in India, which found that legitimating tropes of legal discourse detached suffering from the victims. The discourse of suffering “was used to reduce those who suffered to silence”, while the negotiations and construction of events, including that of the suffering itself, were commandeered by politicians and lawyers. The emphasis here

is on the victims of suffering, while the legal mechanisms are shown to have deprived them of a voice.

Images of suffering typically portray the sufferer as the other, as distanced from “us” the responsible, the actively viewing subject. In a series of photographs by Pierre Gonnord reproduced in *El País* under the heading “El silencio de los marginados” (García, 2008), the mute, closed faces of the marginalised are in contrast to the outgoing, engaging presence of the photographer himself, depicted by a newspaper photographer.

The representation of suffering forms an essential component in that political economy of suffering that involves domination, *désaffiliation* and dispossession. On one hand, suffering is constituted as a salient political phenomenon by artistic, media and political representations. On the other hand, responses to suffering are framed by representations of the suffering subject and its converse, the responsible subject. Where suffering is represented as silence, the role of those responsible becomes to represent, to speak for, and, finally, to act for the sufferers. The media, politicians and lawyers play these roles with professional zeal. In the meantime, responsibility for one’s own actions and legal liability for specific injustices and the spoils of dispossession are washed away by the tide of a reimagined history, dispersal of collective responsibilities and the representation of suffering embodied in those who suffer.

The allocation of responsibility and suffering among Indigenous and settler Australians provides an illuminating instance of these processes. It tests and illustrates the theoretical framework developed above. At the same time, the concepts developed there should also be expected to suggest an evaluative framework and a way forward in improving the relations between the two groups, and in addressing the objective conditions of suffering. The following sections describe two relevant recent developments in law and policy relating to Australian Indigenous peoples (comprising two broad distinct groups known as Aboriginal people and Torres Strait Islanders, respectively).

“SORRY”

The demand for an apology to Indigenous people for policies that led to the removal of their children dominated debate on black-white relationships for ten years from the release of a report (HREOC, 1997⁴) on the impact of those policies to a change of government in 2007. The simple word “sorry” gained huge significance: on banners, in demonstrations, graffiti and on a number of occasions written by the vapour trail of a small aircraft above Sydney.

⁴ Unless otherwise specified, the data in this section comes from the HREOC (1997) report, *Bringing them Home*.

Through most of the twentieth century Aboriginal peoples of Australia were subjected to various paternalist regimes that assumed the inferiority of their cultures, if not (always) their inherent inferiority as human beings. It was assumed that the culture was destined to be wiped out by “progress”, if it had not already been, and that individuals would need to adapt to the new ways (Markus, 1990).

Those regimes assumed that tribal Aboriginal cultures and people would soon die out. Great effort was expended, however, in policing the boundaries between black and white communities. Aboriginal people could generally only marry with permission of a “protector of Aborigines” or some such authority, and marriages between Aborigines and Europeans were treated with particular suspicion. With or without formal authorised marriages, there were many opportunities for relations between the communities, typically based on inequalities of power and resources. The authorities were classifying children into varying degrees of whiteness or Aboriginality obsessively, as half castes, quarter castes and so on (Ellinghaus, 2003). To hasten the assimilation of the Indigenous communities, children of “mixed race” were removed from their families to institutions and foster families. They were trained and used as domestic servants and farm hands, occupations for which the whites assumed they were suited, and which white employers required, as cheaply as possible.

These consistent organised policies of child removal persisted for most of the twentieth century, until the 1970s. Aboriginal individuals and organisations spent increasing amounts of time and energy trying to match up the broken remains of families scattered across the country, relying more on local memory and oral histories than on the records of the white authorities, kept for any purpose other than preserving family histories or cultural traditions.

Eventually those organisations, such as *Link-Up*, raised awareness of these destructive policies to the point that in 1995 the Attorney-General of Australia briefed the Human Rights and Equal Opportunities Commission (HREOC) to report on past and present laws separating Indigenous children from their families, and to “examine the principles relevant to determining the justification for compensation for persons or communities affected by such separation” (HREOC, 1997). The *Bringing Them Home* report, released in 1997, made wide-ranging findings as to the impact of the policies on individuals and communities and recommended reparations, to consist of “1. acknowledgment and apology, 2. guarantees against repetition, 3. measures of restitution, 4. measures of rehabilitation, and 5. monetary compensation” (HREOC 1997: App 9). These recommendations were based on findings that the forcible removal of Aboriginal children was

[...] a gross violation of their human rights [...] was racially discriminatory and continued after Australia, as a member of the United Nations from 1945, committed itself to abolish racial discrimination. [...] The Inquiry concluded that forcible removal was an act of genocide contrary to the Convention on Genocide ratified by Australia in 1949 [which] specifically includes “forcibly transferring children of [a] group to another group” with the intention of destroying the group.⁵

By the time the report was delivered there had been a change of government in Australia, and the incumbent conservative coalition refused to recognise any of the recommendations of the report, particularly those sections dealing with reparations. The very first point, that of “acknowledgement and apology” became a major sticking point, a *cause célèbre* on both sides of politics, and the government’s refusal to even go to that point was a bitter blow to the members of the “stolen generations” as the report called them, and to all Indigenous families who had been affected by the policies.⁶

The first gesture of the new government when the Labor party won the election at the end of 2007 was to make a speech of apology as the first item of business of the new Parliament. On that day, 13 February 2008, Indigenous flags and the word “sorry” appeared on public buildings, schools, houses, pavements and media across Australia. The Prime Minister’s speech was broadcast live to outdoor screens in all major cities, while schools and workplaces organised events around the screening. The event was an emotional breakthrough for members of the stolen generations and their families, and was widely seen as a major step to reconciliation between black and white communities in Australia.

THE “EMERGENCY RESPONSE”

The Prime Minister, Mr. Rudd, made no commitment to honour other recommendations of the HREOC report, and expressly renounced the possibility of reparations. For many on the conservative side of Parliament, even this went too far. They had always opposed the apology on the grounds that it could lead to the fifth of the items under the report’s recommendations on reparations, *i.e.* “monetary compensation”. Senator Fieravanti-Wells abstained from voting on the motion put in the Prime Minister’s speech on the grounds

⁵ The summary of the report goes on: “Genocide is not only the mass killing of a people. The essence of genocide is acting with the intention to destroy the group, not the extent to which that intention has been achieved. A major intention of forcibly removing Indigenous children was to ‘absorb’, ‘merge’ or ‘assimilate’ them, so Aborigines as a distinct group would disappear” (HREOC, 1997). While the Commission showed that Australian policies fell within the terms of the UN Convention, it has been criticised as ‘legalistic’ and failing to recognise the difference between ‘absorption’ and ‘assimilation’ (McGregor, 2004: 293-4).

⁶ According to the Commission’s findings, “not one Indigenous family has escaped the effects [of forcible removal of children]. Most families have been affected in one or more generations by the removal of one or more children. Nationally, the Inquiry concludes that between one in three and one in ten Indigenous children were forcibly removed from their families and communities between 1910 and 1970” (HREOC, 1997).

that “today’s motion is the beginning of the next phase where this and future generations will be made financially responsible for past and potentially current actions towards indigenous Australia” (Hoctor, 2008).

“Current actions” received remarkably little attention on the day of the Prime Minister’s speech, though they had been the focus of mass protests outside Parliament House the day before. The conservative senator’s concerns could have been addressed to those protests, which drew attention to a massive police and military operation in the Northern Territory of Australia in response to a report on child abuse among Indigenous communities. That intervention had been an initiative of the previous conservative government which was criticised but ultimately supported, in all its legislative points, by the Labor Party.

These introduced a series of measures introduced in an atmosphere of moral panic in response to a report on child abuse among Northern Territory Aboriginal communities. These measures included “quarantining” welfare benefit payments so that a proportion could only be spent in recognised food stores, medical examination of all Indigenous children in the Territory and the compulsory leasing of lands held by Indigenous communities under native title. The authors of the original report stated in August 2007 that “the intervention does not include acting on any of 97 recommendations they made after a nine-month inquiry into the sexual abuse of indigenous children”. They were “devastated” to see “the troops roll into the Northern Territory” (Murdoch and Murphy, 2007).

The use of military force to combat child abuse, a return to the paternalistic policies of the past, such as withholding welfare payments from entire Aboriginal communities, and taking control of land held under native title, indicated that the policies of forced assimilation and dispossession had returned to Australia. So concerned was the government that the intervention may be found to be racially discriminatory that it was exempted from the provisions of the Racial Discrimination Act.

The “emergency response” has continued throughout the two years following the first sitting of the new parliament and the Prime Minister’s apology speech. On 13 October 2008 the Minister for Indigenous Affairs released the report of the Northern Territory Emergency Response Review Board. While generally supporting the intervention as a response to a genuine “national emergency”, the Review recommending improved cooperation with Indigenous communities, making the income management scheme voluntary and that all government actions should “respect Australia’s human rights obligations and conform with the Racial Discrimination Act 1975” (“the Act”) (NTER Review Board, 2008: 12). A year later the Minister announced that the Act would apply to the intervention, while many of its provisions would continue as “special measures” under

the Act. Other provisions are to be amended so that, while expressly applying to Aboriginal people, they are to be for their “benefit” (as in the case of compulsory leases) or, in the case of the powers of the Australian Crime Commission, to apply where Aboriginal people are the victims of serious violence or child abuse (Macklin, 2009: 12784-5).⁷ An “emergency response” justifying the suspension of law (specifically the Act), has been regularised as “special measures” under the very same Act whose operations were suspended to allow the intervention.

A number of commentators and protest movements have highlighted the contradictions between the apology and the intervention (Behrendt, 2008 and 2009; Mohr, 2009). These concerns focus on the risk that genocidal practices may be repeated in the Aboriginal communities of the Northern Territory, through the return to paternalism, racism, and a para-military response to parenting and children. These contradictions are summed up in the slogan of a protest against the intervention in Sydney in early 2010: “Sorry means you won’t do it again” (STICS, 2010).

CONDITIONS OF SOCIAL SUFFERING IN AUSTRALIA

The situation of Indigenous Australians conforms closely to Renault’s three factors in social suffering: domination, deprivation and *désaffiliation*. These will be considered, briefly, in turn. From the arrival of the British colonisers in 1788 there was a systematic attempt to dominate the first inhabitants. Together with the impact of new diseases, (Butlin, 1983) this was achieved by a combination of frontier wars and unauthorised massacres and legal domination, (Connor, 2002; Morris, 1992) whereby British law was imposed without regard for the existing Indigenous legal systems. Unlike other Anglophone settler societies (New Zealand, Canada, United States) there were no treaties, so the domination might be said to be even more complete (Dodson, 2008).

From the first arrivals of European settlers, Indigenous people were deprived of their land. Relying on well established colonial and legal tropes of land as the property of those who worked it, the Indigenous peoples were defined as merely ranging over the land like animals. Their legal, religious and land management practices, all based on the land and its ecosystems that supported them, were ignored or denied in the process of dispossession (Reynolds, 1987). To this day, levels of unemployment, poverty, welfare dependence and insecure work are higher than in any other community in Australia. Indigenous people are seriously disadvantaged in their health status, with morbidity and mortality levels not just many times worse than those of the white community, but at levels that would be considered scandalous in many third world countries (Hoy, 2009). This is a

⁷ The previous legislation conferred these powers on the Commission where “serious violence or child abuse [was] committed by or against or involving an indigenous person” (Manderson, 2008: 244).

situation that saps the community of valuable resources in terms of energy and elders. The activities of most Indigenous people are constrained by ill health, poverty, welfare policies or police and legal practices (Cowlishaw, 2003; Cunneen, 1988).

Through a combination of depriving the people of their culture and language, separating them from their traditional lands and families to institutionalise them on missions and reserves, in “orphanages”, and prisons, the intersubjective supports available to the Indigenous population have been systematically attacked at personal, family and cultural levels (HREOC, 1997; Roach, 1997 and 2009). The common experiences of Aboriginal and Torres Strait Islander peoples have, however, led to the forging of new links across old boundaries, and some remarkable developments of shared identity in the colonial or postcolonial setting. To mention just the symbolic level, each of these communities has, in the last generation or two, designed flags that are now recognised throughout Australia to represent their “national” identities.

Clearly, from the above brief description, the social conditions in which most Indigenous people live conform in every respect to the objective conditions of suffering as defined by Renault. We can safely say that the conditions of all Indigenous people conform to Renault’s definition in some respect. Even those Indigenous people who have overcome poverty and deprivation have suffered and continue to suffer from racism and the damage to cultural and social ties inflicted by six, eight or more generations of colonialism, including child removal policies that affected every Indigenous family.

REPRESENTATION AND THE CONSTITUTION OF THE SUFFERING SUBJECT

Suffering, no matter how “objective” its conditions, cannot be understood in isolation from its broader social and cultural milieu. It has been noted, above, that the *social* aspects of suffering indicate that people do not suffer simply as a result of some natural condition. Their suffering has social origins and causes, and its very construction *as suffering* has important consequences for the way it is experienced and the frame within which solutions may be sought. The concluding sections of this article explore ways in which the theoretical analysis with which it began may be applied to understanding, reimagining and responding to the suffering of Indigenous Australians. I turn first to questions of representations of suffering to see how these constitute subjects who suffer, before dealing with questions of responsibility.

In earlier discussion it was noted that representation in all three of its forms – aesthetic, political and legal – may actually compound suffering and render the sufferers more powerless. Mute suffering is a powerful photographic trope, identified in the work of Pierre Gonnord (García, 2008) and also familiar from television reports of famines and disasters, and advertisements for aid agencies. The trope is active in depictions of

Aboriginal Australians. An archival photograph on the cover of a leading Australian newspaper's weekend magazine section (*Good Weekend*, 2009) on the anniversary of the Prime Minister's apology showed a tribal Aboriginal couple in a classic pose of powerlessness and mute suffering. The headline read "Lest we forget", using the motto familiar from invocations to remember the war dead, thus referring back to the genocidal imaginary of an earlier age, in which the demise of the Aboriginal race was assumed, and the role of the "white man" was to "ease the dying pillow" (Dodson *et al.*, 2006). While ostensibly reminding us of injustice or of its redress through the Apology, the subjects of suffering are silenced, symbolically "killed" by the unmistakable reference to remembrance and fallen soldiers. These constructions of suffering *represent* the suffering subject in two senses: as an aesthetic and moral image, and as a silent subject who is in need of representation: by a photographer, a politician, or a lawyer.

Representation in these multiple senses came together with devastating impact in Aboriginal communities of the Northern Territory in 2007 following the release of the *Little Children are Sacred* report on child abuse. The "emergency response", described above, was justified by the horrifying images of widespread Aboriginal child abuse that were talked up by the government. The image of suffering was used to justify the suspension of law. Renault (2008: 31) reports Nancy Scheper-Hughes's analysis of the same tactic in Brazil.

She has particularly described the way in which the violence and dehumanisation in the favelas constitute not only factors aggravating social suffering inside these social exclusion zones, but also arguments to justify armed violence exercised against their inhabitants by the rest of society (unlimited police repression, death squads, etc).

The constitution of suffering as a social pathology going beyond the experience or comprehension of those who do not suffer constructs the sufferers in a zone of biopolitics where police repression, military intervention and extra-judicial killings are justified as the exception to the law. The Australian government was quite explicit in making this link: the suffering constituted grounds for an emergency response that justified the suspension of law. In the first instance the terminology of a state of emergency (Agamben, 2005) was used to suspend the operation of the *Racial Discrimination Act*. After its promise at the 2007 election to apply the Act to the intervention, it took the new Labor government two years to transmute emergency powers into "special measures", and other devices described above, to maintain the operation of the intervention while shielding them from legal appeals on the grounds of racism. With the pretext of protecting suffering children

and women, successive governments have deprived whole communities of their rights to property and to legal protection from racial discrimination. The representation of suffering Aboriginal people has been used to constitute them as a biopolitical substratum, unworthy of the legal protections afforded citizens as fully-fledged political subjects.

SUFFERING, VICTIMHOOD AND RESPONSIBILITY

The representation of Indigenous people as silent sufferers not only serves to deprive them of their rights to agency and self-determination, but also reconstructs members of the dominant settler society as the natural agents of their betterment. While this is clearly seen in the paternalistic approach of the Northern Territory intervention, it also raises questions about responsibility for suffering. This is particularly so in the case of colonisation, where the settlers have in fact been the agents of domination and have benefited by appropriating the land from the dispossessed.

The solution does not lie in the dissipation of responsibility so explicit in the Prime Minister's apology speech, which expressly invoked the responsibility of parliaments to absolve any individual of responsibility. As Mr. Rudd said, "We, the parliaments of the nation, are ultimately responsible, not those who gave effect to our laws. The problem lay with the laws themselves." (Rudd, 2008: 170) There can be no question of agency in this account: people who implemented policies of child removal, even those "protectors of natives" who stand condemned by their genocidal statements that Rudd quoted,⁸ were merely "giving effect" to laws. There is no opening here for inquiries into individual responsibility or culpability, of the sort that motivated South Africa's or Canada's Truth and Reconciliation Commissions.

One response to the allocation of responsibility for suffering, while avoiding the further disempowerment of the sufferers, has been to cast the issue in terms of "guilt" versus "victimhood". The issue needs to be dealt with briefly here, since it has come to prominence in Australia, as in the United States, in response to racial disadvantage. The Aboriginal intellectual Noel Pearson, citing African American writer Shelby Steele, has linked the "erosion" of black responsibility to the politics of victimhood, which itself relies on certain attitudes among whites.

Victimhood relied on a phenomenon within the dominant white societies that had two faces: white guilt and moral vanity. The rise of victim politics meant that, even as

⁸ "The problem of our half-castes... will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white..." (Northern Territory Protector of Natives, similar to views of the Western Australian Protector of Natives) *apud* Rudd, 2008: 169.

there was increased recognition of black rights in the post-citizenship era, there was also a calamitous erosion of black responsibility. (Pearson, 2007: 13)

Pearson sees black victimhood and white guilt as a pair, two sides of a coin. From this he deduces that while certain “liberal left” white Australians were exhibiting their “moral vanity” in clamouring for an apology to the stolen generations, they were working against the interests of Indigenous communities which would be better served by tough policies forcing Aboriginal people to take responsibility. Pearson’s analysis is founded in a neo-liberal ethos of individual choice within a market economy, and relies on strong moral terms such as guilt, vanity, victimhood and responsibility, but it lacks a recognition of historical power relationships or the economic conditions of Indigenous disadvantage and the consequences of the experience of disadvantage.⁹

Domination, disadvantage and dispossession may be manifested or experienced as victimhood. Though it is not constituted *by* or constitutive *of* white guilt, there are mutual relationships between the political subjectivities of the dominated and the dominating, the dispossessed and the possessor. Australian debates over responsibility, redistribution policies, collective identity and race relations now bring intellectuals, activists, political parties and social movements together across racial lines to contest the fundamental terms in which the communities understand themselves and each other. These are some of the practices, names and narratives (Gatti, 2010) that constitute identities in a single territory that was colonised but never ceded by the first nations. This analysis recognises these constitutive foundations of identity formation, taking account of political, economic and historical conditions and the stories that are told about them. It requires understanding white responsibility for specific injustices, without automatically casting those who have suffered from them as passive victims. The narratives of nation can only be effectively told if they are developed as a dialogue.

Passivity arises when the discourse of suffering imagines a “victim” of suffering, posed against an active dominant group that represents those sufferers, as discussed in the previous section. Wendy Brown criticises movements that simply

perform mirror reversals of suffering without transforming the organization of the activity through which the suffering is produced and without addressing the subject

⁹ Darryl Pinkney has pointed out that Barack Obama’s analysis of the constitution of Afro-American deprivation, in *The Audacity of Hope*, effectively counters Steele’s analysis, though not explicitly. “For black Americans, such separation from the poor is never an option, and not just because ‘the color of our skin’ makes all of us only as free as the least of us, but also because ‘blacks know the back story to the inner city’s dysfunction’. [Obama] means that he cannot separate from the black poor.” (Pinkney, 2008: 9)

constitution that domination effects, that is, the constitution of the social categories, ‘workers’, ‘blacks’, ‘women’, [...] (Brown, 1995: 7)

The problem, then, is to recognise and allocate responsibility for suffering under conditions that allow those who suffer to constitute and imagine themselves as political subjects. It is only in this way that we can avoid their simplistic representation as biopolitical or even biological objects. Renault (2008: 372) calls attention to a critique that began with Gramsci as an analysis of the barriers to the development of the worker as a revolutionary subject. The critique is continued by those contemporary figures who “explicitly pose the question of political subjectivity as a problem”, and Renault names Balibar, Butler, Žižek *inter alia*.

Renault points out that the three forms of suffering, domination, deprivation and *désaffiliation*, have been characterised by specific political movements, through which participants have constituted themselves as political subjects in various ways according to their times and circumstances. While the industrial proletariat’s struggles against domination were seen as a model of political resistance from the nineteenth into the mid twentieth century, the struggles of peasants and other extremely poor people against deprivation were less developed, or at least less fully theorised and constructed by Marxist theory. Renault (2008: 33) refers to the more recent movements of Indigenous and landless interests (specifically in Bolivia and Brazil) as models that have become better recognised for their struggles against dispossession.

Recognition that the constitution of subjectivity is one of the key obstacles to an effective response to suffering refocuses attention on *désaffiliation*. If suffering is in large part a problem of powerlessness and the social construction of victimhood, then clearly *désaffiliation* is a key category of analysis. So, if resistance is the active response to domination, and if appropriation is the active response to deprivation, how can one respond actively to *désaffiliation*?

Das’s analysis of Bhopal indicated that the reduction of those who suffer to the status of passive and silent victims is a process of disempowerment. The natural response, then, would be to call for their empowerment. Yet we must be careful with what we mean by this “fashionable word” (Burgi, 2009: 26). Brown contrasts “empowerment”, as a means of “generating one’s capacities... without capitulating to constraints by particular regimes of power”, to “resistance [which] implicitly acknowledges the extent to which protest always transpires inside the regime” (1995: 22). Yet even though the term opens up more possibilities than the reactive notion of resistance, and “articulates that feature of freedom concerned with action”, there are dangers in the way it imagines subjectivity. “Indeed, the

possibility that one can ‘feel empowered’ without being so forms an important element of legitimacy for the antidemocratic dimensions of liberalism.” (Brown, 1995: 23)

If empowerment is to enable the engagement of active political subjects with the objective social conditions of their suffering, then we need to reengage with the concept of alienation. Social suffering, for Renault (2008: 387), is characterised by structures that block the satisfaction of needs, both organic (psychic and corporeal) and intersubjective needs. The resulting self-alienation requires a realisation of self by engaging with those conditions, or as Brown would put it, “organization of the activity through which the suffering is produced” (1995: 7).

RECONSTITUTING SUBJECTIVITY

Reappraisal of the role of the political subject of suffering opens the way to a new approach to the vicious circle of white responsibility: black suffering. *Pace* Pearson, it is not white guilt that constitutes black victimhood. Indigenous people suffer as a result of historical and social conditions, yet they are represented as suffering in a biopolitical space outside the norms of the Australian polity and its legal framework. Recognising white responsibility for colonial and postcolonial injustices, right up to the amendments to the *Racial Discrimination Act* proposed at the end of 2009, does not deprive Aboriginal people of their responsibility, social cohesion or will. That is perpetrated by precisely those laws that treat the Indigenous population as irresponsible, as existing in a lawless state of suffering and victimhood.

Let us be more explicit about the sources of Indigenous *désaffiliation*, the short French term that denotes the weakening of intersubjective supports. This was caused by an active process of colonisation and detachment of people from their land, their laws and their families and communities. Recognition of these causes and conditions does not lead inevitably to a paralysis of guilt, nor need it lead to paternalistic policies that seek to oversee the demise of the race or to supervise the parenting practices of entire communities (under white guidance). This recognition indicates priorities for both Indigenous and settler communities. Overcoming alienation and reestablishing intersubjective supports cannot be imposed on or offered to a community from outside. It must be an autonomous and continuing organising process. Members of the settler society must remember what it is they are sorry for, and to have sufficient understanding of their wrongs and the damage caused to ensure that they are not repeated. This will include reminding the “parliaments of the nation” (Rudd, 2008: 170) who, in the present situation, seem so prone to ethical amnesia. Indigenous communities need the freedom to fight alienation and the resources to support themselves and each other.

The discourse of suffering does not only offer insights into the constitution of the political subject who suffers. As the Australian case indicates, the “other” of the sufferers is likewise constituted by their position in relation to the sufferers, including their responsibility for the suffering, or the advantages they have gained from dispossession. The significance of the word “sorry” was characteristic of the construction of complementary identities of a community of sufferers and of a responsible collective. By adopting the position that the settler community as a whole should apologise to the Indigenous community, the former acknowledged their part in the destructive impact on Indigenous societies.

Since the major impact of the policies of child removal had been on the intersubjective ties between Indigenous people, the apology was most relevant to the type of suffering that Renault calls *désaffiliation*. The suffering caused by dispossession and domination was not explicitly addressed. While it may have been a sub-text of the demand for an apology, questions of material loss and benefit were always carefully shielded from the discourse. It has already been mentioned that the Prime Minister expressly avoided any commitment to reparations, and the entire debate was about stolen children, not stolen land. The question of land is more sensitive for white society, since any serious effort to redress that injustice may affect their property. The question of land rights, through court cases, political conflicts and legislation, notably during the 1990s, is another major chapter in the history of Australia (Yunupingu, 1997; Motha, 1998; McNamara and Grattan 1999). While it goes to the heart of dispossession, it cannot be retold here.

The domination suffered by Indigenous people is effected in large part by the operation of law, and the law itself is the foundation of the nation’s legitimacy. That legitimacy continues to be disputed, despite the universal claims of the Australian common law, since the prior Aboriginal laws were never recognised. This is the suffering that never can be recognised within the scope of a legal system obsessed with its self-referential legitimacy (Veitch, 2007: 112-4). The law making practices of “the parliaments of the nation” continue to draw on a rhetoric of suffering and responsibility while reinforcing their legitimacy through incessant legislating and story telling. At the same time that those laws and stories purport to represent the original occupants of the territory, they work to legitimate their own domination over them. This is where we find the wreckage of law as a means to redress suffering or to enforce responsibility.

The laws of Australia continue to exist in the shadows of legitimacy, with the Aboriginal laws of the land lying beneath like an unstable geological layer, the shifting sands beneath a modern polity. As the narratives of suffering and identity, of “White Australia” and its “Black History” proliferate, the communities are themselves constituted by discourses of suffering and responsibility. These can contribute to the developing self-

awareness of Australian society as long as they can be recognised as competing legitimacy stories, while the underlying conditions of dispossession, domination and the destruction of intersubjective supports are still visible, through Indigenous stories,¹⁰ under the elaborately coded and codified mantle that we keep weaving. It is only through conscientious recognition of our own responsibility that we may develop as political subjects and recognise others in all their own subjectivity.

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¹⁰ These are most powerfully accessible through the work of singer songwriters such as Kev Carmody (2007) and Archie Roach (1997 and 2009).

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