

## **Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony**

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*The transformation in prevailing conceptualizations of property and the drive to render land as fungible as possible, the desire to commoditize land that had been pursued in earnest since the seventeenth century in England, was realized in the space of the settler colony decades before it would be implemented in the United Kingdom. The author explores how the commodity logic of abstraction that subtended new property logics during this time, reflected in the Torrens system of title by registration, was accompanied by a racial logic of abstraction that rendered the land of the Native, or Savage vacant and ripe for appropriation. By way of conclusion, the author speculates on the ways in which the imposition of English property law in the settler colony influenced the development of modern property law in England.*

### INTRODUCTION

Robert Richard Torrens, the primary supporter and on some accounts, primary architect of the land registration system that came to be known as the Torrens system, wrote passionately about the unsuitability of English land law for the colonies:

Possibly, some ... may concur with me in regarding it as altogether too splendid and ingenious a work of art to suit either our means or our requirements in these colonies; that, like those exquisite carvings in ivory which we see marshalled in order in some recess or cabinet of a lady's

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boudoir, but never drawn out when the game of chess is really to be played, the proper place for this ‘splendid code’ is the cabinet of the antiquary, where those who have leisure and a taste for that sort of thing, may admire this ‘proof of the vast powers of the human intellect, however vainly or preposterously employed’ [quoting from Blackstone]. In playing out the game of life in this work-a-day part of the globe, we require something less costly, something less artificial, something which we may handle with more freedom and rapidity.<sup>1</sup>

In making the case for the adoption of a system of title by registration in the colony of South Australia, Torrens wrote with near delirium about the opportunity for property law reform presented by a place that was unencumbered by a landed English aristocracy and the remnants of a feudal property regime. This place was also, in the minds of English colonists, quite conveniently free of a population with recognizable pre-existing ownership of the land. The transformation in prevailing conceptualizations of property and the drive to render land as fungible as possible, the desire to commoditize land that had been pursued in earnest since the seventeenth century,<sup>2</sup> could be realized in this vacant land so much more easily than in England itself. While Australia was a place initially identified as the perfect host for those elements of British society who were expelled on the basis of their criminality, the export of the raw materials (such as sheep) that were required for the maintenance of a pastoralist economy<sup>3</sup> would eventually give way to a more agriculturally intensive economy. As I explore in this article, colonial settlement in Australia required a place that was outside of the space and time of English relations of ownership, where new forms of land holding could be imposed with relative ease.

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Alain Pottage has argued in meticulous fashion that the system of title by registration inaugurated with the 1925 Law of Property Act in the United Kingdom, and subsequent to that, the 1930 Land Registration Rules relating to conveyancing, embodied a ‘logic of registration’ that replaced the property logic of contract and conveyance. Registration ‘superimposed’ a new sequence onto practices of conveyancing, which essentially reordered primary elements of the old scheme ‘according to a new grammar of property’.<sup>4</sup> This new grammar of property gave expression to an increasingly abstract concept of ownership. Long-held justifications for and practices of

1 R.R. Torrens, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties dealing, illustrated by Copies of the Books and Forms in use in the Lands Titles Office* (1859) 4.

2 E.P. Thompson, *Customs in Common* (1992); E. Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from the Renaissance to Enlightenment* (2011).

3 See S. Franklin, *Dolly Mixtures: The Remaking of Genealogy* (2007) 119.

4 A. Pottage, ‘The Originality of Registration’ (1995) 15 *Oxford J. of Legal Studies* 371, at 377.

ownership that were based on possession and use gave way to an affective<sup>5</sup> grounding of ownership rooted in expectation and the desire for security. Property ownership came to be defined by these abstract qualities and required different legal forms and techniques, such as title by registration, to structure and realize newly configured relations of exchange and modes of alienation. Pottage has traced the rules and practices of conveyancing, and the cartographic techniques that were essential to the transformation in land holding that title by registration inaugurated. Significantly, he illuminates how the coexistence of two different forms of registration (in relation to mortgages, for instance) during a long transitional phase from one paradigm of ownership to another exposed the distrust that property owners had of this new logic of registration which, in their eyes, created a form of ownership of real property that lacked reality. A registered owner of a mortgage charge was understood to be a ‘person with power’, but bereft of a legal estate in the property. Actual possession of the title deeds by the mortgagee, deeds that signified ownership, was being displaced by a bureaucratic and abstract representation of ownership interests in an administrative archive. The coexistence of a system in which the mortgagee took the registered charge and also held the mortgage off-register, was ‘[c]onsistent with the idea that registration involved the construction of fictitious ownership’.<sup>6</sup> In order to more fully understand the nature of the abstract fictions that come to define modern concepts of property, I depart from a concept of abstraction influenced by a Weberian discourse that focuses on the role of a faceless, sanitized bureaucracy and administration in the emergence of modern property law, and draw on Pashukanis’s theory of the legal form. I utilize Pashukanis’s work to explain why title by registration became the most appropriate legal technique<sup>7</sup> to facilitate the shift from predominantly feudal

5 The term affective is used here to denote the sentiments, emotions, and sensibilities that come to explicitly ground justifications for ownership in the work of Bentham, Blackstone, and others; namely, desires, expectations, and fear of loss and insecurity. For an excellent discussion of how affect operates in contemporary Canadian settler colonial property relations, to engender a sense of entitlement and expectation to property ownership among settler communities, see E. Mackey, ‘(Un)Settling Expectations: (Un)certainly, Settler States of Feeling, Law and Decolonization’ (2014) 29 *Canadian J. of Law and Society* 235.

6 Pottage, op. cit., n. 4, pp. 381–2.

7 What does it mean to speak of legal techniques? Timothy Mitchell, writing about processes involved in the fabrication of the concept of ‘economy’ writes of the:

mixtures of what are called real and representation, thing and value, or object and idea. In fact, it would be impossible to hold them apart according to such a distinction . . . Our world is made up of technical bodies, hybrids that are neither wholly objects nor ideas, more than just things but not disembodied spirits (hence appearing as crystallized spirit), not properly divisible into nature and culture, or reality and representation.

(T. Mitchell, *Rule of Experts: Egypt, Techno-politics, Modernity* (2002) 116–17.)

The concept of legal technique allows one to expose and unfold the processes that make or constitute legal artefacts, de-naturalizing distinctions between subject and

conceptualizations of land to modern forms of property. As I argue below, the settler colony of South Australia was the ideal space for the imposition or trialling of this technique, treated, as it was, as a *terra nullius*.

This article analyses the transformation in conceptualizations of ownership that found expression in the system of title by registration known as the Torrens system. While the myriad factors involved in the history of land reform in England during the nineteenth century is inevitably complex and irreducible to any singular causal explanation, I seek to focus on one particular aspect of this transformation: the logic of abstraction that shaped a new grammar of property ownership, and consequently, the legal form of property that emerges during the nineteenth century in Britain and its colonial possessions.<sup>8</sup> In addition to this commodity logic of abstraction, there is another form of abstraction that facilitated the imposition of a system of title by registration in its first instantiation, in the colony of South Australia. That a system of title by registration was first imposed there by English colonists was no accident. The racial abstraction embodied in the figure of the Savage or Native was realized in the doctrine of *terra nullius*, which enabled English settlers to impose the Torrens system of registration first in South Australia, and then elsewhere. Developments in the law of conveyancing, and the form of land ownership that was imposed in the colony of South Australia some 70 years prior to being fully implemented in the United Kingdom, were premised upon the particular visions of both property and race that the colonists carried with them to South Australia. Governed by a logic of abstraction, the land was understood as a commodity without any owners, to be claimed, partitioned, securitized, and cultivated. The indigenous peoples who had lived on the land for thousands of years prior to the arrival of Europeans were understood as a primitive race, which would vanish from the landscape, and failing that, could be salvaged through assimilation. The counterpart to the alchemical nature of conjuring fictitious value in land as a commodity was the burgeoning pseudo-scientific classifications of race and racial difference. Echoing earlier movements of enclosure in England and Wales, title by registration functions during the nineteenth century as a technique of dispossession in the settler colony.

Contemporary social theory is awash with different forms and logics of abstraction.<sup>9</sup> Drawing inspiration from Marx's concept of real abstraction, I

object, person and thing, material and ideational, which property laws tend to assume and rely upon: see A. Pottage, 'Introduction: The Fabrication of Persons and Things' in *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, ed. A. Pottage and M. Mundy (2004).

8 For analysis of the imposition of a system of title by registration in colonial Bengal, see R. Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (1981); for Mandate Palestine, see Z.B. Ghandour, *A Discourse on Domination in Mandate Palestine: Imperialism, Property and Insurgency* (2007).

9 See, for instance, Toscano's thorough exploration of the way in which abstraction functions in the work of Whitehead, Stengers, and Marx: A. Toscano, 'The Culture of Abstraction' (2008) 25 *Theory, Culture & Society* 57.

examine the historical and social conditions of settler colonialism in South Australia, and the particular legal technique of title by registration that facilitated the realization of land in its abstract form as a commodity. Marx's notion of 'real abstraction' reflects a passage, as Toscano writes:

from [a] fundamentally intellectualist notion of abstraction ... to a vision of abstraction that, rather than depicting it as a structure of illusion, recognizes it as a social, historical, and trans-individual phenomenon.<sup>10</sup>

In this case, land as a commodity and the abstract figure of the Savage co-emerge from the social and historical grounds of settler colonialism.

The article is structured in two parts. In the first, I discuss registration as the primary legal technique that facilitates the transition to an abstract concept of ownership. I also analyse the theories of ownership that informed changes in the legal form of property, primarily through the work of Jeremy Bentham. I then explore how envisioning South Australia as a space and time outside of English relations of ownership, as a *terra nullius*, fuelled and facilitated the imposition of the Torrens system. In the second part, I examine the racial abstractions that were central to the vision of the land as free and fungible of its inhabitants. By way of conclusion, I speculate on the place of the settler colony in the reform of English land law, leading to the reforms of the 1925 Land Registration Act which finally saw the imposition of a system of title by registration throughout England and Wales.

## A TECHNIQUE OF OWNERSHIP, A TECHNIQUE OF DISPOSSESSION: TITLE BY REGISTRATION

### 1. *Registration*

Sir Robert Richard Torrens was born in 1814, in Cork, the son of Colonel Robert Torrens, the Chairman of the Colonization Commissioners. Torrens had no legal training whatsoever, making the fact that the land title system that has spread like a virus throughout much of the Commonwealth bears his name ever so slightly ironic. Robert Torrens sailed for South Australia in 1840 and was elected to the Parliament of South Australia in April 1857, largely because he campaigned on a platform of conveyancing reform.<sup>11</sup> He was to become the third premier of South Australia in that same year, and worked tirelessly to promote the wholesale reform of the conveyancing

10 A. Toscano, 'The Open Secret of Real Abstraction' (2008) 20 *Rethinking Marxism: J. of Economics, Culture and Society* 273, at 275. See, also, J. Rosenberg, *Critical Enthusiasm: Capital Accumulation and the Transformation of Religious Passion* (2011) 22–5.

11 G. Taylor, *The Law of the Land: the advent of the Torrens system in Canada* (2008) 24.

system. Introduced as a private member's bill in 1858, the Real Property Act eventually came into force at the beginning of July that year.

Prior to moving to South Australia, Robert Torrens worked as a landing waiter in the Port of London, and once he had arrived in Australia, was appointed as a customs officer in the Port of Adelaide. It was at the customs department that he gained experience of the shipping system, where funded property was bought and sold within a system of registration. Working with a system of property that was funded rather than landed, Torrens was to gain an acute appreciation of the similarities in forms of moveable and fixed property. The system of registration for land title that was introduced into South Australia was in part modelled on the system of registration of the Hanseatic states of Germany, and Torrens relied upon the expertise of his German collaborator Hübbe in no small measure.

His formative experiences with the system of registration employed by the shipping industry influenced Torrens's vision of landed property as a commodity, abstracted from prior relations of ownership, and to whatever degree possible, from particular and individualized characteristics or traits. One of the many objections to a system of registration for land titles was that, unlike funded property, landed property was subtended by the facts of occupation, possession, and individual characteristics that required special attention in the selling and purchasing of land. It is in response to these objections that Torrens elaborates on what he sees as the likenesses between funded property and landed property.<sup>12</sup>

The process by which property comes to be seen in abstract terms, both generally and specifically is typified by Torrens's comments on the similitude between fixed and moveable property. Torrens wrote that 'this objection on the score of difference in essential attributes disappears like a mirage upon investigating closely the nature of property in shipping.'<sup>13</sup> He argued that like land, a ship is even more indivisible, and also bears the trait of individuality. He also argued that registration was even more suitable for immobile property as compared to that which is shipped, as the latter 'may be removed beyond the ken and jurisdiction of the registering officer ...'.<sup>14</sup>

12 Torrens (op. cit, n. 1, pp. 10–11) wrote:

If the comparative indivisibility in land constitutes a difficulty, it exists in a yet greater degree in a ship. Here also we find the characteristic of individuality. We must identify the particular ship to be transferred by a long description in the register. Here again the contingency of adverse possession requires to be guarded against. Finally the attribute of immobility renders transfer by registration more suitable for that description of property than for shipping which may be removed beyond the ken and jurisdiction of the registering officer; yet the transfer and encumbrance of shipping property through the instrumentality of registration has given universal satisfaction, ensuring certainty, simplicity and economy.

13 id.

14 id.

Torrens refuted the notion that there are material differences between land and funded property, and argued that land is essentially the same, for purposes of conveyancing, as intangible and/or mobile forms of property. He quotes from J.S. Mill who remarked, ‘to make land as easily transferrable as stock would be one of the greatest economical improvements which could be bestowed upon the country.’<sup>15</sup>

Registration was a necessity in the shipping trade because in order to be transferred, ships had to be identified by a long description in the register.<sup>16</sup> The shipping registers kept by customs officers reflect a system of recording in the form of a legal register that emerged as a form of writing as early as the thirteenth century. Entry books emerged as a form of record keeping that stood somewhere between the official rolls and the literary treatises connected to them:

Here, as in other branches of record-making, the Exchequer was the pioneer. In the two Black Books and in the Red Book of the Exchequer we have perhaps the earliest instances of this kind of compilation. In later times the example of the Exchequer was extensively followed . . . From the period of the Restoration the War Office possesses a series of entry books. Many corporate towns made similar collections; and the great landowners, lay and ecclesiastical, possessed registers and cartularies which were used for their possessions in the same manner as the official publication were used for the department of state to which they referred.<sup>17</sup>

The register as a form of record keeping emerges as one means of creating social and legal facts. Registers recorded surrenders of land to the Crown, along with copies of statutes, state papers, and other public documents that related to the activities and jurisdiction of the Exchequer. By the eighteenth century, registers record all manner of transactions that relate to various state departments. Significantly for my purposes, it is interesting to note the primary place of registers in colonial governance. In registers produced by colonial administrators and customs officers, everything from each bushel of wheat produced in the British North American colonies and imported into Britain, to the number of tonnes of cotton exported from India, to parcels of land carved up for sale in the colony of Australia, were recorded in registers and thus became a crucial instrument in creating colonial taxonomies of productivity, income, and expenditure. The laws of the customs, as they related to shipping, navigation, and revenue, are digested in successive tomes that register the revenue collected from the importation of each and every item arriving by ship from the colonies and elsewhere.<sup>18</sup>

15 *id.*, p. 43.

16 *id.*, pp. 10–11.

17 W.S. Holdsworth, *The History of English Law Vol. II* (1903) 224.

18 See for instance, N. Jickling (Customs Officer), *A Digest of the Laws of the Customs Comprising a Summary of the Statutes in Force in Great Britain and Its Foreign Dependencies Relating to Shipping, Navigation, Revenue and other matters within the cognizance of the officers of the Customs, from the earliest*

The registers for shipping, with which Torrens would have been well acquainted, first arose in order to make the national provenance of ships easily identifiable and legally verifiable.<sup>19</sup> As Thring points out, '[s]hips, by international law, are for the most purposes considered as a portion of the territory of the nation to which they belong',<sup>20</sup> and thus the legal identity of the ship's paternity was essential to secure commerce, and to determine 'without difficulty which ships are subject to our municipal laws and regulations.'<sup>21</sup> The system of registration for British ships became a precondition for enjoying the privileges afforded British seamen. Moreover, however, it also provided a means of making the title and transfer of ships much more efficient in an increasingly globalized system of trade.

Thring, writing a memorandum that was published in 1854, addressed the similarities between the two types of registry, that of shipping and those proposed for real property:

It is the more important to look at the law determining the rights to ships in this general point of view [the rights of owners as established by English law], as the registration of real property, now so much discussed, rests on precisely the same principles, and the same rules might, with certain modification of details, accommodate the migratory character of shipping and the fixity of land, be applied to both species of property.<sup>22</sup>

The logic underlying this argument that property, whether fixed or mobile, landed or seaborne, could be governed by the same type of system of registration rests on the assumption that despite their differences, the realization and use of their value as commodities required a system that would allow for maximum amounts of security in trade and exchange. From the late sixteenth century, a variety of different mercantile and commercial devices such as double-entry book keeping,<sup>23</sup> trade agreements, commercial sales contracts, and precise records of price and value were generalized across fields in order to produce a 'general logic of contractual exchange'.<sup>24</sup> Paraphrasing Pottage, registration was a key device utilized to codify and rationalize the fictive and abstract quality of property.<sup>25</sup> This is evidenced by

*Period to the 53 Geo. III inclusive, Part II* (1815). For a discussion of the importance of customs records to revenue collection, as customs duties provided a more reliable source of income than excise taxes or Parliament, see M. Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (1998) 126.

19 H. Thring, *A Memorandum of the Merchant Shipping Law Consolidation Bill; Pointing Out and Explaining The Points in which The Existing Acts Are Altered* (1854) 4–5.

20 *id.*, p. 4.

21 *id.*, p. 5.

22 *id.*, p. 9.

23 Poovey, *op. cit.*, n. 18.

24 W. Pietz, 'Material Considerations: On the Historical Forensics of Contract' (2002) 19 *Theory, Culture & Society* 35, at 42.

25 Pottage, *op. cit.*, n. 4, p. 383.

the use of registration across a range of fields during the nineteenth century, including life insurance<sup>26</sup> and patent law.

While particular technologies of exchange, such as the bill of exchange, to take one example, had been in existence for centuries,<sup>27</sup> it was deployed within what Baucom, following Pocock and Arrighi, has called novel structures of knowledge that emerge from the seventeenth century onwards. At the heart of a system of credit that was retooled to fit the needs of exchange in a burgeoning capitalist system, were:

both a theory of knowledge and a form of value which would secure the credibility of the system itself . . . Central to that theory was a mutual and system-wide determination to credit the existence of imaginary values.<sup>28</sup>

Baucom examines the centrality of slavery to the increasingly widespread use of the insurance contract, and argues that both operate as techniques of financialization. The value of the insurance contract, like that of the life of the slave, was fictitious in the sense that both would only be confirmed at some future time. Baucom persuasively argues that exchange based on a system of credit and debt required a collective act of imagination and trust: faith in the promise of money value. As I will explore below, these imaginary or fictitious values related not only to commodities whose money or exchange value was yet to be realized (whether it was a parcel of land or a slave) but lay at the basis of the racial taxonomies that were integral to the constitution of new and emergent forms of property.

The eighteenth and nineteenth centuries witnessed massive transformations in the concept and regulation of property. A commodity logic of abstraction increasingly informed processes of propertization in a range of fields.<sup>29</sup> While contemporary theorists (and ethnographers) of ownership practices have ably and amply demonstrated how such practices can

26 J. Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (2012) 99.

27 The bill is one of the oldest instruments of credit in the world, and we can trace its origins far back in classical history. Thus in the fourth century BC, Greeks made use of bills. That credit standing and the value of a good name were already well understood is instanced by a story by Herodotus. Writing three generations after the failure of one Glaucus to honour a bill in defiance of oracular advice from Delphi, Herodotus describes him, his descendants, and even any of his house, as being 'utterly extirpated from Sparta'.

(Gillett Brothers Discount Ltd., *The Bill of London; or, the Finance of Trade by Bills of Exchange* (1952) 1–5.)

28 I. Baucom, *Spectres of the Atlantic: Finance Capital, Slavery and the Philosophy of History* (2005) 18–19. I have explored this in much more detail in B. Bhandar, 'Property, Law, and Race: Modes of Abstraction' (2014) 4 *Irvine Law Rev.* 203.

29 For instance, a life insurance registry was created in the state of Massachusetts in 1858, the same year the Torrens system was brought into being: Levy, op. cit., n. 26, p. 99. For a discussion of how abstraction was a presumption to understandings of the process of patenting in the realm of intellectual property, see A. Pottage and B. Sherman, *Figures of Invention: A History of Modern Patent Law* (2010) 138–9.

contradict, subvert or challenge the idea that possessive individualism is the primary if not the only mode of organizing property relations, my focus in this article is the *legal form* of property. In other words, while particular communities may find ways of subverting a logic of possessive individualism in terms of how they use and relate to property ownership within discrete arenas and everyday practices,<sup>30</sup> the overarching juridical form that structures and constitutes property ownership remains one that is governed by the exchange logic of the commodity form. The problem with failing to adequately theorize the relationship between the commodity form of property and its ‘social’ or ‘identity’ dimensions is that the material basis of producing property and the subjectivities which emerge in relation to it become detached from one another. One consequence of this move is that the material basis of the social effects of property ownership are rendered illegible,<sup>31</sup> and the term ‘property’ effectively replaces the term ‘identity,’ relegating the concept of property to use as a metaphor.

This is not to say that property as a concept is not much more expansive than the life it lives within legal practices and doctrine.<sup>32</sup> However, I want to

30 See, for example, N. Blomley, *Unsettling the City: Urban Land and the Politics of Property* (2004).

31 For example, in D. Cooper and D. Herman, ‘Up Against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights’ (2013) 21 *Feminist Legal Studies* 61, the authors acknowledge that a ‘commodified and fungible’ form of property cannot be separated in a clear-cut manner from how property works to ‘constitute and form’ relations of belonging (p. 68). However, their analysis of social property seems to be premised upon such a separation. As a result, the ways in which modern property law (in its commodity form) shapes and determines the constitution of legal subjects fall outside of their analytical frame, recasting several major interventions into the social effects of property logics in non-materialist terms. Of significance to my argument is their reading of Cheryl Harris’s path-breaking article on ‘Whiteness as Property’ (1993) 106 *Harvard Law Rev.* 1709, at 1716–21. Harris’s concept of whiteness as a form of property is rendered in terms of ‘asymmetrical power imbalances’, where whiteness ‘gives power to certain subjects’ (Cooper and Herman, id., p. 68), a reading which diminishes the novelty of Harris’s argument, which is that whiteness comes to function as an analogue of property based on a commodity logic rooted in chattel slavery and later transposed into standardized concepts of racial value. The material basis that produces whiteness as a form of property (along with an ideology of white supremacy), and significantly, the material effects of this transmutation which are both central to Harris’s argument, is effectively diminished in their discussion of whiteness as a form of ‘social property’.

32 Margaret Davies makes a distinction between property theory and property law and argues that ‘the concept and the manifestations of property in the Western liberal context go far beyond legal doctrine, extending to ideologies of the self, social interactions with others, concepts of law, and social concepts of gender roles and race relations’: M. Davies, *Property: Meanings, Histories and Theories* (2007) 2, 24. Property as a cultural phenomenon is seen as separate and distinct from property as a legal phenomenon (p. 3). However, there is a tension in Davies’s work between speaking of property as something greater than legal concepts of property and the repeated recourse to the legal discourse of property throughout the book. For

suggest that for the most part, the symbolic, cultural, and social connotations of property have a material basis. Particular attributes or properties that attach to political subjects (for instance, sexual identities or racial difference) are imbricated within relations of exchange and ownership; these attributes attach to the legal subject as one who is self-owning. C.B. MacPherson's concept of the possessive individual, based on his reading of Hobbes, Harrington, and Locke, is central to this analysis. The emergence in the seventeenth century of a market society inaugurated a concept of the subject who was defined primarily through his self-possession, defined by his capacity to alienate his labour in the market place, and his ostensible freedom from reliance on others.<sup>33</sup> In a marketized, capitalist economy, the traits or qualities that attach to property owners, such as respectability and propriety come to function as property interests in themselves, with their own exchange values that shape social, legal, and kinship relations (consider, for instance, legally enforceable eighteenth- and nineteenth-century marriage contracts). Cheryl Harris has illuminated how the system of chattel slavery, based on the ownership of black slaves and an ideology of white supremacy, produced whiteness as a form of property in and of itself, one protected by law.<sup>34</sup> After the abolition of slavery, whiteness as a form of property maintains its value in a racial society and political economy that initially saw the convict-lease system and now, the prison system, institutions both central to a 'racialised statecraft',<sup>35</sup> flourish. Slavery and colonial dispossession constitute the pre-history of MacPherson's possessive individual, who could not exist outside of a system of exchange based on racial capitalism.<sup>36</sup> In order to discover the relationship between property's material basis and its social, cultural or symbolic effects, a materialist method of legal analysis, or one that focuses on legal *form*, is indispensable.

instance, in the second chapter, Davies argues that the use of property as a metaphor to describe the cultural and symbolic dimensions of subjectivity cannot be directly or causally linked to its legal form (p. 26). While I certainly agree with this, I think it is essential to acknowledge and excavate the relationship between legal concepts of (self) ownership and its cultural or symbolic dimensions. In my view, it is in exposing this relationship between the material and the symbolic, cultural, and social that the political potency of using property as an analytical framework to critically engage social relations of race, class, gender, and sexuality lies.

- 33 C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962) 264.
- 34 Harris, op. cit., n. 31. Of particular relevance is her discussion of *Plessy v. Ferguson* (1886) 163 U.S. 537.
- 35 A. Gordon, 'The Prisoner's Curse' in *Towards a Sociology of the Trace*, eds. H. Gray and M. Gomez-Barris (2010) 17, at 17; see A.Y. Davis, *Are Prisons Obsolete?* (2003).
- 36 For an analysis of 'racial capitalism' see C. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (1983); for a critical discussion of C.B. MacPherson's notion of possessive individualism in the context of settler colonial property relations, see B. Bhandar, 'Status as Property: Land, Identity and First Nations Women in Canada' in *Reflections on Dispossession: Critical Feminisms*, eds. B. Bhandar and D. Bhandar (forthcoming).

The theory of the legal form offered by Pashukanis is particularly apt for understanding how land became commoditized from the seventeenth century onwards. This is because Pashukanis critiques the empty formalism of neo-Kantians such as Kelsen,<sup>37</sup> theorizing law as a form based on the actual, real operation of law and legal relations.<sup>38</sup> Thus, a legal form analysis draws our gaze towards the mechanisms, in this case, title by registration, that were developed in order to transform land into private property in its modern, commodity form. Pashukanis analysed the central role that law plays in structuring and facilitating relations of exchange and the regulation of labour, resulting in a theory of law as a form rather than as a system of norms and rules, or conversely, as ideology.

Of central significance to the theory of legal form elucidated by Pashukanis is the relationship between the subject of law and property. While anything that approaches a satisfying or fully fleshed-out theorization of property in Marx's *Capital* eludes us, Pashukanis's focus on the close relationship between the legal subject and the commodity form places property at its centre. The transition from feudal to capitalist social relations brought into being an abstract legal subject who was defined by his capacity for self-ownership.<sup>39</sup> Whereas possession in the broadest sense, including relations of subservience and dominance, was 'inextricably bound up' with property, perhaps especially prior to the emergence of modern forms of property,<sup>40</sup> the legal subject of capitalist relations of exchange and ownership assumes the illusory mantle of equality in its status as an abstract legal subject.<sup>41</sup>

The emergence of modern landed property becomes the 'basis of the legal form only when it becomes something which can be freely disposed of in the market.'<sup>42</sup> Property, in the hands of legal subjects defined through their self-ownership, provides the fertile soil for a world to be made through the logics of ownership, alienability, and exchange. The Marxist critique of the cunning of abstraction reveals how the commodity form congeals multiple forms of use value, the various types of labour involved in producing, cultivating, tending to the land (or scientific invention, or coats, or hats for that matter), into a 'material shell of the abstract property of value'.<sup>43</sup> In masking these different forms of labour and use, the commodity logic of abstraction obliterates pre-existing relations to the land, and pre-existing

37 E.B. Pashukanis, *Law and Marxism: A General Theory*, ed. C. Arthur (1989, 3rd edn.) 51.

38 For discussion of this point, see C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005) 77–84.

39 Pashukanis, op. cit., n. 37, pp. 110–11; and see K. Marx, 'On the Jewish Question' in *Early Writings*, tr. D. McLellan (1972).

40 Pashukanis, id., p. 110.

41 id., pp. 114, 119.

42 id.

43 id., p. 112.

conceptualizations of land as something other than a commodity. The legal form renders invisible (and severely constrains) the ways in which people live, act, (re)-produce the conditions of their existence, and relate to one another in ways not confined to commodity relations of ownership and exchange.<sup>44</sup> In the words of Pashukanis, the ‘concept of property loses any living meaning and renounces its own prejudicial history.’<sup>45</sup> The legal form imposes its homogenous time on the title document held in the registry, or the patent registered in the Patent Office, and condenses multiplicity into a singular figure of the owner.

So far, this rendition of Pashukanis may seem familiar to anyone with a passing acquaintance with the commodity-form theory of law. What is of significance in the argument presented here, however, is the importance of the colony in the development of the legal techniques that facilitated this transition to modern landed forms of property. From Ireland in the seventeenth century, to South Australia in the nineteenth or Mandate Palestine in the twentieth, the abstractions of property as a legal form are best understood by grasping the social and historical processes through which they are brought into being, a point that Marx makes in the first pages of the *Grundrisse*. The legal form of property works to naturalize modern private property relations, rendering illegible all pre-existing relations of use and ownership; this is more easily realized in places where the inhabitants are deemed by the force of law as something less than civilized (defined, of course, in spectacularly circular reasoning, by the absence of private property). The treatment of the landless during the long period of enclosure in Britain, premised on a similar logic to the racialization (and criminalization) of indigenous peoples in the colonies, may certainly be viewed as having established the ideological grounding for what followed elsewhere.

The practices of abstraction find their philosophical ground in the work of Locke, Bentham, J.S. Mill, and others, who had reconceived of land ownership as based not on hereditary titles and inheritance (birthright), but on labour, expectation, and security. In the work of Bentham, we see an abstract notion of ownership not based on physical possession, or occupation. Primary to the property relation is law, which *secures* the property relation, or guards and protects the expectation.<sup>46</sup> Title by registration can be

44 For an insightful analysis of the feminist critiques of this Marxist theory of law, which obscures forms of labour that fall outside commodification, such as reproductive labour in the home, see R. Fletcher, ‘Legal Form, Commodities and Reproduction: Reading Pashukanis’ in *Feminist Encounters with Legal Philosophy*, ed. M. Drakopolou (2013), a cogent and critical re-appropriation of Pashukanis’s theory of law in the context of valuing women’s labour in the realm of reproductive biotechnology. See Pashukanis, id., p. 110.

45 Pashukanis, id., p. 122.

46 Possession and occupation precede this shift, this transformation that marks the commodification of land, and eventually do not provide a justification for ownership. However, possession remains central to the lifeworld of property; notions of

seen, then, as the ideal form for articulating and representing this abstract notion of ownership.

However, in addition to emphasizing the essence of ownership as being, for Bentham, rooted in expectation, it is equally as important to understand the centrality of security to this notion of ownership. Law's *raison d'être* for Bentham is security. The expectation of being able to use and exploit one's property hinges on this ability to be free from the imposition of others' interests, be it the state authorities or arbitrary powers. Further, the law must protect the owner from the needs of others, and work to diminish the fear of loss by any other means. The fear of losing one's property arguably functions as an expression of a fear of losing civilization altogether. Savagery, defined by the lack of respect for property law, is that which property law must guard itself against.<sup>47</sup> In another instance of tautological reasoning, the 'beneficent genius' that civilizes savagery is *Security*.<sup>48</sup>

The figure of the Savage runs throughout Bentham's theorization of property. He extols the acts of William Penn who, landing upon 'the savage coasts' (in an account that utterly lacks plausibility, I might add), established a colony with other 'men of peace', avoiding bloodshed.<sup>49</sup> North America is a place of savage nature prior to its colonization and cultivation;<sup>50</sup> the rulers of the Ottoman Empire a bunch of 'barbarous conquerors';<sup>51</sup> and governments of the east inflicted with 'oriental despotism'.<sup>52</sup> The language of primitivism conflates with a racial discourse of savagery and tribal life, both defined by the absence of property.<sup>53</sup>

## 2. *Emplacement outside of the space and time of English land law*

The law is terrified of an empty space. The land invites me to ownership. It thirsts for a master. Kant and Hegel have shown that the status of the will postulates the privative appropriation of all nature.

(B. Edelman)<sup>54</sup>

privilege and entitlement shape the contours of one's consciousness, based on the possession of particular qualities and characteristics that once constituted the prerequisites of one's ability to own: see Harris, *op. cit.*, n. 31. For an analysis of how possession also remains central to property relations in settler colonies such as Canada and Israel/Palestine, see B. Bhandar, 'Possession, Occupation and Registration: Recombinant Ownership in the Settler Colony' *Settler Colonial Studies* (forthcoming).

47 J. Bentham, *Theory of Legislation* (1840) 120.

48 *id.*, pp. 118–19.

49 *id.*, p. 118.

50 *id.*, p. 117.

51 *id.*, p. 116.

52 *id.*, p. 89.

53 *id.*, p. 113.

54 B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (1972) 42.

Edelman's personification of law as a creature terrified of empty space can be read in a few different ways. One is as a reflection of a capitalist imaginary in which the wilful subject is naturally drawn to appropriation, where the land seduces potential masters through its sublime, threatening beauty. The empty space, in this imaginary, is one in which property relations have not yet been established; and thus, things could go in any direction. There is no assurance, nothing to secure appropriation, no guarantee of ownership. There could be multiple and overlapping forms of use, different temporalities at play, functioning in the form of communal use based on practices, memory, histories, that are embedded in the topography of the land. The land, which is perhaps a symbol of a feminized presence, is not under the control of a male proprietor. Terrified of such heterogeneity, disdainful of what it sees as unproductive or wasteful, the law uses force to impose a system of ownership that secures what Bentham referred to as 'habitual ideas of property': the expectation that one should own what one appropriates, possesses, labours over, or uses.<sup>55</sup> These 'habits' of property, however, are for Bentham natural rather than cultivated, as a more contemporary sensibility would understand them to be. In the context of South Australia, the fear of an empty space was pre-empted through securitizing the land to facilitate settlement. In other words, the space was filled with law at a distance, before physical settlement began in earnest, in order to secure the future.<sup>56</sup>

The mode of settlement of the colony of South Australia illuminates both the financial dimension of colonization and the centrality of the operation of *terra nullius* to colonial settlement; two factors that were, I argue, quite intimately related to one another. The land, infamously claimed by the Crown on the basis that it was uninhabited, was sold to settlers before their arrival. The Colonization Commissioners for South Australia note that by 1839 (three years after the first settlers had landed on the coast of St. Vincent's Gulf) 250,320 acres of public land had been sold for the sum of £229,756. The customs and licence duties added a further yield in revenue of

55 Bentham, *op. cit.*, n. 47, p. 154.

56 Of course, the practicalities of settling this space and creating the conditions for capitalist production presented massive challenges given the absence of a working class. One Mr. Peel arrives in Western Australia with a handsome sum of capital and '3000 persons of the working class ...' but is left without the primary element for capitalist production: wage-workers. With land so abundantly available, English colonists had to be inventive in procuring classes of workers for the burgeoning settler colony. With his typically acerbic wit, Marx writes:

Horror of horrors! The excellent capitalist has imported bodily from Europe, with his own good money, his own competitors! The end of the world has come! No wonder Wakefield laments the absence both of relations of dependence and feelings of dependence on the part of the wage-labourers in the colonies.

(K. Marx, *Capital*, Vol. I (1990) 936.)

£20,000 per year.<sup>57</sup> The enabling legislation that established the Colonization Commission provided that the surveying of the land was to be funded by a combination of the advanced purchase of public lands in South Australia (£35,000), and a further £20,000 raised ‘on the security of its future revenues and un-appropriated lands.’<sup>58</sup> Thus the survey of land was funded not by the British colonial government, but by private individuals and the South Australian Company who bought ‘unexplored land’ that was destined for settlement. After much exertion by the Commissioners, 437 preliminary land orders for 135 acres each (comprising 134 acres of rural land, and 1 acre of town land) were sold at the fixed price of 12 shillings per acre.<sup>59</sup> Moreover, the Act required the Commissioners to raise a guarantee fund ‘by raising a loan upon the security of the probable revenues of a proposed settlement, the site of which was yet unknown.’<sup>60</sup> They were authorized to raise a loan for up to £200,000 at an interest rate not exceeding 10 per cent per annum. The money borrowed was to be a charge upon the revenue, or the monies received from duties and taxes levied in the colony; the unsold lands as collateral.<sup>61</sup> The Act further provided that a portion of this loan would be invested in government securities, to protect the ‘mother country’ from any liabilities that might result in the course of colonization. Colonial settlement was thus privatized from the very beginning, with the techniques of finance capitalism, such as speculative investment on futures, funding the colonial venture. What is also very clear from the enabling legislation is that the land was viewed, even prior to settlement, as a fungible commodity to be used to both finance settlement through its sale and speculatively, as collateral for securities. This mode of colonization reflected a concept of property imbued with the characteristics of the commodity form, abstracted from any pre-existing social relations or use, even before the arrival of the settlers. It also reflects the spatialization of capital: South Australia was produced as a space of colonial settlement through the use of land for financial speculation.<sup>62</sup>

The anxiety created by a space imagined to be empty and unpopulated by law was thus quietened through the use of land as financial collateral. Once propertized in this way however, land ownership still augured fear in relation to

57 South Australian Colonization Commission, *Fourth Annual Report of the Colonization Commissioners For South Australia to Her Majesty's Principal Secretary of State for the Colonies: 1839...* (1839/2012) 3.

58 *id.*, p. 4.

59 *id.*

60 *id.*

61 *id.*

62 Henri Lefebvre's insight that ‘capitalism and neo-capitalism [produce] an abstract space that is a reflection of the world of business on both a national and international level, as well as the power of money and the *politique* of the state’ seems quite apt here: H. Lefebvre, *State, Space, World: selected essays*, eds. N. Brenner and S. Elden, tr. G. Moore et al. (2009) 187.

the insecurity of title. Prior to a system of registration, the sale of land was based on contractual principles.<sup>63</sup> The seller had to produce each and every deed of conveyance (going back as far as possible) to show the purchaser a good chain of title. Of course, one of the major defects with this system is that 'not every interest in the land was created by or recorded in the deeds forming the chain of title'; the same held for interests created outside the frame of conveyancing (such as inheritance).<sup>64</sup> In other words, even the most thorough searching of the title deeds did not always provide sufficient security for prospective purchasers. In light of this, contracts for sale and purchase of land reflected an amalgam of title deeds and local knowledge of the land:

Given that the formal ideal of a good root of title was often unattainable, contract formation became a practical art, which referred only obliquely to the theory of conveyancing. In practice, conveyancing was an exercise in evaluating the plausibility of a paper title against practical senses of property which had arisen from land use, and which lay in local memory or in the memory of an estate inventory.<sup>65</sup>

Pottage explores in depth how the system of conveyancing that preceded the introduction of registration relied upon 'a local sense of place and property'.<sup>66</sup> Prior to the cartographic mapping of the country, which happened at different moments throughout the nineteenth century,<sup>67</sup> boundaries were determined and identified by reference to natural or local landmarks, and what Pottage calls 'a logic of localized practice'.<sup>68</sup> This local knowledge was gradually codified with the emergence of mapping from the sixteenth century onwards,<sup>69</sup> and Pottage illuminates both the emergent techniques of cadastral mapping and the significance of the transposition of ownership signified by the memory of lived, social experience to ownership signified by paper held in an administrative archive, the registry.<sup>70</sup>

The defects with the contractual system of conveyancing were many, and reiterated at length throughout the nineteenth century as members of the British parliament repeatedly attempted to introduce local registries of titles, and ultimately, a national system of title by registration. As noted above, the greatest defect with the system was considered by many to be the insecurity of title.<sup>71</sup> As the Commissioners stated, '[i]n all civilized countries, the Title

63 And, I suspect, trust between individuals who were attached to others through social and kinship relations.

64 R. Stein and M. Stone, *Torrens Title* (1991) 4.

65 A. Pottage, 'The Measure of Land' (1994) *57 Modern Law Rev.* 363.

66 *id.*, p. 365.

67 See Tithe Commission and Ordnance Survey; *First Report of the Registration and Conveyancing Commission* PP (1850) XXXII.

68 Pottage, *op. cit.*, n. 65, p. 366.

69 *id.*

70 *id.*

71 The Commissioners of Inquiry into Real Property, *Second Report* (1830) 4: the 'most important evil [of the existing system of conveyancing] is the insecurity of Title.'

to Land depends in a great measure on written documents . . .'.<sup>72</sup> They go on to detail all of the circumstances in which every material document may not be produced, and even in cases not involving fraud, as noted above, there may be interests that were not conveyed in a deed.

It is important to note that the system of title by registration implemented in 1925 was not introduced out of nothing. A system of registration existed in Scotland as early as the seventeenth century.<sup>73</sup> For some of the reasons explored above, many attempts, from as early as the sixteenth century onwards, failed in the English context.<sup>74</sup> The logic of registration begins to emerge, as noted above, with the shift to an increasingly commoditized vision of the land. Local county registries and a fledgling one in London itself emerged in the 1860s<sup>75</sup> but it would take until 1925 for the system to be imposed in a definitive and compulsory manner throughout England and Wales. Thus, the legal profession and other opponents of the system of registration were not abruptly defeated but land law reformers won the day gradually, and notably, as I argue here, sometime after the Torrens system had been introduced in various British colonies.<sup>76</sup>

Robert Torrens, in introducing the Real Property Bill in the South Australia legislature, was somewhat more dramatic about the evils of insecurity accompanying conveyancing. After citing the pecuniary loss involved in procuring a good title, he said:

But the pecuniary loss is not the worst feature. The harassing, spirit-wearing perplexity in which the land-owner is too frequently involved is yet more distressing . . . How many purchasers for *bona fide* consideration, having parted with their money, pass their days in anxiety and bitterness, dreading lawsuits, eviction and ruin.<sup>77</sup>

The problems of conveyancing reiterated in the colonial context, which do not at any point acknowledge the presence of aboriginal communities on the land (which at a minimum may have at least constituted a 'problem' for the security of title) reflect a degree of non-recognition that is truly revealing of the meaning of *terra nullius*.

The second perceived defect with the system of conveyancing was the cost involved. The perusal of title deeds and related investigations into the land, the lucrative preserve of lawyers, was indeed expensive and this proved

72 *id.*, p. 3.

73 The Registration Act 1617 provided for a system of registration of land in Scotland.

74 B. Simpson, *An Introduction to the History of Land Law* (1961) 254.

75 A. Offer, *Property and Politics 1870–1914: Land Ownership, Law, Ideology and Urban Development in England* (1981) 69.

76 As noted below, the Torrens systems was introduced in the colony of British Columbia in 1870, and a system of land registration was introduced into Ghana (the Gold Coast then) in 1883. See P. McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development* (2003) 74. See, also, n. 8 above.

77 South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, p. 202 (4 June 1857).

particularly onerous in the colonies, where the initial outlay of expenses to obtain land were high. In the colonies of New South Wales and South Australia, immigrants would first purchase 'land orders' that they could sell on the private market. Speculation became rife, and with an especially transient settler population in the early days of settlement, problems relating to the insecurity of title were exacerbated.

The imposition of the Torrens system of registration was explicitly intended, like all registries, to provide greater security to titleholders. In order to identify the parcel of land represented on the title document with sufficient precision, surveying and cadastral techniques of mapping became indispensable. The surveying and mapping of land rearticulated it in entirely different terms (temporally, spatially, and materially) from what existed before. As I explore below, in the context of South Australia, the vision of the land as literally empty of any prior claims or use meant that mapping and surveying the land had far less importance than in England, or even in the context of the colony of British Columbia.

A great deal of scholarly work has been done on mapping, examining its emergence as a surveying technique of appropriation and a mode of knowledge production. Mapping currently constitutes an extremely significant and valuable means of resisting hegemonic ways of seeing particular political conflicts, and representing economic networks of production and commodity circulation.<sup>78</sup> In the specific context of land titling, Pottage argues that the move to registration effectively reduces land to paper. Abstraction lay at the basis of this reduction:

Registration extracted land from the network of relations and understandings which formed the 'local knowledge' of different communities, relocated it on an abstract geometric map, and deciphered it according to a highly conventionalised topographic code.<sup>79</sup>

The surveying and mapping of territory was certainly an integral dimension of implementing a system of title by registration, and more significantly, effacing pre-existing ways of knowing and using the land. Surveying and mapping of territory had particular force in relation to agricultural labourers

78 See, for instance, Blomley, *op. cit.*, n. 30; A. Bhagat and L. Mogel (eds.), *An Atlas of Radical Cartography* (2009). With regard to spaces of political conflict, particularly struggles over land ownership, mapping provides a key means of representing different visions and understandings of possession and dispossession. In Israel/Palestine for instance, nearly every NGO, UN body, and Israeli state agency produces maps prolifically and continuously in order to literally chart the appropriation of land, the construction of the Separation Barrier, the position of checkpoints, and the growth of settlements. Maps and mapping are thus key components in the struggle over representing the conflict.

79 Pottage, *op. cit.*, n. 65, p. 363; and see Pottage and Sherman, *op. cit.*, n. 29, particularly ch. 2, for a novel discussion of how abstraction (and Marx's labour theory of value) were central to modes of propertization in the development of patent law doctrine.

in the English context, and indigenous communities in the colonial settler context whose relationships to land were to be dramatically suppressed, literally buried under the vision of colonial surveyors.<sup>80</sup> In South Australia, however, Torrens argued that mapping was not a necessary precursor to the registration of title, because in new colonies the size and boundaries of new estates were constantly changing and being created. Quoting from the Real Property Commissioners' reports he noted that '[o]ne of the witnesses has observed in his evidence that "A map is a good servant but a bad master; very useful as an auxiliary, but very mischievous if made indispensable"'.<sup>81</sup> The necessity of procuring maps as a prerequisite for a system of registration was thus a contested issue in South Australia. 'The grant or certificate of lands contained a diagram of the land, drawn accurately and to scale, and a verbal description of the parcels and of the parties entitled.'<sup>82</sup> And, as I have outlined above, surveying and mapping was not carried out on a large scale prior to a vast number of sales of parcels of land being sold prior to settlement.

The benefits of the Torrens system lay for the most part in the security it would provide prospective purchasers, and also, the ease with which land could be alienated. Given the way in which land in the colony was viewed prior to settlement, it is no surprise that Torrens argued that this system should have been implemented 'at the planting of these colonies when lands were first granted from the Crown.'<sup>83</sup> In any case, the other rationale for adopting the system of registration lay in the temporal break from the vestiges of aristocratic land holdings that the colony of Australia afforded.

Key sites of resistance to the system of registration were lawyers and an aristocracy who were not inclined to make the alienation of their vast estates any easier. As Stein and Stone note, in 1833, '24 peers in the realm of England each held estates in excess of 100,000 acres.'<sup>84</sup> Torrens critically addressed the aristocratic stranglehold over the land very incisively when he wrote:

The class immediately affected (the landed gentry of England) are proverbially averse to changes in existing institutions; the genius of conservatism is opposed to any such radical reform as would leave to diminish the obstructions which tend to preserve the hereditary acres in the old lines of descent.<sup>85</sup>

Legal historian Offer emphasizes the resistance of the legal profession to a system of title by registration.<sup>86</sup>

In noting the resistance of the landed gentry to a system of title by registration, one should resist concluding that they were not using their vast

80 See C. Harris, *Making Native Space: Resistance, Colonialism and Reserves in British Columbia* (2002).

81 Torrens, op. cit., n. 1, p. 13.

82 id., p. 19.

83 id., p. 22.

84 id., p. 11.

85 id., pp. 6–7.

86 See Offer, op. cit., n. 75.

estates to engage in speculative financial ventures. The far-away plantations in the West Indies which serve as the backdrop for Austen's *Mansfield Park*<sup>87</sup> and, indeed, for Bentham's own speculations on the nature of ownership in his *Theory of Legislation* were emblematic of the enormous amounts of capital invested in the slave trade, plantations, and land speculation throughout the Empire. The social-cultural significance of land that developed during the feudal era, however, did not diminish with the long transition to a capitalist economy. As Sugarman and Warrington note: 'In the strange, half-timeless world of the traditional English landed estate, feudal concepts blissfully lingered long after feudal relations had been eradicated.'<sup>88</sup> In a compelling analysis, the authors show how the equity of redemption, a core device in the law of mortgages, was utilized to protect the rights of landholders from the encroachments of capital, while at the same time, 'fostering the extension of commercial contracts sustained by credit.'<sup>89</sup> The resistance amongst the aristocracy to a system of title by registration that would render land more easily fungible was thus consistent with the paradoxical nature of the uses of landed property during this period: its value as social-cultural capital remained undiminished, while it was simultaneously retooled to facilitate emergent financial forms of capital investment and speculation.

For Torrens, the colony of Australia was a space unencumbered by the social relations of aristocracy, by history, by a past. The colony of Australia as a *terra nullius* provides a space for a radical break with the political and legal inheritance of England. 'Here feudal tenures – the source of all the complication – never had existence.'<sup>90</sup> Contrary to the assertion made by Povinelli that the English carried the 'prior' with them in the very substance of English property law,<sup>91</sup> it is clear that the primary objective in the reforms sought by Torrens and his supporters was to begin anew, and the doctrine of *terra nullius* provided the means and justification for creating this new system of ownership in the colony.

Aboriginal communities in Australia were not consigned to a time of the prior; nor, significantly, were English property-owners. The specific concept of ownership imposed had as its primary objective to displace the concept of the prior, and prior ownership, from the juridical sphere. Perhaps the most radical aspect of a system of title by registration is that it renders all prior

87 For a critical reading of the colonial and imperialist dimensions of Austen's *Mansfield Park*, see E. Said, *Culture and Imperialism* (1993) ch. 1.

88 D. Sugarman and R. Warrington, 'Land law, citizenship, and the invention of "Englishness": the strange world of the equity of redemption' in *Early Modern Conceptions of Property*, eds. J. Brewer and S. Staves (1996) 111, at 111.

89 *id.*, p. 112. See, also, P. Girard, 'Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920' in *Despotic Dominion: Property Rights in British Settler Societies*, eds. J. McLaren et al. (2005) 120, at 131.

90 Torrens, *op. cit.*, n. 1, p. 7.

91 E.A. Povinelli, 'The Governance of the Prior' (2011) 13 *interventions* 13, at 20.

ownership claims irrelevant. Title by registration precludes any consideration of what was there before. This is more akin to a logic of elimination, based on the doctrine of *terra nullius*. Coupled with this erasure of indigenous interests was the desire to shed the weight of English land conveyancing and the aristocratic stranglehold over forms of land ownership, in order to implement a new system of registration of title. The retrospective recognition of aboriginal communities' prior presence on the land comes much later; but to assert that a governance of the prior arrives in Australia with the colonists is to mis-characterize the nature of property ownership that was imposed in South Australia in the form of the Torrens system. Torrens, like Bentham, rejected Blackstone's rather more romanticized vision of English property law, as evidenced by the quotation that opens this article. Blackstone's concern with how colonists ought to deal with the existence of prior legal relations amongst indigenous communities at the point of colonial encounter reflects his overarching preoccupation with how to theorize the transition from natural law conceptualizations of ownership to a more rational scientific basis, which he attempted to construct in the *Commentaries*. In other words, the existence of prior legal relations in the state of nature presents a logical problem for Blackstone's objective of creating a rational science of law, more than an ideological concern with modes of governance or the legitimacy of colonial sovereignty.

The bifurcation of issues relating to aboriginal peoples from considerations of property law in several different archival sources (Reports of the Colonization Commissioners, legislative debates of the South Australia parliament, and colonial correspondence) make it clear that the land was viewed as a commodity entirely divorced from the people living on it. Aboriginal peoples were an inferior race, blackfolks to be displaced and corralled into reservations, educated, civilized, and protected by the Crown. It is often argued that because the land was viewed as *terra nullius*, the colonists were able to impose a system of private property ownership in Australia. However, it seems that this misses the significance of the prevailing concept of property held by the colonists even prior to settlement. The discourse of savagery makes aboriginal rights to their land a non-question, and the doctrine of *terra nullius* facilitates the materialization of this vision of the land as free and fungible.

Armed with a battery of new concepts grounded in the political philosophy of the Utilitarians, an English government desirous of colonization, and deep-rooted resistance to a transformation in the existing modes of land ownership and conveyancing in England, the colonists were able to push forward radical reforms in land law. The ultimate violence of abstraction that lay at the basis of the proposed rationales for the imposition of the Torrens system was that land was deemed to be vacant, a *tabula rasa*. The relationship between a colonial ontology (based on a racial taxonomy) and property ownership was thus central to this process of transformation. Abstraction as a central modality of propertization was based both on

changing justifications and conceptualizations of ownership, as I have explored above, and on an abstract fiction that posed a continual threat to civilization and security: the figure of the savage.

## RACIAL ABSTRACTIONS

As I have argued, the commoditization of land required a system of ownership that would facilitate exchange without the bothersome encumbrances of the past, of pre-existing relationships to the land, and with the maximum possible security for owners. The settler colony of South Australia afforded English settlers a place where they could experiment with a system of registration that had been resisted in England and would not be fully implemented ‘at home’ for another sixty years.

The concept of *terra nullius*, or vacant land, was based on a racist discourse of the civilized and non-civilized, with civilization being signified by private property ownership, the cultivation of land, modes of governance, and social organization.<sup>92</sup> Ironically, while the racist underpinnings of the doctrine of *terra nullius* have been repeatedly disavowed by contemporary courts in the context of aboriginal rights litigation, aboriginal title is persistently defined in relation to the same Anglo-European norms and concepts of property ownership that were the basis of indigenous dispossession. However, dispossession was not, as I have been arguing in this article, simply a matter of racist notions of civilized and barbaric peoples. Dispossession was both a prerequisite and a consequence of the co-production of racial value and property ownership, rendered possible by a logic of abstraction that was central to emergent capitalist forms of property, its modern legal form, and the racial subjugation of indigenous peoples, their lands and resources.

The emergence of a capitalist economy that was based on the exploitation of colonies required new forms of knowledge. Baucom has referred to the novel forms of knowledge that accompanied the economy of exchange and trade in slaves as a new *episteme*. The eighteenth and nineteenth centuries mark a moment when human life and property are imbricated in relations of exchange to the extent that one stands in for the other. This is a moment when the meaning of the word *stock* is rendered ambiguous, referring to cargo that is inanimate, slaves that become property like any other, and animal livestock. It is a time when the term *specie* refers both to money and

92 See P. Moloney, ‘Colonisation, Civilisation and Cultivation: Early Victorians’ Theories of Property Rights and Sovereignty’ in *Land and Freedom: Law, property rights and the British diaspora*, eds. A.R. Buck et al. (2001) 23–38; P. Fitzpatrick, ‘“No Higher Duty”: *Mabo* and the failure of legal foundation’ (2002) 13 *Law and Critique* 233; I. Watson, ‘Aboriginal Laws and the Sovereignty of *Terra Nullius*’ (2002) 1(2) *borderlands*.

slaves, a species of property that is utilized as a stand-in for currency.<sup>93</sup> While the histories of the trans-Atlantic slave trade are clearly germane to the formation of property and racialized indigenous subjects in the United States, they are somewhat less directly of import to the colonial settler contexts of Australia and Canada.

Nonetheless, the fact of blackness certainly was a live and material concern in the Australian context. Indigenous communities, referred to as ‘blackfellas’ from the time of colonial settlement onwards, were marked and identified as a vanishing race. Certainly this racial identification was related to a myriad of radical differences between them and the colonists, and blackness no doubt was among them. So, while aboriginal bodies were not commoditized in the same way as those of African slaves, I argue that the logic of abstraction was still at play here; racial difference was quantified and measured as a property that could be bred out. The pseudo-science of blood quantum figured significantly in colonial policies on aboriginal peoples in Australia.

Racial science during the eighteenth and nineteenth centuries, to some degree, was influenced by the inauguration of the science of natural history,<sup>94</sup> and subsequent to that, the shift to the modern science of biology. The development of measurement and quantification<sup>95</sup> as the primary techniques used to taxonomize and classify life forms was globalized, what Mary Louise Pratt has termed a ‘planetary consciousness’.<sup>96</sup> Linnaeus first classified human beings according to a racial taxonomy divided into four categories, determined by geography: Americanus, Europaeus, Asiaticus, and Africanus.<sup>97</sup> Pratt argues that Linnaeus’s project of classification extended to the colonial world in a way that relied upon the same navigational mapping utilized to ‘search for commercially exploitable resources, markets, and lands to colonize ...’.<sup>98</sup> Shoring up and producing a ‘world historical subject’ who was ‘European, male ... and lettered’, Pratt’s work provides something between a supplement and corrective to Foucault’s analysis of eighteenth-century natural history which, as she notes, ‘[does] not always underscore the transformative, appropriative dimensions of its conception.’<sup>99</sup>

93 See M. O’Malley, *Face Value: The Entwined Histories of Money & Race in America* (2012).

94 See A.S. Curran, *The Anatomy of Blackness: Science and Slavery in an Age of Enlightenment* (2011).

95 See A.W. Crosby, *The Measure of Reality: Quantification and Western Society 1250–1600* (2007) for a history of the long development of quantification in science, mathematics, and aesthetic forms.

96 M.L. Pratt, *Imperial Eyes: Travel Writing and Transculturation* (1992).

97 W.H. Tucker, *The Science and Politics of Racial Research* (1994) 9; S.J. Gould, ‘The Geometer of Race’ *Discover*, November 1994.

98 Pratt, op. cit., n. 96, p. 30.

99 id., p. 31.

Linnaeus and Cuvier in the eighteenth century questioned the basis for classification that had preceded the classical age, namely, resemblance, similarity, and difference.<sup>100</sup> Whereas racial difference was previously defined primarily in relation to visible physical traits and differences, this framework shifts from the eighteenth century onwards with the burgeoning discourse of racial science. Race (and the racial superiority of white Europeans) came to be grounded in something other than theological precepts of the God-given sovereignty of the Christian races over others; rather, the measurement of skull size,<sup>101</sup> the segregation and displacement of peoples based on the measurement of the quantum of ‘black’ or ‘Aboriginal’ blood<sup>102</sup> that bodies carried as a result of their biological and ancestral inheritance, served to justify dispossession in settler colonial contexts.<sup>103</sup>

Race became a defining feature of human life. Racial science relied on emergent concepts of classification, yet also ‘escaped from that critical relation ...’. In writing about scientific conceptualizations of life in the classical age, Foucault writes:

[Life] escapes – which means two things: life becomes one object of knowledge among others, and is answerable, in this respect, to all criticism in general; but it also resists this critical jurisdiction, which it takes over on its own account and brings to bear, *in its own name*, on all possible knowledge.<sup>104</sup> (emphasis added)

Racial science, a way of taxonomizing life itself, comes to bear on forms of knowledge across fields: economy, politics, philosophy.<sup>105</sup> At the same time, subjects relegated to the lower strata of systems of racial classification resist this jurisdiction and bring different forms of knowledge and critical practices of resistance to bear across this very same terrain.<sup>106</sup>

If racial science was reliant upon larger scientific developments in philosophies of life itself, one might well speculate about the ways in which

100 M. Foucault, *The Order of Things* (2002) ch. 2.

101 See C. Perrin and K. Anderson, ‘Reframing craniometry: human exceptionalism and the production of racial knowledge’ (2013) 19 *Social Identities* 90; P. Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (1999) 48–9.

102 See Curran, op. cit., n. 94, p. 2, where he discusses the identification of ‘black bile and blood’ by eighteenth-century French anatomists in their attempt to understand the ‘anatomical and conceptual status of blackness’.

103 For a fascinating account of how racial identity based on the notion of biological difference required, in the context of racial identity trials in the United States, the performance of whiteness or blackness, and other modes of fashioning of racial selves, see A.J. Gross, *What Blood Won’t Tell: A History of Race on Trial in America* (2008).

104 Foucault, op. cit., n. 100, p. 162.

105 For instance, Tucker, op. cit., n. 97, ch. 1, illuminates how racial science supported arguments for slavery in the southern United States, along with education policies, amongst other things.

106 See F. Moten, *In the Break: The Aesthetics of the Black Radical Tradition* (2003).

prevailing notions of race as biologically grounded come to bear on forms of knowledge central to capitalist relations of exchange. This is precisely the point O'Malley makes when he argues that racial knowledge was used to fix value in relation to currencies, which, during the late eighteenth and early nineteenth centuries, lacked any fixity of value. Abstracted from the actual lives of non-European peoples, blackness and indigeneity came to signify a lesser value not only in relation to white European settlers, but with respect to relations of ownership. Relatedly, Pratt notes how Linnaeus's system of classification for humans explicitly posited the European subject as superior, but in such a 'strangely abstract, unheroic gesture' so as to render this racially charged and ideological taxonomy quite harmless in appearance.<sup>107</sup> The logic of abstraction serves the interests of commerce and colonization, with a natural history of man that charts racial difference in a taxonomy that *standardizes* notions of white European superiority.

In the settler colony of South Australia, racial science produced a scene of violent dispossession and displacement.<sup>108</sup> The taxonomy of racial classification that accompanied the imposition of the systems of land ownership across various types of colonies becomes clear by contrasting the way in which aboriginal communities and Indians are viewed by the Australian colonists. Searching through a variety of archival documents, I came across a short but lively debate that took place in the South Australian Legislative Council on Wednesday 27 January 1858. Moved by the Honourable Mr. Morphett was a motion to present to her Majesty the 'sympathy and feelings of this Council in reference to the insurrection in India.' They were referring to, of course, the Indian Mutiny of 1857, which is often understood as symbolizing the beginnings of the nationalist, anti-colonial movement. The members of the Legislative Council duly noted their upset and quibbled over whether their sentiment ought to be backed up by something more material, such as horses for the British cavalry or financial support. The other affect that is expressed, and more significant for my purposes here, is disappointment, and vicarious shame at the 'disgrace which [the Sepoys] had heaped upon themselves, knowing how gallantly those regiments had formerly fought when under the command of British officers.'<sup>109</sup> The Sepoys were rebellious colonial subjects, but were more in need of stronger authority and discipline, which their British colonial masters would undoubtedly provide, than anything else. This horrid warfare was to be roundly condemned, and with perceptible melancholia, some members of the Legislative Council lamented that during the time they had served as British officers in India, it was evident that very few of the native soldiers could be depended upon for loyalty.

107 Pratt, *op. cit.*, n. 96, pp. 32–4.

108 Wolfe, *op. cit.*, n. 101.

109 South Australia, *Parliamentary Debates*, Legislative Council, p. 792 (27 January 1858).

This is in stark contrast to the way in which aboriginal communities are described in correspondence between Lieutenant-Governor Arthur and HM's Secretary of State for the Colonies relating to aboriginal communities living on Van Diemen's Land (today known as Tasmania). Although the correspondence covers an earlier period, around 1831, the contrast is dramatic. Aboriginal communities are described as 'predatory hordes,' as 'partially civilised' and as 'abject beings' (Dispatch No.1) The 'tribes of savages' (Dispatch No.2) are described as though they are another species altogether, driven by an insatiable 'love of plunder' (Dispatch No.7). The only remedy for those with an inherently 'savage spirit' is expulsion from settled areas, and eventually, extermination. While the history and settlement of South Australia is vastly different from that of the penal colony of Van Diemen's Land, the discourse of the 'vanishing race of Aborigines' was certainly pervasive throughout Australian colonies.

What I am gesturing toward, and by way of conclusion, is the racial taxonomy that marked black aboriginal bodies as abject and capable of expulsion. This abstract notion of the irredeemable Savage accompanied the vision of their lands as free of encumbrance: malleable and capable of being shaped into a new commodity form that embraced the mercantile and marine logic of registration as the most expedient and future-oriented means of ownership.

## CONCLUSION

Scientific abstractions that were utilized to confirm the pre-existing European belief in the inferiority of the black racial subject, and a commodity logic of abstraction both worked together to produce aboriginal lands as ones that were imagined to be free, fungible, and uninhabited. This vision of the space of the colony, outside of the time and space of English relations of ownership, were central to the imposition of a particular system of land ownership in the colonies. However, it is also essential to acknowledge that the argument offered here does not account for this history of confrontation between the English and aboriginal communities nor aboriginal resistance during the early part of settlement and thereafter. My account is not intended to suggest that the specificities of colonization were not rife with contradiction, negotiation, and also, the recognition of aboriginal jurisdiction over particular matters, criminal, civil and otherwise. As many scholars have recently argued, colonial sovereignty as expressed through jurisdiction reflects a long period of settling,<sup>110</sup> and the continued

110 L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia 1788–1836* (2010); M. Finnane, 'The Limits of Jurisdiction' in *Law and Politics in British Colonial Thought: Transpositions of Empire*, eds. S. Dorsett and I. Hunter (2010) 149–68; H. Douglas and M. Finnane, *Indigenous Crime and Settler Law* (2012).

presence of indigenous laws presents possibilities for moving towards decolonized, shared jurisdictional spaces.<sup>111</sup>

Another aspect of the colonial encounter not explored in this article is aboriginal resistance to the imposition of settler colonial property relations. Irene Watson has written powerfully of raw law, ‘the still-existing, living, breathing’ law of First Nations in Australia.<sup>112</sup> The persistence of raw law despite attempts to obliterate it attests to the failure of the colonizing mission embedded in the imposition of the English common law (and indeed, as Watson argues, international law). Similarly, Audra Simpson points out that colonialism ‘in its settler form’ has failed to fulfil its objective: to eliminate First Nations through the appropriation of their lands and assimilation into a white-dominated body politic.<sup>113</sup>

A useful trajectory of questioning would be to consider how the logics of abstraction were utilized, and perhaps even necessary, in order to secure colonial sovereignty. What was the nature of aboriginal resistance to colonial settlement that forced English colonial administrators to *fix* racial value in the way that they did in Australia and elsewhere? How did aboriginal communities resist racial classification, and the horrors of residential school education inflicted upon children who were variously classified as ‘full-blood’, ‘half-blood’, or ‘quadroon’?

The devastating consequences of the transposition of English property law to settler colonies for indigenous communities continue today, as English property norms remain the central referents in defining what can be recognized as aboriginal title.<sup>114</sup> Placing the effects of dispossession at the forefront of their analyses, many post-colonial legal theorists have rightly focused on the racist (and gendered) underpinnings of the international law doctrines and property laws that were used to appropriate native land.<sup>115</sup> In doing so, however, some aspects of the transformations in conceptualizations of property and changes in the nature of ownership that emerged from the eighteenth century onwards have become obfuscated. English property ownership is indeed a mode of lawfare in the colonies; however, the development of law in the colonies was unfolding in a context rife with a

111 S. Dorsett and S. McVeigh, *Jurisdiction* (2012).

112 I. Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (2014) ch. 1.

113 A. Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (2014) 8.

114 See B. Bhandar, ‘Plasticity and Post-Colonial Recognition: Owning, Knowing and Being’ (2011) 22 *Law and Critique* 227.

115 A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); P. Fitzpatrick, *Mythology of Modern Law* (1992); for a contrary point of view in relation to colonial settlement in Australia, see A. Pottage, ‘Conflict of Laws: Comparing Autochthonous Legal Cultures’ in *Territorial Conflicts in World Society: Modern Systems Theory, International Relations and Conflict Studies*, ed. S. Stetter (2007) 149.

mixture of encounter, conflict, recognition, and brutal dispossession, affecting the legal consciousness of both colonizer and colonized. In considering the contemporary use of registering ownership as a means of formalizing property rights in impoverished communities, strenuously advocated by Peruvian economist Hernando de Soto as a means of advancing a development agenda, it is clear in the eyes of his critics that such programmes have not necessarily increased access to credit among the poor, and have led to an increase in the hours of labour performed outside the home.<sup>116</sup> In the Australian context, and the Northern Territory specifically, proposals to convert land communally held by indigenous communities (land that has been restored to its owners through the use of the Native Title Act) into property held in fee simple by individuals (converting, essentially, native title to title held by by registration) has met with criticism on the grounds that it will not necessarily improve the economic and material conditions of aboriginal communities located in remote areas.<sup>117</sup> The legal form of property continues to function as a means of fashioning particular kinds of legal subjectivity (the owner, the consumer, the debtor) through the specific technique of title by registration.

A different but no less important question to pursue is to what extent the development of the system of title by registration in the colony of South Australia, and then the colony of British Columbia, influenced the development of the system of title by registration in England. To what extent were the colonies used as legal laboratories, testing grounds, for legal reform of property law in England? While the centrality of property law to colonization has been remarked upon widely, the relationship between settler colonialism and the transformation of English property law has received far less attention.

A conclusive answer to this question is beyond the scope of this article. However, we do know that Sir Robert Richard Torrens did travel back to England in 1863, and made several speeches and submissions to various Commissions dealing with the question of title registration.<sup>118</sup> While English law reformers insist that the system of title by registration finally implemented in the 1925 legislation bears no relation to the Torrens system, many

116 See for instance, T. Mitchell, 'The Work of Economics: How a Discipline Makes a World' (2005) 46 *European J. of Sociology* 297; for an exploration of how the Torrens system functions in colonial Kenya, see P. McAuslan, *Land Law Reform in Eastern Africa: Traditional or Transformative?* (2013) 19–22; also McAuslan, *op. cit.*, n. 76, pp. 73–5, where he notes the importance of the Torrens system to market development in Kenya, Zanzibar, and Ghana.

117 See J.C. Altman et al., 'Land Rights and Development Reform in Remote Australia' (2005) discussion paper no. 276/2005, Centre for Aboriginal Economic Policy Research.

118 J.S. Anderson, *Lawyers and the Making of English Land Law 1832–1940* (1992) 140, 170–1.

contemporary scholars assert that there are few differences.<sup>119</sup> Perhaps to acknowledge lawyers, judges, and law reformers' awareness of the system's successful implantation in the far-flung corners of Empire would have caused too much strain on the prevailing notion of land law as the highest inventive accomplishment of the English legal mind.

119 R.W. Simpson, *Land Law and Registration* (1986) 76–7; K.J. Grey and P.D. Symes, *Real Property and Real People* (1981) 321.