SMOKE, CURTAINS AND MIRRORS: THE PRODUCTION OF RACE THROUGH TIME AND TITLE REGISTRATION

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ABSTRACT. This article analyses the temporal effects of title registration and their relationship to race. It traces the move away from the retrospection of pre-registry common law conveyancing and toward the dynamic, future-oriented Torrens title registration system. The Torrens system, developed in early colonial Australia, enabled the production of 'clean', fresh titles that were independent of their predecessors. Through a process praised by legal commentators for 'curing' titles of their pasts, this system produces indefeasible titles behind its distinctive 'curtain' and 'mirror', which function similarly to magicians' smoke and mirrors by blocking particular realities from view. In the case of title registries, those realities are particular histories of and relationships with land, which will not be protected by property law and are thus made precarious. Building on interdisciplinary work which theorises time as a social tool, I argue that Torrens title registration produces a temporal order which enables land market coordination by rendering some relationships with land temporary and making others indefeasible. This ordering of relationships with land in turn has consequences for the human subjects who have those relationships, cutting futures short for some and guaranteeing permanence to others. Engaging with Renisa Mawani and other critical race

theorists, I argue that the categories produced by Torrens title registration systems materialise as race.

KEYWORDS. Colonialism; land; race; time; title registration; Torrens.

Title registration has been identified as 'a modern globalising trend' in land law, being voluntarily adopted by governments in an increasing number of jurisdictions around the world, and imposed by the World Bank and International Monetary Fund (IMF) in others (Raff 2003, p. 8) For common law jurisdictions, title registration systems – that is, land title registries and the legislative frameworks that facilitate their operation – change the legal basis of title from possession to registration. As judges and legal scholars have noted, this change is a profound one, shifting the very idea of 'land' in law, as well as the processes involved in conveying it from one party to another (Pottage 1994; Taylor 2008).

In this paper, I analyse the temporal effects of title registration and their relationship to race. I begin by examining the linear time produced through unregistered conveyancing, which relied on retrospection. I argue that this linear time helped to naturalise the English aristocracy's multi-generational monopoly on land ownership. In 1858 colonist Robert Torrens developed a different system for the transfer of land in South Australia, where the land was understood as 'new'. The Torrens system of title registration enabled the production of 'clean', fresh titles that were independent of their predecessors, thus eliminating the need for retrospection. The Torrens system produces indefeasible titles behind its distinctive 'curtain' and 'mirror', which function similarly to magicians' smoke and mirrors by blocking particular realities from view. In the case of title registries, those realities are particular histories of and relationships with the land. Building on work by Renisa Mawani (2014), I argue that the operation of title registries in settler colonies can be understood as a process that 'demarcated populations… as inhabiting competing and incommensurable times of colonial settlement' (Mawani 2014, p. 85); those demarcated as inhabiting a historical period that has now ended are rendered temporary, and treated as waste to be contained and removed

from the land, while those demarcated as inhabiting the land's future are made indefeasible and given the legal right to ignore and exclude what came before them. Reaching a conclusion which resonates with Ruth Wilson Gilmore's work on racism, I argue that these demarcated populations *materialise as race*. And while title registration was developed in a settler colonial context, its production of race through the blocking out of particular histories with land can also be seen in other contexts today.

BEFORE THE REGISTRY: RELATIVE TITLE, LINEAR TIME

Synchronicity between title and possession

The common law system for determining land title has not historically involved a public ownership register. Instead, title to land is essentially a private matter, with transfers of title being effected by contract. When disputes arise, courts do not declare any party 'the owner' of land, but rather make a determination as to which of the disputing parties has the better title at that point in time (Gray and Gray 2009, p. 56). Title is thus relative, rather than absolute, and ultimately based on 'the raw fact of physical possession' (ibid, pp. 180-182). Anyone in possession of land, including a trespasser or 'squatter', 'has a perfectly good title against all the world but the rightful owner'.[1] And even 'the rightful owner', that is, someone who can prove a better, prior right to possession, can lose their (better) title should they fail to re-take possession of the land for 12 years.[2]

The principle of relativity of title corresponds with the legal impossibility of *directly* owning land in England (unless you are the monarch).[3] Instead, subjects own an 'estate', which is a 'slice of

[1] *Fowley Marine v Gafford* (1968) 1 All ER 979, CA.

[2] The length of time has varied according to what is set by the Statute of Limitations. Currently the period is 12 years for unregistered land in England and Wales (*Limitation Act 1980* s15). For registered land the doctrine of adverse possession is now governed by the statutory scheme set out in the *Land Registration Act 2002*.

[3] Though note that the 'radical title' of the Crown is not the same as full beneficial ownership (*Mabo v Qld (No 2)* (1992) 175 CLR 1).

time' in the land (Gray and Gray 2009, p. 58). 'Title' is the entitlement to assert rights over the estate. As Pottage argues, rather than being a thing that is owned, title is a status indicator (Pottage 1998, p. 131). Title to an estate can be lost if it becomes more than 12 years out of sync with possession. Under the doctrine of adverse possession, if title over land is not asserted for 12 years and during that period someone else (ie a 'squatter') possesses the land, the 'original' or 'paper' titleholder will be prevented from asserting his/her title, leaving the squatter with the better claim to the land. Possession and title will thus be brought back into alignment.

Retaining title to unregistered land under common law thus requires something of an ongoing performance of estate ownership. This requirement fits with the Lockean ideal of making land your own by labouring on it, but it also reproduces Locke's selectivity: traditionally, not everyone's labour has been deemed capable of constituting possession.[4] The courts have tended to regard the labour of women, travellers, servants, and other 'others' as not making a sufficiently permanent mark on the land to constitute possession and thus warrant title status (Green 1998, p. 248). The synchronicity between possession and title that is retained by relativity is thus not inclusive of all long-term relationships with land, but only those which the law recognises as estate ownership.

Projecting the past into the future: Common law conveyancing

Before title registration, the relativity of common law title made conveyancing a risky process for prospective estate owners, because title could not be established definitively but only inferred from the absence of adverse claims (Offer 1981, p. 23). As Pottage's work on the historical legal techniques of conveyancing demonstrates, title to land was 'a fragile commodity' in that its stability and marketability depended on the collective memory of the local community (1994, p. 361). In medieval times, elaborate public rituals were performed when land was conveyed for the purpose of embedding the event of title transfer in the local collective memory (1994, p. 361-362). Because that memory was needed to determine the identity of the owner and the extent of his estate, the duration

[4] See Davies 2007, pp. 88-90.

of common law title was locally produced. As Pottage writes, 'the scales of measurement were themselves the product of a local sense of space and time. Spatio-temporal relations were plotted not according to 'clock-time' but according to the temporality of a practical orientation to the world' (1994, p. 366). While the measurement of time via clocks is also 'a practical orientation to the world' (see Bastian 2012 below), what Pottage is emphasising here is the importance of local, as opposed to universal, understandings of time and space to the content of title. Relative title depended on and was defined by local understandings of and relationships with land.

Pottage describes how medieval rituals involving swords and cuts of turf were eventually replaced by techniques involving paper documents, oral testimony and land inspections, but the ritualistic nature of preparing and verifying these documents (having them signed and witnessed, checking descriptions with locals) and their purpose of embedding the event of title transfer in the local collective memory remained (Pottage 1998, pp. 135-138). As anthropologist Carol Greenhouse has observed, putting a description in writing (as opposed to expressing it orally) gives it a level of fixity and certainty which can facilitate the systematisation of normative ideas around the text (1996. p. 52). Literacy has been associated with linear time because the written word is understood 'as anchoring a "base point" in time, irreversibly disengaging a moment in time from time's cycles' (ibid, p. 53). The conveyancing rule of *nemo dat quod non habet* (you cannot give what you do not have) is based on the premise that all title has a 'base point' which anchors the title being conveyed. As Pottage writes:

> Traditional conveyancing supposed that new owners emerged either when a subsidiary interest was carved out of a larger, pre-existing, entitlement or when one person succeeded another as the owner of an interest. In both cases, present ownership was founded upon past ownership. To prove title, one had to trace the 'parentage' of an interest back through each of its predecessors to an ultimate root of title. Transmission of ownership was understood in genealogical terms. (1998, p. 139)

Retrospection is thus key to common law conveyancing, but the 'ultimate root of title' is impossible to prove, it being a kind of mythic base point/moment at which title was first legitimately acquired. Instead, prospective purchasers would have to satisfy themselves that the genealogy or

'chain' of the title had been proven back to a point in time after which it was unlikely that any rival claims to the title could emanate. Up until 1875, this period was 60 years (an arbitrary time period perhaps chosen because it was roughly commensurate with upper class life expectancies at the time, thus reducing the likelihood of a prior adverse claim (Offer 1981, p. 23)). A 60 year chain of documents thus came to represent the existence of a 'base point' for title – the moment in the temporally distant but spatially local past which legitimated the present title.

Title documents orient their users (buyers, sellers and others concerned with the legal status of the estate) toward the history of the land, spanning back at least 60 years, as that history was expressed by previous owners. They are also determinative of the future of the estate. Pottage writes that title documents 'stored up the past and projected it into the future', with the purpose of keeping estates in the family (1998, p. 135). Title documents not only proved the pre-existence of a relationship with land, they also made detailed provisions for future events such as births, deaths and marriages, in order to keep land and family aligned long after the documents' authors had departed. As well as providing a 'base point' disengaged from time's cycles, title documents were instrumental in linking the past and the present to the future in a way which is evocative of Elizabeth Grosz's theorisation of linear time (Grosz 1999a, p. 7). Grosz envisages time as both a singular, unified and whole overarching time, as well as the numerous specific fragmented durations of each thing or movement (1999b, p. 17). Time as a whole is 'braided, intertwined, a unity of strands layered over each other', with this braiding of individual times into an overarching time allowing for times and durations to be located relative to each other (ibid). Linear time 'homogenizes and measures all other modes of passing insensitively' (ibid). Each title has its own specific duration, but the documents and legal principles governing them braid these durations together, producing an overarching time that homogenised aristocratic land ownership and measured other relationships with land 'insensitively', i.e. they were not permitted to interrupt the multi-generational alignments between land and an elite class of families. As Greenhouse argues, linear time tends to naturalise events and structures

by rendering them part of an irreversible, logical progression from past to present (Greenhouse 1996).

Indeed, it can be argued that the linear time of common law title and unregistered conveyancing had the effect of naturalising the elite class' multi-generational ownership of estates. Michelle Bastian argues that time – whether linear or otherwise – is 'a powerful social tool for producing, managing, and/or undermining various understandings of who or what is in relation with other things or beings' (2012, p. 25). Title documents and the common law principles applied to them produced an understanding that English land was (and, for unregistered land, still is[5]) in a stable relation of ownership with a small class of families, based on an ultimate legitimating 'base point' in the temporally distant but spatially local past. The synchronicity between possession and title helped to naturalise the English class system, constructing an 'image of timeless continuity' for estate ownership which undermined the reality of highly contested and ongoing battles over land (Green 1998, p. 235). History shows not only that English land was once understood and used as a common resource, but also that its enclosure and privatisation was a violent and much resisted process which required brutal legal suppression and brought about fundamental social change (Thompson 1975; Federici 2004; Graham 2011). The common law system of relative title and documentary conveyancing connected past, present and future in a way that helped to naturalise the seemingly perpetual relationship of ownership between English land and an elite class of families.

INDUSTRIAL REVOLUTION: REJECTING RETROSPECTION

During the late eighteenth and early nineteenth centuries, England underwent economic and social upheaval as newly invented machines replaced labour-intensive systems of production (Polanyi

[5] According to HM Land Registry, most unregistered land in England and Wales today is 'most likely to be owned by the Crown, the aristocracy or the Church': Land Registry Blog, 'Registered or unregistered land, that is the question' 22 January 2014 http://blog.landregistry.gov.uk/registered-unregistered-land-that-is-the-question/#sthash.9hrKQhlO.dpuf (accessed 29 January 2016).

1944/2001; Harvey 1989). Attitudes towards land and the conveyance of title began to change following the Industrial Revolution. Prior to the Revolution, constructing the 60 year chain of title was the main source of business for solicitors, who made their living handling documents described by Lord Chancellor Westbury as 'difficult to read, impossible to understand and disgusting to touch' (cited in Offer 1981, p. 23). But the slow and labour-intensive retrospective investigations performed by solicitors, as well as the fees and commissions which they charged, came to be regarded as inefficient and an impediment to a free market in land (Offer 1981, pp. 11-22). As title transactions became more frequent and the process of proving title genealogy became more of an impediment to commercial transactions, the requirement that a good root of title be evidenced through documents covering at least 60 years was reduced – to 40 years in 1875, and to 15 years since 1969.[6]

Throughout the 1800s there were several attempts in England to improve and even replace documentary conveyancing through the introduction of a title registry (Anderson 1998, p. 116). In 1846 a select committee of the House of Lords reported that 'the marketable value of real property is seriously diminished by the tedious and expensive process attending its transfer', and proposals were made for both a register of title deeds (i.e. a register of copies of existing documents evidencing title), and a register of title (i.e. 'a registry which should in itself be evidence, not of a deed, but of a title': Fonnereau 1830 in Simpson 1976, p. 40), in order to make land transfer faster and easier (Simpson 1976, pp. 41-45). The latter option of a title registry in which 'as to the *effect* to be attributed to registration: the entries in the register must constitute *the title*, the entire and *only title*' (Hogg 1830 in Simpson 1976, p. 40)[7] was the more radical proposal. Such a registry would mean that title would no longer be legitimated by a 'base point' in the temporally distant, spatially local past. Instead, the registry itself would provide title with its legal legitimacy. Retrospection would no

[6] Law of Property Act 1969 s23.

[7] Emphasis in original.

longer be necessary, as the registry would provide all the information any potential purchaser needed to know. Registered titles would even be indefeasible and guaranteed by the state.[8]

The institution of a title registry would significantly reduce the workload and thus the incomes of solicitors, who strongly opposed it (Anderson 1998, p. 119). Whereas previously conveyancing had been a laborious construction of evidence demonstrating decades of past ownership – a task best undertaken by local solicitors with knowledge of the area – conveying title through the registry would be a mechanical and singular process. Those arguing for the registry made the case that if shares could be bought and sold through a simple change in a register, without the need for solicitors and their expensive, 'laborious retrospective investigation' (Wilson 1950 in Simpson 1976, p. 41), then the same should be possible for land.[9] Law should not require prospective purchasers to construct

> a tedious and uncertain list of by-gone transactions and events, in which he has no concern or interest, but to an authentic statement of a present fact, which alone he wishes to know, namely the fact that the person from whom he is buying is entitled to sell. (Wilson 1850 in Simpson 1976, p. 41)

Despite opposition from solicitors and the landed class, in 1857 a Royal Commission report proposed a title registration system in which an entry in the register would legally constitute the title. The proposal involved a central London registry and district offices, with the goal of enabling buyers and sellers 'to deal with land in as simple and easy a manner… as they can now deal with moveable chattels or stock'.[10] The register would be constantly updated so that prospective pur-

[8] The state would indemnify all registered title holders, undertaking to pay compensation if the operation of the register caused a loss: Simpson 1976, p. 175.

[9] London solicitor Robert Wilson asked, 'Why is it so difficult to transfer the interest called a freehold, when it is so easy to transfer the equally real and permanent interest called a share in a railway company?… [T]he purchaser of a railway share finds the title to it already *posted up to the day*, and not left 60 years in arrear as the title to land is' (Wilson 1950 in Simpson 1976, p. 41).

[10] *Report of the Commissioners on the Registration of Title with reference to the Sale and Transfer of Land* (CP 2215, 1857 – session 2) para XL. Cited in Gray and Gray 2009: 187.

chasers of registered land would not need to engage in retrospection. The first state-backed title registry for English land was brought into being in 1862, and although it was initially unsuccessful, the political momentum against retrospection and toward simpler, faster conveyancing continued to grow. By 1897 registration of title was made compulsory for some land transfers, and this compulsion applies to all transfers of English and Welsh land today.[11]

Producing new, fresh titles

While the push for a title registry came from a desire to change the conveyancing process, the changes the registry would bring to that process have also fundamentally changed the nature of title itself. Pottage describes this change as being one that transformed the idea of land in law from being a contractual construct, to being a bureaucratic artefact (1994, p. 364). While previously, buyers and sellers would agree with each other on the marketability of a pre-existing title through retrospection, with the registry, buyers receive a new, fresh title from the registry itself. Titles produced by the registry derive their legal legitimacy, and thus their marketability, from the singular act of registration.

The title registry is capable of producing fresh, new, marketable titles at a far greater rate than solicitors could make an existing title marketable under the old conveyancing system. In realisation of the fears of nineteenth century aristocrats, title registration has made conveyancing easier and more accessible to more people, thereby turning land into a commodity that *anyone* with the appropriate funds can purchase (Anderson 1998, p. 109). When the introduction of the registry was first being debated in England, one of the main arguments against it was the potential diminution in the social value of title. The aristocracy feared that the centralised, potential mass production of what had previously been 'the badge of full citizenship within a predominantly aristocratic political structure' (Anderson 1998, p. 109) would interrupt their power to project the past into the future. That is, the linear time of aristocratic land ownership was threatened by the introduction of the title

[11] This has been the case since the Land Registration Act 1986 s2(1).

registry. With the registry bestowing legal legitimacy on a title upon every conveyance, land users would no longer be oriented toward a history of local ownership and a mythical legitimating 'base point' in the distant past. The multi-generational aristocratic hold on land might even begin to seem unnatural. Indeed, the push for title registration was associated with a broader movement for land reform and political enfranchisement. For class conscious radicals, Offer writes, 'registration was a means of dismantling the instruments of aristocratic identity and separateness' (Offer 1981, p. 33). With the state's insuring of registered titles and employing a Registrar to operate the registry, the proposed new registry would mean a significantly more active role for the state than it had previously played in regard to land title, just when the state itself was undergoing democratising reforms.[12] While this debate continued in England throughout the nineteenth century, title registration was implemented at far greater speed in the 'new country' of Australia.

NEW WORLD, NEW TITLE: LAND IN BRITISH COLONIES

Torrens: Producing perfect title

For most English subjects, land in the colonies had (and continues to have) a different social and political meaning from land in the mother country. The Australian and North American land being colonised by British settlers from the 1600s onwards did not have a history of aristocratic estate ownership. It was instead understood by colonisers as land 'in the State of Nature' waiting to be cultivated and properly used (*Mabo v Queensland (No 2)* (1992) 175 CLR 1). As A.R. Buck writes, while land in England was owned by a small elite class,

> in the colonies, by contrast, land seemed, in theory at least, to be open to all – a source of wealth, not as a stable element in life, but transitory and transferable in its nature. (2005, p. 176)

In the settler colonies, land law was modified in various ways to increase the alienability of land. Philip Girard for example points out that as early as 1732, an imperial statute made Canadian

[12] The Representation of the People Act 1832 was the first of multiple Acts extending the franchise to eventually make it independent of land ownership.

land subject to seizure for debts on the same basis as chattels, contrary to the equivalent laws in England (2005, p. 121). Most significantly, in 1858 – the year following the Royal Commission report proposing title registration – the Torrens system of title registration was introduced in the colony of South Australia. Established by the British Parliament in 1834, South Australia was the only Australian province which began its colonial life through free settlement rather than as a penal colony (Selway 1997, p. 5).[13] South Australian land was sold to settlers in advance of their moving there, and speculation was rife, with 'land orders' (another colonial innovation) purchased from the Crown and then sold and resold multiple times by investors, many of whom had no plans to move there (Taylor 2008, p. 7). As a 'new country' Australia was seen by English politicians as a good 'testing ground' for the 'adventurous' policy idea of title registration (Rogers 2006, p. 127). While in England the 1857 title registration proposal would for decades be stalled by political opposition from the landed class and the practical problem of land ladened with centuries of convoluted estates and interests, in South Australia there were no such hurdles. Indeed with Australian land being treated as empty – *terra nullius*, despite the presence of Indigenous people – and thus without a history of ownership to navigate, it offered land that was conceptually a blank slate upon which a title registry could operate to produce a new and improved kind of title.

Robert Torrens, a former Premier of South Australia, decided in 1857 to devote his career to reforming the land transfer system of the colony (Simpson 1976, p. 69). Torrens pointed out that the costs of transacting South Australian land under the English conveyancing system were often greater than the cost of the land itself, and suggested that land could more efficiently be traded by adopting a registration system akin to that already used for ships and shares (Raff 2003, pp. 27-36). These arguments were persuasive and successful. Designed to facilitate a new market in cheap and

[13] The establishment of the colony of South Australia was influenced by the lobbying of Edward Gibbon Wakefield, who proposed that the sale of land 'at a reasonable price' rather than very cheaply or free as land in other British colonies had been dealt with, would both pay for the costs of establishing the colony and ensure a constant supply of cheap labour, as not everyone would be able to afford their own land: Moss 1985, pp. 4-9.

legally unencumbered South Australian land, Torrens' system took further the 1857 Royal Commission recommendation for a title registration system by clearly setting out the principles and mechanisms through which the registry would operate to be the independent source of title.

The principles of the Torrens system are most commonly described as the 'mirror', the 'curtain' and the insurance principle. The first two are the most important Torrens innovations (Taylor 2008, pp. 12). The 'mirror' principle dictates that a publicly available register will accurately and completely reflect the interests which affect the land within its coverage. As described by Taylor, the mirror principle means that 'if something is not on the register then people are entitled to ignore it' (Taylor 2008, p. 12). Like any real mirror, the Torrens registry 'mirror' can only reflect what is held up to it, and can only represent the objects held up to it in a limited, two-dimensional way. The Torrens 'mirror' reflects only those interests in land that are brought to the registry; relationships with and interests in land that, for whatever reason, are not brought to the registry will not appear in the 'mirror'. That does not mean that such relationships with and interests in land do not exist. As other scholars have noted, the register does not actually reflect all facts that are material to the land, but only 'everything which can be registered, and is registered' (Hinde, McMorland and Sim 1986, cited in McCrimmon 1994, p. 310). While unregistered equitable interests might on some occasions be recognised, in general all unregistered/unregisterable interests in land will disappear from *legal* view, and will not be binding upon new title-holders or other third parties. The mirror principle of the Torrens system means that the registry will come to reflect, represent and legally legitimise the interests of those who hold their interests up to it.

The second principle, the 'curtain', takes further the selective two-dimensional representation of land produced by the 'mirror', by ensuring that interests that are not on the register will not bind new title-holders or other third parties. The register is the sole source of information for prospective purchasers to check, allowing them to draw a metaphorical curtain across all prior and existing interests in the land that do not appear in the 'mirror' (Taylor 2008, p. 13). Any interest hidden behind the curtain will not take effect in property law and can be ignored by prospective pur-

chasers. Like real curtains, the Torrens registry 'curtain' obscures and sometimes blocks particular realities from view. Interests in and relationships with land that are blocked by the registry curtain will not be upheld by property law. Again, this does not mean that such interests and relationships do not exist, only that registry users can effectively pretend that they do not.

Finally, under 'the insurance principle' the state guarantees the accuracy of the register and will compensate any registered title-holder who suffers a loss due to a defect in the register, for example through a fraudulent or erroneous entry (Taylor 2008, p. 14). Working together, these three principles produce indefeasible titles. The purchaser receives a 'certificate' once title has been registered, but the legal legitimacy of the title comes from what stands on the register.

Torrens title registries thus *represent* land, *hide* other interests and *guarantee* their users the validity of their titles. Much like magician's smoke and mirrors, the registry's 'mirror' and 'curtain' block prior unregistered interests from legal view while the registry conjures up fresh, indefeasible titles. Retrospection is no longer required when transferring land because Torrens titles are independent of their predecessors and free of the encumbrances of historically derived local land use patterns and custom. These titles are of such high quality that they have been described as 'akin to an absolute grant from the Crown' (Hepburn 2013, p. 229). As famously described by Australian High Court Chief Justice Barwick in *Breskvar v Wall*, Torrens is 'not a system of registration of title but a system of title by registration':[14] that is, registration in the Torrens system is not merely the recording of pre-existing title, it is the manufacturing of title – new, indefeasible title.

The Duration of Torrens Titles and the Temporal Order of the Registry

The Torrens registry made the sale and resale of Australian land by investors (many of whom remained on the other side of the world) simpler, cheaper and faster than ever before. Torrens titles being indefeasible, they do not fit with the principle of relativity which kept title in sync with pos-

[14] (1971) 126 CLR 376: 381.

session of land under the old system.[15] Because it manufactures perfect titles, the Torrens registry has been described as operating in a transformative, almost magical way, with the moment of registration starting time anew for the land, and thus freeing title from both law and history. TBF Ruoff for example wrote of the Torrens system:

> Anterior defects of title are cured, and thenceforth all investigations of the history of how the named owner came to be entitled is ruled out forever and all future transactions are carried out by simple forms and simple machinery. (1958 cited in Lim and Green 1995, p. 273)

With similar attentiveness to the curing of 'anterior defects' in title, Greg Taylor describes the Torrens system as 'a hospital':

> It does make things better, cure invalidities, and make people's titles certain. It does this, once registration has occurred, by taking away the need to show from then on that the registered owner's title originated in the seller's right to sell the land. The Torrens system therefore means the end of the need to look backwards for possible flaws. (2008, p. 10).

Indeed, Taylor's language goes further than this, describing the way the Torrens curtain prevents historical entitlements from 'infecting' potential buyers (ibid, p. 13). This pathological language for the description of historical relationships with land invokes both a fear of and revulsion to those who had such relationships in the 'New World'. The 'anterior defects', 'invalidities' and other uncertainties of title to Australian land were seen as different from those of title to English land. In 1859, a South Australian property magazine heralded Torrens title as being the 'glorious realisation' of 'law-emancipated land'.[16] But while Australian land did not have a convoluted history of English land law and aristocratic estate ownership, it did have a history of at least 40,000 years of

[15] If the legal basis of title is the register rather than possession, it does not make sense for title to be obtainable through adverse possession. Torrens jurisdictions have found different ways of modifying the common law principles of adverse possession to accommodate it within the system of title registration (for example O'Connor 2006), but it is clear that registered title is more absolute than relative (it is arguable that relativity of title still exists to some degree under the Torrens system because it allows for different kinds of title to exist in one estate).

[16] Estates Gazette, 15 October 1859, p. 314, cited in Rogers 2006, p. 128.

Indigenous laws and ownership.[17] The legal fiction that Australian land was empty and that no laws governed it prior to British colonisation would not be overturned until 1992.[18] In the meantime, the production of Torrens titles to land across the Australian continent meant that the registry's curtain was repeatedly pulled across this local ownership history, legally invalidating and disappearing these prior relationships.

The Torrens registry orients potential purchasers toward the future: a colonised future. The ultimate legitimating 'base point' in the temporally distant but spatially local past which oriented purchasers under the old system toward the history of the land as it was told by local owners, was no longer needed to give title market value. Torrens titles are instead given that value by the temporally immediate, spatially centralised registry.[19] The local ownership history becomes irrelevant as the indefeasibility and independence of Torrens titles orients new owners toward the future. History starts anew for each title manufactured by the registry, with a new title being produced with every conveyance. So rather than stretching out slices of time over multiple generations, the registry allows a new era to begin with each conveyance. Braiding together these multiple eras, all of which begin without history due to the operation of the curtain, Torrens title registration produces an overarching time of repetitive new beginnings, a series of staccato-like slices of time in the land that are detached from the past and oriented only toward a limited and memory-free colonial future. This future-oriented temporal framework was seen by English politicians and settlers as appropriate for the New World they thought themselves to be building (Rogers 2006, p. 126).

[17] Ownership is not a concept most Indigenous Australians tend to use to describe their relationship with land (Black 2011; Watson 2002). I use the term Indigenous ownership for the purposes of this article as it is the closest rendering that a proprietal reading of that relationship can make. It is a strong and constitutive relationship, in some ways commensurable with exclusive possession, but also exceeding the idea of a common law estate, in part because that relationship is not restricted to being a 'slice of time' in the land (ibid).

[18] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[19] The debate over 'immediate' and 'deferred' indefeasibility is limited to whether a fraudulent entry on the register becomes indefeasible on the initial or a subsequent entry: O'Connor 2009.

Consistent with its orientation toward the future and away from the past, commentators have described the Torrens system as favouring 'dynamic' over 'static' security (O'Connor 2005, 2009). In economic terms, static security allows property to be securely held – thus favouring those who already have it – while dynamic security allows property to pass securely to new owners, thus favouring those who make later purchases (O'Connor 2009). Whether a system favours static or dynamic security becomes particularly relevant in situations where, after the conveyance has taken place, it transpires that the property was procured by 'defective means' (ibid). Those who lose their property by such means will not be protected in a dynamic system.

As the duration of each Torrens title is dependent on the registry rather than local ownership histories, the overarching time produced by the Torrens system is not synchronised with the land to which the titles relate. The lack of synchronicity between land and title occurs because Torrens registries signal and give effect to changes in title not pursuant to physical possession, localised scales of measurement and practice, and local histories of land ownership, but pursuant to the obscuring effects of the 'mirror' and the 'curtain'. The 'mirror' not only produces a two-dimensional mirror of the interests held up to it, it also freezes those interests in time at the moment of registration. The initial registration of land (referred to as 'torrensing the title' by some lawmakers (Simpson 1976, p. 68) and as 'the terminal event in the lifetime of an unregistered estate' by Gray and Gray (2009, p. 195)) involves a state-authorised surveyor producing a cadastral map which represents that land as static (Kain and Baigent 1992). James C. Scott describes the cadastral map as 'like a still photograph of the current in a river': it represents a parcel of land as it was arranged and owned at the moment the survey was conducted, but the land itself – the natural life that it supports, the networks of relations that define who is entitled to use and occupy it, the conceptualisation of its beginning and end – is always moving (1998, p. 46). The rigid geometric grid of the cadastre tends 'to run afoul of the natural features of the nonconforming landscape' (ibid) which continue to live and shift. The curtain hides historical relationships with interests in, and entitlements to land that have not been registered. Once hidden by the register, these relationships with land do not disappear, but

they do not bind the new title-holder. The subjects who have such relationships with land are thus put into a precarious position, potentially becoming trespassers on land they have long known and lived on.

Colonial co-ordination

There can be little doubt that Torrens title registration functioned as a tool of colonial governance. The Torrens registry has been described as 'the jewel in the Crown of colonial land management' (Home 2004, p. 17). Torrens himself had previously been involved with the issuing of 'clean, fresh' titles to Irish estates that had been bankrupted by the Potato Famine (Rogers 2006, pp. 132-134). After its inception in South Australia the Torrens system spread quickly through large parts of the British Empire, and by 1875 had been adopted by all Australian states, New Zealand and the western provinces of Canada (Taylor 2008, p. 3). Canada, Taylor writes, 'was a crucial conquest for the Torrens system' (2008, p. 4). R.G. Patton traces the further spread of the Torrens system to Hawaii, the Philippines and some Latin-American jurisdictions, arguing that the purpose of the system is to provide 'incontestability of title' in places 'where titles were particularly hazardous… in the more distant portions of the Empire where records of old titles were non-existent or undependable and where large areas of wild land were being transferred from public ownership to private ownership' (1951, p. 224). Jurisdictions that operate a Torrens registry have been described as 'bijural' because the registry is so powerful over and distinct from the 'ordinary' or local rules of property law that it is seen as producing its own overarching law (O'Connor 2009, p. 195). The system 'cleared the way for the extension of rubber plantations at the expense of the peasantry' in British Malaya (Offer 1981, p. 31). Today the Torrens system is used throughout most of the Commonwealth, and Torrens-inspired title registration systems (also operating versions of the mirror and curtain) are being increasingly adopted in other parts of the world – many at the behest of the World Bank and the IMF (Raff 2003, p. 9).

With this colonial history, it is not surprising that some argue that the dispossession of Indigenous people was the very purpose of the Torrens system. Australian Aboriginal activist Noel Pearson has argued that

> All clues point to young Torrens inventing the new system of land registration, which now bears his name, in order to complete the dispossession of the Aboriginal people… The new system of land registration provided indefeasible titles to land owners. Whatever name is registered as the owner of the title cannot be challenged… the genesis of Torrens title in Australia has been ignored so far as the principle event in the history of the theft of land from the indigenous owners. (Pearson in Ainger 1991, p. 18)

More recently, Brenna Bhandar has argued that the instalment of the Torrens system of title registration in South Australia by English colonists 'was no accident', and that it functioned as a 'technique of dispossession' in this context (Bhandar 2015, p. 256). My interest is not in uncovering the purpose or intentions of those who designed and implemented the system. Consistent with Dean Spade's method of focussing on how laws function to produce categories of subjects with differentiated vulnerability to economic exploitation, violence and poverty, my interest is in understanding the operation and effects of the Torrens system (Spade 2011, p. 22). I suggest below that, whatever the intentions of those who created and implemented it, the temporal order produced by title registration (whether Torrens or Torrens-inspired) creates categories of subjects: those who are vulnerable to losing their historical relationship with land, and those with guaranteed entitlement to the land's present and future. And, I argue, these temporal categories materialise as race.

PRODUCING RACE THROUGH TIME

As has been shown in a wealth of scholarship, race is not a biological truth but a powerful social and discursive construct with very material effects (Omi and Winant 1994; Crenshaw et al 1995; Gilroy 1987; Hall 1997). Stuart Hall argues that race functions as a 'floating signifier' which classifies human subjects, creating categories which make discursive constructs about difference appear fixed and 'true' (Hall 1997; 1996). Race is produced through various discursive and material forces including law. Torrens title registration, I argue in this section, produces race through its temporal

ordering of relations with land, the subsequent categorisation of human subjects who have those relations, and finally through the temporal consequences of that categorisation.

By providing guaranteed up-to-date information about the proprietorship of land, the Torrens system produces a predictable temporal order for the everyday business of the land market. Whereas the old system of conveyancing through deeds required retrospection for managing the risk of unknowable pasts, the Torrens system eliminates that risk: the mirror pretends the land has no unknown history, the curtain blocks such histories out, and the insurance principle provides buyers with total peace of mind. Prospective investors with no prior knowledge of the land can easily gather information about it and coordinate with sellers by simply consulting the registry.

The registry thus enables market coordination and also produces a shared orientation toward the future. In so doing, it performs a similar function to that of time-related devices such as clocks and calendars, which also produce temporal orders by enabling coordination and producing shared temporal orientations. Michelle Bastian argues that clocks and the way we 'tell the time' in everyday life enable us to coordinate with some realities and ignore others (2012). Bastian argues that clocks signal change in order for their users 'to maintain an awareness of, and thus be able to coordinate themselves with, what is significant to them' (2012, p. 31). Clocks and their users involve decisions about what is significant, 'and consequently which elements of our world we want to keep to time with and which elements we can afford to drop from our sphere of direct concern' (ibid). The same argument can be made in relation to other time-related coordinating devices, including title registries. The Torrens registry 'mirror' and 'curtain' hides significant aspects of the land's local history from registry users, allowing owners and speculators to drop the land's history from their sphere of direct concern. The registry provides settlers and speculators with continuous and predictable 'befores' and 'afters' in relation to land. Their attention is directed only to future ownership changes in the land as they are signalled by the registry, as this is the information they require to coordinate with each other. To use Elizabeth Grosz's terms, the divergent local histories of land

and those who live and have historically lived on it become irrelevant as the overarching, standardised order of the registry takes over (1999b).

The imposition of an overarching, standardised temporal order has been recognised as an important part of maintaining capitalist and colonial power in other contexts. E.P. Thompson describes how during nineteenth century England, there were numerous innovations to ensure the institution of a standardised temporal order in English towns and cities, so that factory owners could coordinate their workers (Thompson 1967). Thompson shows that during this period, time came to be understood and regulated not by how long it took to complete particular tasks necessary for one's own subsistence, but rather by the demands of employers who bought workers' time (Thompson ibid). In Bastian's terms, it was necessary for the burgeoning capitalist system to convince workers that 'telling the time' according to a standardised clock was what they needed to do to coordinate their lives. As capitalism grew increasingly international, British 'standard time advocates' lobbied for an overarching global time to allow for commercial and military coordination at this international scale (Barrows 2011, pp. 2-4). These advocates prevailed with the 1884 Prime Meridian Conference recommending the global adoption of Greenwich Mean Time, with most nations (many of which were then British colonies) synchronising their times with the Greenwich Royal Observatory by the 1930s (ibid, p. 2). Communities geographically very far from London were thereby oriented towards it, and away from local patterns and rituals. The successful push for nations around the globe to synchronise their times with the heart of the Empire was a distinctly colonial achievement. As Renisa Mawani argues,

> law's production of an 'overarching time,' to use Grosz's phrase, differed significantly from and existed in tension with the multiple durations of lived time that it sought to order and even eradicate. This doubling of time, between law's time and the duration of lived time, fractured colonial legalities, opening sites for resistance and subversion, while also producing new intensities of colonial-legal violence. (Mawani 2014, p. 73)

The colonisation of time, Mawani argues, 'was crucial to Britain's acquisition and control over territory and to its modalities of colonial legality and governance' (2014, p. 74).

Examining a different British colonial context, Mawani argues that racial categories were produced through 'a juridico-political and temporal process that differentiated individuals and demarcated populations as racially distinct and as inhabiting competing and incommensurable times of colonial settlement' (Mawani 2014, p. 85). While Mawani is discussing laws in nineteenth century South Africa, her analysis can also be applied to the production of racial categories through the Torrens temporal order. In settler colonies, those subjects whose historical relationships with and entitlements to land are repeatedly blocked by the curtain and absent from the mirror are those whose relationships with land pre-date the existence of the registry. These subjects become categorised as 'Indigenous'. 'Indigenous' is a generalising colonial term: no Gurindji, Arrente or Yorta Yorta people defined themselves as 'Indigenous' before the imposition of colonial rule, but their pre-invasion history with the land and the law's ongoing efforts to erase that history puts them into the 'Indigenous' temporal-racial category (see Watson 2009, p. 49). Irene Watson argues that this process of categorisation was 'tied to the idea of progress or the movement towards a "vanishing future"' for those with pre-colonial relationships to land (ibid). The rights to land of those in this category are unenforceable against new, registered title-holders.

Being Temporary

Of course, title registries are not the only means through which this temporal division is (re)produced. As Mawani has noted, there are many ways in which Indigenous people in settler colonies (not just Australia) have been constructed as pre-modern subjects, 'their time' confined to the past and history (Mawani 2014, p. 77; Keenan 2014). The production of this temporal-racial division through the title registry has particular material effects. Designated as belonging to a historical period that has now ended, like all visitors and trespassers, the bodies of those categorised as Indigenous can only be 'here' temporarily. Despite the reality of their prior and ongoing relationship with land, their temporal-racial category renders them temporary. The materialisation of this temporariness is evident in settler cities, where, as Sherene Razack has shown, Indigenous people are so

materially out of place that they come to be understood as waste that needs to be contained and removed from the streets (2015, pp. 43-45). As Vinay Gidwani and Brett Story argue, waste is a political category – the political other of value (Gidwani and Story 2012, p. 7). This category has historically been used 'to designate material excess that is disordered or improper for the purpose, largely, of legitimising capitalist expropriation of common resources' (ibid). While title registries give value to what they produce, so too do they create waste. That waste consists of the historical relationships with land that are hidden behind the curtain – the potentially 'infectious' 'defects in title' which legal historians have described as being magically cured by the registry, and which Indigenous subjects know to be their historical and ongoing relationships with land. These connections are not in line with the temporal order of the registry but they do not in fact magically evaporate; they are the registry's material excess, and those whose very existence on the land is rendered into a category of temporary waste must suffer the consequences.

The temporal consequences for those included in the category 'Indigenous' are not only evident in cities, but in all settler colonial landscapes – Indigenous subjects have lower life expectancies than settlers, are disproportionately homeless, subject to violence, and killed with impunity by police in urban and rural areas (Razack 2015; Perera and Pugliese 2011). Nor is the correlation between temporariness, racial categorisation and land limited to settler colonies. In her work on the growth of the Californian prison system, Ruth Wilson Gilmore puts forward the thesis that racism is 'the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death… locally unwanted land uses accelerate the mortality of modestly educated working people of all kinds in urban and rural settings' (2007, p. 247). This definition is useful in thinking about race as a temporal category, not just in terms of when a group of subjects 'arrived' (see Ahmed 2000) and which 'time of colonial settlement' a group is seen as inhabiting (Mawani 2014), but also in terms of how long racialised subjects are able to survive in the world. Caught behind the curtain of the registry and thus rendered as waste in the title-manufacturing process, those whose connections to land are temporary and precarious are therefore more likely to live lives of

short duration. It also affirms the importance of unwanted, destructive land uses in producing this accelerated mortality.

Being Indefeasible

Meanwhile, those who obtain their title through the registry become indefeasible; their title is new, perfect, oriented toward the future and insured against the past. The absolute entitlement to land the Torrens registry gives to title-holders assists them to inhabit the colonial time of settlement. To inhabit this time carries racial significance. As Mawani argues, as a colonial formation, the settler is ontologically white, being constructed through the conquest of land and assertions of permanency, priorness and superiority over 'immigrants', who are racialised differently and constructed as having a less permanent claim to the land (2014, p. 81). Aileen Moreton-Robinson also points out the whiteness of the 'settler' category, whose entitlement to be on Australian land is based on the original British theft of the land and its declaration as *terra nullius*, compared to the differently racialised 'migrant' category, who must seek permission from settlers to arrive and stay on the land (2003, pp. 27-29). Both temporal-racial categories are distinguishable from the Indigenous category, whose members are confined to the (blocked out) past.

The obscuring effects of the Torrens curtain and mirror and its provision of indefeasible title can help subjects to inhabit the time of colonial settlement, though they will not necessarily make those subjects white. Subjects who are racialised as Chinese, for example, can purchase Torrens title land in Australia. Chinese title-holders will still face racism in Australia, but holding registered title will mean that they are invested in land on the terms of colonial law; they will coordinate with other title-holders and be oriented toward the land's colonised future. Indigenous subjects can also purchase Torrens title. The deeply entrenched impoverishment of the Indigenous population – the direct result of the colonial theft of land– makes such purchases relatively infrequent.[20] Some Indig-

[20] A recent case study of the state of New South Wales for example shows that home ownership in Indigenous households was significantly lower than the ownership rate among all households (Crabtree et al 2015, p. 23).

enous subjects prefer to live on outstations/homeland communities where land is held communally pursuant to native title or legislative land rights frameworks (Altman 2013, pp. 107-110). Indigenous subjects who do purchase Torrens title do not thereby become white, but rather, in Cheryl Harris' terms, take action which enables them to survive under the coercive force of white supremacy (1993, pp. 1743-1744). Moreton-Robinson argues that 'Indigenous people may have been incorporated and seduced by the cultural forms of the coloniser but this has not diminished the ontological relationship to land. Rather, it has produced a doubleness whereby indigenous subjects can "perform" whiteness while being indigenous' (2003, p. 31). Acquiring Torrens title does not erase identity – despite the illusion of the curtain, pre-colonial relationships with land do not actually disappear – but it might assist those in the Indigenous temporal-racial category to inhabit the time of colonial settlement, contrary to that categorisation which designates them as belonging to the past. No such feats of time travel are required of title-holders who are already racialised as white. For them, the indefeasibility of Torrens title reaffirms their whiteness.

Through the registry's repetitive reproduction of new titles, every conveyance reinstantiating the newness of the land, the temporal-racial categories produced can come to seem natural (see Mawani 2014, pp. 76-77). The naturalising power of time thus operates here not through a linear connection between past, present and future as under the old conveyancing system of title documents and unregistered English land (see Greenhouse above), but rather by the continuous production of new, indefeasible titles. This continuous manufacturing of new eras for land cumulatively produces the 'overarching time' of title registration. This overarching, future-oriented time is continually reproduced with each and every conveyance, as 'theoretically, a new grant is issued each time by the Crown' (Burns 2011, p. 792). As a Crown grant of Indigenous land extinguishes native title under common law[21] and potentially undermines assertions of Indigenous sovereignty and ju-

[21] While common law courts have 'recognised' pre-colonial Indigenous connections with land and constructed *sui generis* forms of title for it, these forms of recognition-based title do not fully encapsulate the Indigenous connection with land or comply with the relevant Indigenous law (Coulthard 2014; Watson 2002), and have been critiqued for locating

risdiction (Pasternak 2014), the overarching time produced by the registry – restarting the dispossession with every conveyance/Crown grant – maintains invasion as a structure rather than an event (Wolfe 2006, p. 388). This structure can begin to seem natural and fixed when in fact it is being constantly manufactured behind the curtain and mirror.

CONCLUSION

In this article I have argued that title registration developed out of a rejection of the laborious retrospection requirements which had previously been necessary for conveying land under common law. The innovation was opposed by the aristocracy for fear that it would interrupt their multigenerational monopoly of estate ownership. Political opposition to title registration stalled its implementation in England, but in the colonies land was seen by colonists as unowned, 'empty', and ripe for registration. Torrens' system of producing indefeasible title, first conceived for the colony of South Australia, has been taken up by much of the common law world. The colonial development and structure of the Torrens system should be taken into account in the study of contemporary title registration systems throughout the common law world.

Building on interdisciplinary work on time as a social tool, I have examined the temporal aspects and effects of title registration in relation to what Pottage describes as the bureaucratisation of land transfer (1994, p. 383). The Torrens registry produces fresh, new and indefeasible titles through its 'mirror' and 'curtain' – principles which, like the objects they are named after, block certain objects from sight and can only ever produce a limited, static view. In Australia and other

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Indigenous law and culture in the past rather than the present (Kerruish and Purdy 1998; Keenan 2014). The common law formula for native and Aboriginal titles is that they are inalienable titles constituted through historical (indeed, pre-colonial) connections with land, meaning they do not fit with the Torrens system. While the recognition of native and Aboriginal titles – and of treaty and reserve land – has political and practical benefits for some Indigenous people, these titles do not interrupt the Torrens system – they are either modified to allow for their assimilation into the Torrens register, or they exist outside of it (Bankes et al 2014; Secher 2000; Thomas et al 2013).

settler colonies, the curtain blocks out and thus legally invalidates histories of Indigenous land ownership. Settlers and speculators buy and sell land through the registry, coordinating their transactions and looking to the future while dropping Indigenous claims to land from their sphere of direct concern. The temporal order produced by the registry produces categories of subjects – those whose relations with land are blocked are rendered temporary, while others become indefeasible. These categorisations, I have argued, have materialised as race in the Australian settler colonial context. My discussion of the Torrens system has thus demonstrated one means by which colonial legal orders used time to categorise and manage populations.

My focus has been on the Australian context because that is where the Torrens system originated. However, title registration is fast becoming widespread around the globe. In the US, a corporate-run electronic mortgage registration system facilitated the rapid and unsustainable trade in securities tied to sub-prime loans (Peterson 2011). In the crisis that followed, it was overwhelmingly black and hispanic mortgagors who found they no longer belonged in their homes: their time as homeowners, in fulfilment of that 'American dream' cut short as they were rendered back to their status as temporary renters, trespassers or homeless. In the Global South, states that have adopted Torrens-like systems at the behest of the World Bank or the IMF have had large areas of land purchased by foreign investors, taking away local farmers' security and making more precarious the poorest residents whose relationship with land is informal and unregisterable (Besteman 1994). And here in England and Wales we have recently witnessed the criminalisation of squatting, a move which would not have made sense outside a registration system and which has a disproportionate effect on those who are already materially precarious and socially ostracised. In a United Kingdom Supreme Court judgment last year, Lady Hale acknowledged with caution the lack of synchronicity between land and registered title. 'It is important to bear in mind that the system of land registration is merely conveyancing machinery' she wrote; and if courts fail to acknowledge that interests in land exist prior to their registration, 'we are in danger of letting the land registration tail wag the

land ownership dog'.[22] As legal scholars we would do well to exercise caution at the registry's power to perform deceptive feats and upend pre-existing relationships with land. As the overarching time of registered land markets takes hold in jurisdictions around the world, we must be wary of whose histories are being blocked and whose futures cut short behind the registry's curtain and mirror.

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