

THE WHITE SUBJECT AS LIBERAL SUBJECT

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Abstract

In this article I use storytelling to explore the production of the white subject as the liberal subject—the full citizen. Drawing on Indigenous theorists such as Irene Watson and Aileen Moreton-Robinson, I critically reflect on aspects of my life and demonstrate that my whiteness is a form of property that has allowed me to shift my class position. In contrast, the Aboriginal person is denied full humanity, living in a country subjected to violent hierarchies of race. In my academic research, I have travelled far to gather data on racist practices and called for change. However, I had not realised the racism located within the practices of family members and how I had benefited from these. Here, I acknowledge that the construction of my white citizen's subjectivity in a raced nation entails a racism lodged in my unconscious. I set ethical goals for myself arising out of the understanding flowing from critical reflection on my whiteness.

Introduction

The focus of this article is my reflections upon my own story and my response to my whiteness. To do this, I use poststructuralist theory both to interrogate the production of the white subject as the liberal subject—the woman/man who is a full citizen—and to reflect on the benefits flowing from this privileged subject position. I draw on the insights from Indigenous critical race theorists, in particular Irene Watson

(1998; 2005; 2007) and Aileen Moreton-Robinson (2000),¹ and whiteness theorists (eg. Frankenberg 1995) to map out the violent hierarchies of race in the Australian context and to acknowledge that my subjectivity is formed within this hierarchical system.² As Justice Brennan stated in *Mabo v Queensland [No 2]* (1992) ('*Mabo*'), Aboriginal peoples have been regarded as 'so low in the scale of social organisation' that it was 'idle to impute such people some shadow of the rights known to our [that is Anglo-Australian] law' (*Mabo* [28]). In what is a desire for justice, I call for an ethics of alterity to reshape white racist practices and law.

My ethical position is primarily drawn from the work of the philosopher, Emmanuel Levinas (1979) who, writing in response to the horrors of the European Holocaust, argues for an 'ethics of alterity'. In this ethical position, the other can never be reduced to the self; at its heart is the belief that 'the demand of the other obliges me'. Levinas (1972: 7) writes of 'the impossibility of cancelling responsibility for the other ... a duty that did not ask for consent ... that came without being offered as a choice'.³ I take from Levinasian ethics the concept that before I am 'human' comes my responsibility to the 'other'. The 'other' who calls me into being in this article is the Aboriginal person. She is denied the 'humanity' accorded the white subject in Australian economic, political and legal institutions. I do not discuss Aboriginal concepts of identity as I have no access to this knowledge.

Using this theoretical framework I critique the privileges attaching to the liberal, white subject of law. However, I cannot end there, as justice demands not only the removal of the legal barriers to full citizenship for Aboriginal peoples. It requires the adoption of an alternative imagining of the ethical life and a subsequent reshaping of the law. In my theoretical position my identity is fluid, rather than fixed; it is constructed through the operation of discursive practices (Derrida 1992; Lacan 1982). The subject 'I' is not an independent, autonomous person; I exist only interdependently, as the result of relations with others. This I theorise as an emancipatory position. If I become critically self-reflexive and bring into consciousness the racist discourses and microphysics of power that circulate through society, and indeed through my body, there is an opportunity to resist at each node of power (Foucault 1980). Out of this self-reflexivity and the bringing of repressed knowledge into consciousness, a transformation of person, and ultimately of structures, can occur. In this context, I desire to bring the privilege of whiteness out of my unconscious and take responsibility for my part in the violent racism that permeates Australian society. As Cixous (1976: 880) writes: 'because the unconscious, that other limitless country, is the place where the repressed manage to survive'.

To be born into whiteness in Australia is to be born into humanity. It is to have your birth celebrated by the nation and your death mourned. It is to assume the mantle of the liberal subject. In contrast, to be born Aboriginal is to be constituted as 'less than human, without entitlement to rights, as the humanly unrecognisable' (Butler 2006: 98). Watson has passionately documented this in her work, most powerfully in her article 'Illusionists and Hunters' (2005).

Spivak (1988: 271) speaks of marking positionality when engaging in research, and in later work, explores how Western philosophers in seminal works actively prevent non-Europeans from occupying positions as fully human subjects (1999). My whiteness, in a country that privileges whiteness, allows me a 'natural' subjectivity that is denied to non-white persons. My ability to speak is presumed (Moreton-Robinson 2000). I share in the modernist orthodoxy of a neutral, objective position of reason. The stories I choose to tell are clothed in the legitimacy of the white, university-educated lawyer. If I regard the 'problems' in Aboriginal communities as flowing from a 'welfare mentality' and the failure of the white state to impose policies of 'zero tolerance' and to maintain 'law and order' I will be regarded as reasonable, pragmatic and compassionate; indeed I may be deserving of a federal government grant (Watson 2007).

To tell a story of white colonial practices, white privilege and white abuse and neglect as the primary causes of Aboriginal trauma and disadvantage is to cast aside the cloak of the 'reasonable man' and put on a 'black armband'. It is to take a critical position in the history wars, to decry the 2007 'invasion' of Aboriginal lands (Watson 2007) and to court illegitimacy.

Storytelling

In this article I use storytelling as a way of being critically self-reflexive about my assumptions and my practices (Gordon 2005). In using this methodology, I desire not only to critique law's claims to innocence (Fitzpatrick 1990) but to engage in a transformative process.

Storytelling, sometimes called narrative or auto-ethnography, is a method used by critical race theorists in the United

States (Delgado 2002; Williams 1991), and feminists to destabilise the Western production of knowledge. Knowledge is, in Western systems, theorised as arising from a positivist methodology, one that reifies objectivity, dispassion and neutrality (Davies 2008). In contrast, storytelling is a method that asserts that desire and subject position are always implicated in knowledge production. In law, a discipline dominated by positivist theory and methods, storytelling by white law professors is rare. Conference papers and articles are mostly written from a third-person, 'objective' position. There is a deliberate distancing of the person 'speaking' from the events they describe. This serves to render the speech dry, dispassionate, inauthentic and therefore scholarly. Duncan Kennedy's piece (1990) 'Legal Education as Training for Hierarchy' is one of the few essays by a white, male law professor that exposes the techniques of dress, manner and language used to produce the 'reasonable man of law'. However, Kennedy is unaware of his white privilege and the impact that whiteness has on his subject position. Patricia Williams, a female Afro-American law professor, does not share Kennedy's experience; she describes feeling like an 'alien' in law school (1991).

My storytelling in this paper seeks to remove the cloak of reason woven in the academy and reveal my skin of spirit and emotion. I want to expose the reproduction of white privilege in my life and explore the ways in which I can challenge this discursive practice (Frankenberg 1995). As Margaret Davies (2008: 215) writes: 'knowledge cannot be disentangled from social meanings and ... personal history does influence what you know and how you know it'. I take responsibility for my part in the injustices issuing forth from my position as white subject and citizen by using this

knowledge to inform my daily practice as a law teacher.

Born into a large, struggling working class family where no one had ever gone beyond Year 8 and many, such as my aunts and mother, had left school below or at the legal age of 14, I had a valuable property right: I was white (Harris 1993). This affected my life in ways that, until recently, I was largely unconscious about. As a law student at university I felt my outsider status keenly in terms of my class and gender. It took a long time and the patience, generosity and scholarship of many Aboriginal people before I became aware of my position of privilege (Moreton-Robinson 2000; Watson 1998; Lucashenko 1993, 2008). This transformative process continues. There is a danger in storytelling by white people that it enables whitefellas to construct themselves as 'victims'. The space opened for Indigenous scholars in the academy, arising from their lived experience of racism, may be colonised by white people writing about the existential pain (rather than the undoubted pleasures), of their race privilege. Aware of the danger I nevertheless write, trusting that to document white privilege is a positive contribution to ending that privilege. As Cixous (1975: 87) asserts:

[w]riting is precisely *the* very possibility of change, the space that can serve as a springboard for subversive thought, the precursory movement of a transformation of social and cultural structures.

White Lies

White history 'works through radical effacement, so that there never was a human, there never was a life, and no murder has, therefore, ever taken place' (Butler 2006: 147). This is the 'white lie' at

the heart and on the lips of the nation. In *Cooper v Stuart* (1889) the Privy Council declared that the colony established in New South Wales 'consisted of a tract of territory practically unoccupied without settled inhabitants or settled law ... it was peacefully annexed to the British dominions' (*Cooper v Stuart* 1889: 291) ('Cooper'). 'As soon' their lordships decided 'as colonial land becomes the subject of settlement and commerce, all transactions [are] governed by English law' (*Cooper* 292). In this judgment, the concept of property is constructed from a white ontology. 'Settlement' of land and 'commerce' are the basis of property rights. The case was used as authority in *Milirrpum v Nabalco* (1971) where Justice Blackburn found that the Aboriginal plaintiffs had no property rights in land as they did not have to right to enjoy the land, to exclude others or to trade it as a commodity (*Milirrpum v Nabalco* 272). Property requires an exclusion of others and a desire for profits. Alienability is a central feature of white property. Borders must be erected and a dominion of all within the borders instituted; 'Possession [is] ... defined to include only the cultural practices of whites' (Harris 1993: 1721).

Personal Narrative

In December 2005, I attended the ACRAWA *Whiteness and Horizons of Race* Conference and then an ACRAWA masterclass. The morning of the second day of the masterclass, I was overwhelmed by flashback memories, reliving scenes from my childhood. Experiences rising from my unconscious became vivid and pressing. I was again a young girl, surrounded by my mother's family, and I began to feel the privilege of whiteness at a deep level, beyond cognitive awareness.

The 'white lie' of *terra nullius* allowed the 'settlement' of my Irish ancestors on the

Australian landscape. At the linguistic level, my 'mother tongue' was English, the official language. I was allowed to speak the language my parents spoke and to learn family stories from them. This privilege allowed my identity to be constituted in ways that were not available to Aboriginal peoples, large numbers of whom were removed from their families (Roach 1992; Valentine 2004). On my mother's side, I had English relatives, however going to a catholic school and being taught by Irish nuns, I formed an Irish-Australian identity. The nuns were very critical of the oppression of the Irish by the English and students at the school did not openly speak of any English ancestry. Even now, I think of myself as from an Irish background thus repressing my English heritage. I prefer to keep unconscious my genetic and lived complicity with the genocidal behaviours perpetrated in Australia.

My sense of belonging to the broader society developed during school years. Undeniably 'Australian', my race was an unconscious quality, something that neither I nor anyone else questioned. Returning from World War II, my father was rewarded for his defence of 'mother' Britain by entitlement to a low-interest war service home loan, something I later found Aboriginal soldiers were denied (Due 2008). This gift from a grateful nation reduced our housing costs enough to allow mum and dad to support and educate their five children on low-wage work.

Along with the English language, my 'mother tongue', came the concepts of 'good' and 'evil' and so on. English is a language built on binary terms where one term is hierarchised over the other. And, within the hierarchy of this language structure, the 'European' person is deemed superior to the non-European. Power constructs the value accorded to the terms while rendering

the process 'natural' and hiding the mechanisms of power (Foucault 1980). My subjectivity was formed inside this language and is still defined by it (Lacan 1982; Derrida 1992; Grosz 1989). In English 'whiteness' and associated terms connote 'good' but blackness, darkness and so on are linked to 'evil'. The European fairytales that filled my childhood were peopled with fair skinned, blue-eyed princes and princesses; later Superman, dressed in the colours of the American flag and with bulging muscles, became a hero. At my Irish catholic school, the statues and paintings of Jesus, Mary, Joseph, the saints and the guardian angels showed them fair skinned and blue-eyed, belying the reality of the Holy Family's Middle Eastern genealogy; Jesus, Mary and Joseph were re-skinned and reshaped by the merchants of religion.

On Saturday night, if Dad had a win on the horses, we went to see a film. Here were brave white cowboys shooting Native Americans and taming the 'West'. The only Australian film I can remember seeing was one about bushrangers. There was never any mention of Aboriginal people or their struggle for their country. As school children, we sold newspapers to fish and chip shops and used the money received for the starving 'black babies'. Vaguely, we thought these black children, worse off than us, were in Africa. There was never any mention of Aboriginal children in Australia requiring assistance. They were absent from the collective, white unconscious. The non-white other existed only beyond borders as the 'white man's burden', as heathens requiring salvation.

White Mythology

Born into a white skin I shared in the multi-layered mythology of white

supremacy. I was of a disadvantaged, (Anglo)-Irish background and female, but if I put in enough effort I could be acceptable to the 'establishment.' If I were Aboriginal that option would have been closed to me.

I have in my academic work long acknowledged white privilege and white failure to 'construct its racist practices as crimes'.⁴ However, inspired by the ACRAWSA masterclass I began to critically reflect on my life. My grandmother Muriel was raped and birthed her first baby at 14, then my mother and later two other children. Muriel's sister, my great Auntie Gret, left home at an early age and earned her living waiting on tables. The money she sent home enabled my great gran dad to pay for a few acres of land on which he tried to make a living growing fruit and flowers. My mother grew up in this environment.

During World War II, Auntie Gret started up a delicatessen in Elwood in Victoria. Here, she sold cooked rabbits and 'Greta's Home Made Jams'. The labels on the jars and the gingham tops were home made, but the jam was mass-produced in large tins and later spooned into jars. Enterprise such as this, and later my mother's work in the shop, enabled Auntie Gret to get enough money together to lease a hotel in Euston in rural NSW at the end of the war.

When I was 14, Auntie Gret sent money for my sister and I to catch a bus to Euston. On this and later trips I began to learn how Auntie Gret engaged in a performance that produced her as the most powerful person in the small town and I found, as is often the case, that the powerful are able to break the law with impunity. In contrast, those who are 'other'—Aboriginal people in the district who lacked power—could be arrested

for minor offences, such as swearing (Bird 1987). Most of Aunty Gret's trade was done on Sundays when the pub was supposed to serve only 'bona fide travellers'. However a bit of negotiation, and gifts of alcohol, kept the local police away from her hotel on Sundays, and she (illegally) served locals in the bar. Locals, however, did not include everyone.

Aunty Gret's Racist Practices

Aunty Gret would not allow Aborigines to be served in her pub; a common apartheid-like practice in rural Australia as I later discovered. She told me that letting Aborigines in would 'end up in fights' and lead to the police having to come in and restore order. She described her concern that her licence could be under threat if there was 'trouble'. Greta Carter was a 'self-made' woman, proud of maintaining 'law and order' and not given to self reflection.

Aunty Gret was the family success story. I loved her dearly and she was a strong role model for me. However, I noticed that she was always prepared to sell alcohol to Aborigines at the back of the pub, often well after business hours. At times like Good Friday when hotels were supposed to be closed, she would drop off alcohol in the bush. Aunty Gret told me that Aborigines liked to drink outside, particularly nearby on the banks of the Murray River, or in the bush beyond the town centre. I did not question her about this at the time. Noticing the shadowy figures at the back of the pub and money changing hands I was still in a state of abysmal ignorance about race. There was no realisation that an apartheid system was operating in the provision of services throughout Australia; that understanding came much later.

The Beginning of Awareness of Whiteness

In 1976, I studied a unit called Aborigines and the Criminal Justice System taught by the late Elizabeth Eggleston. For my research paper I took my two small children and my mother and went back to Robinvale, Euston and Mildura and did some fieldwork interviews. I began to uncover the reality of Aboriginal life in these towns. Aunty Gret had by then retired and sold the Royal Hotel. Elizabeth Eggleston asked me to be her research assistant on her book *Fear, Favour or Affection* (1976), the first Australian text to document racism in the criminal justice system. Some years later, inspired by Elizabeth's work, with the kids (9 and 10 years old) and their father, I travelled in an old Vanguard station wagon and slept in a tent in various camping grounds in Western and South Australia and engaged in fieldwork around these issues. Through interviews and participant observation on this trip, the law was unveiled. My positivist notions of law were shattered; the legal system was not innocent (Fitzpatrick 1990); indeed it could accurately be described as a system of injustice. The situation Elizabeth had uncovered was continuing: Aboriginal people were grossly over-represented in the criminal justice system, often for minor, public order offences (Bird 1987).

During this fieldwork, I met many generous Aboriginal people who shared with me their perspectives on the Australian criminal justice system. I saw the apartheid system working and realised that Australia was not post-colonial in any sense; rather it continued as a colonial state (Watson 1998; Moreton-Robinson 2007). I reflected that the treatment Aboriginal people had received would engender anger towards all white people and was amazed that many were prepared to

get to know me and to encourage me in the work I was doing.

On my return to Monash University I was awarded a scholarship for postgraduate study in law at Cambridge. Aunt Greta offered me an extra \$2000 as the 'Greta Carter Scholarship' and I gratefully accepted. It was not until the ACRAWSA masterclass that I saw the connection between Aunt Greta's racist practices as a publican and the 'scholarship' she gave me for Cambridge. In my field work I had been investigating white racist practices far from home—unconscious that I had benefited, not only from the structural racism in Australian society, but also from the racist practices my aunt employed in making a profit in her pub. As a student at Cambridge University, I donned the university's academic robes and fantasised that I belonged in that world (however a fellow student reminded me of the 'pecking order in the human barnyard', exuding his superior position in that barnyard).

White Law School

At university in the 1960s, on a Commonwealth scholarship, my first demonstration was in support of the Gurindji people. The Gurindji had walked off the Wave Hill station in August 1966 to protest against their working conditions and the theft of their land by Lord Vestey, the British 'landowner'. Even so, I did not query my professors and lecturers in the law faculty who taught British history (law) without any mention of the 'peaceful settlement', let alone the invasion, of Australia. The major focus was the British Civil War of the mid 17th century and the struggle by the emerging, mercantile middle class to strip the monarch of their sovereign powers and vest these powers in a property-based parliament (Stanley 2007: xiii), a parliament dominated by

the new, mercantile class. Predictably, the vote was regarded as too dangerous to be offered to the property-less.

In Legal History we studied many documents translated from Latin and Old French. The unit concerned English legal history and the melding of Anglo-Saxon and Norman legal concepts, particularly concerning the title to lands. We were being prepared for the important study of (white) property. There was no mention of the centuries of Aboriginal law that cared for country. In this version of law and history, Australia was lawless and *terra nullius* until the arrival of the British.

Property Law did not interrogate how a whole continent was transferred from the custodianship/ownership of Aboriginal and Torres Strait Islander peoples to that of a British sovereign. We spent one third of a year-long course learning the legal means for tying up landed estates in England. 'Estates in tail male' were reliant on convoluted, feudal legal rules designed to ensure that the eldest son took the whole of the estate. This prevented the huge, aristocratic land holdings becoming fragmented. Growing up on the outskirts of Melbourne, on the working-class side of the river Yarra, my experience was a world away from English landed estates.

Much later I was pleased to see in *Mabo (No 2)* and *Wik Peoples v Queensland* (1996), some enlightened judges criticising the continuing influence of feudal legal concepts in Australian property law. However, in spite of these aporias (Derrida 1992) the property system in Australia is still based on a racist system. The 'tide of history' concept has done much to reinvent the discredited *terra nullius* doctrine, especially in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002).⁵

The legislative native title regime has delivered little and is, at the conceptual level, steeped in racism and continuing to dispossess. The definition of 'native title' is based on white concepts of Aboriginal peoples' tradition and culture; concepts that are deeply offensive and serve to privilege white dealings with land (Atkinson 2008).

In the hallowed, sandstone buildings that housed the Faculty of Law at that time, I heard lectures on the 'injustices' in the legal system. This fed my desire for a more just society. However, there was never a mention of the injuries Aboriginal peoples were suffering as a result of the invasion and theft of their lands and the setting up of the system of concentration camps, euphemistically called 'reserves' or 'missions'. Tort law did not examine the fiduciary relationship between government and their Aboriginal wards, and contract law had nothing to say about the unfair employment contracts for Aboriginal workers on pastoral properties, where rations of tea, sugar and tobacco served as 'wages'.⁶ In any case, this material on 'injustice' was often dealt with in special Honours seminars that only a minority of students attended. The 'whitestream' courses dealt with pressing black letter, commercial issues.

Constitutional Law was taught in the final year of the law degree by Professor Colin Howard. Although most of our classes in other units had been run on the Socratic method, involving dialogue between teacher and the students, he decided against this in favour of straight lecturing. Howard told us: 'You will not be contributing to this subject because you have nothing worthwhile to contribute'. His announcement was met with stamping of feet and loud hissing, but this was as far as our rebellion went in the law classroom. We knew that our assessment for the unit was in his hands

and by this, our final year, we had been fashioned into Foucauldian docile bodies, the proper body of the liberal subject (Thornton 2000).

Although Howard was on the left in his political leanings, his teaching of constitutional law was quite orthodox. He uncritically accepted the sovereignty in Australia of the British monarch. The issue of sovereignty was barely touched on, although, to give him his due no white academics were critical of the concept at that time. Years later in a newspaper opinion piece Professor Howard castigated the setting up of ATSIC (Aboriginal and Torres Strait Islander Commission) describing the body as the establishment of a 'black Parliament.' Even though he was 'the' constitutional law 'expert', I saw a flaw in his logic. ATSIC was very firmly on a government leash. Besides, it did not have any taxation powers or other means of fundraising and was dependent on federal parliament's largesse. I had thought that parliament was sovereign for such reasons as its power to pass legislation and its power over supply. How could ATSIC be a 'black Parliament?'

Reflecting on my University of Melbourne degree I realise now that 'whiteness' permeated the law curriculum, a naked display of Foucault's assertion that power produces knowledge (Foucault 1980). Those of us from working-class backgrounds were a tiny minority in the law school. This was my introduction to the concepts of 'good schools' and 'old school ties'. Many students had careers in 'daddy's firm' or 'uncle's firm' already secured. My working class background made me feel an outsider in the law school as did my gender. My whiteness went unnoticed, but it was my most important quality, one that made me part of the club. There were no Aboriginal students: their absence was

'unmarked', by both academics and the student body (Frankenberg 2001). I joined the Rhythm and Blues Club, found 'soul mates' and became active politically in civil disobedience in the anti-Vietnam War movement.

Articled Clerkship

Graduating with a LLB Honours degree, I obtained articles with a Queen Street law firm in Melbourne.

Re-reading that sentence, it suggests the system of obtaining articles was operating on 'merit'. However, this was not the case. This firm was the one my great Auntie Gret, now a hotel owner, used for her legal business. Auntie got me an introduction to the firm. I wore a tweed suit, refined lip stick and tamed my long tresses. Later one of the partners told me to wear a hat and gloves to court and offered to give me the name of a decent dressmaker.

On critical reflection, I am faced with the knowledge that it was not my own efforts or talents that counted in getting articles in Queen Street. The 'liberal promise' (Thornton 1990) that we are all equal citizens and make our way in the world as a result of merit is shattered by this experience. It was not my Honours degree; it was the fact that I had a relative with property that opened the doors of that firm. My talent lay in my ability to use the aporia Auntie Gret had opened to pass through to an articled clerkship. I had to appear to be enough like them to merit a place in their firm. My birthed skin colour allowed me to pull off this counterfeit. I aimed to look like a Melbourne University law graduate at the interview and to speak like one too. I was performing as a liberal subject (Butler 1990: 24). The elocution classes given by the nuns allowed me to sound appropriately middle class. As Nietzsche writes: 'there is no "being" behind doing,

effecting, becoming; ... the deed is everything' (1969: 45). To paraphrase Butler (1990), my class identity was 'performatively constituted' at the interview, a possibility that flowed from my whiteness.

After getting to know my values and my lack of contacts (I could not bring any wealthy clients into the firm), the partners suggested I apply for a job as an academic. Perhaps my lingering unworldliness was a negative for me too. A senior associate asked me to have an affair with him. I said: 'But you're a married man.' He replied in a professional voice: 'My dear, that's the type that has affairs'. I refused to take up his offer and further scuttled my prospects with the firm in the process. After a year in that law practice the scenario of a university job began to look attractive; my 'whiteness' eased me into an academic appointment at the fledgling Faculty of Law at Monash University.

Aborigines as Non-Citizens: Outlaws

I was a citizen: born a white subject, I entered the gates of the law school without much difficulty. At that time no Aboriginal person had entered law school in Australia. To require an exemption from Aboriginality in order to receive any of the fruits of citizenship demonstrates that Aboriginal people were cast into the borderlands, neither inside nor outside of law. They had what Giorgio Agamben (1998) calls *zoe* (bare life), biological life, but were denied *bios*, the political life granted to citizens. As Agamben (1998: 126) points out:

[T]he so called sacred and inalienable rights of man show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to the citizens of a state.

The British colonies in Australia and later Australian governments did not apply democratic legal norms in respect of Aboriginal peoples: they were indeed 'non-human'. Like the inmates of Guantanamo Bay today or the asylum seekers on Nauru they were/are dealt with by the executive, not according to the rule of law. This is what I take Justice Brennan to mean when he stated in the *Mabo* decision that Aboriginal peoples were not dispossessed by the common law, but by executive Acts. Law provided the legitimating tactic for the original theft of the continent. However the casting of Aboriginal people beyond the law soon ensured that the executive could deal with their bodies without restraint. Genocidal behaviours were carried out with impunity and justified in cases—such as *Kruger v Commonwealth* (1997) and *Cubillo and Gunner v Commonwealth* (2001)—as in Aboriginal peoples' 'best interests' (Clark 2001).

The recent 'history wars', a pet project of defeated Prime Minister Howard, has Keith Windshuttle asserting that 'there was very little bloodshed' in the 'settlement' of Australia and that Aboriginal people were 'fascinated' by whites (Lateline 2003). But we know from Aboriginal oral histories that there was bloodshed and worse (Patrick 2003). The resistance left wounds and scar tissue both on the bodies and spirits of Aboriginal survivors and inscribed on the nation's psyche, although as a nation we deny it (Bird 2005).

Now Aboriginal people are being faced with the 'new paternalism': a paternalism laced with racism that has led to the 2007 military 'invasion' of Aboriginal lands (Foley 2008), the suspension of the permit system and the forced transfer of land to the federal government, a situation that has Watson (2005) writing of the contemporary 'nigger hunts'. Foucault (1980) tells us

that governance is about the management and control of bodies. Aboriginal bodies need to be controlled by the state, in order to protect white privilege and white property. Until 1967, Aboriginal people were absented from law, except as wards of the state. Nowadays, the construction of Aboriginal people as chaotic and dysfunctional is used to support the argument that Aboriginal communities based on communal native title do not work. The government proposed capitalist, single freehold title to land as the resolution.

Conclusion

Levinas (1972: 55) writes that 'the responsibility that owes nothing to my freedom is my responsibility for the freedom of others. There, where I could have remained spectator, I am responsible, that is to say again speaking'. In the face of Aboriginal trauma at the hands of white Australians, those of us who are white Australians cannot stand silent. The injustice Aboriginal peoples suffer calls forth in me a responsibility that is not chosen, that began before memory or consciousness. In writing of this ethical position, Levinas uses the image of the face, not to signify an actual face but because 'the face is a trace of otherness inscribed on the ground of self' (Douzinas and Warrington 1994: 166).

I write this essay as a first step towards responsibility for the legal and other privileges arising out of my whiteness. I call for an opening of the borders at the level of ontology and a collective mourning of the broken, raped and murdered bodies of Aboriginal peoples. To begin taking responsibility, I have explored some of the ways in which my whiteness has given me privileges. I have partaken of the 'stolen goods' derived

from the invasion of Aboriginal country. I have received a 'good' education, proper health care and I own real estate. My success could be read as an example of 'merit' and part of the 'lucky country' narrative—proof that Australian citizenship delivers on 'the liberal promise' (Thornton 1990). However, using critical self-reflexivity demonstrates that in large part these 'gifts' have been directly linked to my aunt's racist practices as a publican and have flowed from the white property, inherent in her and my body. This white property has facilitated my shift from my birthed position in a working-class family to the position of a middle-class academic lawyer. It has enabled me at the level of language and other discursive practices to assume an identity as the liberal subject.

I am aware of the difficulty of resisting my culturally produced white body, the property that has brought me into full citizenship. As Butler (1990: 93) writes:

it is necessary to take into account the full complexity and subtlety of the law and to cure ourselves of the illusion of a true body beyond the law. If subversion is possible, it will be a subversion within the terms of the law, through the possibilities that emerge when the law turns against itself.

Critical self-reflection and storytelling is worth little if it provides merely a personal catharsis.

The bringing into consciousness of my white privilege is transformative only once it is put into action in my daily life. To my curriculum design, teaching practices, discursive strategies, research and indeed, to my life outside the academy, I can bring the fruits of my critical self-reflexivity (Lindsay 2007). Supported by the scholarship and collegiality of Indigenous critical race

scholars and supportive white colleagues, I can continue what is a transformative process, both personally and at the level of institutional structures—towards a legal subject that is no longer confined to those who are white, and towards an ethics of alterity and its hope of justice.

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Notes

¹ Critical race theory emerged in the United States through the work of theorists such as Richard Delgado, Mari Matsuda and Patricia Williams. This critique of law was based primarily on the oppression of Afro-Americans and Latinos in the North American context. In Australia, theorists such as Irene Watson and Aileen Moreton-Robinson have developed a new philosophical critique, what may be called Indigenous critical race theory (see Watson 1998; 2005; 2007 and Moreton-Robinson 2000).

² For a discussion of subjectivity see Lacan (1982). Lacan sees the subject as desiring coherence and mastery, but always on the edge of chaos.

³ Douzinas, explaining how this ethics shapes subjectivity, writes: 'My uniqueness is the result of the direct and personal appeal the other makes on me ... Before my identity and my subjectivity are constituted they have been subjected not to law but to the other' (Douzinas and Warrington 1994: 165).

⁴ See Bird (1987). These words were written in 1984 after a fieldwork trip in WA and South Australia.

⁵ Dr Wayne Atkinson, Yorta Yorta man and Research Fellow at the University of Melbourne and Justice Tony North, judge of the Federal Court delivered papers on the deficiencies in the native title regime on Saturday 13th September 2008 at the third National Legal Indigenous Conference (North 2008).

⁶ On the liability in tort see *Trevorrow v State of South Australia (No 5)* [2007].