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Property, Law, and Race: Modes of Abstraction

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the some of negroes
over
board
the rest in lives
drowned
exist did not
in themselves
preservation
obliged
frenzy
thirst for forty others
etc[1]

One of a cycle of poems written by M. NourbeSe Philip, titled *Zong! #3*,[2] this particular fragment exposes the tension between different (and sometimes competing) conceptualizations of value that characterised the enslavement of black Africans. "Some negroes," the equivalent *sum* of negroes, were jettisoned like any other species of cargo, by Captain Luke Collingwood in the hopes of recovering the value of the insurance funds that had been secured by the slave

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1. M. NOURBESE PHILIP, *Zong! #3*, *in* ZONG! 6 (2008).
2. *Id.*

owners.[3] The slaves did not exist in themselves (as individual human beings) in the eyes of the law, or one may surmise, Captain Collingwood, but rather as a type of property that could be deemed superfluous—an "etcetera."

The simultaneous presence of these competing forms of value in the same object (a slave's value, however ambiguous, as a person marked by racial difference, and her value as a commodity) speaks to the coemergence of modern conceptualizations of race and modern forms of property. Writing about the ways in which the money form and race emerged in a "codeterminate and interdependent"[4] manner, O'Malley analyzes the narrative of Broteer Furro, a slave who was captured at the age of eight and taken to Rhode Island sometime around 1737.[5] Furro, having taken the name of Venture after being sold into slavery, recounts the subsequent use of his self as a form of credit and value by his owner.[6] As O'Malley points out, Venture comes to see himself as inseparable from his status as commodity. When asked why his master would want to sell him, he replied: "I could not give him the reason, unless it was to convert me into cash, and speculate with me as with other commodities."[7]

As O'Malley notes, "Venture sees his self and the money as the same."[8] The collapse of object and subject into one and the same, and thus, the blurring of a distinction of profound importance to a western philosophical episteme that has influenced the organization and conceptualization of a system of property ownership in many liberal democracies, throws up a multitude of contradictions and complexities for thinking through the relationship between being and having. This collapsing of boundaries between object and subject, thing and person, concretized in the body of the slave presents the most extreme form of this hybrid juridical form. Other forms of extreme subjection under European colonial rule have similarly produced a psychic life rife with the agonies of being treated legally, socially, and politically as both object of ownership and subject capable of criminal liability.[9]

The relationship between being and having, or ontology and property ownership, animates modern theories of citizenship and law. The relationship has philosophical, symbolic, and political-economic significance. The treatment of

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3. *See generally* IAN BAUCOM, SPECTERS OF THE ATLANTIC: FINANCE CAPITAL, SLAVERY, AND THE PHILOSOPHY OF HISTORY (2005).

4. MICHAEL O'MALLEY, FACE VALUE: THE ENTWINED HISTORIES OF MONEY & RACE IN AMERICA 20 (2012).

5. *Id.* at 33.

6. *Id.*

7. *Id.* at 34.

8. *Id.*

9. *See, e.g.*, STEPHEN M. BEST, THE FUGITIVE'S PROPERTIES: LAW AND THE POETICS OF POSSESSION 1–22 (2004) (examining the relationship between laws pertaining to fugitive slaves and transformations in the law of intellectual property, and exploring the co-constitution of personhood and forms of property); COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 40–42 (2011) (providing a magisterial examination of how the law dehumanizes detainees, criminals, and slaves).

people as objects of ownership through the institution of slavery calls our attention to the relationship between property as a legal form and the formation of an ontology that is in essence, racial. My primary aim in this Article is to provoke consideration of how both the legal form of property ownership and the formation of the racial[10] from the eighteenth century onwards rely on a logic of abstraction,[11] and it is the operation of this logic which irrevocably fuses property and race together. In some senses, this provocation to consider the role of a logic of abstraction merely emphasizes a relation that others have explored, if not explicitly, through intertwined histories of slavery, property, and the money form with great attention to the empirical contexts in which they take shape.[12] In engaging this analytical framework that explores the co-constitution of the legal form of property and the racial, I attempt to point to the contradictions that inhere in the materialization of abstractions in the subjectivities of owner and owned, colonizer and colonized.

By way of this provocation, I will begin by discussing the now canonical article by Cheryl Harris, *Whiteness as Property*,[13] in order to identify questions that her thesis generates in terms of furthering our understanding of the co-constitution of the racial and property ownership as legal forms. I will move from a consideration of Harris's article to present a basis for thinking through abstraction as the motor force of transformations in the legal form of property that emerges from the eighteenth century onwards. I will conclude by considering how recent work theorizing the emergence of new forms of property in the form of finance capital in the eighteenth century emphasizes the centrality of slavery to this process but fails to adequately theorize the racial.[14]

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10. I use the term "the racial" at times, rather than the terms racial difference or race, in order to refer to the ways in which philosophical concepts, economic forces, and scientific invention work in collaboration to produce race as a strategy and technique, both of which are deployed to create and sustain particular forms of subjectivity, of law, and of being. This concept draws heavily from the work of DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE (2007).

11. My point of departure, drawing on the work of Evgeny Pashukanis, is that the legal form reflects the commodity form, as the legal form mirrors and supports existing relations of production, property relations, and market forces. *See* EVGENY B. PASHUKANIS, LAW AND MARXISM 96 (Chris Arthur ed., Barbara Einhorn trans., Ink Links Ltd. 1978) (1929); BERNARD EDELMAN, OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW 21–26 (Elizabeth Kingdom trans., Routledge & Kegan Paul Ltd. 1979) (1973); Brenna Bhandar, *Disassembling Legal Form: Ownership and the Racial Body*, *in* NEW CRITICAL LEGAL THINKING: LAW AND THE POLITICAL 112, 112–27 (Matthew Stone et al. eds., 2012).

12. *See* BAUCOM, *supra* note 3, at 59–64 (arguing that the tragedy of slavery and the accumulation of speculative capital from the eighteenth century impacts today's financial capital); BEST, *supra* note 9, at 225–28 (examining the effect of abstraction in the context of *Plessy v. Ferguson*, 163 U.S. 537 (1986), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); O'MALLEY, *supra* note 4, at 32–40 (discussing the deep history and providing a penetrating analysis of American thinking about money and the ways that this ambivalence unexpectedly intertwines with race).

13. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

14. O'Malley makes a similar argument in relation to the slavery, race, and money form in eighteenth- and nineteenth-century America, arguing that some scholars analyze the economic dimensions of slavery and fail to account adequately for race, and vice-versa. O'MALLEY, *supra* note 4, at 81. O'Malley argues that "beneath the enthusiasm for market freedom lies the desire to have value

I. SLAVERY, WHITENESS, AND GREAT EXPECTATIONS

In her article *Whiteness as Property* Cheryl Harris, inspired by the work of Derrick Bell, sets a new trajectory for considerations of the relationship between law, property, and race. Illuminating the linkages between the history of slavery and the dispossession of Native Americans in the course of the founding of the United States of America, Harris presents a very persuasive and novel theoretical framework for understanding how whiteness came to have value as a property in itself; a value encoded in property law and social relations. For Harris, the genesis of whiteness as a property in and of itself begins with the commodification of black bodies during slavery.[15]

Harris begins by arguing that the propertizing of human life—the lives of black slaves—is what facilitates the merger of white identity with property. Slavery created a form of property that was contingent on race; "only Blacks were subjugated as slaves and treated as property."[16] This form of property thus produced a hybrid legal form that has both the status of object and human. The figure of the slave collapses the very distinction that property law relies upon to structure and regulate the use of land and moveable (both tangible and intangible) property.[17] As I will explore below, this blurring of boundaries between thing and person reflects the same conflation of self with property that justifies private property ownership for John Locke and Jeremy Bentham. The materialization of the abstraction of the Black or Negro in the body of the slave who is simultaneously object of ownership and subject (who can be held liable for crimes); or the materialization of the abstract sovereign subject whose very self is constituted through his ownership of things, are far more messy and contradictory than one might initially suspect.

Harris explores in depth the consequences of fusing property and race through chattel slavery. Black slaves count as three-fifths of a person in the Representation Clause in the American Constitution; by the seventeenth century black women's bodies become a means of producing more slave-property and reproducing the master's labor force.[18] While initially racial boundaries were not so strictly defined, the increasing importance of chattel slavery to Southern colonies in the seventeenth century ensured that the racial subordination of Native Americans and Blacks was increasingly intertwined with the appropriation of land and its cultivation.[19]

Racial subordination becomes enshrined in laws that attribute a lesser legal status to slaves and Native Americans. Whiteness thus comes to have the status of

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rest on some solid 'natural' foundation" and that racial difference provided the market with a fixed, non-negotiable value through the subordination of black people. *Id.* at 42.

15. Harris, *supra* note 13, at 1716–21.
16. *Id.* at 1716.
17. *See* Bhandar, *supra* note 11, at 114–15.
18. Harris, *supra* note 13, at 1718–19.
19. *Id.* at 1717–18.

property in relation to the status of white people as full legal citizens. The creation of whiteness as a form of property that has "income-bearing value"[20] emerges as forms of labor come to be legally differentiated on a racial basis. As chattel slavery is consolidated in slave laws,[21] white workers cannot be enslaved and significantly, workers come to identify as *white* workers as a means of differentiating themselves from the Blacks who are unpersonned and degraded as objects of ownership.[22] As Harris notes, "whiteness became a shield from slavery."[23]

Significantly, Harris discusses the transition from whiteness as status property to a more contemporary or modern form of property, in which whiteness as an entitlement to preserve the status quo (of racial subordination) is reflected in formalist interpretations of equal rights doctrine. Whereas *Plessy v. Ferguson*[24] recognized whiteness as a status property, *Brown v. Board of Education*[25] replaces this form of whiteness as property with a "more subtle form . . . . In failing to clearly expose the real inequities produced by segregation, the status quo of substantive disadvantage was ratified as an accepted and acceptable base line—a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so."[26] Whiteness, as a property and as a privilege, gives the owner of this property a sense of entitlement that becomes naturalised in the everyday order of things.

Harris's article in many ways remains unsurpassed in its theorization of the way in which whiteness is a property that has economic value, one which was historically enshrined in a range of laws, and persists in the unspoken, unchallenged backdrop to contemporary litigation over affirmative action policies. At this juncture, I would like to explore in more detail Harris's theorization of the interrelationship of property and race. She begins by arguing that "rights in property are contingent on, intertwined with, and conflated with race."[27] Property and property rights are racially contingent; that is, property rights in land are from

20. David R. Roediger, *Critical Studies of Whiteness, USA*, 48 THEORIA 72, 80 (2001) (quoting W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: 1860–1880, at 17–31, 700–01 (Atheneum 1992) (1935)).

21. Harris, *supra* note 13, at 1720.

22. The literature on this topic is vast. *See* DU BOIS, *supra* note 20, at 17–31 (discussing the color caste system in labor that has persisted since before the Civil War and was facilitated by the white working class and its fear of competition from free black workers); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 75–77 (1995) (examining the Irish attachment to the Democratic Party based on a vision of a society polarized between white and black); *see generally* DAVID ROEDIGER, WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (3d ed. 2007) (arguing that racism cannot be explained simply with reference to economic advantage; rather, white working-class racism is underpinned by a complex series of psychological and ideological mechanisms that reinforce racial stereotypes and thus help to forge the identities of white workers in opposition to Blacks).

23. Harris, *supra* note 13, at 1720.

24. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

25. *Brown*, 347 U.S. 483.

26. Harris, *supra* note 13, at 1753.

27. *Id.* at 1714.

the beginnings of settlement and colonization in the United States based on the "racial subordination of Blacks and Native Americans."[28] In terms of her theorisation of the property form itself, Harris argues that "social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property."[29] The social relations that produced slavery grew out of an ideology of white supremacy. Harris thus rightly identifies white supremacy as a prime determinant of an economic system (slavery) that was thoroughly racialized and absolutely central to the formation of property and property rights in the United States. For Harris, property laws take shape through an economic system that is saturated with race, and the racial ideology of white supremacy, rather than the property form itself, is determinant of this system.

In theorizing the shift from an early modern to a late modern concept of whiteness as property, Harris argues that whiteness shares the critical characteristics of property. The rights to use and enjoyment, the reputation and status property of whiteness, and the power to exclude, for instance, are all critical characteristics shared by various forms of property, whether it be physical property such as land or whiteness.[30] Like property, whiteness has economic value, value that is not immutable but is contingent on shifting economic conditions and social relations. Race is, on Harris's analysis, an analogue of property. Harris presents a powerful analysis of how whiteness functions in the same way that property and property rights do. However, how does Harris's theorization of property itself shed light on the coemergence of private property and the racial? In other words, how does a certain notion of race in the abstract figure of the slave, the native, the savage, coemerge with forms of property that are similarly abstracted as commodity forms?

Harris maps a shift from the type of property protected in *Plessy* as status, to *Brown*, which she identifies as a "modern" form of property.[31] What lies in this distinction, and this transformation? Property, from the eighteenth century onwards, undergoes transformations in the legal form that ownership takes, reflecting changes in the justifications of private property ownership. Lockean and Benthamite theorizations of property inform Harris's analysis,[32] but in my view, the shifts in conceptualizations of property have far greater significance to the co-constitution of the racial and private property ownership than she attributes to them.

Abstraction lies at the basis in transformations of how property comes to be conceptualized from the eighteenth century onwards. Taking the instance of land as a general focal point, the long and variegated shift from feudal landed property holding to capitalist private property ownership required significant legal

28. *Id.* at 1715.
29. *Id.* at 1718.
30. *Id.* at 1734–36.
31. *Id.* at 1746–57.
32. *See, e.g.*, *id.* at 1725 nn.60 & 63.

innovation to securitize new forms of ownership. Whereas possession and use once justified ownership, the commoditization of land witnessed a shift in the conceptual underpinnings of ownership itself. While Locke had reconceived of land ownership as based not on hereditary titles and inheritance (birthright), but on labor,[33] Bentham emphasizes expectation and security as the key justifications for private property ownership.[34] In the work of Bentham, we see an abstract notion of ownership not based on physical possession, occupation, or even use, but the concept of ownership as a relation, based on an *expectation* of being able to use the property as one wishes.[35] Primary to the property relation is law, which *secures* the property relation, or guards and protects the expectation.[36]

In the work of Bentham, private property becomes naturalized through affective structures of ownership.[37] Like Locke, there is an abstract idea of ownership in Bentham's thought not based on physical possession or occupation. There is the notion of a relation, based on an expectation of being able to use one's property as one wishes. Whereas Locke asserts property ownership as a natural right, which flows from a particular idea of self,[38] Bentham asserts expectation, a *feeling of expectation* that arises from ownership.[39] However, like other justifications for private property ownership, Bentham's rendering of the relationship between expectation and property law is rife with tautological reasoning. If I own property, even something quite remote from where I actually am, for instance, a plantation in the West Indies, this ownership gives rise to an expectation, and this expectation can only "be the work of law." "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[40] I have the expectation because I have property, but property itself is nothing more than this expectation.

Bentham's writing, like Locke's, is consistently peppered with references to the figure of the savage, which provides a distinctive referent point against which civilization is defined.[41] If property law exists in order to secure one's expectations, law's *raison d' être* for Bentham is security. The expectation of being able to use and exploit one's property hinges on this ability of being free from interference from arbitrary powers, state authorities, the needs of others, and fear of loss by any other means. Set as a sort of permanent relief in the backdrop is always the fear of savagery which is defined by the absence of respect for the

33. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 299 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1689).

34. JEREMY BENTHAM, THEORY OF LEGISLATION 112–13, 118–19 (photo. reprint 2011) (R. Hildreth trans., 6th ed. 1890) (1802).

35. *Id.* at 112.

36. *Id.*

37. *Id.*

38. *E.g.*, LOCKE, *supra* note 33, at 286–87.

39. BENTHAM, *supra* note 34, at 112.

40. *Id.* at 112–13.

41. *See, e.g.*, *id.* at 112; LOCKE, *supra* note 33, at 274.

inviolable laws of property. The "beneficent genius" that civilizes savagery is *security*.[42]

Bentham notes that in the state of nature, there is some indication of savages respecting the acquisitions of each other, which reflects the introduction of a "principle to which no name can be given but that of law."[43] It seems then, that laws of property arise from the quite natural feeling of men, even savages, to want to secure for himself by his own means, the enjoyment of certain things. Law is what establishes "a strong and permanent expectation" of property,[44] not mere physical possession.

For Bentham, this expectation is an abstraction, but one with very material effects. He writes: "There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind."[45] It is also a conception that gives rise to or is consonant with structures of affect and feeling. The expectation that one can utilize a thing that one owns to "be[] able to draw such or such an advantage from the thing possessed"[46] reflects the intrinsic value of property. And this connection between property as a metaphysical relation and real feelings of expectation link having (or owning in an abstract sense) to one's very being. Bentham writes:

> Everything about it represents to my eye that part of myself which I have put into it—those cares, that industry, that economy which denied itself present pleasures to make provision for the future. *Thus our property becomes a part of our being*, and cannot be torn from us without rending us to the quick.[47]

So while physical possession and use are no longer the justifications for ownership, possession as a feeling, entitlement, and the desire to secure one's property become the *sine qua non* of ownership. Harris illuminates how this expectation, a sense of entitlement to a range of social and economic goods defines whiteness as a property, particularly in the post-*Brown* era. However, I think Bentham's theory of ownership explains how one's property, which is an abstract and exterior thing—be it expectation to use a resource uninhibited by state interference, a sense of security from theft, or an entitlement to enjoy—comes to be materialized, or comes to have an actual life, in how we are constituted as subjects. The notion that property exists as a metaphysical entity is only part of the story. Property mirrors the commodity form, and as I will explore below in relation to Ian Baucom's work, produces obscene degrees of violence in rendering human beings as forms of money capital. As O'Malley has noted, "racial value anchored monetary value" at the dawn of American settlement.[48] But the

42. BENTHAM, *supra* note 34, at 118–19.
43. *Id.* at 112–13.
44. *Id.* at 113.
45. *Id.* at 112.
46. *Id.*
47. *Id.* at 115 (emphasis added).
48. O'MALLEY, *supra* note 4, at 11.

violence of abstraction takes on a life in the very real lived experiences of people constituted by juridical forms shaped by the property-racial matrix. The ideology of white supremacy, which Harris identifies as one of two principal causes of the propertization of whiteness[49] (the other and related cause being chattel slavery), emerges in conjunction with a concept of property based on a commodity logic. And thus, we may sharpen and deepen her observation that "racial identity as a justification for slavery also had implications for the conceptualization of property."[50]

Property from the eighteenth century thus comes to be metaphysical, but at the time, intensively embodied in the experiences and self-conception of colonial subjects. This fusing of subjectivity with objectivized properties creates contradictions reflected in the very notion of self-ownership that derives from Lockean justifications for private property ownership. The body is both the container for one's very being as an agentive subject and simultaneously a resource, a source of labor that one owns. The body of the slave is both treated juridically as one who can be held legally culpable for crimes but is also an object to be owned by others.[51] And for Bentham, as noted above, one's sense of entitlement, expectation, and cares for that which one owns form the core of one's very being.[52] Thus Harris's theorization of how whiteness becomes property maps the transition from real forms of property to abstract forms of property rooted in expectation; however, she does not identify this transition as in part, a consequence of the radical changes occurring in modes of propertization. In recounting the psychic trauma that her grandmother experienced in sometimes performing the attribute of whiteness in order to survive economically in the Jim Crow era, Harris reflects a theory of how whiteness becomes an abstract property with legally encoded economic value that is also central to the real lived experiences of oppressed communities.[53] However, it is important to account for how whiteness, and the racial apparatus more generally, are produced by the same logic of abstraction that renders slaves, parcels of land, cargo stock, and other things as having equivalent value in the money form.

Abstraction functions in such a way so as to create legal forms of property and racial ontologies coterminously. Emergent forms of property ownership were constituted with racial ontologies of settler and native, master and slave. This is as evident in the burgeoning realm of finance capital and its relationship to the slave trade as it is with regard to transformations in how the ownership of land is conceptualized in the colonial settler context. It is not merely the case that racist ideologies of savagery enabled the dispossession of indigenous communities on

49. Harris, *supra* note 13, at 1714–16.

50. *Id.* at 1718.

51. BEST, *supra* note 9, at 16 (characterizing the fugitive slave as "competing parts pilfered property and indebted person"); DAYAN, *supra* note 9, at 89 (analyzing the definition of the slave as a "person in law" for the purposes of punishment).

52. BENTHAM, *supra* note 34, at 112.

53. Harris, *supra* note 13, at 1710–14.

the basis that they were too "low in the scale of social organization"[54] to be recognized as property owners. I argue that more than this, the very nature of property ownership from the eighteenth century onwards is created through a mode of abstraction that entangles notions of legal-political personality within it. We might say here that abstraction lies at the basis of an ontology of property and the racial, and that the each of these phenomena rely upon the other for their actual, material realization.

The laws that gave effect to these transformations took many different guises, including the legal regulation of shares and companies,[55] stock (shipping and insurance law), and land. In each of these domains, the legal form evolves to support a burgeoning network of finance capital. For instance, the legal form of ownership in relation to land shifts from one that reflects the use and possession of land as embedded within feudal social relations, to a legal form of ownership that had as its primary objective, the alienation and marketization of land as a commodity. As a commodity, land was imbricated within a circuit of trading, exchange, and colonization—land in the colony of South Australia, for instance, was used as collateral to finance loans to fund colonial surveying activities even prior to actual settlement of the land.

The legal form that land ownership took shifted from the eighteenth century onward from one rooted in actual practices, use, and memory, to an abstract form of title that was to be deposited and held in a Land Registry.[56] Throughout the nineteenth century, there were successive attempts to introduce a system of title by registration in Britain, whereby ownership of land would no longer be conveyed in a manner that required physical and customary demonstration of proof of ownership, but rather, would require all interests in the land to be congealed in one document.[57] The contents of this title document would serve as ultimate proof of ownership of land, irrespective of any other, and crucially, prior interests in the land that were not noted therein.[58]

The violence of abstraction in this context lies in the production of an object of exchange deracinated of the lived, social relations of occupation, multiple use,

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54. Mabo v. Queensland, (No. 2) (1992) 175 CLR 1, 39 (Austl.).

55. Paddy Ireland et al., *The Conceptual Foundations of Modern Company Law*, 14 J.L. & SOC'Y 149, 152 (1987). Paddy Ireland, Ian Grigg-Spall, and Dave Kelly argue that from the 1830s, "the legal nature of shares began to be reconceptualised, and by the mid-nineteenth century the close link between shares and the assets of companies had been severed." *Id.* As Ireland et al. argue, the case of *Bligh v. Brent*, 2 Y. & C. 268 (1837), embodies the moment of where a definitive severance of shares in a joint stock company (whether incorporated or not) from the assets of the company occurs, rendering shares as a type of property in themselves, equivalent to a portion of the revenue of the company. Ireland et al., *supra*, at 152. Shares become personalty, even if the company holds real property as its assets. *Id.* at 153. Ireland et al. argue that these transformations in the juridical concept of the share to a form of money capital reflect *par excellence* the rise of fictitious capital. *Id.* at 156.

56. W.S. HOLDSWORTH, HISTORICAL INTRODUCTION TO THE LAND LAW 308 (1927); Alain Pottage, *The Measure of Land*, 57 MOD. L. REV. 361, 377–78 (1994).

57. HOLDSWORTH, *supra* note 56, at 316.

58. *Id.*

spiritual significance, and prior histories that attach to the land. One of the most important instruments devised to realize this abstraction in the form of ownership was title by registration. Title by registration, first trialled in the colony of South Australia in 1857, was very much enabled by the treatment of South Australia as a *terra nullius*. Aboriginal peoples were an inferior race, blackfolks, to be displaced and corralled into reservations, educated, civilized, and protected by the Crown. Similar to the claims that Harris makes in relation to the appropriation of Native American land, it is often argued that because the land was viewed as a *terra nullius*, the colonists were able to impose a system of private property ownership in Australia, and of course this is true.[59] However, it seems that this misses the significance of the prevailing concept of property that was held by the colonists even prior to settlement. The figure of the savage that made aboriginal rights to land a non-question, and lies at the heart of the doctrine of *terra nullius*, shares a similar conceptual apparatus and logic as the property form itself. It is this logic of abstraction, with all its myriad violence which enables this vision of free and fungible land to be materialized. To sum up, in the context of landed private property, the abstract nature of the commodity form takes on a juridical life that creates and relies upon the abstract categories of native and settler to define the boundaries of ownership.

Private property emerges in the eighteenth and nineteenth centuries in a co-constitutive relationship with race, and what I have been referring to as the racial emerges in relation to and dependent upon modern forms of private property. Whereas Harris's theorization of the relationship between property and race does not sufficiently consider the significance of the changing nature of the legal form of property from the eighteenth century onwards in the constitution of the racial, recent work by Baucom examines the centrality of slavery to finance capital, and how the fictitious nature of capital is ultimately and initially based on the radical objectification of human beings as slaves.[60]

II. SLAVERY, PROPERTY, AND FICTITIOUS CAPITAL

The relationship between the abstract nature of property and the institution of slavery has been explored by Ian Baucom in *Specters of the Atlantic: Finance Capital, Slavery and the Philosophy of History*.[61] The book is focused on the infamous *Zong* case, where the underwriters of an insurance corporation were engaged in a civil litigation dispute with the owners of slaves who claimed the proceeds of an insurance policy for the deaths of 132 slaves who were murdered by the *Zong's* Captain Collingwood en route to Jamaica.[62] Four months after they had left West Africa, the Captain made the decision to throw the slaves overboard to their

59. Stuart Banner, *Why* Terra Nullius? *Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95, 95 (2005).

60. BAUCOM, *supra* note 3.

61. *Id.*

62. *Id.* at 61–62.

death; sixty slaves and ten crewmembers had already died on the voyage as a result of disease and malnutrition. Rather than face further financial loss in the form of dead slaves, Captain Collingwood decided that if he were forced by necessity to jettison the slaves, their owners could collect the insurance proceeds.[63] Although there was no necessity at the point at which he ordered his crew to throw the slaves overboard, he instructed them to tell anyone who asked them, that they were running short of water.[64] Of the 132 slaves that were killed, ten of them resisted the absolute power of the slaveholders by leaping to their own deaths.[65] The case resulted in a dispute over the insurance contract, and centered on whether the actions of the Captain were necessary or not. Despite evidence at the trial that there was in fact no water shortage, the court found for the slave owners.[66] On appeal, Lord Mansfield ordered a new trial on the question of whether the fact of necessity had been established.[67]

The emergence of finance capital in the eighteenth century, which becomes intensified in the twentieth century, relies on particular structures of knowledge. Drawing on the work of J. G. A. Pocock and Giovanni Arrighi, Baucom makes a persuasive and powerful argument that the "central epistemological drama of the long eighteenth century" was a result of the contestation between old, real, and tangible forms of property and the "imaginary value of stocks, bonds, bills-of-exchange, and insured property of all kinds."[68] As the latter transcended the former in economical significance, "the concepts of what was knowable, credible, valuable, and real were themselves transformed."[69] Following Pocock, and also Walter Benjamin's philosophy of history that reconfigures the interrelatedness of aesthetic form, the logic of capital, and a critique of historicism, Baucom analyzes the insurance contract as an exemplary instance of new forms of knowledge. Central to burgeoning circuits of finance capital were credit and debt, and new epistemological structures required above all faith in the imaginary values promised by ocean-crossing bills-of-exchange, promissory notes, and other financial instruments that made the slave trade possible.[70] At the moment when the insurance contract between the would-be slave owners and the insurance company was signed, neither party to the contract had "possessed anything more than an imaginary knowledge of the property they had agreed to value at 15,700 pounds, they could and did legally bind themselves to credit that knowledge and, by that act of crediting one another's imagination, brought that value into legal

63. ADAM HOCHSCHILD, BURY THE CHAINS: THE BRITISH STRUGGLE TO ABOLISH SLAVERY 79–80 (2005).

64. *Id.* at 80.

65. *Id.*

66. *Id.* at 80–81.

67. *Id.* at 81.

68. BAUCOM, *supra* note 3, at 16.

69. *Id.*

70. *Id.* at 15.

existence."[71] It is thus a fictitious value that lies at the basis of the insurance policy that comes to be the centre of the dispute in the *Zong* case. Crucially, Baucom illuminates how at this moment, the value created (in this case, by the capture and bondage of Africans and their eventual sale as slaves in Jamaica) does not precede exchange, but "retrospectively confirms it."[72] The value created, in other words, is not based on a pre-existing use value that is then transformed in the act of exchange. Exchange based on a system of credit and debt requires a collective act of imagination and trust; faith in the promise of money value, "value in the guise of the 'general equivalent.'"[73]

Slavery takes central stage in this nuanced account of the financialization of commodity exchange. By replicating shipping lists that described slaves as so much other tangible cargo,[74] Baucom initially introduces the reader to the violence of abstraction by subtly emphasizing that at the basis of this particular circuit of exchange lay the absolute objectification of human beings. Significantly however, he develops an analysis of how the slave becomes both commodity and interest-bearing money, thereby demonstrating how property in its legal forms as commodity and money are constituted through the radical objectification of humans, of black Africans, to be more specific. The bills of exchange referred to above were one aspect of a banking system based on credit. Local sales agents in the Caribbean or the Americas would sell newly arrived slaves and then "'remit' the proceeds of the sale in the form of an interest-bearing bill of exchange."[75] This bill of exchange was in effect a promise to pay the full amount with interest at a rate agreed upon at the end of a specified period. Baucom explains this transaction in the following way:

> The Caribbean or American factor had thus not so much sold the slaves on behalf of their Liverpool "owners" as borrowed an amount equivalent to the sales proceeds from the Liverpool merchants and agreed to repay that amount with interest. The Liverpool businessmen invested in the trade had, by the same procedure, transformed what looked like a simple trade in commodities to a trade in loans. They were not just selling slaves on the far side of the Atlantic, they were lending money across the Atlantic. And, as significantly, they were lending money they did not yet possess or only possessed in the form of the slaves. The slaves were thus treated not only as a type of commodity but as a type of interest-bearing money.[76]

Slaves thus become a "flexible, negotiable, transactable form of money."[77] And this fact enables Captain Collingwood to devise a plan whereby the loss of

71. *Id.*
72. *Id.* at 17.
73. *Id.*
74. *Id.* at 11.
75. *Id.* at 61.
76. *Id.*
77. *Id.* at 61–62.

the disappeared slaves can be recouped in the form of insurance proceeds. It is only because the slave is conceptualized as a form of money, represented by the bills of exchange and loan agreements that structure the capital flow of the slave trade that enables Collingwood to "confidently massacre 132 slaves aboard the *Zong*."[78]

The first third of *Specters of the Atlantic* is intensely stimulating in its illumination of how political economy, legal forms of ownership, and aesthetic forms emerge within novel epistemological frames. Baucom's inventive borrowing of Walter Benjamin's philosophy of history to argue that the emergence of finance capital in the eighteenth century returns in the twentieth century in intensified forms[79] illuminates the contemporary relevance of insurance contracts, the rise of the joint stock company, the proliferation of new forms of money (significant actors in the banking industry), and other instruments of finance capital. However, as the book progresses, concerns with forms of witnessing, literary conceptualizations of temporality and historicism, and the affective dimensions of property relations become the primary focus. Curiously, and what sets this text far apart from the theorization of whiteness that inform Harris's analysis of chattel slavery and laws of property generally, is the utter absence in Baucom's text of any serious or sustained treatment of race.

This is quite curious in a book that traces the emergence of finance capital as dependent upon the institution of slavery. And while Baucom certainly does not shy away from expressing the horrific levels of violence that were prerequisite to treating African slaves as chattels and also the basis for financial speculation, he does not account for the place of race and raciality in this process of extreme dehumanization. In analyzing the forms of modern subjectivity that emerge out of an epistemology of financialization, he turns to both Slavoj Žižek's reformulation of the Kantian subject as subject $ (the slaves were "regarded by the law to have vanished" in two senses, the brutal act of slaughter and the "*antecedent* dematerialization as subjects of insurance"), and Gayatri Spivak's native informant.[80] However, even in borrowing Spivak's figure of subalternity, race is nowhere to be found in his analysis of the means by which slaves become "no more than the empty bearers of [an] abstract specie value."[81] In one of the final chapters Baucom analyzes the black-Atlantic literature, the work of Derek Walcott, Toni Morrison, Paul Gilroy, and Éduoard Glissant,[82] yet the significance of blackness and the racial ideology of superiority that was so central to the propertization of those who were enslaved remains firmly outside of this otherwise acutely insightful analysis of the emergence of finance capital through slavery.

78. *Id.* at 62.
79. *Id.* at 17.
80. *Id.* at 149–50.
81. *Id.* at 150.
82. *Id.* at 309–33.

Baucom argues that the *Zong* trial and the events that led to it are "late-eighteenth-century and late-twentieth-century events [that] are subtended by and script a common and long-durational cycle of accumulation, speculation, and subjectification."[83] To this, as the very texts by Gilroy, Morrison, Walcott and Glissant attest to,[84] we would need to add the word "racialization."

III. CONCLUSION: CAPITAL, RACE, AND PROPERTY

Negro tried
to cash hisself
for Money ¢¢¢
at a bank. . .

Got arrested

as a
counterfeit

Nickel![85]

Amiri Baraka's poem captures in a few words the conflation of race, the money form, and its impossible contradictions for the subject who bears the legacy of this monstrous hybridization wrought by chattel slavery and finance capital, the former being indispensable to the growth of the latter. Baraka writes that a "Negro tried/ to cash hisself/ for money."[86] It is an attempt to transform one sort of specie to another; let's take note of the absence of the word "in" between "hisself" and "money." There is no mediation here, no split between who he is as a person and his monetary value, no aspect of his person that exceeds his status as an abstract value. Our protagonist attempts a direct exchange of his very own self for money. He succeeds, for a moment, before being criminalized as a fake, as counterfeit money. He is guilty for committing, and of being, a fraud. Baraka's "Negro" protagonist, much like Venture referred to in the Introduction of this Article,[87] cannot fully realize his monetary value *for* hisself (or *as* himself for

83. *Id.* at 160.

84. *See generally* PAUL GILROY, THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS (1993) (arguing that a Black Atlantic culture exists that transcends ethnicity and nationality and has become something wholly modern); ÉDOUARD GLISSANT, POETICS OF RELATION (Betsy Wing trans., 1997) (1990) (dissecting the particulars of Caribbean life in an effort to stress the importance of culture and connectedness of societies); TONI MORRISON, BELOVED (1987) (discussing the horrors of slavery and the significance of race through the story of a runaway slave in post–Civil War Ohio); DEREK WALCOTT, OMEROS (1990) (commenting on the tragedy of African enslavement and other significant historical events via an epic poem).

85. AMIRI BARAKA, *Adventures in Negrossity*, *in* UN POCO LOW COUP 19 (2004).

86. *Id.*

87. O'MALLEY, *supra* note 4, at 33–34.

that matter); he is caught in the impossible position of being object of circulation and subject who is only recognized as such by the law in matters criminal. This is the fact of blackness, the story of "negrosity" in the law.

In this Article, I explored the work of Ian Baucom who has examined the centrality of slavery and the figure of the slave in emergent forms of property and significantly, the system of credit and debt that enabled finance capital to decisively collapse real and intangible forms of value in the body of the slave.[88] However, there is in his account a distinct absence of an accounting for the ways in which abstraction operated in the constitution of a particular discourse of the racial. In Harris's germinal piece on the creation of whiteness as a property in itself, I argued that there is a failure to fully account for the ways in which transformations in conceptualizations of ownership shaped emergent racial abstractions in the figures of the savage and slave, the very figures that were required to effectively dehumanize slaves as chattel property (and financial instruments) and to render indigenous communities immaterial to land appropriation.

As discussed above, transformations in conceptions of ownership that occurred from the eighteenth century onwards reflect the transcendence of the commodity form and its reflection in the legal regulation of land, stock, and companies. Possession and occupation as justifications for ownership preceded this shift, and eventually do not provide a justification or basis for ownership. However, I argue possession remains central to the lifeworld of property, the possession of particular qualities and attributes that give rise to a sense of entitlement and security. This contradictory mixture of attributes that are both metaphysical, embodied, and affective shape the very constitution of modern legal-political subjectivities. Notions of privilege and entitlement shape the contours of one's consciousness, based on the possession of particular qualities and characteristics that constituted the pre-requisites of one's ability to own property. Understanding the historical development of the interrelationship between the legal form of property and the racial remains crucial to accounting for contemporary iterations of a globalized capital firmly rooted in histories of slavery and colonialism.

88. *See supra* Part II.