Difference and Recognition:

Subverting the Australian Colonial Paradigm
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The work presented in this thesis is, to the best of my knowledge and belief, original except where acknowledged in the text. I have not submitted this work to any other institution, or for any other higher degree by research.

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Introduction

The 1938-1940 Report of the Aborigines Protection Board, and the hearings and minutes of evidence that led up to it, discussed a dual track policy for the state approach to Aboriginal people. First, to “preserve” “full blood” Aboriginal people by relocating and isolating the residents of a number of reserves onto a single “giant reserve,” under the supervision of one white man. Second, was “assimilation of the [non-reserve] aborigines into the general community.” The giant reserve was never created, but there were mergers between reserves which entailed the forcible relocation of entire Aboriginal communities from one location to another. Commenting on these relocations in 2005, co-founder of Walgett Aboriginal Medical Service and one-time resident of Angledool Reserve, George Rose, wrote:

The moving of Angledool – it was deeper than what people thought. It was the first step to destroying our Aboriginal culture… even I could see that, as a 13 year old. I could see that by combining the three tribes they were destroying the cultures.

So, thirteen-year-old George Rose recognized that the mergers were an existential threat to Aboriginal cultures: that “preservation” brought destruction. And the Aborigines Protection Board recognized that there was something to preserve in Aboriginal culture, but failed to understand what and how. What did George Rose recognize? What is a culture? What was wrong with the colonial “preservation” policy and why did it destroy that which it nominally sought to protect? What, in short, sustains colonialism?

There is a significant body of excellent anthropological, sociological, and historical scholarship on this topic, but less in the way of philosophical discourse. From a philosophical perspective, we can begin to identify and unpack what is at the core of these questions. From a philosophical perspective, they become questions of the what it means to be human in relation to other humans, and to be humans-in-relation in a colonial context. We can ask what it means

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1 Legislative Assembly NSW, 1938, “Parliamentary Select Committee on Administration of Aborigines Protection Board Minutes of Evidence,” re-printed in a number of Yundiboo 6, no. 4, Walgett: Dharriwaa Elders Group, (2005)
3 George Rose’s comments on “Parliamentary Select Committee” in Yundiboo 6, no. 5, Walgett: Dharriwaa Elders Group, (2005): 4
to be differently, and what the possibilities of relation with others are. George Rose was a Yawaalaraay man, born on a reserve. He and his mother, Linda Fernando, were both forcibly removed from their families during their youth and sent to boarding houses. They, among many others, were subjected to a colonial attempt at erasing their identity, their difference from the colonial concept of being a modern human. George Rose’s life of activism can be read as a response to this colonial imposition, an attempt to make others recognize what he recognized at thirteen. Using a philosophical lens, we can ask the question at the heart of this thesis: what is the relation between recognition and colonialism?

Before proceeding, however, let me pause a moment to introduce and make clear a word that will become central for the theory of relation this thesis develops: subversion. Subversion is the noun form of the transitive verb subvert, a compound of the Latin prefix sub- and verb vertere. Sub (also suc-, suf-, sug-, sum-, sup-, sur-, and sus- depending on the first letter of the infinitive) is a prefix with diverse implications. Sub-, under or from below, can indicate both physical and rank (order) positionality, and can be merely descriptive or evaluative – subterranean, sub-standard.

Most importantly for this thesis, all of the uses of sub- indicate relationality. Underneath something, below something, from underneath something. It is a prefix which puts its verb into contact with. It locates the verb proximate to the object of the sentence. It is a relational prefix indicating an underneath or from bellow relation, sub-standard, sub-ordinate, sub-terranean positionality. The object’s nearness is always implicated in the relation. The Latin verb vertere means to turn, according to the Concise Oxford Dictionary of English Etymology. To subvert, then, is to turn from underneath, to overturn or overthrow by undermining. If we turn to the Concise Oxford Dictionary of Politics, we find that, in English, subversion has been in use regarding laws and “realm” since the fourteenth and fifteenth centuries respectively. Prior to this usage, “subversion” could apply to a broader range of events and processes, such “as the military defeat of a city and a severe gastric disorder.” There are no further examples of usage provided here, so it is difficult to say precisely how the relation between city and attacking military force, or disease and individual, were articulated by the word “subversion.”

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6 We must here keep in mind that “to break” or “to rupture” does not fit into this etymology of subversion.
7 It is assumed here that the severe gastric disorder was not conceived of in relation to “population” as such. This is primarily following Foucault’s lead in theorising the production of “population” as an advent of medical and statistical sciences at a later date. See Michel Foucault, Society Must Be Defended: Lectures at the Collège de France 1975-76, Trans. David Macey, ed., Arnold Davidson. First ed. New York: Picador, (2003).
both of the examples provided do indicate, however, is the effect of a change inducing encounter with the near. This is, again, a threat posed by the nearness of an indefinite force. The nearness of something capable of changing the constitution of a given state, of the health of the body or the city. The nearness of, the in contact with, the relationality of something with another something capable of undermining or overturning the status quo.

Subversion, then, is a mode of relationality that contains the possibility for undermining, for turning, for bending but not breaking, for overturning from below where below is determined by that which is above or near. Its defining characteristic is its proximity and potential for altering that with which it is in contact. In order for subversion to be a possibility there need only be a something with the capacity to be altered, undermined, or overturned. This suggests that subversion is a characteristic of the in-relation.

This makes subversion an important consideration in post-colonial studies. Colonizer and colonized, active and passive, subject and object. It is difficult to escape the first of these linguistic couplets in postcolonial discourse, and so also to avoid the implications of the latter two. If we introduce subversion into these dichotomous relations, however, we find that there is no stable claim to –er and –ed suffixes. As I have described it, subversion is a possibility of the in-contact, or a possibility of the in-relation. Thus, subversion implies activity of a kind that denies retention of, or exclusive claim to, the active subject implications of “colonizer.” One does not need to “be” the dominant or subordinate to have recourse to the possibility of subversion. But just what, then, are the possibilities of and for subversion? Is the possibility of subversion merely a platitude used to placate the colonized and comfort the colonizer? Does such a discourse fail to recognize the need for explicit rupture to effect real alteration? Does a discourse in subversion subvert the possibility for substantive change? To answer these questions let us take another small but necessary detour to carve out the space for subversion, to put it in contact and contrast with other possibilities contained in the colonial paradigm.

There are three responses or possibilities that have some traction in history and the literature. The first we will call revolution, which here will be characterised by the modality of violence and discourses of rupture. The second can be understood as resistance, which is characterised by overt but non-violent modes of relation such as (peaceful) protest, passive resistance, and even critique. The third response is what Fanon termed countersubversion, where subversion is used to undermine and subvert a subversive, violent, or resistance movement. It is this last moment that tells us unequivocally that subversion is available to and for and in any relation. This last movement, the subversion of subversion, can also be conceived
of as “the ruse of sovereignty.”

The task set out here is to show, briefly, how subversion is operational in each of these modes of relation. More specifically, we find that these three responses may be understood as scales of response which are all underpinned by subversion. Ultimately, we will find that subversion demonstrates the instability at the heart of concepts of authority.

Despite their divergent views on the potential of revolution to effect substantive change, Hannah Arendt and Frantz Fanon both recognize revolution as an historically important process in the political. For Arendt, revolutions are both “the only salvation which this Roman-Western tradition has provided for emergencies” and destined to fail to effect change because they end either in “restoration or tyranny.” This means that, for Arendt, revolution, rupture, violence, is an ineffective mode for effecting political change that reduces oppression. But why? When do they “end” and why do they “end” so bleakly? This is a question that is implicitly answered by a discourse on subversion. For Fanon, on the other hand, violence is presented as necessary even though:

The militant who confronts the colonialist war machine with his rudimentary resources realizes that while he is demolishing colonial oppression he is indirectly building another system of exploitation.

So, in this reading of Fanon we see that while the violence of revolution and its issue is not exempted from a slide into either restoration or tyranny, the rupture is necessary if any change is to be brought about, and that the potential to slide does not of necessity negate the potential for change. What both of these perspectives contain implicitly, however, is the prior moment of subversion, and the continued possibility of subversion in any political relation. How does the moment of rupture erupt and how does it slide?

Arendt’s rejection of revolution assumes that revolution is both beginning of and ground for change. If we understand subversion to be active in the preparatory movement, and also throughout the process of rupture, then we needn’t be restricted by the potential for devolution into tyranny or the restoration of identical systems of oppression represented by the authority against which revolution acts. Rather, what these potentialities for devolution and replacement point to is the unstable claim to be “active” in relations of power because of the in-contact relationality of subversion. That is, the possibility for the third modality of subversion, the ruse of sovereignty. This potential is present also for Fanon, who notes, “In the colonial context the

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colonist only quits undermining the colonized once the latter have proclaimed loud and clear that white values reign supreme.” Thus, Arendt’s critique of revolution and Fanon’s identification of the ruse of sovereignty point us to the presence of the possibility of subversion that destabilises notions of unidirectional power relations.

Further, I would suggest that revolution as the violent expression of dissatisfaction and desire for change cannot be thought of as the cause of itself. And nor can the dissatisfaction and desire for change be thought of as providing sufficient ground for uprising (this word, uprising, should alert us to the from below relation of subversion). Rather, dissatisfaction and desire for change must be accompanied by the loss of confidence in the sovereign. The undermining of the authority of the sovereign must already have taken place, infiltrated the public conscience, and what else is this undermining than the turning of public opinion, the de-authorizing and subverting of belief in the regime? Similarly, resistance is inherently subversive, or, rather, is predicated on a rejection of a concept of absolute authority (or auctoritas). Subversion then, is the condition upon which revolution and resistance rest and the weakness in the revolutionary movement. This argument applies equally to how we have presented Fanon’s conception of violence. Subversion, either of the right or perception of capacity, of the colonialist to maintain the structure of domination must have already developed to a sufficient degree to allow for the thinking of revolution in the moment. This shows Fanon’s conception and Arendt’s critique of revolution to be commensurate with the logic of the first and third modalities of subversion, and resistance to be an intermediate modality.

This thesis argues that the relation between recognition and the colonial paradigm is structured by subversion. That is, the logic of the colonial paradigm subverts recognition, and recognition subverts the logic of the colonial paradigm. The polarities are inescapably in contact, and as such, are susceptible of subversion and counter subversion. It is argued here that recognition and its absence are, respectively, the counter to and foundation of the logic of colonialism. Thus, the task of this thesis is to develop a theory of the relation between colonialism and recognition. To do this, however, it will be necessary to understand the concepts. What is the colonial paradigm? And what is recognition? These questions form the first half of the thesis. This thesis is presented in four chapters. The first two chapters elucidate the polarities in isolation – that is, first the colonial paradigm and then recognition. The last two chapters form the second half, and bring the polarities into contact to theorise their relation to one another.

11 Fanon, Wretched of the Earth, 8.
Part I

*Preparatory Analysis of the Structures*

There are two possibilities for the structure of the relation of human and human with which I am here concerned. The first is the colonial paradigm and the second is recognition. They are by no means the only possible structures for the relation between human and human, but I pick them up here, to the exclusion of the innumerable other possibilities, because of the relation between them. Understanding this relation can help us to identify the operation of power in post-colonial contexts. So, ultimately, this thesis will ask about the relation of the colonial paradigm and recognition, but first it is necessary to make clear what we mean by these terms “colonial paradigm” and “recognition.” It is only after finding some clarity regarding these structures of relation that we can begin to consider how they may relate to one another. Thus, the first part is dedicated to analysing each of these designations in turn. That is, chapter 1 is concerned with the colonial paradigm, and chapter 2 with recognition.
Chapter 1

Temporal Difference Erases Difference: on the Colonial Paradigm

White man, only time is between us.
Oodgeroo Noonuccal “Stone Age”12

Let me contextualise the philosophical discussion to follow by beginning with a broader international and historical perspective. Current discourse in international relations theory highlights the continued operation of the classical standard of civilization in the global power relations of the present despite the term having dropped out of common usage. The “standard of civilization” “was used by international lawyers in the nineteenth century to defend the Europeans’ right” to acquire colonies.13 The standard also provided the means for resisting imperial powers, but as noted by Brett Bowden:

In order to meet the requisite standard of civilization and be admitted to the family of international law-abiding nations, non-European societies were required to organize themselves in a manner that would be immediately recognizable by European states as reflecting their own sociopolitical organization.14

Or, the implication is, not be recognized as legitimate and sovereign, and thus be susceptible of assumptions of sovereignty by foreign powers, and military interventions. Barry Buzan argues for the continued relevance of the term “standard of civilization” because “it is important to highlight the continuity of the practice and not to pretend that things have changed when they have not.”15 Indeed, recognitions as a legitimate sovereign state and member of international society (or more recently, a member of certain international clubs) has been and

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still is predicated on meeting and adhering to this standard which, as noted by Buzan, acts as a “basis to gate-keep on access to the private goods of international society’s inner circles.”

Further, and particularly relevant to this chapter, Buzan notes that one “element underpinning the historical standard of civilization was the increasing dominance of positive over natural law in Western thinking and practice in the 19th century.” These historical and international perspectives are relevant to this discussion because they highlight that international law and the standard of civilization began as responses to and legitimations for colonialism; and because the historical power structures (legitimated by early modern philosophy) that the standard of civilization is founded upon continue to operate on the world stage. Additionally, as alluded to by Buzan’s statement above, they draw a link between early modern western philosophy and the production of a global structure of domination that privileges western modes of being, thought, and politics.

The doctrine of *terra nullius* is not, in this context, an invention of the Australian state in response to domestic relations of coloniality, but rather is a part of the historical and global relations of imperialism and their justifications. The shift to more liberal norms noted by Buzan in the modern iterations of the global standard of civilization is echoed in the assumption that indigenous peoples’ ways of life are outmoded and unsustainable in the “modern world.” In Australia, we can see this assumption in moments such as then Prime Minister Tony Abbott’s 2015 characterisation of Aboriginal on-country modes of being as an unsustainable “lifestyle choice” that should no longer be supported by the state.

Operational in this global and local context is a particular concept of difference. In order to grasp this concept, we must take a philosophical perspective. In a philosophical discourse, we might say that the standard of civilization was relied on as justification for assertions of sovereignty, or was an instrumental concept in legitimating sovereignty claims. That is, the standard of civilization provided a normative framework, or *the form* of legitimate government. This framework or form allowed for the exclusion of indigenous peoples from claims to legitimate government, and thus legitimated their dispossession and colonization. In other words, the standard of civilization demarcated western political and social forms from indigenous, and recognized only western as legitimate. The standard thus creates a distinction between legitimate and illegitimate, western and indigenous, governance and the state of nature. It creates a normative framework that excludes indigenous social and political forms.

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17 Ibid., 579.
18 Ibid., 580.
This chapter argues that the difference thus created is conceived of as merely an effect of temporal mismatch in colonial contexts. That is, as an effect not of difference as alterity, but as an effect of the uneven progress of peoples toward the same end. In this conception of difference, the colonialist is simply further advanced in attainment of this end than are colonized peoples. Any observable difference is attributable to this accident of temporal mismatch rather than genuine ontic or epistemological alterity. It is this paternalistic conception of the temporality of difference that Oodgeroo Noonuccal’s poem, “Stone Age,” sardonically draws attention to: “White superior race, only time is between us – As some are grown up and others yet children” she chides in an indictment of the logic of colonialism. It will be argued here that this temporally conceived difference is the justification underpinning the privileging of “western” modes of thought, being, and politics over indigenous modes of thought, being, and politics; and that this privileging erases difference. Put differently, the privileging of western epistemology, ontology, and politics is justified by a concept of difference as produced not by real alternative modes of being, but rather by difference in developmental stage. In this privileging, indigenous modes of thought, being, and politics are covered over, denied, or dismissed as anachronistic and pre-modern. It is time that separates colonized from colonizer in colonialism, and all difference is subsumed and subsumable by bringing the Enlightenment and its fruits to those who have not yet fully “broken free” of the state of nature. To return to literary examples, Rudyard Kipling’s “White Man’s Burden” is built almost entirely on, and reflects, this justification for colonialism. His “new-caught sullen people, half devil and half child” must be “captured and served,” they must be taught how to “be modern” for their own advancement toward the universal, civilized end of the human species.

My argument is that in order to function and sustain itself, colonialism requires difference to be conceived of as merely temporal. Time is what separates colonized peoples from colonizers. In colonialism, all modes of being, politics, and thought are placed along a single, unidirectional, chronology, the most modern point of which is occupied by “western” modes of thought, being, and politics. It is this relation, that of modern colonizer and infantilized colonized, that I will call the colonial paradigm, and terra nullius is but one manifestation of the paradigm. And this one manifestation, terra nullius, is of particular importance for Australia. There is, in the history of western philosophy, much to be found that underpins the single-telos-of-humankind logic of the colonial paradigm. Let us first make a

19 Noonuccal, “Stone Age.”
small review of this history, and then see how the doctrine of *terra nullius* manifests this logic of temporality and difference.

**The telos of humankind and homogenous modernity**

As alluded to above, the single telos of humankind, or homogenous modernity, reasoning is intimately bound up with contractarian and natural law theorists, and the increased dominance of positive over natural law underpinned the classic standard of civilization. Here I add to these observations, that it is the reliance of positive law on natural law that provides the link with homogenous possibilities for the expression of human existence. That is, it is not so much the dominance of positive over natural law, or the replacement of natural law by positive law, but rather the natural law foundations of positive law that creates universalised homogenous normative socio-political possibilities. Indeed, many of the early-modern philosophers who are significantly identifiable in the development of international law and justifications for colonialism began with assumptions about the state of nature, and the nature and purpose of humankind.

For Thomas Hobbes, positive law is a *natural* response to the assumption that “[n]ature hath made men so equal, in the faculties of body, and mind”\(^{21}\) that “during the time men live without a common Power to keep them all in awe, they are in a condition which is called Warre.”\(^{22}\) In this state of war, *reason* dictates “the first, and Fundamentall Law of Nature; which is, to seek Peace, and follow it” and the only way to obtain and sustain peace is to transfer all rights to a sovereign (by way of covenant) whose absolute authority is justified by its capacity to maintain peace.\(^{23}\) Therefore, in Hobbes, the state of nature and humankind’s *universal* psychology (notably the capacity for “reason”) *naturally* produce positive law (the social contract) or “a political ontology that assumes might is right.”\(^{24}\) Similarly, John Locke’s theories on toleration and the civil space, and the acquisition of property are predicated on his own conception of the state of nature and the rationality of humankind.\(^{25}\) Indeed, as noted by Jeremy Waldron, capacity for *reasoning* “to the existence of God” is the prerequisite for

\(^{22}\) Ibid., 88.
\(^{24}\) Vardoulakis, *Sovereignty and its Other*, 84.
admission to personhood in the Lockean universe. This is a further example of positive law being the *natural* or *reasonable* heir to natural law, or a western conception of the *telos* of human kind assuming universal legal status in the form of positive laws that ultimately justify colonialism. This type of reasoning also underpins Jean-Jacques Rousseau’s famously idyllic state of nature, and even John Stuart Mill, who seeks to distance himself from these earlier natural law proponents, but “write[s] as if descriptions of the physical universe are normatively meaningful.” Moreover, practices valued by western “civilization” are presented by Mill as natural to mankind: “It is natural to man to speak, to reason, to build cities, to cultivate the ground, though these are acquired faculties.” However, Hobbes, Locke, and Mill all maintain that, despite the naturalness of reason (as conceived in western terms), there are peoples who have not attained the status of “rational being” capable of self-governance. For Hobbes they are madmen and fools, for Locke they are atheists, Catholics, and Mahometans, and for Mill they are “backward states of society in which the race itself may be considered as in its nonage.”

François Jullien’s attempt to uncover the “origins” of the universalising propensity of western philosophy is of some assistance here. Jullien argues that in ancient Greece “philosophy turned to that which is stable and unchangeable in its quest for truth; that which is true only became absolute truth when it became linked with being (in other words, philosophy only emerged by becoming ontological).” In these terms, then, it is the epistemological basis of “western civilization” and its need for “truth” produced by “reason” that necessitated the creation of a universal or supreme ontological truth which would (by its claim to superiority as singularity) either subjugate, exclude, or deny the existence of other modes of being, thought, and politics. Or viewed from the early modern period, in seeking to overcome the arbitrariness of political authority, it was necessary to reason from the state of nature, to create a universal origin myth that justified and validated Enlightenment projects. The very search for this justification which would create a non-arbitrary political authority is also, in the colonial paradigm, constitutive of an arbitrary political authority.

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**Terra nullius and the state of nature**

I will now move to the doctrine of *terra nullius* as a specific and important example of this teleological underpinning of the reliance of positive law on natural law that has become domestic law for “post-colonial” states, and for Australia in particular. *Terra nullius* as an idea and justification for the acquisition of lands grows directly out of this same history of the universalised *telos* of humankind. Where once *terra nullius*, as a part of the standard of civilization, could be used as justification for acquisition, upon “acquisition” it became a justification for the privileging of Enlightenment indebted modes of thought, being, and politics over indigenous modes of thought, being, and politics. Recent discourse has made much of the absence of the term *terra nullius* from the colonialist vocabulary and 17th and 18th century legal justifications for the dispossession of indigenous peoples; but Andrew Fitzmaurice makes the case that the term is simply a new descriptor for the natural law tradition of the early modern period, which did feature in the common psyche and legal justifications for colonial expansion, and, as we have suggested, positive law found its justification through natural law.31 Fitzmaurice argues that this natural law tradition is traceable to the Roman law of the first taker, or *ferae bestiae*, which “states that any thing, such as a wild beast, that has not yet been taken by anybody becomes the property of the first taker.”32 This doctrine was initially used by those at the Salamanca School, such as Frances de Vitoria, as a defence of indigenous peoples’ right to not be colonized. However, the use of Aristotelian natural law in this argument left open the possibility of denying ownership to indigenous peoples who had not sufficiently brought the potential of nature to fruition, and had therefore failed to establish property (or proprietary interest), and by extension their humanity.33 And so, I use *terra nullius* here to designate this tradition and doctrine.

The salient distinction in this discussion is in the definitions of sovereignty, and property and property rights. The definition of property rights, as we have noted, is a product of the western natural law tradition and despite numerous attempts to secularise it, it retains structures of universalizing Christian theology. I’ll here consider Locke’s thought in more detail, and in conversation with *terra nullius*, to see how it operates within and underpinning the single modernity model. I turn to Locke both because of his widely-acknowledged influence and because he makes the case particularly clearly. The *Two Treatises of Government* is rich in

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32 Ibid., 6.
33 Ibid., 7-8.
examples of this theo-universalizing logic.\textsuperscript{34} Here, Locke uses biblical hermeneutics to argue for divine sanctioning of the appropriation of property.

Every man had a right to the creatures by the same title Adam had, viz. by the right every one had to take care of and provide for their subsistence: and thus men had a right in common.\textsuperscript{35}

This is Locke’s state of nature: pre-political and pre-normative. A state of human existence characterised by equality of right to the goods of the earth.

God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth.\textsuperscript{36}

God didn’t just give the earth to humankind, but also commanded us to labour. Because of the equality of right that humankind, in the state of nature enjoys to the goods of the earth, it would be impossible to survive if the goods were never able to be removed from the common: we would starve. Therefore, it is the mixing of our labour, initially by effort of hunting or foraging, that removes goods from the common and establishes an individual right. And because the flesh requires labour to sustain it, reason (which God gave us) also commands us to labour and subdue, which, again, removes that upon which we have laboured from the common.

And hence subduing or cultivating the earth, and having dominion, we see are joined together. The one gave title to the other. So that God, by commanding to subdue, gave authority so far to appropriate. And the condition of human life, which requires labour and material to work on, necessarily introduces private possessions.\textsuperscript{37}

So by mixing our labour, which we are commanded to do (by God and reason) in order to subdue and to survive, we also necessarily acquire individual rights to property. The world was given to humankind, that is, humankind have dominion over the earth by divine dictate. But, in so giving, God also commanded that humankind subdue, to improve, the earth. That is, to make it more capable of supporting human existence by farming, which allows smaller tracts of land to produce higher yield (makes the land more productive).

But when there was not room enough in the same place, for their herds to feed together, they [the families of Abraham’s line], as Abraham and Lot did, Gen. xiii. 5, separated and enlarged their pasture where it best liked them.\textsuperscript{38}

\textsuperscript{35} Ibid., 56.
\textsuperscript{36} Ibid., 113.
\textsuperscript{37} Ibid., 114.
\textsuperscript{38} Ibid., 117.
When the population outgrew the location, people simply moved to unpopulated (unsubdued) areas where, by mixing their labour with the land, they *necessarily*, acquired it as a private possession.

Thus labour, in the beginning, gave a right of property … afterwards, in some parts of the world, (where the increase of people and stock, with the use of money) had made land scarce, and so of some value, the several communities settled the bounds of their distinct territories, and by law within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began.39

Put differently, when tracts of unsubdued land could no longer be found, in part because of the greater tracts able to be acquired once money could be accumulated as “unspoilable” goods, people, individually and as communities, began making compacts and agreements to regulate and protect the acquisition of property.

These are but a few examples of Locke’s argument to show the progression from *Genesis* and God to private property and civil society, or, natural law to positive law. For Locke, the creation or acquisition of property (and colonies) is a natural right, dictated by reason and doctrine, and civil society is *the* rational method for protecting said property.40

This theo-Lockean logic of property production presupposes a separation between the material and the spiritual, and between human and nature. The human is in nature, but not of nature, and with the passing of time there is a recovery of prelapsarian dominion.41 This relationality of dominance mediates the connection between particular land and inhabitants. It is the mixing of one’s labour with particular objects and land that creates property (propriety/dominion) and fulfils the divine imperative.

In this sense, the imperative to cultivate land in a particular way is divinely justified, but the connection with particular land is not; and nor does the subduing and use of land and property imbue property with sacredness. Following Locke’s reasoning here, despite this sacred imperative to subdue, the property remains vulnerable to human vice because it is human labour and human use that create it as dominion/property. Property is transferable, and exploitable. Once property is established, civil society naturally follows in order to protect property from human vice and conflicting appetites, and property rights are the articulation of this protection in law. Some sort of overarching sovereign authority is required to regulate and

39 Locke, *Two Treatises of Government*, 119.
mediate these conflicts, and so a state is born, the primary concern of which is protection of private property in accordance with agreed property rights.

This alienation of the spiritual from the material is the crucial element in much of the theology of property production, and also the precondition for production of sovereign authority. This is why a lack of sovereignty, or *terratorium nullius* (land over which no claim of sovereignty has been made), is contained within the idea of *terra nullius* (land over which no proprietary interest has been established) without having to be specifically stated. In this conception of the human, time, and land, there is no outside. It is a narrative of the “progress of civilization” as having one clear trajectory and is therefore the basis of (and based on) erasing the possibility of multiple contemporaneous modes of social and political organisation. It is this narrative that binds theology, economy, politics, law, and philosophy together in such a way as to designate Aboriginal and Torres Strait Islander law, politics, philosophy, theology, and economy as temporally dislocated, and obviates recognition of difference qua difference. It is a narrative that throws difference into the world, where the world stands as a universal, unmarked, neutral ground of the possibility of human expression. In these terms, the assertion of *terra nullius* alerts us to difference conceived of as a temporal aberration, which conception erases difference: temporal difference erases difference. In the colonial paradigm, difference is covered over and replaced by a temporal divide that can be overcome only by homogenising expressions of human existence in the model of the standard of civilization.
Chapter 2

Without the Differend: Recognition of Masters, Slaves, and Idioms

Spears could not contend against guns and we were mastered,
But there are things they could not destroy.
We were conquered but never subservient,
We were compelled but never servile.
Oodgeroo Noonuccal “I Am Proud”

Again, let me begin by contextualizing the philosophical discussion to come. The word recognition has a specifically Australian political history. Recognition has been the rallying word for the recently discontinued multimillion dollar government campaign, Recognize. The stated purpose of the campaign was public awareness and education aimed toward a referendum on amending the Australian Constitution to include recognition of Indigenous Australians as original custodians of the land. The co-chairman of Recognize, Tom Calma, “said the Recognize campaign had made ‘a significant contribution’ to building public awareness of constitutional change” and that the work of the “campaign will transition into Reconciliation Australia.” However, the campaign drew significant criticism, largely revolving around its lack of nuance and authenticity. It was accused of presenting and funding a position that conformed entirely with the absence of government policy, and providing media

42 Noonuccal, “I am Proud,” Australian Poetry Library.
savvy corporate and political photo opportunities to groups and individuals for their own gain.\textsuperscript{44} The campaign was also accused of misrepresenting the level of support it enjoyed among Aboriginal and Torres Strait Islander peoples, and for posing unacceptably ambiguous survey questions when seeking that support.\textsuperscript{45}

This controversy points to the contested nature of recognition. In this context, it is timely and useful to examine what we mean by recognition, and a philosophical method is particularly well suited for such examination. The recognition I wish to speak of is not confined to the Australian historico-political context outlined above, but does find relevance there. Because of this cross over, there is a potential for conflation or ambiguity when using this language in an Australian context, and also for being taken out of context. Despite this potential, or perhaps because of this potential, it is important to examine and demarcate what we mean by “recognition.” There are two questions that will guide my analysis: (1) what is recognition? and (2) what is recognition of? The first, \textit{what is recognition}, asks us to examine the concept and word. The second, \textit{what is recognition of}, brings the concept back into contact with the object of this thesis – the operation of difference in the colonial paradigm. This chapter is divided into two parts that are responses to these two questions. Thus the first division draws on the philosophical discourse of recognition from Georg WF Hegel to Frantz Fanon, and the second division draws on Jean-François Lyotard and Martin Heidegger to assist us in understanding what difference, not erased by temporal conceptions, might be.

\textbf{Recognition: of masters, slaves, and self-consciousness}

I will here draw out some concept of recognition from Hegel’s phenomenology and then follow through to those upon whom his influence is unmistakable. That is, Alexandre Kojève, Emmanuel Levinas, and Frantz Fanon. Whilst each of these interpret and arrive at recognition in more or less different ways, the trace of Hegel runs through them. There are three points in this discourse that are of relevance here, and that all our philosophers refer to. The first is the sociality of the human, that is, the necessity of intersubjectivity to demarcate the human from animal, the self-conscious from the merely conscious. The second is the violence that is necessary in the production of self-consciousness that is constitutive of the human. The third,

\textsuperscript{44} Celeste Liddle, “I Don’t Want Your Recognize Campaign – It’s Nothing but a Sham.” \textit{The Guardian}, August 18, 2014, \url{https://www.theguardian.com/commentisfree/2014/aug/18/i-dont-want-your-recognize-campaign-its-nothing-but-a-sham}.


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and mostly silent, point is the assumption of the universalised neutral ground of the subject. These three points are facets of the concept of recognition. In their terms, let me impose the image of my perception upon the words they have left. When speaking of Hegel, we must remember that at any given point, there is (at least) a duality to his words. When speaking of spirit, for instance, it is both the infinite spirit and the particular self-consciousness that are referenced. The fractal pattern of his philosophy both simplifies and complicates, because terminology and concepts slip between whilst also containing multiple levels of the pattern. However, central to his concept of self-consciousness is his concept of recognition, and recognition is central to self-consciousness. So, in order to discuss recognition, we must also discuss self-consciousness. And this is where I begin.

In a series of dialectical moves, self-consciousness for Hegel both requires and negates the other, but ultimately, “Self-consciousness is thus desire” and “Self-consciousness attains its satisfaction only in another self-consciousness.”46 That is, self-consciousness “exists only as a recognized being”47 and in this existing as recognized being, exists for an other. But this other is as much self-consciousness recognizing itself in the other, as it is recognizing an other that is for-itself.48 Self-consciousness “sees itself in the other” and “must sublate its otherness” which is simultaneously sublation of the self-consciousness.49 The slipperiness of these concepts into and out of one another are, according to Hegel, “the movement of recognition.”50 This movement means that others are, for self-consciousness, primarily not recognized as and for themselves, but are nonetheless necessary for self-consciousness’ self-consciousness. The mirrored and doubled actions of self-consciousnesses are constitutive of themselves and of the other, but self-contained.51 It is the mediation of the self-consciousness through the other self-consciousness that allows the self-consciousness to take itself as an object existing for itself. “They recognize themselves as mutually recognizing each other” and this is the “pure concept of recognition.”52 However, the initial recognition is of “self-sufficient shapes absorbed within the being of life… they have not yet presented themselves to each other as pure being-for-itself.”53 And this means they only superficially recognize themselves, because they are bound in their self-recognition with their recognition of the other.

47 Ibid., 164.
48 Ibid.
49 Ibid., 164; 165.
50 Ibid., 164.
51 Ibid., 66.
52 Ibid., 167.
53 Ibid.
The condition of possibility for real recognition is the “life and death struggle” to be recognized by the other.\(^\text{54}\) The superlative ends of the possibility of recognition thus achieved are encapsulated by the essence that is for-itself and the essence that is for-the-other, or, the master and the slave.\(^\text{55}\) Kojève takes this construction of self-consciousness and recognition and notes that “therefore, to speak of the ‘origin’ of Self-Consciousness is necessarily to speak of a fight to the death for ‘recognition’.”\(^\text{56}\) Levinas, too, constructs the recognition of the other as necessarily containing the conditions for murder. The other is the one we cannot fully negate without such negation being murder.\(^\text{57}\) But recognition as human by human, as characterised by Hegel, Kojève, and Levinas, omits to consider modalities of being human that are not conditioned by the same set of ideals, ontologies, and epistemologies. This recognition does not account for the possibility of difference. The life and death struggle for recognition, and the recognition that allows for the concept of murder, all take place on a common battle ground. This common battle ground is made of the common conceptual framework shared by those in the battle. They appear to one another in terms that are recognizable because of the shared conceptual framework in which they are constituted.

This is where Fanon diverges. But let me first say how Fanon appears to concur. Fanon takes this construction of the possibility for recognition and asks how it might operate in the phenomenology of decolonization. The colonized subject dreams “of taking the place of the colonist” and to do so “must blow the colonial world to smithereens.”\(^\text{58}\) “On Violence” is, in these terms, a study of the negation of the other, and the life and death struggle for recognition. Indeed, it is hard not to recall Hegel and Kojève when Fanon writes: “In its bare reality, decolonization reeks of red-hot cannonballs and bloody knives. For the last can be the first only after a murderous and decisive confrontation between two protagonists.”\(^\text{59}\) However, I think there is something else to be read from Fanon’s phenomenology. He writes almost explicitly that he is not in the business of validating Hegel’s dialectic: “The ‘native’ sector is not complimentary to the European sector. The two confront each other, but not in service of a higher unity.”\(^\text{60}\) If the confrontation is not in the service of a Hegelian unity, how are we to understand it? I suggest that whilst Fanon’s “On Violence” appears to argue in a Hegelian way

\(^{\text{54}}\) Hegel, Phenomenology of Spirit, 168.
\(^{\text{55}}\) Ibid., 170.
\(^{\text{58}}\) Fanon, “On Violence” in Wretched of the Earth, 5.
\(^{\text{59}}\) Ibid., 3.
\(^{\text{60}}\) Ibid., 4.
that violence is necessary, Fanon’s construction points to the necessity as contingency. That is, violence is necessary when the other (that is, the colonist) constructs its narrative of recognition as Hegel has, and claims universality for the construction. The colonist has set the stage, and in the paradigm of the stage, enacts and acknowledges nothing other than violence. To demonstrate this point, allow me to take Fanon’s sentence that precedes the one in which the colonial world is blown to smithereens:

The violence which governed the ordering of the colonial world, which tirelessly punctuated the destruction of the indigenous social fabric, and demolished unchecked the systems of reference of the country’s economy, lifestyles, and modes of dress, this same violence will be vindicated and appropriated when, taking history into their own hands, the colonized swarm into the forbidden cities.61

The violence here is not an inherent quality of the relation between humans, but is instead characteristic of the colonist’s modes of being in the world. The same violence brought by the colonist is appropriated by the colonized and returned to the colonist who finds in its re-turn vindication of the original violence. But it is and always was the colonist’s violence. In these contingent circumstances, the colonized respond as they must in the only language the dialectic can hear – violence. Thus, rather than taking Hegel’s mastery and servitude and dropping it uncritically into the colonial paradigm, Fanon shows how the universality claimed by such constructions creates the conditions it claims to reveal. The question becomes then, can the colonist recognize themselves and others without imposing this universalised concept of the necessity of a life and death struggle for recognition? Can the colonist recognize different modalities of being that are not centred on violence? To begin to answer this question we must now develop our theory of difference. How can we recognize something if we don’t know for what we are looking?

**Recognition: of idiomatically constituted humanity**

For a theory of difference, I turn to Lyotard’s concept of the differend.62 The differend gives us a way to understand the unintelligible, or at least to understand that the unintelligible exists and is no less “real” for its apparent unintelligibility. The differend articulates the meeting of the radically other. It presupposes a universal concept of life, but this universal concept is fragmented and particularised by its socio-linguistic mediation. Life is conceived of

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61 Fanon, *Wretched of the Earth*, 5-6 (italics added).
as inherently reliant on a shared phrasal and conceptual framework that is specific to a people, a nation, or in Lyotard’s terms, an idiom. These idioms are as inescapable as they are different from one another. It is quite impossible to articulate the issues of one in the other, and the result of this inability to create meaning across idioms causes significant difficulty and trauma. Lyotard calls this difficulty and trauma a wrong. A wrong is violation and injury that it is impossible to seek a remedy for or: “a damage [dommage] accompanied by the loss of the means to prove the damage.”\footnote{Lyotard, \textit{The Differend}, 5.} This loss can be because “the testifying phrase is itself deprived of authority” and is accompanied by “the impossibility of bringing it to the knowledge others, and in particular to the knowledge of a tribunal.”\footnote{Ibid.} In the colonial paradigm, the differend makes it impossible to have a claim for justice heard, a claim of a wrong, when to do so the colonized must use the conceptual and legislative framework of the colonizer. This is one of the challenges faced by colonized peoples, to be seen and heard in an idiom that rejects or fails to understand the authority of their phrases and insists instead on violence, mastery, and servitude.

One of the most stark and relevant examples of the differend in colonial paradigms, and one that we have already come across, is in the radically different relationships to private property and land in western and Aboriginal idioms. The doctrine of terra nullius encapsulates the relationship to property and land contained in western idioms, and the privileging of those idioms over those of colonized peoples.

In traditional Aboriginal idioms, the concepts available for the relation between human and land are profoundly different from those available in western idioms. Moreover, there is great difficulty in translating Aboriginal concepts into western concepts and describing them with western languages, including English, the language of the Australian state. Indeed, it is not only human and nature, or sacred and country that are conceived of differently, but also time and self.

Let us consider the following (English) descriptions of some of the concepts available in Aboriginal idioms:

[M]an, society and nature, and past, present and future, are at one together within a unitary system of such a kind that its ontology cannot illumine minds too much under the influence of humanism, rationalism and science.\footnote{WEH Stanner, \textit{The Dreaming and Other Essays}, (Black Inc. Agenda: EPub, 2010): 100.}
This description of Aboriginal being is offered by William Stanner, pre-eminent anthropologist and academic credited with significantly altering Anglo-European Australians’ understanding of Aboriginal culture. And he notes further:

The Dreaming conjures up the notion of a sacred, heroic time of the indefinitely remote past, such a time is also, in a sense, still part of the present. One cannot “fix” The Dreaming in time: it was, and is, everywhen.66

Everywhen: a time of myth, a historical concept, a future concept, and a present. This is not an origin myth, as might be understood by western constituted minds upon encounter with stories of the Rainbow Serpent and the shaping of the land. The Dreaming does not fit on a unidirectional chronological line. The Dreaming is a concept of time and existence that does not find any equivalence in the common western understanding. But, as noted by Sonia Smallacombe, this non-equivalence has been covered over by the influence of western universalizing concepts:

[W]estern perceptions have, to a large degree, failed to recognize that indigenous conceptual systems have their own internal logic and rationality, which are not always translatable into the dominant western legal and political system... The intellectual and cultural property of indigenous Australians provides the foundation of our personal identity and ancestral anchorage. It offers a distinctive world view that outsiders can rarely grasp.67

In the examples above, we see the authors struggle to find English words and western concepts that are adequate to the task, and ultimately resort to pointing to a beyond, to an indescribable, untranslatable something. This something is, from another point of view, everything.68 Even so, it is quite apparent that in the idioms referred to, the spiritual is not abstracted from nature, and nor is the human severed from nature. And that time and self are diffused through each other and place in a complex web of connections. If the human and the land (country) are part of an inseparable web of sacred connection, where such connection is predicated on birth lineage and every human, by right of birth, belongs to particular land and vice versa, then property is not transferable, merely material, and exploitable. In this sense, if we think of “property rights” as being something that requires sovereign authority to enforce it because land is commodifiable, as discussed in chapter 1, then land rights didn’t exist in a way recognisable by historically contextualized western legality in this type of society. If land is

66 Stanner, The Dreaming and Other Essays, 95.
not commodified (or even commodifiable), and the concepts used for understanding self and
land are inextricable, then land is not owned in the sense recognized by “property rights” but
is rather integral to self as part of an immanently sacred existence.

This disconnect between Aboriginal idioms’ narratives and concepts and western idioms’
narratives and concepts is precisely the point of the differend. As chapter 1 argued, western
modes of being, thought, and politics construct colonized peoples as “backward” or
“underdeveloped” rather than genuinely different. With a concept of the differend we can see
how western modalities enact this erasure, and that they enact this erasure, and begin to ask
what it would be to understand and recognize difference as difference.

We have now arrived at a point in our understanding of the differend that necessitates a
pause to consider how we might talk about something that defies translation. I have conducted
a brief online review of some of the Aboriginal language dictionaries and sites available in an
attempt to at least have some contact with an Aboriginal word that articulates a relation of
existence (or rather this one-ness), but have found none. This could be in part due to the
redaction (noted in some Aboriginal Language dictionaries) of some words referring to or
involved in the sacred aspects of Aboriginal idioms. It was because of this redaction that I did
not pursue the word(s). The redaction alerted me to the possible offence and colonial tenor of
such appropriation. So, I am here going to use ov to signify the type of being available, so far
as I can grasp it, in Aboriginal idioms.

The choice of ov is, in part, to bring us in mind of Heidegger.69 Heidegger’s “Being” and
“world” (Sein and Welt) come closest to the descriptions I have found for the relationality of
being in Aboriginal idioms. For Heidegger, “world” does not designate a subject-object
separation, but rather refers to the complex web of contextual references in which human
beings always already are.70 Being, for Heidegger, is always being-there, that is, there is never
a person or thing without a location and context.71 Part of this context is an abstract notion of
what we might loosely call an in-common consciousness. This shared or in-common consciousness is not any one person in particular, but it is every person.72 This is what is
translated as “the They” – a designation that alludes to loosely tossed out rumour or common
knowledge, “they say…” but also underpins common conceptual intelligibility among
idiomatically (or linguistically) similar groups. So we see that being, world, human, and

70 Ibid., 85.
71 Ibid., 53; 131.
72 Ibid., 123-126.
community are all intricately linked in Heideggerian ontology. So ov will stand in similar significance to Sein and Welt, but without the difficulty that can arise from adopting too closely a Heideggerian perspective. Additionally, ov is used rather than ontology or Heidegger’s οντολογία to avoid the historicized western concept or conflation of logic, λογος, and ov, because it is not the historicised and categorized being’s logic that we are here concerned with. This resistance to οντολογία is also in deference to eminent anthropologist William Stanner who articulates inculcation in western logics of being as prohibitive to understanding the unique discourse available in Aboriginal idioms.

Further, it is perhaps a timely demonstration of the differend that I have been unable to locate an appropriate word in Aboriginal idioms. In western idioms, the power of words is understood in a limited way, most commonly with regard to words reclaimed by groups that have been marked and categorized as “other” or “sub” (those with the power to subvert being’s logic). The rejection or reclamation of pejorative categorizing nouns by these groups, and the response of those who would use the terms, demonstrates western idioms’ understanding of the colonial and hetero-normative capacity of language. While the colonising power of words is understood in western idioms (and the possibility for subversion of the pejorative associations by “marked” populations), the need for permission or authority, granted by initiation and socio-cultural achievement, to use particular words and concepts is lacking. This highlights the linguistic and idiomatic difference that forms a basic tenet of this thesis. If, following Heidegger, the condition of the possibility of language is understanding, discourse, and a common They, I do not have access to the They and understanding of Aboriginal idioms nor the authority that is granted within them. So, I must instead find a word that alerts us to the limits of its use and designates it as produced by and within western idioms. Being, Sein, existence, welt, and world all easily dissolve into my everyday and western philosophy categories and understandings, so I use ov to jolt myself and the western-idiom-constituted reader out of this habit of, or habitual, understanding that would elide the differend. Ov stands as a western-idiom-produced place-holder with enough irregularity to point to a meaning beyond itself, a meaning that by its nature defies translation. Ov, then, signifies a universal and particular, material and spiritual, existence-being characterised by sacred immanence but defying translation, or perhaps denying understanding (in the Heideggerian sense).

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73 Heidegger, Being and Time, 30-31.  
74 Stanner, The Dreaming and Other Essays, 99-100.  
75 Heidegger, Being and Time, 155-161.
If we bring this on back into conversation with western idioms and the production of property and sovereignty, we find that on describes a relationship between human, place, and spirit but does not produce sovereignty or land rights in a form recognized by the western natural/positive law tradition at the time of contact. This leads to the unsettling conclusion that, under the circumstances, terra nullius (and by extension territorium nullius) is an accurate representation of the categories contained within western law, and the exclusion of Aboriginal peoples from voting was in keeping with such understanding. This is the risk inherent in failing to recognize the differend, or failing to recognize difference as difference.

So, the discourse of terra nullius and its connection to land rights highlights the significance of the differend. We see two senses of the political based on divergent epistemological/ontic frameworks. Depending on the idiom through which one views the relationship between nature and human, the material and the spiritual, both are “justified” and, if confined to one idiom or the other, both are unintelligible to the other. Indeed, from one perspective, without the differend, the other is not even a contemporaneous expression of the possibilities of human existence, yet. In these terms, only the other’s body is contemporaneous, and this body experiences the world through an anachronistic lens. Without the differend, there is no possibility for recognition that is not predicated on the violent life and death struggle for recognition by the other. Without the differend, difference is elided by the telos of humankind; the possibility of recognition is subverted by temporally conceived difference. In order to structure a relation of being-with on recognition, recognition must have a concept of difference.

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76 even using “relation between” suggests a separation which does not belong in this construction but which is linguistically almost impossible to avoid.
Part II

*On the Relation of The Structures of Relation*

The preceding part (I) analysed two possible modalities of the structuring of the relation of human and human. Thus, we now understand the colonial paradigm as a structure of relation that is characterised by the *erasure of difference*, and recognition as *requiring a concept of difference* if it is to escape the idiomatically specific bounds, that is, if it is to find relevance beyond its borders. It might, at this juncture, be pointed out that recognition is not a structure *per se*, but a possibility of the relation between idiomatically disparate peoples. To this I respond, recognition is a possibility that structures – that is, it is possible to structure the relation as recognition. Failure to structure the relation thus, allows for a colonial structure. But we are still unclear as to what this structure of recognition looks like. So, with the analysis of the structures in isolation complete, we are now ready to ask: what is the relation between the structures of the colonial paradigm and recognition? How do these two structures of the relation of human and human relate to one another? To answer these questions it is helpful to approach the relation between the colonial paradigm and recognition from a number of angles that we might build an image of the structure, and its absence. That is, I will first approach it from the perspective of absence or disavowal of recognition, and then as possibility. This part (II) is again in two chapters. The first asks how the colonial paradigm subverts recognition, and the second asks how recognition subverts the colonial paradigm. Thus the first chapter will be a phenomenology of erasure, and the second chapter a phenomenology of recognition.
Chapter 3

The Subversive Potential of the Colonial Paradigm

Pour your pitcher of wine into the wide river
And where is your wine? There is only the river.
Must the genius of an old race die
That the race may live?
Oodgeroo Noonuccal “Assimilation – No!”

Let me begin by providing a historical context to recognition as I am developing it here. There have been many attempts, other than the Recognise campaign, at something resembling recognition in Australia. For instance, in 1988, Bob Hawke, in his capacity as Prime Minister of Australia, made a commitment to concluding a treaty between Aboriginal peoples and the Australian Government. Hawke’s commitment was in response to the demand for a treaty and land rights contained in the Barunga Statement which was presented to him at that time. The demand for treaties is in line with practices in other colonial states. Colonial treaties have been perceived as a form of recognition between colonizer and colonized, where the sovereignty of indigenous peoples is duly accounted for. At the time of writing this thesis, there have been successful native title claims, but there have not been any treaties concluded in Australia, though one is under negotiation in Victoria. However, this chapter argues that the structure of the colonial paradigm is such that any form of recognition may be subverted: treaties, land

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77 Noonuccal, “Assimilation – No!” Australian Poetry Library.
rights, or constitutional. This is why an understanding of the structure of recognition is so important.

We now have some understanding of the importance of a concept of difference for the structure of recognition. With this we can examine the colonial paradigm through the lens of the differend to identify how the colonial paradigm erases or subverts recognition of difference regardless of the intent of the political process relied upon. Recognition, as we have constructed it in the previous division, must be of difference. The difficulty with such recognition is that the structure of western states and institutions resist recognition of difference, particularly in colonial contexts.

There are two examples of the ways in which the colonial paradigm operates to subvert recognition of difference that I want to talk about here. The first example is the relation between the colonizer and the Crow in the United States of America. This example is important for at least two reasons. (1) That there is a treaty, and (2) that there has been an influential philosophical analysis of the relation that fails to properly recognize the differend. This makes it a philosophical perspective that erases difference, and in so doing it can assist our enquiry to reach some inferences.

The second example I will use here is the first indigenous litigation in Australian courts that challenged the power of the Australian government to issue land titles: the Gove litigation brought by the Yolngu people. This litigation is important for at least two reasons also. (1) The dual reasons that Paul Patton focuses on that were given for its rejection, and (2) the precedent that it set in common law.\textsuperscript{81} Importantly, both of our examples contain a moment of recognition which is quickly subverted to reinforce the colonial paradigm. However, in one, the colonized recognizes difference, and sublates its own otherness, and in the second the colonizer recognizes difference only to immediately defer it. By examining these examples, we can begin to see the structure of recognition in a negative form. That is, we begin to see how the colonial paradigm erases difference and thus negates recognition.

**Phenomenology of erasure: the self**

In *Radical Hope*, Jonathan Lear develops a theory of the relation between a colonial power and a colonized nation where a treaty was concluded. He calls his concept “radical hope” and in this chapter I argue that radical hope is a subversive structure of relation. To arrive at this assessment of radical hope, in this section I will examine the structure of radical hope, whilst keeping in mind our understanding of recognition.

Radical hope is a concept developed by Lear in response to the experience of the Crow, a Native American nation deeply affected by the colonialist assumption of sovereignty. Specifically, Lear draws on the biography of the last Crow Chief, Plenty-Coups. With an Aristotelian and psychoanalytic lens, Lear constructs a new concept of hope directed specifically to peoples whose way of life has been destroyed and to whom the possibility of “turning back time” is necessarily unavailable. Lear’s analysis posits a hope for an unknowable good, and a new kind of “practical reasoning into the future.” The main characteristic of radical hope is that it is engaged with reality rather than wishfully optimistic. Ultimately, Lear argues that radical hope is central to the courage needed to both hope for and realise a future that is distinctively Crow, yet so vastly altered in response to contingency as to be unimaginable prior to such realisation. Central to the narrative is Plenty Coup’s capacity to lead his people through the radical break represented by their relocation and confinement to reserves and the necessary collapse of the paradigm in which Crow meaning is produced. In these terms, radical hope is a concept of the possibility of relation between colonist and Crow, and the text is a study of the efficacy of this concept to motivate responses to and within the colonial paradigm.

In *Radical Hope*, Lear highlights the importance of power, not in determining the narrative that is told, but in determining the field of possible narratives: “For the issue that concerns us is not who has the power to tell the story – however important that might be; it is rather how power shapes what any true story could possibly be.” If, as Lear argues, radical hope is the central component of the courage needed to face and hope for a future in which the

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83 This biography was the result of extensive interviews and a firm friendship between the author, Frank Linderman, and Plenty Coups. It is interesting, in this context, to note that Linderman’s rationale for recording Plenty Coups’ story was to deepen understanding between ‘the Indian’ and the whites. Frank B. Linderman, *Plenty-Coups: Chief of the Crows*, (Lincoln: University of Nebraska Press, 1962).
84 Lear, *Radical Hope*, 103; 94.
85 Ibid., 112-13.
86 Ibid., 31.
Crow may constitute themselves as a new kind of Crow, then radical hope is a structure of relation that affords recognition of difference. In this formulation we can see radical hope as that which motivates and binds a distinct group of people to continue to hope for an alternate relationship with a colonial power. Or in Lear’s terms, radical hope is the core component in the courage needed to imagine and realise a story that is responsive to but not consumed by colonialism. This appears to take difference seriously: Lear acknowledges the radical alterity of the idiom in which the Crow are constituted.

However, upon closer examination, relationality structured as radical hope is primarily the possibility of transforming Crow subjectivity into something resembling the individualised liberal subject of the colonizer, with a Crow flavour. As noted by Lear, after “the death of the traditional forms of Crow subjectivity” the Crow have become lawyers, hip-hop artists, and farmers, living on and off the reserve, and participating in US economic, legal, and ethical systems. So whilst Lear wishes to resist describing a prescriptive new Crow subjectivity, the subjectivity produced is much the same as any other religious or ethnic minority living in the United States of America.

To illustrate this interpretation let us consider Wendy Brown’s concept of the individuated liberal subject developed in Regulating Aversion. If we do so, we can see that the new Crow subjectivity is in close agreement with it. Brown argues that there is a:

methodological individualism of liberal theory [that] produces the figure of an individuated subject by abstracting and isolating deliberative rationality from embodied locations or constitutive practices. The formulation of rationality that has nonreason as its opposite presumes a Cartesian splitting of mind from embodied, historicized, cultured being.

This individualised liberal subjectivity relegates culture to the private sphere in a Cartesian style separation between belief and practice; culture is chosen by rational free actors rather than providing the ontic, epistemological and ethical superstructure. There is no room for that is not superseded by liberalism. The mutual exclusivity of rationality and culture necessitates such a split for civic order to be maintained. Culture that is chosen by an individuated rational actor exercising her free will within the liberalized paradigm is tolerated, whereas culture that is the ethical and political indicates a lack of rationality and will, and on those grounds is

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87 Lear, Radical Hope, 107.
88 Ibid., 98-99.
89 Ibid., 99.
91 Ibid., 152.
92 Ibid.
beyond the limits of toleration. Or, in Andrew Schaap’s terms, an ethic of “toleration… cannot acknowledge the political nature of its own exclusions.” So difference, if it is recognized, is recognized as an invalid modality of being.

Prior to the Crow’s relocation to reserves, and the collapse of concepts it precipitated, there was, in Lear’s account, no separation between practice and belief in Crow epistemology. Practice and belief were constitutive of one another. The new Crow subjectivity, conceived of in these terms, is one that is chosen by the rational, individuated liberal subject exercising her free will, and as such, is of no danger to the United State’s status quo. Thus, in simply adopting a theory of relation that individualises “the subject” in a typically liberal fashion, placing all the emphasis on the capacity for marginalised peoples to first reimagine and then assert their identity within the liberal framework, there is a subversion of the possibility of indigenous idioms as distinct idiom rather than temporally dislocated antecedents to western idioms. The ethical, epistemological, and ontological superstructure is that of western idioms, and all else is derivative possibilities of choice – western idioms set the field of choices.

This conception of the structure of relation, that transforms the colonized beyond existing imaginative capacities, despite Lear’s efforts to supress or avoid it, means radical hope has the potential to function as a retrospective justification for colonization, and to support arguments for assimilation. It is, in one reading, a story of transcendence out of a limited and limiting paradigm. In Lear’s interpretation, the Crow exist in a world rather than in the world and it is a world that is governed by rigid virtue ethics and a concept of the good life that is entirely dependent on excellence in war. Their conceptual framework is restricted to a gamble with nature and a simplistic law of the excluded middle: they will win, or they will lose; they will plant a coup stick, or they will fail. By contrast, the world into which Plenty Coups leads his people requires an understanding that the real gamble was with necessity. That is, “a gamble that the entire field of possibilities will remain stable; that one will continue to be able to judge success or failure in its terms.” Radical hope furnishes Plenty Coups with the capacity to step outside the Crow world and in so doing to transcend the limits of their paradigm: the coming of age of the Crow requires the shedding of their childish notions of courage. Indeed, Lear uses the metaphor of the child when attempting to describe the nature of Plenty Coups’ commitment to the transcendent good:

93 Brown, Regulating Aversion, 153.
95 Lear, Radical Hope, 24; 27.
96 Ibid., 21-26.
97 Ibid., 26.
We instinctively reach out to parental figures for emotional and nutritional sustenance that, in the moment, we lack the resources to understand. This is the archaic prototype of radical hope: in infancy we are reaching out for sustenance from a source of goodness even though we as yet lack the concepts with which to understand what we are reaching out for.98

The metaphor of the infant and the parent alerts us to the operation of a logic of the single *telos* of humankind with the colonizer representing the natural maturity of the species. How different are Lear’s infants from Kipling’s “new-caught, sullen peoples, Half devil and half child”? The salient point here is that such language cannot be neutral, it unavoidably recalls a historical power construct in which the colonizer is not only dominant through might, but is also further evolved, matured, and enlightened. The colonizer occupies the most advanced location along the natural chronology of the *telos* of humankind. This colonizer is the bringer of civilization to the “rude” peoples, their saviour, and their hope for transcendent salvation. Plenty Coups recognizes the radical alterity of the whiteman’s idiom, and, with more than a little duress, disavows the Crow idiom. He recognizes the differend, and in recognising the risk to life, is forced to sublate it.

I have discussed already the absence the western conception of sovereignty in Australian Aboriginal idioms. The Crow idiom contains a different relation to land and self again, and so speaking of sovereignty is a somewhat fraught undertaking. Moreover, if we are to import a western idiom constituted concept, we find that it serves again to erase difference. To demonstrate this let us view the narrative of the Crow and Plenty Coups through Carl Schmitt’s theory of sovereignty.99 Schmitt’s sovereign is the one who decides on the exception. That is, the one who holds the authority to name an imminent existential threat, and to suspend or step above the law in order to meet or mitigate that threat. In Lear’s analysis, Plenty Coups in his position as Chief, identified the colonial power as holding the potential to eliminate the Crow, and concluded a treaty with the colonialists that erased Crow law. In these terms, Plenty Coups’ leadership is transformed into nothing other than the sovereign right to decide on the exception. It was Plenty Coups, in his capacity as sovereign, who determined that the Sioux were the enemy and the white man an ally. In keeping with Schmitt’s concept, this political alliance did not require shared morals or aesthetics, only political felicity. In the face of an imminent existential threat to the *Crow way of life*, Plenty Coups made the sovereign decision on the exception to save *biological life*. Plenty Coups decided that Crow law would no longer apply. This Schmittian reading leaves a hollow and incomplete picture of indigenous identity and

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98 Lear, *Radical Hope*, 122.
resistance, replacing it with a Christian theory of sovereignty that is inconsistent with retention of an alternate identity. This then, is a colonized concept, a symptom of the erasure of the differend, despite its attempts to overcome its very nature.

Finally, the process of reimagining Crow subjectivity described by Lear, as we have noted, is one of a complete voluntary relinquishing of one concept of life in the face of an overwhelming power. To say voluntary in this context may offend some readers’ sense of justice, and indeed history, so let me clarify. Voluntary here is not meant to describe a lack of coercion, but rather the pragmatic assessment of the threat and subsequent decision to change. Any person may make the same decision as Plenty Coups, when faced with a choice between preserving a way of life, and preserving life. Indeed, this is the point that Oodgeroo Noonuccal makes when she asks “Must the genius of an old race die, That the race may live?” This, then, is not a criticism of Crow choices, but rather is an indication of the structure of relation that set the field of choices. The concluding of a treaty did not guarantee recognition. In fact, the concluding of the treaty, by outlawing intertribal warfare that provided the superstructure of meaning in the idiom, destroyed the Crow idiom and forced the Crow to erase their own alterity.

This analysis of radical hope highlights the erasure of recognition of contemporaneous heterogeneous idioms that can and has been be enacted not only politically and legally in colonial paradigms, but, when we are not heedful of the differend, philosophically also. Lear’s hope is that Radical Hope offers a philosophical approach to thinking about the structure of relation that characterises the colonial experience and the possibilities for continuation of indigenous idioms. Despite his intent, Lear’s narrative and concept enact an erasure of the Crow idiom that is disguised as recognition. This erasure masquerades as hope for the erased. It takes the political power of a proximate alterity and turns it back upon itself and is therefore an example of the subversive character of the ruse of sovereignty. This makes radical hope a subversive colonialist power fertilized by the buried corpse of the differend. It is a power to recognize difference only to disavow the self, to erase difference by erasing the self that is constituted in an idiom other than the colonist’s.

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100 Noonuccal, “Assimilation – No!” Australian Poetry Library.
Phenomenology of erasure: of the other

Let me again provide a small historical contextualization for the philosophical analysis. Milirrpum v Nabalco Pty Ltd (1971) was the first litigation of an indigenous challenge to the state’s right to grant title in Australian courts.\(^{101}\) This case is often referred to as the Gove case and is was the first time an Aboriginal litigant sought a judge’s ruling on the Crown’s common law right to extinguish Aboriginal title. It is this ruling that the Mabo v Queensland (2) (1992) case would later repudiate.\(^{102}\) The Gove litigation was brought to Australian courts by the Yolngu people, and was the first, but ultimately unsuccessful, challenge to the state’s right to grant and extinguish title in Australian courts. The reasons for the failure of the claim give us a way into analysing the second example of the homogenizing relation between the structure of recognition and the colonial paradigm.

Milirrpum’s objection to the Crown’s exercise of its powers for extinguishment was rejected, and underpinning the full list of reasons for its rejection are two ideas important for our purposes. The first reason, as we might expect from the discussion thus far, was that the Yolngu’s relationship to land did not satisfy the conditions for creation of proprietary interest – a case of the differend was in play, and despite acknowledging religious connection to land, there was no capacity within Australian law for this to translate into property rights, particularly communal property rights, which were again non-existent within the dominant Australian legal idiom.\(^{103}\) The second reason, however, was that the British Crown’s assertion of sovereignty in Australia automatically extinguished indigenous rights to land. These appear to be contradictory statements. They are based on diametrically opposed premises. First, that no rights existed, and second, that rights were extinguished. In the case of the first, that no rights existed, this is arguably true from within the western idiom: land rights did not exist in any way recognisable by the law and \textit{terra nullius} prevails. However, the second is a tacit acknowledgment of the differend. It says, \textit{even if some presently unintelligible notion} of land rights did exist, it was extinguished by the assertion of British sovereignty: \textit{terra nullius} is not assumed. So whilst the differend is the fulcrum point of the first, the second is an acknowledgment of the differend that admits the (im)possibility of Aboriginal-as-land-holder.


\(^{102}\) Mabo and Others v. Queensland (No. 2) [1992] HCA 23. The full decision can be found at Austlii URL: \url{http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html?context=1;query=mabo}. For ease of expression, I will from here onward refer to this case simply as Mabo or the Mabo decision.

Let me now pick up these reasons in more detail. The logic of “even if,” which is implied in an assertion of extinguishment, is a tacit acknowledgment of that which is outside western idioms. This even if reason is the discovery of a border, which necessarily implies an other. It is an abrupt encounter with, and deferral of, the finitude of the western idioms in which it is uttered. Even if is the acknowledgement of the encounter. Even if does not assume terra nullius which would notify us to the presence of erasure, and so implies that something inter-idiomatically unintelligible can nevertheless exist and be recognized as contemporaneous authority. However, they were extinguished is a deferral. They were extinguished immediately relegates the encounter contained in even if to an historical moment already at a remove from the present. There was an encounter with a contemporaneous alterity, but upon meeting, only one, the modern, survived. Even if… they were extinguished says that the effect of this historical moment has already been decided – no rights exist contemporaneously in the present, even if they, at some historical time before and at the point of encounter, had.

Let us now take seriously the radical alterity of the idioms under consideration. To take this radical alterity seriously means to recognize the mutually unintelligible concepts of property/country contained in western and Aboriginal idioms. It means to recognize the differend. As has been argued above, nothing like the western conception of “property rights” existed in the ov of Aboriginal idioms. This does not mean that the relationship between country and people was or is any less valid. Even if says that mutual unintelligibility does not necessarily exclude the possibility of recognition per se, but I suggest it does inform the content of the possible recognition.

To explore this, we must recall the recognition contained in Hegel, Kojève, and Levinas which assumes the neutral ground of the subject. Recognition without this neutral ground, understanding, and familiarity requires a humbling of the I, which, feeling threatened by proximity with the unknowable, and, assuming a universalized concept of the struggle for recognition, seeks to assert itself. Because the unknowable of the other cannot appear, cannot be seen, the I interprets it as a conceptual void, and fills the void with the only thing it has access to: its own form. This is something like Hegel’s recognition of the self in the other. However, in a colonial context and without the common ground of the idiom, the I projects this form onto the bodies and idioms it fails to grasp and judges them by how closely they conform to it, that is, the I’s concepts of self, personhood, and being. With its western/enlightenment constitution, the I finds evidence to support its state of nature origin myth rather than the alterity that by its existence undermines the origin myth. Rather than learning a new narrative, or even
recognising it, and destabilising its own foundation, the I incorporates the other into its own narrative. This brings me in mind of Zygmunt Bauman’s description of the “civilizer” producing “an exact copy itself with a minus sign.”\textsuperscript{104} There is no differend, only greater and lesser degrees of “development” of the I and its idiom. Thus, the “I” colonises the “other” conceptually and physically.

So viewed from within western idioms, the negation of property rights enacted by the first reason of the Gove decision is a negation of a right that cannot yet exist. It cannot yet exist because proprietary interest has not been established, and proprietary interest is a natural and necessary stage of human development. The second reason, the even if is a tacit acknowledgment that negates the first, but results still in negation. In this sense, it matters little whether the first or the second reason for the Gove judgment are considered, the negation that was the assertion of terra nullius is followed closely by a negation of terra nullius, but both lead to the determination that no right exists in the present moment. Both of the underpinning reasons negate the possibility of contemporaneous indigenous property rights, either by absolute denial of the possibility of contemporaneity or by historicized, temporally specific, containment of a faintly acknowledged possibility. I’ll call this judgment, with its two reasons, the original negation.

It is, however, this original negation that produces the possibility for claiming a right from within the western idiom in which the claim is heard, in which the right doesn’t but might one day exist. That is, if as posited by Lyotard, “It is necessary that negation be the negation of a determination,” until there had been a negation of rights to land in the form of a determination in the western idiom, there could not be a negation of that determination and a proving of existence.\textsuperscript{105} The operative doctrine of terra nullius was a taken-for-granted assumption rather than a common-law determination, and as such, difficult to overturn.

Because this original negation takes the form of a common law determination, it allows for the possibility of a further negation, a negation of a determination, which produces a right in potentiality that never existed: a mediated right to land. In this sense, the doctrine of terra nullius and the reification of that doctrine in the first reason for the Gove judgment is an a posteriori and contingent negation of an unintelligible right that “appears” as a void. That is, there is some form of right that is negated, but it is not that which the negation takes as its object. The negation takes the perceived void as its object, but what is negated is an unintelligible and unrecognized right that shapes and is shaped by other idioms. This a


\textsuperscript{105} Lyotard, \textit{The Differend}, 9.
posteriori negation wears a mask of a priority when there is no concept of difference, when it has a void as its object. That is, when confined to western idioms that claim universality, there are no alternate, non-anachronistic, conceptions of being and the relation between individual, land, and community: there is no ov. All other idioms are simply antecedent, underdeveloped by western standards, prequels to modern western concepts and societies. All other idioms are temporal aberrations or retardations in the teleologically conceived development of humanity. Without the differend, there is no negation contained in or produced by the Gove determination of no right existing, only statement of fact. The negation of a nothing, the negation of a void that has been covered over with an image from the creation myth of the I of western enlightenment idioms that, in actuality, negates. The mediated right to land that is later claimed is a product of, but not synonymous with that which was negated. The right then claimed, if successful, is a negation of a negation that produces a new type of right: a right to land mediated by western legality and the state. This negation of the original negation unveils the contingency hiding at the heart of terra nullius. The mediated right is something new, the scion of negation. Negation, then, can produce its object. The original, a priori, right (that is, in western idioms’ vocabulary and conceptual apparatus, full and exclusive right and sovereignty) is never realised or upheld, so whilst the object is produced, it is immediately mediated. It stands as a painting does of a landscape, representing, imitating, but made of altogether different materials, flattened, framed, contained.

So we see that the colonial paradigm operates by a logic that is subversive of difference qua difference. In the case of Plenty Coups and the Crow, recognition was subverted by a colonial power that “recognized” the sovereignty of the Crow sufficiently to conclude a treaty. However, the terms of the treaty recognising this alternate authority necessitated a complete collapse of the Crow idiom. It was a subversive recognition, that entailed the self sublation of the “pre-modern” idiom. Lear interpreted this collapse philosophically as merely the maturation of the Crow, the transcendence out of a world into the world of the modern universal individualised liberal subject. Similarly, the even if... it was extinguished reason for the Gove decision “recognized” only to immediately erase. This indicates that the colonial paradigm can subvert recognition, even when appearing to structure the relation on recognition.

However, the reverse is also true. Fanon uses “countersubversion” to describe the activities undertaken by the colonist to divide and weaken the revolutionary movement – to turn the movement into factions who will fight one-another instead of the colonist.106 Here, I

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106 Fanon, Wretched of the Earth, 86-87.
want to extend the idea of countersubversion, to include something the colonized does to undermine the logic of the colonial paradigm: to structure relations as recognition.
Chapter 4

The Subversive Potential of Recognition

The past is still so much a part of us,
Still about us, still within us.
We are happiest
Among our own people. We would like to see
Our own customs kept, our old
Dances and songs, crafts and corroborees.
Why change our sacred myths for your sacred myths?
Oodgeroo Noonuccal “Integration – Yes!”

The previous chapter showed how, and that, the structure of the colonial paradigm subverts recognition of contemporaneous alterity. The current chapter reverses the lens to show how recognition can and does enact counter-subversion, that is, subverts the colonial paradigm. In completing the analysis from this angle, I wish to highlight the perpetual movement and potential of each to subvert the other. That is, the potential for each of the structures of relation to disrupt and subvert the logic of the other structure of relation. Before beginning, let me summarise the shape of the argument thus far. This will allow a slight loosening of the focus in this chapter which admits the entanglement of the separate segments of the topic that have been maintained in the previous chapters.

I began by analysing the structures of relation individually. That is, the colonial paradigm, and recognition. In so doing, it became apparent in chapter 1 that the colonial paradigm is built upon a universalized concept of the telos of humankind, and that this telos

temporally displaces, or historicises, different idioms. Differently put, a temporal concept of
difference erases contemporaneous difference, and upholds the universalized origin myth of
western positive law which attaches modernity to western idioms. With this understanding, we
were able to see that the doctrine of terra nullius is an expression of this concept, and that
central to it is the necessary separation of the human from nature. Chapter 2 analysed the
structure of recognition, and found that, to be useful beyond the western idiom, recognition
must have a concept of difference. With a concept of difference such as the differend, it is
possible to understand radical alterity as contemporaneously valid expressions of the
possibilities for human existence. So from the first two chapters it became apparent that the
colonial paradigm erases difference, and that conversely, recognition is of difference. Chapter
3 began to analyse the relation between the colonial paradigm and recognition from the
perspective of erasure of recognition of difference.

I have recapped these chapters here because the current chapter, in showing the reverse
angle, allows in more of the fluidity between structures. That is, whilst recognition subverts
the colonial paradigm, the colonial paradigm is quick to seep back in to subvert recognition.
To demonstrate both the reversal and the counter, I begin with the 1992 Mabo v Queensland
(2) decision, which is structured by recognition. This recognition is almost immediately (in
legislative terms) subverted by the structure of the Native Title Act 1993. But the Rubibi
community’s claim again subverts the colonial paradigm by forcing recognition in the courts.
This last movement is also the subversion of subversion, or, in our extended understanding,
countersubversion.

**Phenomenology of recognition: Mabo**

I begin where the previous chapter finishes, with a right in potentiality produced by the
negation of a negation. That is, with the Gove case as a dual negation that, in being a
determination of negation, produced a new right in potentiality. The realisation of that
potentiality in the form of a right came on June 3rd, 1992 with the Mabo v Queensland (2)
decision.\(^{108}\) The Mabo decision was a watershed moment in Australian post-colonial history.
For the first time since “contact,” indigenous land rights were given common law legal
standing, and the Crown’s sovereign assumption of absolute title was rejected. Where the Gove

\(^{108}\) Mabo and Others v. Queensland (No. 2) [1992] HCA 23. Also referred to here as Mabo and the Mabo decision.
case was the first litigation to challenge the state’s authority to grant and extinguish title, the Mabo litigation was the first to secure a decision, at least in part, in favour of the claimant. In so doing, the Mabo decision rejected both the upholding of the doctrine of terra nullius and the even if extinguishment principle contained in the Gove decision. If we recall, the first underpinning reason for the Gove decision was that there was no proprietary interest established, or, there was no recognition of the possibility for a different relationship with being: a finding that are simply antecedent modalities of being compared with western idioms. The second underpinning reason was that even if... they were extinguished which I have characterised as a tacit acknowledgement of the possibility of contemporaneous alterity.

During the Mabo High Court hearing, Mr Davies, lawyer for Queensland, conceded:

We do not really argue extinguishment. We say no recognition [occurred upon annexation by the colonizers] in terms of... a usufructuary right, personal and terminable and no grant of a proprietary right.109

This is a clear abandonment of the extinguishment argument, but a reassertion of the single telos of humankind logic that erases recognition. Important to this thesis, the eventual success of the Mabo litigation hinged, in part, on Justice Moynihan’s previous Determination of Facts, in which he acknowledged the great difficulty and risk involved in making determinations about another culture from the perspective of his own.110 Moynihan J. recognized the differend, even if his determination of facts appeared to pose significant threat to the applicants’ case. This means that the Mabo decision was made with a concept of difference. We begin to see, then, the importance of recognition in the Mabo case.

In this context, it is possible to see the Mabo decision as an explicit acknowledgment of the existence of that which is outside western idioms. The shift signalled by the Mabo judgment is between the first or original negation and the second. The original negation being the Gove determination which negated the possibility of land rights, and the second negation being the possibility for negating that determination. The Mabo decision negated the Gove determination and is therefore the negation of a negation. The Mabo decision was in favour of a priori indigenous land rights and is a recognition of the finitude of western idioms. This negation of the original negation is a recognition of the borders of the differend, in response to a reality that does not conform to the colonial paradigm’s logic. Jeremy Webber notes that this is how native title should operate, as a response to “the need to manage the interface between non-

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indigenous and indigenous legal orders, between non-indigenous and indigenous occupation.” At its best, this is what native title law represents: a law of the border.

Viewing Mabo and native title through this lens shows that western idioms’ protracted encounter with resilient alterity demands attention. The persistence of the other’s demands for recognition forces a concession from the colonial paradigm, which can no longer claim with internal coherence to be temporally universal, or a-temporal. Western idioms may not understand and the other, but they cannot deny the other’s existence when faced with the border of the differend. Both idioms are unavoidably altered by this encounter. One because it must translate its epistemology through a filter of the language of right, it must try everything to be heard across the gulf of differend and in so doing extends its boundaries; the other, because where once it was necessary and universal, now it is finite and contingent. The newly limited idiom, however, resists this reconceptualization of itself. It is, after all, imbued with its own origin myth, which is unremittingly universalized. So while the source of native title may be extraneous to the idiom of the court, and individual judges, lawyers, and plaintiffs recognize this, the logic of the idiom reproduces itself. The concession is hard won and difficult to maintain. This creates a tension at the border of the differend. Where the colonized seeks to be heard and identified as other-and-equal, to be recognized, the colonial paradigm seeks to re-assert its singularity: to bring the other into the logic upon which it functions.

The right to land produced by the Mabo decision demonstrates that something does follow from nothing, that is, a mediated right to land. So whilst this negation has produced its object, the structure of the juridical object resists its own production. It is a structure that favours the status quo, whilst being incapable of denying the demand for change. If the dominant idiom can internalise these new rights, it does so only under duress. Recognition of this structural continuation of subversion of Aboriginal idioms is central to identifying the continued operation of colonialism in the Australian state.

Subversion of recognition: the Native Title Act 1993

So, whilst the Mabo decision negates the original negation, and, as a precedent, produces a new type of right, the structure of this right is not unproblematic. This structure is reified in

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112 Webber, “Beyond Regret,” 62.
the Native Title Act 1993 which aimed to regulate the breach of the logic of the colonial paradigm that the recognition contained in the Mabo decision represents. A reflection on the structuring of the relation between recognition and the colonial paradigm contained in the Act will show us the limits of the shift achieved by the recognition of the Mabo decision. These limits can be articulated in Lyotard’s vocabulary as the difficulty of proving existence. The Mabo decision said that were and are recognizable contemporaneous modes of human existence with their own logics and relationality; and that western idioms could understand ov as producing a right to land and that such rights were never relinquished. Ideally, this would mean that the state must bring land claims to Aboriginal peoples. Put differently, the Mabo decision nominally changed the defendant from being the Australian state to the Aboriginal nations in residence at the time of invasion. However, under the Act, it remains a state of affairs that Aboriginal peoples wishing to have their _a priori_ title recognized by the state must still shoulder the onus of proof and bring a case to the court, even while being the defendant. Whilst being the defendant, they carry the onus of the plaintiff; and the state, in transferring this onus, enjoys the benefit of presumption of right in absence of challenge. Aboriginal and Torres Strait Islander peoples must bring proceedings to the court and prove unbroken connection with land, which connection is central to the ov of their idiom: they must prove existence. This is problematic if we take into account Lyotard’s assertion that “it is impossible to establish one’s innocence, in and of itself. It is a nothingness.”

Without a specific statement of claim to answer, the bringing of a native title (counter) claim is similar to proving innocence in the absence of a charge. It is similar because it doesn’t have a particular claim to refute, and therefore presents the claimant that is defendant with the task of providing evidence in support of the totality of their movements, or in our case, of existence. Innocent of what? And existing how?

The Australian state, as from the time of the Mabo judgment, no longer even claims innocence, it has in fact, relinquished its right to defence of innocence. It simply asserts that it has a non-right to everything (hardly distinguishable from _terra nullius_), unless successfully challenged. This is a unique position for a plaintiff. It is a plaintiff that brings no action of its own accord and in so doing shifts the onus of proof to the defendant: a reversal of the standard model in western courts. This means that the defendant, whilst ostensibly needing only to refute the plaintiff’s evidence, must instead argue for existence, and the plaintiff may operate nihilistically to negate existence. If, however, negation must be a negation of a something, then

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113 Lyotard, _The Differend_, 9.
negation happens at the time of the claim’s failure, where existence of the evidence presented by the defendant in their claim is found to not comply with establishment of proof standards. Moreover, if the defendant fails to initiate a claim, negation is assumed, as if the defendant were in fact the plaintiff.

Whilst this may sound like a negation of a nothing, it is, since Mabo, a negation of a given state of mediated rights to land and a negation of the idiom in which those rights hold value. It is a temporal displacement of Aboriginal idioms, a denial of their contemporaneous ov. In obviating the need for the plaintiff to make a claim in order to negate the existence of land rights, the land rights are produced and negated a priori. It is then left to the defendant to prove existence a posteriori. Or, it is, then, the job of the defendant to prove something that is, a priori, nothing: that negation even occurred, that something follows from the nothing produced by negation.

Let me then summarise the position of the Australian colonized First Peoples in relation to land and the Australian legal system, as we have outlined thus far. They are granted a technical a priori right to land by the Native Title Act 1993, which was created subsequent to the Mabo decision’s overturning of the doctrine of terra nullius to regulate claims to land. However, to realise this right to land the colonized must bring a claim to a western style court. Failure to prove unbroken connection to land results in an upholding of the status quo – no right to land. Failure to bring a claim also leads to an upholding of the status quo – no right to land. Furthermore, the relationship between land and identity is intimate and untranslatable across the differend. Thus, if Aboriginal or Torres Strait Islander people wish to retain connection with land and identity, they must come before the court to give testimony and prove not only connection with land, but, because of the structure of ov, identity of self also. They must initiate and submit to the juridical process fully and successfully, or not be recognized as existing as contemporaneous idiom. So whilst the Mabo decision was a recognition of the differend, and native title can operate as a law of the border, the Native Title Act 1993 re-asserts western idioms’ position as the neutral ground upon which culture can be built. The onus of proof is squarely on Aboriginal idioms.

I want now to introduce a Foucauldian lens. If we bring the mediated rights to land into Foucault’s frame, we see that there is something else going on even during and after a successful land claim. The Mabo decision led to the Native Title Act 1993, which regulates claims to native title in Australia, and is tasked with: “ensur[ing] that Aboriginal peoples and

Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.”\textsuperscript{115} This is somewhat disingenuous. As argued, the Act makes no such attempt unless a claim is brought \textit{by the defendant that is plaintiff against the plaintiff that is defendant}, and this brining of a claim and submitting to the court testimony of connection with land and identity, is, in Foucault’s terms, a production of a new subject.

There is a double bind inherent in this relationship for Aboriginal and Torres Strait Islander peoples. That is, the juridical process of claiming rights to land is what Foucault might call a game of truth through which the subject is constituted.\textsuperscript{116} Thus, in bringing the claim, the claimant must make every effort to divulge to the court the truth of their connection with the land claimed, or in Foucault’s terms, to make a confession.\textsuperscript{117} This constitution of the subject as being in relation to the Australian judicial system by confession is, through this theoretical lens, simultaneously a dismantling of the previous subjectivity of the claimant, that is, Aboriginal or Torres Strait Islander subjectivity. Moreover, the conditions under which this claim is brought cannot be considered free from coercion. Rather, as noted, it is a matter of necessity to prove existence, in the absence of which existence is negated \textit{a priori}. This is an imperative imposed extraneously on Aboriginal and Torres Strait Islander peoples, “it is not spontaneous or dictated by some internal imperative” but rather “the confession is wrung from the person by violence or threat.”\textsuperscript{118} The violence and threat I am highlighting here can be structural and to the idiom, rather than directed physically at bodies. An existential threat to \textit{ov} and the idiom of its relation, as experienced by the Crow. In these terms, the production of truth by way of confession in the courtroom “is thoroughly imbued with relations of power.” The choices for Australia’s colonized peoples are, then, either to not bring a claim and have existence negated \textit{a priori}, or to submit oneself to the juridical process, to confess, which is simultaneously to constitute oneself anew as subject to and object of the colonial government’s games of truth.

We must recall also that Aboriginal and Torres Strait Islander relationships with land, self, and being, or \textit{ov}, are something that escapes the capacity of westerns idiom to fully understand. This is why I am using \textit{ov} to remind us of the differend. When we acknowledge

\begin{itemize}
  \item \textsuperscript{118} Ibid., 60.
\end{itemize}
the differend, we see that there is an inability to convey foundational concepts, like the Dreaming in western idioms. These concepts, not only the Dreaming, form the basis of Aboriginal and Torres Strait Islander connection with country and sense of self. Thus, the demand for claimants to appear in court or to simply allow the default negation, that is, *terra nullius*, to prevail, is simultaneously a demand for the production of that which it is impossible to produce.

Derrida is useful in helping us understand why such production is impossible. Thinking with Derrida, we find that it is impossible to produce for two reasons, the first of which is inherent to the concept of testimony, and the second is unique to the inter-idiomatic relationship of colonized and colonizer. The first impasse to production of proof lies in the very structure of testimony, which denies the possibility for proof, or contains the possibility of fiction. In native title claims, which refer to spiritual and ontological connection with land, there is no possibility of producing evidence of this connection that does not rely on testimony, on confession/production of that which defines or constitutes the claimant. That is, claimants are unable to produce concretely that which is requisite, and so must instead hope only for faith in their testimony, and validation by the court. Testimony receives its determination as testimony from something other than itself. It receives it from the other who decides on its truth or fiction. Thus the act of testifying is a submission to the other which receives its determination as testimony *a posteriori* and from outside. Submitting oneself thus to the determination of the court is not a voluntary act, it is both demanded and not within one’s capacity to give. One is obliged to perform that which one is not capable of performing. To confess, to testify, and to be judged. In these circumstances, if we recall the truth games that constitute the subject for Foucault, the structure of the Native Title Act serves nothing so much as to produce a tighter circle of power between state and colonized peoples.

The second impasse, whilst not severed entirely from the first, is unique to the inter-idiomatic relationship between colonized claimant and court. This difficulty can also be understood, through Derrida, as the lack of past instance to condition the instant. It cannot be expressed in the western idiom because it has never been expressed or experienced in that idiom before. That is, there is no condition that allows of the saying of the testimony of Aboriginal or Torres Strait Islander subjectivity in western idioms.

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121 Derrida, *Demeure*, 33-34.
The demand to testify, to confess, is a call to subjectivity of a kind that is a repetition but also an originary act of submission to institutional power’s call. That is, for subjects constituted already under the western idiom, such a call is a repetition, and is therefore conditioned and possible. For Native Title cases, however, where each and every claim refers to a different idiom and must be proven by way of testimony, there is no conditioning that is adequate to allow the instant. If, pace Derrida, the instant is only a repetition of the available instances, then the unique subjectivity of the claimant is negated or subsumed under the subjectivity available within the western idiom. Can there be an instant that is also instance that is not only submission? An instant that is conditioned by the possibility of itself? The need, then, is to create an original instant. An originary act of testimony that can condition the saying of a wrong.  

To recognize differance at the point of the differend.

Differance at the differend: subversive recognition

This is where our third revelatory moment becomes important. In the Rubibi Community v Western Australia case, the Rubibi Community submitted secret evidence of sacred objects in the claim area. Let me be clearer: the evidence was not submitted under an order restricting the viewing of it; the evidence was not submitted at all. The claimants insisted on the existence of the objects, but refused to reveal their specific location and description. The rationale for this withholding of evidence was that the sacredness of the objects would be lost if they were revealed to any but those with the authority within the community to know them. This secrecy aspect of the Aboriginal and Torres Strait Islander idioms is widespread. Thus the demand of the court to confess, to testify, is a demand for the saying of the unsayable, for that which in appearing disappears. The submission of a secret testimony calls constituted power’s bluff, it names that which this exerciser of power asserts cannot be named: the falsity of the premise of testimony, it names the authority that is unfit to judge. To testify, to confess, that there are sacred objects which cannot be revealed without negating their sacrosanctity but must nonetheless be counted as evidence, is a double act of submission and defiance. It is a deferral of the testimony that cannot be given. An originary act of saying.

122 ‘Wrong’ here is meant in Lyotard’s vocabulary as that which cannot be said. A wrong is the result of the impossibility of giving evidence of harm.
124 Ibid., 223.
125 This is a reference to Derrida’s differance – that which may not appear.
The submission of secret evidence, the claim that cannot be proven, is possible because of the inescapable condition of testimony, that is the possibility of a lie. What it does, moreover, is to make this condition visible where it is usually sunk in the world, to use Hegel’s terminology. One can just as easily accept a testimony of “this object here is sacred” as “there are sacred objects but I cannot show them to you.” In both cases there is the possibility of the testimony being a lie, but in the second statement the possibility is more obvious. Here, the demand for faith in the testimony is not shrouded by objects that give the illusion of verifiability. There is direct reference to that which will remain concealed, that which cannot be present, cannot appear without disappearing. This secret space, that of the concealed, that appears in form only, without content, signifies the limits of power. It says without saying that the state’s subject is not only object. It pushes the boundary of internality outside the mind and invisibly overlays it onto the material world. In remaining invisible, it makes visible and thus recognisable the unknowable and unintelligible but nevertheless present otherness of an alternate modality of being.

Thus we find, at the culmination of these three movements, from recognition to subversion and back, there is a subversion or alteration of the power relation between colonized and colonizer. The first movement, the Mabo decision, negates the state’s negation of Aboriginal and Torres Strait Islander subjectivity. The second movement, the structuring and codifying of the Native Title Act 1993, seeks to reimagine and coerce claimants’ subjectivity, to draw them into a newly concretised power relation. But the third movement, the submission of secret testimony, subverts the demands of the second. In giving this testimony, the confession of the retention of a secret, the one who testifies becomes the state’s subject whilst simultaneously demarcating that which cannot be grasped. It is a submission to the subversion of the colonial paradigm that must be recognized. Or, it is a conditioned submission, in which the condition is recognition. Further, in the case of the Australian state and Australian Aboriginal and Torres Strait Islanders, it is a submission that doesn’t negate the idiom in which it holds value. It is the making of a claim within Australian law that does not sever the connection with traditional law. The submission of secret evidence is a subversion of the colonial paradigm’s hierarchy of humankind based on the temporal erasure of difference as difference. This shows that the relation between the structures of relation, that is, the colonial paradigm and recognition, is one of subversion and counter subversion. The colonial paradigm is founded upon a concept of the single telos of humankind that subverts and erases idiomatic alterity, and in response, recognition is of idiomatic alterity and so subverts the colonial logic of erasure.
Conclusion

On 8 November, 2015, a public event at the University of Sydney brought Jonathan Lear together in conversation with Australian Aboriginal activist, Noel Pearson. Pearson had titled his Quarterly Essay “Radical Hope” in direct reference to Lear’s book of the same name. Pearson’s admiration for Lear’s book, and concept developed therein, are made clear in the first pages of the essay. In his “Radical Hope,” Pearson draws a comparison between Plenty Coups and Durmagam.\footnote{Noel Pearson, (2009) “Radical Hope: Education and Equality in Australia,” Quarterly Essay, 35 (2009): 4-5.} Durmagam had also lived through a period of immense change, a collapse of the idiom that provided the superstructure of meaning in his and his people’s lives. The difference, Pearson notes, is that where Plenty Coups’ hopes were realised, Durmagam’s were not.\footnote{Ibid.} The possibility identified and ceased upon by Plenty Coups wasn’t identified and ceased upon in Australia. The concepts for organising ethical, political, and moral life collapsed with little or nothing to replace them.\footnote{Ibid., 9.} The appeal of radical hope lies, I suggest, in interpreting it as a framework for understanding how to think the future politically in the face of rupture and loss of concepts. It is a framework of resurrection when the past is no longer accessible or intelligible in the new colonial paradigm. In asking how one constitutes oneself as Crow when it is no longer possible nor intelligible to perform Crow subjectivity, it returns an answer of possibility where impossibility more often resides. However, by focusing on rupture as definitive, radical hope neglects the possibility for subversion to alter whatever precedes and follows rupture. Using the framework developed here we find that radical hope is a structure of relation that subverts recognition. Radical hope accepts the superiority of the colonizer’s concepts and ethical framework as a superstructure, and sets the stage upon which choices may be made. Radical hope presents the choice between preserving \textit{biological life} and \textit{a way of life} as a choice between primitivism and modernity, or infancy and maturity. And so, radical hope is a structure of relation that perpetuates the colonial paradigm.
The subversive logic of the colonial paradigm is threaded through Pearson’s essay, even while he seeks to turn it back on itself – the logic of the colonial paradigm is a persistently slippery. Pearson rejects much of the Australian government’s education policies that conceptualise Aboriginal people as different. He observes that difference in this context is used to absolve government of responsibility for improving outcomes for Aboriginal children. This tells us that concepts of difference are not immune to subversion by colonial logic. Despite this vulnerability of difference, it is clearly important. Pearson still asks:

Surely assimilation is not the only road to success? What happens to discrete Aboriginal communities where people desire to maintain their language and culture? Is there no future for them except to assimilate or to languish in dysfunction and inexorable cultural pauperisation?129

Similar questions are implicit in the titles of Oodgeroo Noonuccal’s pair of poems “Integration – Yes!” and “Assimilation – No!” These are statements about how to think the future politically that lead us to ask what integration might look like, how difference can be unlinked from inequality. To begin to answer these questions, we must be able to distinguish one from the other, that is, assimilation from integration, erasure from recognition, difference from subversive concepts of difference.

From within western idioms, it is difficult to distinguish assimilation from integration if we fail to distinguish the logic of the colonial paradigm from the logic of recognition. These questions ask us to analyse the logic of the paradigm in which they arise. Without recognition and the differend, we have no analytic tool with which to approach statements such as Pearson’s which rejects the idiomatic specificity of enlightenment thinking, and argues instead:

that all pre-modern peoples carried within their cultures some institutional essence of what made and maintained them as peoples. Some things that prescribed how they should live and what were their sustaining ideals as a people. By contrast, modern peoples, secular and unanchored, come to feel the double-edged sword of freedom from traditional orthodoxy: this includes the freedom to lose one’s identity and to assimilate into a dominant culture. Yet those who resist assimilation have no protection against its inexorable advance if they have lost the things that made them a serious people.130

While trying to speak against assimilation, the logic of the colonial paradigm, as developed here, seeps into every sentence but the last. Contrasting pre-modern peoples with modern “unanchored” peoples, is in the terms of this thesis, contrasting all other idioms with western idioms, and finding western idioms to be the modern, the unanchored and neutral. Without the differend, and an understanding of the temporalizing and universal erasure that supports the

129 Pearson, “Radical Hope,” 34.
130 Ibid., 9.
colonial paradigm, we struggle to identify the *positive* prescriptions contained in western/enlightenment idioms. Thus, western idioms, and particularly colonial paradigms, present themselves as the absence of culture, their culture is neutral modernity.

But, if we examine western idioms, as we have, we find that there are similarly strict *positive* rules for belonging to these “modern peoples.” In particular, the directive to understand culture as a choice made by the free will of an individuated liberal subject rather than as an epistemological and ontological superstructure of meaning. So, upon such examination, we find that the very notion of neutrality in these circumstances is subversive. This is because colonial paradigms present themselves as the neutral universal, and in so doing subvert alterity.

I would further suggest that any claim of neutrality in the political be subject to analysis – claims of neutrality in the political alert us to the operation of subversion. This is because neutrality implies a lack of relationality – that which is unaffected and does not produce external affects and effects. The neuter is without gender, the possibility of progeny, and is incapable of affectivity. It is the absence of relationality, the absence of power. The political, on the other hand, is inherently relational and because of this it is also susceptible of alteration by subversion and countersubversion. One of the ways that possibilities of the political may be subverted is with narratives of neutrality which appear as unchallengeable and unchangeable. The idea that only by violent revolution and rupture a neutral starting point may be cleared can be found in Niccolò Machiavelli’s *Discourses* and Thomas More’s *Utopia*.\textsuperscript{131} The originary violence clears a neutral ground and new structures are built upon the neutral ground from the emptiness of the clearing. Arendt rejects the possibilities for such re-birth by violence, but so also rejects the possibility for change.

This is where a concept of subversion becomes important. If the political is the in-relation, then it is susceptible of subversion. The “unanchored” neutral idiom is a subversive concept that elides the relationality of hegemonic systems, and covers over the possibility of countersubversion. However, subversion must have an object and hegemony must have something to elide, and so they imply the other they subvert.

The power of subversion (*sub-vertere, vertere* – to turn) is to over-turn by under-mining. The hidden dimensions of contemporary colonial relations are subterranean, sub-conscious, and often sub-juridical. That is, they occur below the level of the visible, but always in contact with it. The relational potential of subversion is indicative also of the possibility of

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countersubversion. The bending, turning, but not breaking, of subversion and counter subversion is important when viewed in light of discourses where change is impossible or subsequent only to rupture and radical breaks, where change begins with destruction and struggles to fill the vacuum with a structure of relation that is not-in-relation.

Moreover, Arendt’s assertion that revolutions overthrow only to replace can be read as a statement that rupture does not produce a neutral ground from which to build. Rather rupture is a moment in a process that has its roots in subversion of the authority against which it revolts, and remains in contact with the pre-rupture movements. That is, revolution or rupture does not occur in a vacuum and does not produce a vacuum. It is therefore in contact with its past and borders, and so is susceptible of subversion and counter subversion. Where there is contact there is relationality and so subversion in potentiality. Subversion, as a modality of change, makes no pretence at producing or requiring rupture or radical breaks to clear a neutrality from which to build, but neutrality is a subversive pretence. Subversion is a possibility of relationality, and because of its embracing of affectivity, is effective. Narratives of rupture are, we see upon closer examination, narratives of subversion and countersubversion. The impossibility of neutral relations or perfect erasure of the “from whence” of history means that subversion is a primary modality of change.

If we expand our lens again to include the international and historical, these are not new themes in post-colonial studies. The history of (de)colonization is also the history of the subversion and countersubversion of and by liberalism. The liberal justifications for colonization were turned (vertere) back upon their proponents as justification for decolonization, and are again turned back on the newly minted and hopeful nation states under the guise of civilizational (liberal) norms, or, standards of civilization. This turning and returning suggests that revolution is not instantaneous or final. The authority of that which is revolted against must be sufficiently undermined for revolution to become intelligible, and authority established by revolution is susceptible of subversion. Subversion has prepared the ground for revolution; it has paved the way, imagined the future toward which it strives (which is initially, in Fanon, an inversion of power relations), and turned the revolutionaries’ attention toward that which stands in the way. The vacuum anticipated as following the revolution is filled before it arrives and may thus be subverted before it arrives. In these terms, the clean slate of revolution is a myth, and we can begin to see that subversion precedes revolution, but revolution doesn’t always succeed subversion. This potentiality of subversion and countersubversion in the political means that claims to authority are inherently unstable.
In order to see the operation of subversion in colonial contexts, we require a concept of recognition that doesn’t elide difference. Structuring relations on recognition of difference is foundational to subverting the logic of colonial paradigms, that is, to an extended concept of countersubversion. Structuring the relation of being-with on recognition requires attending to the other, humbling the I, and listening to the unintelligible. Not to exclude the other, but to meet the other face to face, to recognize without a life and death struggle.
Bibliography


