WILD LAW IN THE CLASS – 'BLACK [WO/]MAN THOU SHALT NOT STEAL'[1]

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I INTRODUCTION

This paper is a reflection on teaching the first year unit, Legal Process, at Southern Cross University. It arises out of a career in the academy that has married research and teaching within an activist paradigm.[2] While the technical rules of law, often referred to as 'black letter' law, are taught, there is a consensus among staff that knowing what law is forms only part of a progressive legal education.[3] I developed the curriculum outlined below as a means of teaching law in a critical, engaged fashion[4]. Like other teachers in this mode, I prefer classes where the teacher is a facilitator, 'asking questions, inviting comments, encouraging ideas, giving feedback and thinking aloud'.[5]The teacher engages in 'improvised conversation.'[6] My aim is to encourage learning that results in students being 'inclusive, open to other viewpoints, critical to one's own assumptions, dynamic, and capable to incorporate new experiences.'[7] This requires courage on the part of students and teachers. My introductory unit is taught using legal texts, music, drawing, dance, fiction, film, performance and poetry. As teacher I disclose my subjectivity – I have

1 This is a song written by Kev Carmody who generously allows the Law School to use his lyrics in our teaching. See 'Thou Shalt Not Steal,' You Tube Mix, (uploaded 9 January 2009).

2 See Nicole Rogers, 'Activism and the academy' (2008) 33(4) *Alternative Law Journal*, 200–208.

3 The Mission of the School of Law and Justice refers to graduating students 'who: are gender, culturally, socially, politically, environmentally and ethically aware.' Southern Cross University, School of Law and Justice.

4 This article is written in the first person as I do not want to speak for others. Although I have taught with other staff I designed the unit, wrote the prescribed text and the Study Guide and developed the multi media and performance based aspects of the course. The feedback for students and colleagues has been extremely positive. However a minority of students have asked for less emphasis on Aboriginal issues, easier set readings and more power point presentations.

5 Gaby Jacobs and Michael Murray, 'Developing critical understanding by teaching action research to undergraduate psychology students' (2010) 18(3) *Educational Action Research* 319–335, 321.

6 John Biggs, *Teaching for Quality Learning at University: what the student does* (SHRE and Open University Press, 1999) 81. I gave my first law classes at Monash University in 1970, having completed an LLB(Hons) at the University of Melbourne. At Monash I took part in staff development in teaching methods and educational philosophy delivered by HEARU (Higher Education and Research Unit) and was pleased with the evaluation they conducted of my teaching. Later team teaching with Prof Adrian Howe and Dr Ian Duncanson in the Legal Studies Department at La Trobe University inspired me to continue with engaged pedagogy.

7 Gaby Jacobs and Michael Murray, 'Developing critical understanding by teaching action research to undergraduate psychology students' (2010) 18(3) *Educational Action Research* 319–335, 333.

a bias towards 'justice' and black letter law is but one part of this broad enterprise. Another aspect is 'transformative reflection' on the part of teacher and student.[8]

A *The Teaching Space*

As a mark of respect in my academic work I recognise the traditional owners of the lands and honour the elders past and present. At the gateway to each Southern Cross University campus flies the Aboriginal flag and the Torres Strait Islander flag, a legacy of the 1993 Year of Indigenous Peoples. The opening scene in the teaching space for our entering law students is a 'welcome to country' in Widjabul and in English by local elders.

My law teaching, and that of the team at the School of Law and Justice, aims to integrate philosophy, curriculum and methodology.[9] This paper will take a few aspects of the first year unit *Legal Process* and examine its ethos and mechanics closely. At a philosophical level is a desire to interrogate law's claims to neutrality and objectivity and explore the concepts of 'justice' and 'equality'. At the skills level the curriculum in the foundation unit *Legal Process* is designed for the imparting of orthodox legal skills of case analysis and statutory interpretation. It also aims to foster fundamental values of the legal profession, such as ethical conduct and a striving for justice. The methodology is drawn from life experience and the work of feminist and critical race and whiteness scholarship. It is often described as engaged pedagogy. The methods used are designed to foster critical thinking and to engage the whole person.

B *Philosophy*

In my teaching I am guided by a number of insights provided by philosophers and mentors[10]. Perhaps first in time was Paulo Friere whose *Pedagogia del Oprimidido*[11] opened my mind to the concept of 'otherness' and to the possibility that the knowledge I was being taught at university as being neutral, disinterested and objective was perhaps the construction of a certain group of people in society. Often this privileged group, who is represented as

8 See John Biggs and Catherine Tang, *Teaching for Quality Learning at University: What the student does* (SHRE and Open University Press, 3rd ed, 2007) 48.

9 See for example a paper by my colleague Dr Nicole Rogers on 'Activism in the Academy' (2008) 33(4) *Alternative Law Journal* 200.

10 Here I have only chosen some outstanding examples. I found the brilliant teaching/mentoring I experienced at Cambridge University by people such as Professor Maureen Cain gave me courage to continue.

11 Paolo Freire, *Pedagogia del Oprimido* (Myra Bergman Ramos trans, Penguin, 1996).

'benchmark man' in Margaret Thornton's seminal work[12], is not aware of the oppressive nature of the institutions and knowledges authorised in their name.

Freire argues that the work of education is to allow people to become 'beings for themselves'[13]. Educators are not successful if they instil precepts such as students are 'not to think.'[14] It has been my experience that, such are the pressures of the academy, as educators we often reward students who regurgitate material and we do not allow for students to grow into their selves. Drawing on Freire I became enthusiastic about the possibility of a critical way of teaching. Franz Fanon's work[15] was also formative as I began to experience the importance of 'otherness'. His vivid memory of the damage flowing from living in a colonised landscape and his brilliant articulation of this pain I drew on in the classroom. In the predominantly white and Christian law school where I taught I asked: 'whose knowledges are being privileged?' 'What was the hierarchy being played out?'[16]

Another writer who affected my teaching philosophy deeply is bell hooks. Her book *Teaching to Transgress* [17]speaks of the difficulties and rewards of challenging students to reflect on their intellectual framework.

bell also describes dancing in her classroom; this is a method I use in the law classroom and I was delighted to find an 'authority' to support my style. She writes; 'When I dance my soul is free. It is sad to read about men who stop dancing, who stop being foolish, who stop letting their souls fly free...I guess for me surviving whole means never to stop dancing.'[18]A student writes to hooks 'our class has been a dance'.[19]

My next 'mentor' was Patricia Williams, an Afro American law professor, descended from a slave owner. Williams published a wonderful book called *The Alchemy of Race and Rights*.[20] The text is in the form of a memoir recounting her interactions with the law and her experiences in teaching law. Williams deconstructs law's claims to neutrality as she unpicks the 'white' privilege embedded in it. This unconventional law Professor tells us that she

12 Margaret Thornton, *The Liberal Promise: Anti Discrimination Law in Australia* (Oxford University Press, 1991). A chapter from this book is set as a reading for the topic Legal Education.
13 Freire, above n 11, 142.
14 Ibid 136.
15 See Frantz Fanon, *Black Skin/White Masks* (Charles Lam Markmann trans, Grove Press, 1967) and *Dames de la terre/The Wretched of the Earth* (Constance Farrington trans, Penguin, 1967).
16 For a discussion of my privileged position see Greta Bird, 'The White Subject as Liberal Subject'(2008) 4(2) *ACRAWSA e journal*.
17 bell hooks, *Teaching to Trangress: Education as the practice of freedom* (Routledge, 1994).
18 Ibid 197.
19 Ibid.
20 Patricia Williams, *Alchemy of Race and Rights* (Harvard University Press, 1991).

writes dressed 'in an old terry bath robe with a little fringe of blue and white tassles dangling from the hem'[21] and that she is feeling depressed about being a lawyer because of the 'black letter' way in which it is conventionally taught. I use sections of Williams' work both to inspire me and to engage the students in a discussion of the possibilities and limits of law in seeking justice.

Indigenous Australian critical race theorists and activists have also contributed much to my teaching philosophy. Among this group are Gary (Mick) Martin and Professor Irene Watson. Mick and I team taught a number of units at Southern Cross University. Here we interrogated law's 'claims to innocence'[22]. In an action research based curriculum we took students out of the classrooms and into 'community'. In weeks of travel, in a bus and staying in youth hostels, we engaged in conversations with Aboriginal people, among them activists, lawyers and prisoners. The reflexive journals that were produced by students on the field trips demonstrated a growing maturity and fine skills in critical thinking. Mick Martin has a brilliant mind for philosophy and his critique of 'sovereignty', land rights and so on exposes the hollowness of these concepts in western law[23]. His blend of activism informed by academic rigour provides a template for teaching.

Dr Irene Watson, an Associate Professor in law, is pre-eminent in the field of philosophy. Her insights into the nature of law and of justice have had a profound impact on me. Auditing a course, *Race and the Law*, taught by Irene Watson at the Byron Bay Summer School allowed those who were present to witness the deep connection between her philosophy and her teaching style.

These connections with Aboriginal philosophers/teachers confront me at a deep level. They challenge the status quo through authentic selves, what Freire calls 'beings for themselves.' These scholars, have survived oppression and are mature enough to be fully present in the law classroom. This is in spite of the classroom often being for them a place of pain. As Watson writes: 'speaking from the margins I remain hopeful that the voice of dreamers and resisters will grow, because to do otherwise from where I sit seems to ...posit a place too frightful to imagine.'[24]

21 Ibid 4.

22 See Peter Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14(1) *Journal of Law and Society* 119–132

23 Philip Falk and Gary Martin 'Misconstruing Indigenous Sovereignty' in Aileen Moreton-Robinson (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007).

24 Irene Watson, 'Illusionists and Hunters: Being Aboriginal in This Occupied Space' (2005) 22 *The Australian Feminist Law Journal* 15.

A philosopher who interrogates the construction of knowledge via the institution of education is Michel Foucault. Foucault's work on the connections between power and knowledge are illuminating at a deep level. Michel Foucault sets out to deconstruct a belief that knowledge can be objective and impartial. In his philosophy there is not 'Truth' with a capital T. Rather a dominant group, or groups, have the power to determine the 'norm' against which people are classified. Thus some people may be found to be 'criminals' while others are judged 'good citizens'. If there is a shift in society's values these labels may be reversed. As a result Foucault suggests that we explore local conditions in order to construct knowledge and that in doing so we have regard to the 'micro physics of power.'[25] His work does not seek to abolish power relations, this is impossible. Instead the analysis may provide a space to allow those who have been dominated and marginalised to empower themselves. Thus it constitutes a step towards justice. I take from this philosophy guidance as an educator. I design curriculum, choose materials and embrace methodologies to raise the question of the conditions under which legal knowledge is constructed and to explore how marginalised groups can take part in this process. I strive for the critical reflection that can lead to transformative learning.

The question of gender and the position of women in law are examined, albeit in not sufficient depth, in the unit. Feminist philosophers, such as Judith Butler, have reminded us that gender is, in part at least, a performance. The way we express our gender is influenced by discourse. From the moment of conception[26] the baby is gendered. Expectations flow from this classification. In law women have been discriminated against and treated as second class citizens. Those women seen as 'other', for example Indigenous women and those from non English speaking backgrounds have been multiply discriminated against. The harms flowing from these forms of discrimination are explored . A chapter in the prescribed text contains a case study of a female, NESB worker who is mired in a legal claim for a work related injury and stereotyped on the basis of her ethnicity and gender.[27]

The intersections of race/ethnicity and gender are ones that the law deals with inadequately. Indeed the body itself, which I theorise as a text, is often absent from legal education. As Antonia Darder writes in '*Decolonising the Flesh: The Body, Pedagogy and Inequality*': 'The notion of students as embodied and integral human beings has received limited attention in discussions of

25 See Michel Foucault, *Power/Knowledge:Selected Interviews and Other Writings 1972–1977* (Colin Gordon et al trans, Pantheon Books 1980) and Gerald L Gutek, *New Perspectives on Philosophy and Education* (Pearson Education, 2009).

26 A baby is gendered well before birth in the 'developed' world given the prevalence of ultrasound.

27 Greta Bird, *The Process of Law in Australia: Intercultural Perspectives* (LexisNexis, 1993) Chapter 3, Migrants and Workers Compensation.

classroom praxis...Missing even in multicultural discussions of pedagogy is a more complex understanding of humanity and the significance of the body to intellectual formation.'[28]

This is one motivation for my engaging in performance, poetry, dance and so forth in my teaching; as an educator who values a holistic approach I want to be fully present in the classroom in my richness as a complex being. I do not desire to present myself as 'benchmark man', the white, middle class, 'suit'. This 'man' of law can be intimidating to many students from disadvantaged backgrounds. I aim to be a role model for the law student who desires justice, values critical thinking and does not embrace the Cartesian mind/body dichotomy. As bell hooks writes: 'Beyond the realm of critical thought, it is equally crucial that we learn to enter the classroom "whole" and not as "disembodied spirit".'[29]

II Methodology

A *Legal Education*

The first topic in the unit is called 'Legal Education'. After the welcome to country I show the law students in the Legal Process unit the music video of Pink Floyd's 'Another Brick in the Wall.'[30] In this version of a school classroom the teacher demands respect by using a cane and humiliates a student who is writing poetry; 'oh, the lad thinks he's a poet...'. There is an image of the students dropping into a machine and coming out as sausages.

This is the function of much of what passes for education, certainly in western societies, – the creation of a classroom monoculture that disrespects difference. Often this discipline is supported by the use of bullying tactics and intimidation. At the entry to 'law land' we discuss our prior schooling and whether we have been encouraged to be critical thinkers, who challenge the status quo, or passive bodies waiting for spoon feeding. Many students recount the ways they have been force fed a diet of pre digested opinions in their schooling. In the examinations they were expected to regurgitate this

28 Antonia Darder, 'Decolonising the Flesh: The Body, Pedagogy and Inequality' in Roland Cintos Coloma (ed), *Postcolonial Challenges in Education* (Peter Lang Publishing, 2009).

29 hooks, above n 17, 193.

30 See 'Another Brick in the Wall Part 2', which contains the lyrics:
'We don't need no education
We don't need no thought control
No dark sarcasm in the classroom
Teachers leave them kids alone
Hey! Teachers! Leave them kids alone!
All in all it's just another brick in the wall.'

material and their skills in critical thinking have rarely been developed. On a positive side surveys we administered over a number of years to our entering students at Southern Cross University indicate that over 75% of our students want to use their law degree to enable them to work for 'justice'. They are aspiring to a transformative education that encourages them in autonomous thinking. Naturally many of them are also looking for a good salary in a prestigious profession.

B *Law as a Discipline*

Law is a 'tame' discipline, at least it is a discipline that aims to tame its practitioners.[31] The passion of the budding lawyer is to be cut back in the orthodox law school. Objectivity is a goal – the hot case is tempered. The student is not to focus on the context and complexity of human relationships, but rather on the nice legal question. The discipline has developed a teaching method, called the Socratic, or case method, aimed at preparing law students for the rigours of the courtroom.[32]

A film that portrays a good example of this teaching style is 'Legally Blonde'[33] – here Elle Woods is humiliated by the law professor at Harvard as she is literally put in the 'hot' seat. Elle's dress and demeanour mark her as an outsider. I show about 10 minutes of the film in our first class and discuss the Harvard style. This Socratic or case teaching method is used in many law classrooms and may expose students to the arrogance of the god professor. In so doing it serves to marginalise and silence the voices of those who do not measure up to the benchmark.

The readings for the topic Legal Education assist us in critiquing traditional methods of teaching law. Our teaching styles aim at collaboration rather than hierarchy. Each encounter at workshops, seminars or in the online world involves group work with the interplay of ideas that emerge from this co-operation. The Readings set in Legal Process explore the reaction of women, Aboriginal peoples and those seen as 'other' to the teaching in the traditional law classroom. We discuss a group who is 'othered' today, the Muslim community, constructed in much discourse as 'alien' and 'terrorists.'[34]

31 See Heidi Boghosian, *The Amorality of Legal Andragogy* (1 July 2011) Stanford University <http://agora.stanford.edu.au/agora/volume2/articles/boghosian/boghosian.pdf>. Heidi writes: 'The law school curriculum discourages altrustic values with its conservative view of the lawyer's role…' 1.

32 See Duncan Kennedy, 'Legal Education as Training for Hierarchy' in D Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1990).

33 *Legally Blonde*, Metro-Goldwyn-Mayer Pictures, 2001.

34 Greta Bird and Mark McDonell, 'Muslims in the Dock: A Narrative of Life and Law' (1997) 3(2) *Australian Journal of Human Rights* 111–133.

At Southern Cross University we critique the orthodox, 'Socratic' way of teaching law and bring a 'wildness' to our teaching through music, poetry, dance, drawing and performance. Our classes are sometimes noisy, chaotic and playful and places where creativity and learning take centre stage.[35] We examine Duncan Kennedy's piece 'Training for Hierarchy'.[36] Kennedy sees the law curriculum and the teaching methods as a process of desensitisation. At Harvard, according to Kennedy, the teachers are middle class, straight and boring and they prepare students for their roles in a capitalist society. There is some room for the fuzzy, left leaning, liberal professor; however students soon learn that it is the tough professors that carry the most authority.

Patricia Williams, in her text *Alchemy of Race and Rights* writes of her despair at teaching property and contract law in the United States when the first case in the course is one concerning the sale of a slave. The buyer claims that the slave was not 'fit for purpose' and that this is a fundamental breach of contract that ought to lead to the seller refunding the price. Williams is 'trying to decide if she is stupid or crazy'[37]; she sits contemplating her role as a law professor and as the great-great- grand daughter of a slave. Though in the 21st century we are horrified at a legal system that allows people to be bought and sold this was the basis of US economy for many years. Indeed there was a system of apartheid in the United States until the civil rights movement of the 1960s. Looking across the globe today we see evidence of many people being sold as slaves and the failure of governments to control this market in flesh.

At first our students are only given the legal 'facts' without Williams' analysis and are asked to comment on the sale. A number join enthusiastically in discussing whether a fundamental breach has occurred. After a time a student says: 'I don't want to act for the buyer or the seller, I want to work for the slave.' This is the point where a deconstruction of the foundations of law's capital 'T' truth claims can begin. Is the law 'innocent' of bias? Are we all 'equal before the law?' Is race a factor in the 'slave' case, who were slaves and who were owners? Do all Australian citizens have control over their bodies in the 21st century? Are there inequalities in the Australian legal systems?

C *What is Law?*

I ask our students: what is this discipline that 'you' are about to enter? Who are the practitioners, what is its language, how does it back up its claims to

35 See for recent scholarship on creativity Ken Robinson, *Out of Our Minds: Learning to be Creative* (Wiley, John and Sons, 2010).

36 Duncan Kennedy, 'Legal Education as Training for Hierarchy' in D Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1990).

37 Patricia Williams, *Alchemy of Race and Rights* (Harvard University Press, 1991) 4.

legitimacy? Who are the judges? In the first class I give the students a blank piece of paper and ask them to 'draw a judge'. This taps into the area of the brain that is the place of intuition and imagination, allowing our logical brain areas to take a back seat. We then discuss the schools their judge may have attended, their favourite foods, leisure pursuits and so on. Is the judge an 'automaton' or some-one who is a part of a community and whose life experience is reflected in their judgments? Should the judiciary be reflective of the society it serves? We look at Michael Kirby's arguments on this point and discuss the gender, religion and race of the 'typical' high Court judge.

Students in this session are also asked to draw up a list of 'hard' and 'soft' law units. None of us is surprised when overwhelmingly property, taxation law and corporations end up in the 'hard' column and welfare law, human rights, philosophy of law and so on end up in the 'soft' column. In the discussion that follows we see a pattern in our choices. Those units that deal with money are given a credibility that the 'soft' units lack. If there is a hierarchy of legal areas then the 'hard' areas are the ones that bestow the most prestige and remuneration. We consider whether the line between the two columns begins to dissolve if a critical analysis is applied to the teaching of the 'hard' areas.

1 *Topic: The Reception of English law*

Jacques Derrida, the (late) French philosopher, has made the point that all legal systems are at their origins rooted in violence.[38] The Australian narrative of a harsh empty land subdued through heroism, of a land hard won by white explorers, pioneers and young men who fought on foreign shores is constructed in institutions and taught as 'truth'. The story provides a cloak of legitimacy for the nation and for its legal institutions.

As a counterpoint to this established truth, the first page of the prescribed text[39], *The Process of Law in Australia: Intercultural Perspectives*, talks of the 'Bloody', class-biased British system of law at the time of 'invasion.' The Aboriginal peoples had well developed systems of law. These were denied and the first peoples were massacred by the white invaders and taught to kneel; civilised with the gun and the cross. They were taught 'not to steal'.[40] How paradoxical is this Christian command in face of the theft of the continent from the traditional owners.

38 Jacques Derrida, 'Force of Law' in Drucilla Cornell et al (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992).

39 Greta Bird, *The Process of Law in Australia: Intercultural Perspectives* (LexisNexis, 2nd ed, 1993).

40 Kev Carmody, *Thou Shalt Not Steal*.

I ask the students: 'What "Law" ran on the "country" we now call Australia?' Part of our analysis reveals that legal regimes were in place, a 'hard law, hard as a stone'[41], not based on capitalism or Christianity, but on creation spirits and on 'custodianship' of country. Aboriginal reality challenges western orthodoxy and voices an older concept of property. At this point, a music track from the film *One Night the Moon* is played – The lyrics, 'This land "owns" me from here to infinity' illustrate the clash of perspectives between white views 'I own the land' and the Aboriginal 'This land owns me'. The Aboriginal jurisprudence more closely resembles that of Celtic peoples and indeed has common elements with the layers of use rights underpinning feudal concepts of property[42].

Western powers imbued with the spirit of capital were keen for resources and trade routes and an 'empty' land to provide a dumping ground for the 'dangerous classes' who threatened instability in Europe. The white fantasy of 'terra nullius' provided a legal legitimacy for the enterprise. This western imagining remained the foundation for Australian sovereignty until the High Court declared it a 'fiction' in *Mabo (No2).*[43]

D *Law's Legitimating Tactics*

The bible provided Britain with the first authority for the great land grab; 'And god said..let [men] have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth...'[44] The jurisprudes stepped in and translated this into international law; [45]denying the 'idle' any rights to land. Is this a good way to conduct ourselves in the 21st century? Does dominion equal degradation and exploitation of the world's resources? Do we need a new philosophy towards land? If so can we find a way of casting this relationship into law? What role do Christianity and Christian values play in a so called secular state? On this last question the class explores Justice Lionel Murphy's judgment in *Onus v Alcoa.* Here Murphy declares: 'Western European Judeo-Christian culture', if there is such a culture, has no privileged status in our courts. Aboriginal culture is entitled to just as much recognition.'[46]

The imposed law had another foundation of legitimacy, based in sovereignty**.** The British Parliament passed a law: 24 George 111, c56 (1784) that reads:

41 Noel Pearson, The Cape Crusade (11/11/2002) ABC <http://www.abc.net.au/austory/transcripts/s723570.htm>

42 See Bird, above n 39, 284.

43 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

44 The First Book of Moses, *Genesis*, Chapter 1, Verse 26.

45 See Bird, above n 39, 8.

46 See *Onus and Another v Alcoa of Australia Ltd* (1981) 149 CLR 27.

'Whereas it is expedient... to appoint certain places...to which felons may be transported'. The law went on to enact that felons be transported to the colony in New South Wales .The colonial beginning was thus based on forced transportation of convicted criminals and enslaved labour. Violence backed up by law; sovereignty based on a legal fiction of terra nullius.

E *'The Force of Law'*

At the narrative's heart though is a dark silence, that of the dispossessed, the Indigenous 'owners.' They were massacred, the survivors raped and bruised, taken from families and raised to be white. I play Archie Roach's 'Took the Children Away' as a way of understanding the misery that flowed from the flawed policy now known as the 'Stolen Generation'. Later in the day we watch 'Cry from the Heart', a documentary about a young Bundjalung man stolen from his family and the trauma that flowed from this state intervention. We listen to former Prime Minister Kevin Rudd's 'Apology'– there is still much that remains to be done – we whitefellas have 'unfinished business' with Indigenous peoples. The Apology, well received by many Indigenous people, has also engendered frustration. An 'Apology' is the beginning of a reconciliation and healing not an end point.

III The Land

At invasion in 1788 the land became subject to British law and open to a new radical title based on the British Crown. According to international law there was justification for the acquisition of Indigenous land. At international law, those that pursue an 'idle mode of life', the Indigenous peoples, had no legitimate use for the land, it belonged to the industrious.[47] In fact, the law intoned, the land was 'terra nullius', it belonged to 'no one,' Aboriginal peoples merely roamed the land, they had not possessed or dominated it. The absence of agriculture, a settled way of life and profit extracted from the land made Indigenous claims to the land an alien concept to British law.

The judge in the first land rights case, *Millirpum v Nabalco*[48], spoke of indicea of property connected to 'profit and exploitation'. The sharing of land and the failure to exclude others was seen as fatal to any Aboriginal rights to land – and the claimant clans had not proved possession 'from time immemorial' under white rules of evidence. Unsurprisingly the mining giant had a more powerful claim to the land, it could turn it to profit.

47 E De Vattel, *The Law of Nations or the Principles of Natural Law*, Vol 3 (Charles G Fenwick trans, Oceana Publications, 1902) 38.

48 *Milirrpum v Nabalco Pty Ltd and The Commonwealth of Australia* (1971) 17 FLR 141.

Mabo (No 2)[49] is examined in class and seen as a reversal of this racist construction of property rights. The majority finding that Aboriginal peoples were not so low in the hierarchy of peoples as to be incapable of rights. Terra Nullius was labelled by the majority judges a 'convenient legal fiction'. However the case proved to be little more than a shifting of blame for past wrongs onto the political process leaving the common law 'lily white'. It was not the common law, opined the judges, that dispossessed in this progressive narrative of nationhood. Rather the land was taken piece by piece as a result of actions by individuals and now 'the tide of history' had washed away traditional connections.

Before looking at the judgments we watch the documentary 'Land Bilong Islanders'– here we see the traditional owners and their 'title deeds' – 'the stories our ancestors told us...'. These stories can be dismissed by white law however as being mere 'hearsay.' White law has rules that demand evidence that is text based and legitimised by experts. We finish this depressing look at the famous Mabo Case by listening to Yothu Yindi's uplifting anthem 'Treaty'. I dance and ask others to join in. Justices Deane and Gaudron write: 'The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.'[50] The nation remains diminished. 'Treaty Now, Treaty Yeah' sing out Yothu Yindu and we ask: 'How is the move towards a treaty progressing? In late 2010 the idea of a referendum to write Indigenous peoples into the Constitution was raised and supported by all major parties. What change, if any, will emerge from this proposal?'

Our exploration of case analysis and precedent is continued with an examination of the Wik[51] and Yorta Yorta[52] cases. What have these post-Mabo cases delivered for Aboriginal people? In the case of the Yorta Yorta their stories of what their ancestors told them have been rejected in favour of the evidence of the white historian Curr. It is apparent that in white law the written text has a fetish quality that connotes authority; it is hierarchised over testimony based on the oral history of those who have lived on the land for thousands of years.

We explore the 'history wars'. Students engage with materials such as a transcript from the program Lateline called 'Authors in History Debate'.[53] Here Keith Windshuttle and Stuart MacIntyre take part in 'another skirmish'

49 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
50 Deane and Gaudron JJ in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 82.
51 *Wik Peoples v Queensland* (1996) 187 CLR 1.
52 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
53 Australian Broadcasting Commission, 'Authors in History Debate' (Lateline, 2003).

in the ongoing battle over the national narrative. As Irene Watson writes: 'An example of this [the nigger hunts] was in the recent history wars debate, which occurred over whether the nigger hunts actually happened, disputing also the numbers of Aboriginal people who had died as result of these massacres.'[54] Here Watson interprets some of the work of Keith Windshuttle as being a contemporary version of the nigger hunts and asks: where is a place of safety for her and other Aboriginal people when 'the hunters gather in their numbers and the "history wars" revise the Australian history of colonising violence.' [55]

IV Conclusion

The approach to teaching law at Southern Cross University is to focus on the school's mission statement. This includes 'to graduate students with an awareness of Indigenous perspectives, gender and environmental issues'. Environmental law is compulsory in the Bachelor of Laws program as is Philosophy of Law. The Legal Process unit outlined above is a 'perspective' one and involves an interrogation of law's capital 'T' truth claims. The truth claims involve an original British claim to sovereignty over the continent and a claim to 'innocence' of bias.

In this short paper I have indicated only a few of the influences on my teaching philosophy and methodology. I have highlighted a few of the techniques devised to teach the whole person and the curriculum materials designed to put the philosophy into action. By whole person I am referring to the sensory, intuitive and justice oriented person with a commitment to acquiring excellent technical skills As a feminist and 'whiteness' scholar my methods of teaching are designed to be egalitarian and to draw on the lived experience of students and the marginalised. I seek to encourage and develop the skills of critical thinking that allow students to move from dichotomised thinking and adopt a broader approach to knowledge.[56] As a school of law and justice we aim to graduate educated people, those with first rate technical legal skills and with an awareness of the big questions that face the nation.

Towards the end of the unit I draw the threads together. We think back over the role plays and other activities that have formed a major part of the learning. I read aloud in class *The Sneetches* by Dr Suess.[57] This children's book is one that raises questions about class, markers of 'otherness' and hierarchy. Are the

54 Irene Watson, 'Illusionists and Hunters: Being Aboriginal in This Occupied Space' (2005) 22 *The Australian Feminist Law Journal* 15–28, 27.

55 Ibid 26.

56 Linda Markowitz, 'Unmasking Moral Dichotomies: can feminist pedagogy overcome student resistance?' (2005) 17(1) *Gender and Education* 39–55.

57 Theodore Geisel Seuss, *The Sneetches and Other Stories* (Random House, 1961).

degrees we are striving for like the ‘stars on the bellies’ of the Sneetches? Are they markers of authority that indicate a person’s worth in an ethical sense? FinallyI don my Cambridge gown and then my fairy wings and recite a poem I wrote called ‘Authority’. The poem raises issues of birth privilege, authority and inequality. In this performance I bring my body into the classroom with its vulnerability, playfulness, enthusiasm, passion and intellectual curiosity. I strive for a critical space, a space of resistance, and wild law emerges in the classroom.