Subversive Property:
Law and the Production of Spaces of Belonging

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ABSTRACT

This thesis develops a theory of property as a spatially contingent relation of belonging. Drawing on legal geography, critical geography and feminist theory, this spatial understanding of property provides a conceptually useful way of analysing a wide range of socio-legal issues. I argue that property occurs when a relation of belonging is 'held up' by space; that is, when the wider social processes, structures and networks that constitute space give force to that relation. 'Holding up' is a more diffuse, heterogeneous, spatial process than state recognition. The relation of belonging that is held up might be between a subject and an object, as property is conventionally understood, or it might be the constitutive relation between a part and a whole, as identity is often understood (for example the relation between a white person and whiteness). Understanding property in this way reveals its broad powers – how property constitutes subjectivities, shapes social and physical spaces, and how it can operate subversively. This theory of property is explored in relation to two seemingly unconnected socio-legal issues: that of indigenous resistance to long leases of their land under Australia's *Northern Territory National Emergency Response Act 2007 (Cth)* and that of sexuality-based asylum claims made by women in Australia, Canada and Britain. Analysing cases from these two socio-legal contexts, I argue that what was at stake in both contexts was the production of particular spaces of belonging; that is, spaces that hold up some relations of belonging and not others. In the final chapter I unpack the conceptual issue of how space is connected to the subject. Exploring the concepts of 'taking space with you' and inheritance, I put forward an understanding of the complex connections that exist across space and time, and the way those connections affect and constitute the subject.

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1. 'Prossy has been saved!' A sense of unease, a lack of connection, a spatial turn

A couple of years ago, in mid-2008, a friend forwarded me a PinkNews article about Prossy Kakooza, a Ugandan woman who had won an appeal to have her asylum claim re-heard by the United Kingdom Asylum Tribunal, giving her a second chance at winning the right to stay in Britain. At the time, I was very interested in the politics of refugees and of the lesbian, gay, bisexual and trans ('LGBT') movement; indeed, I had begun this PhD some months earlier with the intention of focusing on lesbian refugees and legal impediments to their movement. Kakooza fled her home state of Uganda after being raped, tortured and imprisoned there because of her relationship with another woman. When the Tribunal first heard Kakooza's asylum claim it had accepted that she had been persecuted because of her sexuality, but insisted that she could find safety by moving to another part of Uganda. Now on appeal, a senior immigration judge had dismissed that decision and ordered that Kakooza be allowed to present her claim afresh. To put the story in political context, the PinkNews article reported that British gay activist Peter Tatchell had the day before publicly called on his government to reform the asylum system to stop 'genuine gay refugees being sent back to viciously homophobic countries like Iran, Uganda, Iraq, Nigeria, Pakistan, Jamaica, Belarus and Saudi Arabia'.[1] Tatchell suggested five policy reforms including training Border Agency staff in 'sexual orientation and transgender awareness' and upgrading the Home Office country information reports 'to reflect the true scale of homophobic persecution'.[2]

I followed the links to Kakooza's campaign, which included an online petition, a Facebook page ('Prossy Kakooza Must Stay!'),[3] and various statements of support. It was a well-organised campaign and I continued following it until Kakooza eventually

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[1] Stephanie Philips, 'Hope for Ugandan lesbian's asylum appeal' *Pink News* (London 4 July 2008) <http://www.pinknews.co.uk/news/articles/2005-8219.html/> accessed 20 September 2011.

[2] Peter Tatchell, 'Gay Asylum Reform Proposals' *Gays Without Borders* (London 2 July 2008) <http://gayswithoutborders.wordpress.com/peter-tatchell-gay-asylum-reform-proposals/> accessed 20 September 2011.

[3] 'Prossy Kakooza Must Stay!' *Facebook* (Palo Alto 2008) <http://www.facebook.com/group.php?gid=15442634010> accessed 20 September 2011.

won her claim for asylum in October that year. Throughout her asylum ordeal, Kakooza had had a huge amount of support led largely by the Manchester Metropolitan Community Church. As well as re-telling the horrific trauma that Kakooza suffered in Uganda, her campaign emphasised that she was 'a highly educated woman who can be a productive member of society', and although she was not explicitly described as Christian, it was made clear that her local church was at the forefront of her campaign.[4] When the final decision in Kakooza's case was handed down, the church's website proudly announced the news of her legal right to remain in the United Kingdom for five years, and to then apply for permanent residence if she so desired. The church's news announcement listed the support that had contributed to Kakooza winning her case, including that of 'the 80 members of MCC Manchester who have supported her with their love, prayers, money and concern'.[5] Other sites declared 'Prossy has been saved!'[6]

There is no doubt that the final asylum decision was welcome news to Kakooza and her supporters, but what struck me about Kakooza's campaign was the one-dimensionality of the way the story was presented. In all the news and publicity surrounding the case, Uganda was never described as anything other than, as Tatchell put it, a 'viciously homophobic country' – a place that was uniformly unsafe for Kakooza, a woman who did not belong there but who could fit in here if only granted the chance by the UK Border Agency. Never was there any mention, let alone discussion, of the politics of queer resistance in Uganda, the colonial history or the contemporary economic and political relationship between Britain and Uganda, the active role of conservative US Christian churches in promoting homophobia in Uganda, or of Uganda as Kakooza's home, a home that however tainted was still the place where her friends, partner and family remained, along with her house, her possessions, her local store... her life up until

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[4] 'Prossy Kakooza Must Stay' *LGBT Asylum News* (London 8 June 2008) <http://madikazemi.blogspot.com/2008/06/prossy-kakooza-must-stay.html> accessed 20 September 2011.

[5] 'Prossy Can Stay!' *The Metropolitan Community Church, Manchester* (Manchester 18 October 2008) <http://www.mccmanchester.co.uk/prossy.htm> accessed 9 August 2010.

[6] 'Prossy Can Stay!' *LGBT Asylum News* (London 18 October 2008) <http://madikazemi.blogspot.com/p/asylum-stories.html> accessed 20 September 2011.

the time she left. Anyone's relationship with the place she has spent her life will be complicated, no matter how horrific that life had been up till then; and anyone's relationship with a new place of residence far from her old will also be complicated, no matter how much easier particular aspects of life are there. Yet these messy connections were ignored. It seemed problematically simplistic to portray Uganda as simply a place of danger for Kakooza and all lesbians and gays, Britain as their ultimate place of safety, and Kakooza as a woman saved by British law and a Christian church, and now able to move freely forward in her life.

Although the focus of the campaign, following the structure of the asylum law system, was on Kakooza as a subject who was human / had rights / was in need / was worthy of protection, the spatial context that seemed only to form the backdrop to the campaign was in fact central to it. As well as constructing Kakooza as a worthy asylum seeker, the campaign was also constructing a particular spatial framework in which Uganda was dangerous and Britain was safe, Uganda was repressive and Britain was tolerant, Uganda was backwards and Britain was modern. This normatively loaded spatial framework was essential to Kakooza's campaign. And yet, framing the story in this way, with Kakooza as the lone protagonist on a journey from one state in homophobic Africa to another in the free liberal West, represented as straightforward what was in fact a deeply complicated landscape. Uganda is a relatively small central African state that was under British colonial control from 1888 to 1962. Like all areas that survived colonial violence and oppression, Uganda has had a troubled history. Comprised in the first place of several different ethnic groups, lacking a common language and suffering enormous social inequality by the time the British withdrew, Uganda went through decades of violence and unrest under various leaders, most notably Idi Amin.[7] Since the late 1990s, Uganda has been a site for economic and ideological investment by several

[7] A B K Kasozi, Nakanyike Musisi and James Mukooza Sejjengo, *The Social Origins of Violence in Uganda, 1964 - 1985* (McGill-Queens University Press, Quebec 1994) 6-10.

conservative US Christian churches in the fostering of transnational homophobia.[8] It thus seemed particularly incongruous that Britain and a Christian church from the West be credited with 'saving' a Ugandan lesbian. I had a sense of unease about how Kakooza herself was framed, as a vulnerable foreign woman, about how Uganda was framed as a backward, dangerous state, and how Britain was framed as a benevolent safe haven.

This sense of unease was something I had felt before when working as a solicitor on cases involving police violence against indigenous people in Australia. While it was necessary, for each individual case, to construct the police officer in question as a racist individual who must be held responsible for his actions, this very construction seemed to deflect attention away from the deeper and more complex issues of the landscape of Australian racism – its pervasive, taken-for-granted, everyday manifestations that, in my experience growing up mixed race in Australia, seemed to occur everywhere. Entangled within this general sense of unease were my motivations for this project. The first motivation was a sense of frustration at law's inability to make effective change in issues involving the disproportionate suffering of particular groups of people. I wanted to move beyond the 'practical reform now versus total revolution-to-come' paradigm that I had encountered both as a practitioner and as an activist working on a range of social justice issues, and to instead attempt to think through how radical change might be achievable in the present. The second, related motivation was a sense of frustration with the way identity politics had been taken up across a range of different issues. Although some of the most inspiring and successful political movements of the past century have been based on the politics of race, gender and sexuality, there also seemed to be many problems associated with the essentialised ways in which identity was represented, as intersectionality and other critical approaches have now well-documented, and as the case of Prossy Kakooza's campaign for asylum also shows.

Kakooza is a woman of colour, a Ugandan citizen, a Christian, a woman who was in a

[8] Kapya Kapoma, *Globalizing the Culture Wars: US Conservatives, African Churches and Homophobia* (Political Research Associates, Sommerville MA 2009).

relationship with another woman, a rape survivor, and no doubt a member of many other identity categories that those of us who simply read about her online and in the news do not know about. For the purposes of her asylum claim, Kakooza had to prove a very particular identity – that of a Ugandan lesbian fearing persecution on the basis of her sexuality in her home state and thus in need of protection from the British state. Kakooza was able to successfully prove this identity to the UK Border Agency, but what were the broader political effects? Beyond Kakooza herself, what conceptual, social and physical structures in and through which she lived – what 'spaces of belonging' – were being created or shifted? In deciding whether or not she be allowed to stay, British asylum law required Kakooza to perform a particular kind of British migrant belonging resounding with colonial undertones – the foreign woman in need of salvation from her own inferior culture through inclusion in the British state. Asylum law required her to present her sexuality as an innate, unchangeable element of her identity, an element that would fit smoothly with the British legal understanding of lesbian identity. As will be explored in this thesis, that understanding is one that is based on a commercial, white, gay male culture. Narrow, static identity categories are thus reinforced, along with narrow, static understandings of place – it was vital to Kakooza's case that she show that the whole of Uganda was unsafe for her and would continue to be so indefinitely. There was no room for discussion of how Kakooza's exile, and those of other Ugandan lesbians, affects social and political movements there. Nor was there room for discussion of spaces and times of resistance in Uganda, of fluid gender and sexual practices and identities, of the reality of the British sexism, homophobia and racism that Kakooza will deal with here (indeed already had by going through the asylum system), or of the role of the US Christian right in promoting homophobia in Africa, let alone of the political complexities of the co-optation of LGBT politics into racist nationalist agendas. The concept of the nation-state as the only mode by which the world can be spatially organised and that of citizenship as the defining relationship of belonging between space and the subject were not only left unquestioned, but were reinforced through Kakooza's campaign. Asylum law was understood as the legal

system's benevolent answer to the problem of a geography of good and bad states, rather than as being itself part of that geography.

Almost three years later that geography does not seem to have changed very much. In the week of writing this introduction, I received an email from another friend, this time letting me know that Stonewall – Britain's leading LGBT charity / lobby group – had named the Home Office as the best place for lesbian, gay and bisexual people to work in 2011, coming first in its list of the top 100 (with Lloyds TSB bank and transnational corporate tax advisor Ernst Young running in second and third).[9] It seems that Peter Tatchell's call for sexual orientation and transgender awareness training at the Home Office has been heeded. In the same week, I received the horrific news that leading Ugandan gay activist David Kato was murdered in his home. The strong suspicion that he was killed because of his sexuality prompted even the most homophobic press to run articles about Kato's tireless campaigning against what was portrayed as a distinctly African homophobia.[10] Traveling through London the next day I watched as the commuters opposite me sat reading about how badly Uganda treats its LGBT citizens – in light of Kato's death, the free Metro newspaper had swapped its usual anti-refugee stance for a front page plea that the Home Office 'save Brenda Namigadde', a Ugandan woman who happened to be having her claim for asylum based on her lesbian sexuality reheard that week.[11] I thought about looking up the PinkNews report on Brenda Namigadda's campaign but couldn't face reading another article that used David Kato's death to frame Uganda as bad, Britain as good and gay / lesbian identity as universal. Working through this thesis, I have come to see such framing as a kind of appropriation. It seems like a wholly different kind of appropriation from the government acquisition of

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[9] 'Home Office tops Stonewall's 2011 list of gay-friendly employers' *Stonewall* (London 25 January 2011) <http://www.stonewall.org.uk/media/current_releases/4946.asp> accessed 20 September 2011.
[10] 'Prominent gay rights activist found beaten to death in Uganda' *The Daily Mail Online* (London 28 January 2011) <http://www.dailymail.co.uk/news/article-1351414/Prominent-gay-rights-activist-beaten-death-winning-legal-action-newspaper-wanted-gays-hanged.html> accessed 20 September 2011.
[11] Fred Attewill, 'Battle to save Ugandan lesbian facing death for being gay' *Metro* (London 27 January 2011) <http://www.metro.co.uk/news/853983-battle-to-save-ugandan-lesbian-facing-death-for-being-gay> accessed 20 September 2011.

indigenous land, for example, but as will be explored in this thesis, the two processes are not actually so dissimilar. Thus the journey this thesis takes – thinking first about legal geographies, then about space and thereafter about property as a spatially contingent relation of belonging – began in an attempt to untangle my sense of unease about the way Prossy Kakooza's campaign was framed. Along the way, this path of thinking also enabled me to connect the issue of lesbian asylum with that of indigenous dispossession, to complicate the legal model of the subject and to explore the varied powers of spaces of belonging.

Key claims

Law and the spatial turn

The key claim underlying this thesis is that by embracing the spatial turn and shifting the focus of analysis away from the legal subject and onto the broader spaces in which that subject is embedded, factors that are otherwise overlooked, come into view. The 'spatial turn' is the term used to describe the recognition of, and consequent academic attention to space in any analysis of the social. The spatial turn took hold in the humanities and social sciences over the past two decades, consistent with post-modern and post-structuralist rejections of universality and single-voiced historical narratives.[12] Paying attention to space has enabled new perspectives and issues across a range of topics (from literature to politics to religion)[13] to be brought into view. While legal geography has brought the spatial turn to law to some extent (discussed in chapter two), this thesis goes further by explicitly embracing a dynamic understanding of space and spatialising the subject. While legal geography demonstrates the co-constitutive relation between law and space, it still tends to return to a framework that centres

[12] Barney Warf and Santa Arias, 'Introduction: the reinsertion of space into the social sciences and humanities' in Barney Warf and Santa Arias (eds), *The Spatial Turn: Interdisciplinary Perspectives* (Routledge, Abingdon 2009) 1.
[13] ibid 7-9.

around the legal subject. Although legal geographers such as Nicholas Blomley and David Delaney do interrogate the political meaning of space itself to some extent, on the whole legal geography lacks a theorisation of how space might be usefully re-conceptualised, or of the conceptual boundaries of the subject – where does the subject end and space begin?

In an attempt to think through these issues I turn (in chapter three) to critical geography, in particular the work of Doreen Massey, who puts forward an understanding of space as 'dynamic, heterogeneous simultaneity',[14] and to phenomenology (in chapters four and seven), in particular the work of feminist theorist Sara Ahmed, who examines the intimacy of bodies and their dwelling places.[15] Instead of understanding space as the background to political action (even if, as in some legal geography, that background is understood as important), Massey understands space as 'the simultaneity of stories so far' – the simultaneity of multiple and very different stories of subject, streets, mountains, communities and empires; stories which are, importantly, unfinished. So space is not fixed in meaning because it is the constantly shifting heterogeneity that constitutes the world (whether that be 'the whole world' or the different worlds that attach to particular individuals, groups or networks). Space is constantly being (re)produced in no fixed direction. Massey shows how the traditional privileging of time over space in Western continental philosophy (change, progress and revolution tend to be associated with time rather than with space) is politically debilitating – it assumes that space is the dead, inert matter over which time happens. I draw on Massey's understanding of space, together with feminist theories of the relation between space and the subject, to challenge the idea that space is a smooth, static surface upon which law evenly operates, and the idea that the legal subject is a whole, discrete individual moving through the world, powered simply by her own agency and essentially disconnected from the space around her.

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[14] Doreen Massey, *For Space* (Sage, London 2006).
[15] Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Duke University Press, London 2006).

Drawing on legal geography, Massey's theory of space and feminist work on spatiality and subjectivity enables me to bring a fresh analysis to socio-legal issues generally framed in terms of identity. Bringing the spatial turn to law in this way troubles the legal models of both space and the subject, shows the overlap between biopolitical (control over life) and geopolitical (control over space) governance, and thereby offers new perspectives on a range of socio-legal issues.

Property as belonging in space

Embracing the spatial turn and bringing it to law enables the second key claim made in this thesis, namely that property can be understood as a spatially contingent relation of belonging (set out in chapter four). That relation of belonging might be between a subject and an object, as property is traditionally understood, or it might be between a part and a whole, such as the relation between a white person and whiteness, between a man and masculinity, or between a Londoner and London. I argue that by analysing property spatially, instead of focusing on the subject of property, subject-object and part-whole belonging overlap to the extent that they become indistinguishable. Property of the subject (her belongings) and properties of the subject (characteristics that determine where and / or to what social group she belongs) operate in the same way and blur into one another. What is essential about both types of belonging – what makes them property – is that they are 'held up' by the space in which they exist. 'Holding up' is a more diffuse, heterogeneous, spatial process than state recognition; it invokes a wide range of social processes, structures and networks that give force to relations of belonging. To have property in an object and to be properly oriented in a space, both require spaces that hold up those relations – spaces that are conceptually, socially and physically shaped toward them: *spaces of belonging*.

This analysis of property can be used to show that social properties like whiteness,

Islam, heterosexuality and other characteristics generally associated with membership of identity groups, can be understood as property in the same way as owning a car, a house or a patent can. This understanding takes associations between propriety and property to a new level and illuminates the ways in which property not only requires space but also (re)produces it. I argue that property tends to keep things in place, helping the world retain its shape and providing a strong linkage between the past, the present and the future. Exploring the temporality and spatiality of property I examine (in chapter five) how property functions as an insidious form of governance in the context of recent laws affecting Australia's Northern Territory, but also how property can be subversive – how property can unsettle hegemonic power relations and reshape the spaces, orienting them toward a future that is not linearly linked to the past. I further examine (in chapter six) how subversive property functions in the different empirical setting of sexuality and asylum law, and how subversive property can be appropriated. Discussing a range of examples of subversive property including anti-hierarchical school meetings, bathtubs filled with growing flowers, a walk-off site in the Australian desert, and queer women in patriarchal and homophobic places, I show how each example involves relations of belonging that do not fit but that can, if maintained over a sufficient period of time, cause the space around them to adapt and reshape. As property is spatially contingent and space itself is not fixed or frozen, property is necessarily malleable – the spaces that it requires and (re)produces can be reshaped.

Space and the subject

This spatial understanding of property as belonging and the idea of subversive property involve a rethinking of the relation between space and the subject. If what is essential to property is the space that holds up particular relations of belonging, then it follows that space is not the inert backdrop to action undertaken by subjects. Rather, space is part of that action. This understanding of space is consistent with Massey's understanding of space as the politically important and always evolving simultaneity of

stories so far. It also follows from this understanding of space and property as belonging that the subject cannot be conceived as a discrete, autonomous political actor, but must rather be understood as an entity that is inseparable from the spaces through which she moves and the spaces in which she is embedded. One of the key theoretical contributions made by the thesis is its challenge to any conception of the subject as divorced from her surrounding space. In chapter two I draw on legal geography case studies in a range of contexts to show that the legal connections between space and the subject (connections through migration, citizenship and domicile laws but also through laws affecting homeless people and others) do not accurately reflect the lived conceptual, social and physical connections that subjects in fact have to space. There is of course a significant body of other literature, in particular from feminist theory, that powerfully critiques the liberal idea of the subject as autonomous, essentially equal to all other subjects and moving through the world powered by her own agency. What this thesis does specifically is to look at how the subject takes space with her when she moves – to explore how spaces stick to particular bodies, identities, communities and things.

I draw on critical geography, feminist theory and phenomenology to explore the ways in which the subject does not move smoothly through space. Rather, the subject is inseparable from the conceptual, social and physical space that 'surrounds' her – the subject's movement is dependent on that space, and that space will also shift as she moves. Throughout the thesis I develop the concept of 'taking space with you' to explain the way social meaning seems to attach to particular subjects even as they move across long distances and different sites. In chapter seven I unpack this concept of taking space with you, along with the concept of inheritance, as ways of understanding the complex connections that exist across space and time, and the way those connections constitute the subject.

Connections, strategies, departures

Following on from the three claims outlined above – the spatial approach, the understanding of property as a spatially contingent relation of belonging, and the understanding of the subject as connected to and indeed inclusive of the space around her to the extent that she *takes space with her* as she moves – this thesis draws new connections between different political struggles and points toward new strategies for those struggles. Through studying the two different socio-legal issues of aboriginal[16] resistance to government action in Australia and sexuality-based asylum claims across three Western states, chapters five and six critique both the operation of law and responses to it, calling for a deeper unsettling of space than individual legal cases seem capable of producing. The legal challenges brought by aboriginal Australians discussed in chapter five managed to delay but not prevent the government action in question. And although the inclusion of individual women seeking asylum on the basis of sexuality persecution is life changing for those particular women, such inclusion does not change the various connections and networks that constitute the political landscape that produced their situation in the first place. Indeed as will be discussed, it may even further entrench that landscape, taking what was subversive property and reshaping it such that it bolsters the broad agenda of the receiving state.

Putting property and space at the forefront of analyses of indigenous struggles and sexuality-based asylum claims allows for new connections between these issues to be drawn. Using a liberal socio-legal framework to look at the two issues, they seem disconnected. The asylum issue is about subjects who want to move from one nation-state to another because they are persecuted on the basis of their sexuality in their home state. The cases challenging the Australian government's actions in aboriginal communities, on the other hand, are about subjects who want to stay where they are,

[16] Throughout the thesis I use the term aboriginal when the laws in question explicitly affect aboriginal people and when the individuals or communities affected define themselves as aboriginal. In all other contexts I use the term indigenous to denote the original inhabitants of an area.

and to do so on their own terms. Their claim is not so much of persecution, but of discrimination, and that discrimination is on the grounds of race rather than gender or sexuality. However departing from this liberal framework and thinking spatially through a framework of property, it becomes clear that both sets of cases involve a contestation over space and belonging. Both also involve subjects in an ambiguous relationship with law, appealing to it with mixed results.

Understanding property as a spatially contingent relation of belonging emphasises the broad political importance of processes of inheritance and appropriation in maintaining the status quo, but also shows how subversive property can function to unsettle the status quo. While this thesis does not produce a manifesto or agenda for how effective political change can be immediately embarked upon, it does call for a deeper unsettling of space than direct appeals to law seem capable of providing, and suggests that subversive property might be one way of producing such an unsettling. From chapter four onwards I build the argument that property is a politically potent tool because the space that it requires and (re)produces shape the world conceptually, socially and physically. In particular, the analysis of part-whole and subject-object belonging developed in relation to property in chapter four, explored in empirical contexts in chapters five and six, and taken further in chapter seven, shows how property effects both the tangible and the intangible, the material and the symbolic. Thinking and strategising in terms of property is more useful than thinking in terms of identity or citizenship in the sense that it encompasses the physical as well as the conceptual and social aspects of belonging.

Methods and ethics

Mixed methodology

This thesis draws on a range of sources including case law, media reports, government

documents, and various theoretical approaches. My methodology is thus mixed, though as discussed briefly above, a key claim running throughout the thesis is that taking a spatial approach to socio-legal issues brings different factors into view. Drawing on a Foucauldian understanding of power / knowledge and accepting his argument that 'truth is a thing of this world and is not outside of power',[17] I make the epistemological assumption that methodology is inseparable from the knowledge that is thereby produced. As discussed above, part of my motivation for this project was a frustration with law and with how identity politics have been taken up in a range of campaigns, and a desire to think through, or to know differently, the relation between space, the subject and belonging. Specifically, I wanted to think through socio-legal issues that were usually framed in liberal terms – as individual subjects or as the similarly grouped subjects of identity politics – through a different framework. Thinking spatially was thus both the means and to some extent the ends of this project.

Plotting out the methodologies used in this thesis, I began with legal discourse analysis, which I used first to explore the asylum cases and then the two cases concerning Australia's Northern Territory (although this was the work I began with, it appears in chapters five and six of the final thesis). As an ex-lawyer and being new to postgraduate study, legal discourse analysis was an obvious and comfortable place for me to start, and it was useful in looking at patterns and contradictions within and between the legal decisions and instruments. I then turned to a range of socio-legal literature in order to explore the social context in which law operates – its assumed and actual effects. While socio-legal studies (such as the important work that I draw on to point out the particular difficulties facing queer and women asylum seekers) is useful for both empirically and theoretically placing law in its social context, much of the work in this field tends to retain a focus on the legal subject and on measurable policy outcomes in a way that I wanted to move away from. In order to make this move and to address the issue of space, I turned to legal geography which, as will be explored in some detail, draws on

[17] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (edited by Colin Gordon) (The Harvester Press, Sussex 1980).

both socio-legal studies and geography to examine the relationship between law and space. The literature in this field is varied – some writers look at spaces defined in terms of particular nation-states, or contentious borders zones, others at geographical features such as English hedgerows, and others still at spaces inhabited by particular people, such as the homeless. It thus takes a step away from the focus on the subject and towards an analysis that includes the spaces, places and landscapes that surround and constitute subjects and identities. Where legal geography falls short is in providing a theoretical interrogation and a suggested re-conceptualisation of space itself.

Thinking spatially

Space is an extremely difficult term to define, despite (or perhaps because of) its wide usage and seemingly intuitive meaning. David Harvey offers an understanding of space as 'a reference system by means of which we locate ourselves with respect to the world'.[18] This reference system might be conceptual, social and / or physical; it is a reference system in that it is a set of things (whether that be ideas, social relations, physical objects or a combination of those) that work together to provide information that can be used to ascertain where we are. Space pertains towards proximities, distances, territories, routes, environments and architectures. Like any reference system, it is not 'true' or fixed but something that is constantly being produced, shifted and interpreted in different ways. While time is also a reference system by means of which we locate ourselves with respect to the world, space is distinct in its inclusion of that outside the subject, whether that outside be human or non-human or both. Gillian Rose explores Luce Irigaray's understanding of space as 'the medium through which the imaginary relation between the self and the other is performed'.[19] This psychoanalytic understanding of space is consistent with even the most 'physical' understandings of

[18] David Harvey, *Justice, Nature and the Geography of Difference* (Blackwell, Oxford 1996) 207.
[19] Gillian Rose, 'As if the Mirrors had Bled: Masculine Dwelling, masculinist theory and feminist masquerade' in Nancy Duncan (ed), *Bodyspace: Destabilizing Geographies of Gender and Sexuality* (Routledge, London 1996) 63.

space such as those relied on in earth science in the sense that both understand space as that which surrounds (but also includes) the subject, whether that be in terms of imaginary relations with others or of soil, rivers and mountains. Nigel Thrift understands space as 'a series of connections through which what we know as the world interacts',[20] again emphasising the primacy of the inclusion of that outside the subject, here understood as 'the world' and the connections that constitute her.

Consistent with my desire to shift the analytical focus away from the subject and onto the broader forces and structures around her, thinking spatially is a way to think beyond the subject. That is not to deny the space *of* the subject, in particular the space of the body, but in spatialising the subject I am putting her in the context of a reference system that exceeds her. Where is she located? How is she oriented? The desire for a deeper theoretical exploration of the constitution of space and of the political possibilities of reframing issues spatially led me to critical geography, and in particular to the work of Doreen Massey. Her work has been a major influence on my thinking and approach towards this thesis. As mentioned briefly above, Massey's theory of space is a dynamic and open one – space as 'dynamic heterogeneous simultaneity' or as 'the simultaneity of stories so far'. Massey's understanding does not abandon understandings of space as a reference system / medium / series of connections – but simply emphasises that that reference system / medium / series of connections is constantly being (re)produced in no fixed direction. Massey's insistence that space is not fixed in time is important for my work because I am interested in showing how spaces can be reshaped. Massey's understanding of space encompasses Harvey's space as reference system (whether that be conceptual, social or physical), but also exceeds it in that it explicitly acknowledges the dynamism of those reference systems and the multiplicity of forces that constitute them. From chapter three (my exposition of Massey) onwards, when referring to space I am referring to a reference system that is constituted by a vast multiplicity of different, dynamic forces; it is ever-evolving and

[20] Nigel Thrift, 'Space: The Fundamental Stuff of Geography' in Sarah L. Holloway Nicholas J. Clifford, Stephen P. Rice and Gill Valentine (eds), *Key Concepts in Geography* (Sage, London 2009) 88.

necessarily conceptual, social *and* physical.

Although the three are linked, for analytical purposes it is still sometimes useful to distinguish between physical, social and conceptual space. Physical space can be understood as our clearly tangible environment, whether 'natural' or 'built'; social space as the socially and culturally created yet also tangible surrounds in and through which we live; and conceptual space as the realm of abstract ideas and designs about how the physical and social world does or should operate. These distinctions are particularly useful in the discussion of legal geography (in chapter two), which tends to use these understandings of space, sometimes in a static 'pre-Massey' way. However part of the work of this thesis – an element of bringing the spatial turn to law – is to demonstrate that these three types of space are inextricably linked. Indeed part of the reason for using a theoretical framework of space, particularly with respect to the discussion of property, is that space can operate simultaneously on conceptual, social and physical levels to the extent that it blurs the three. Of course as Bal and Marx-Macdonald write, concepts are never simply descriptive – they are also programmatic and normative.[21] David Harvey argues that space, along with time, is a social construct but is also embedded in the material reality of the world.[22] Massey's theory of space is conceptual but its whole purpose is to reshape the social world, which will necessitate and produce a reshaping of the physical world. Feminist and other critical geographers do conceptual work with space on the assumption that such work will have an effect on the social and physical world. Indeed Gillian Rose argues that any distinction between real (physical and social) and non-real (conceptual) space is constructed in gendered terms, and that this hierarchical engendering of spaces is naturalised by the claim that only one of those spaces (the space in which patriarchy is firmly embedded) is real.[23] Disrupting the distinctions between physical, social and conceptual space is thus an important

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[21] Sherrie Marx-Macdonald Mieke Bal, *Travelling Concepts in the Humanities: A Rough Guide* (University of Toronto Press, Toronto 2002) 28.
[22] Harvey, *Justice, Nature and the Geography of Difference* (n18) 210.
[23] Rose (n19) 58.

political as well as theoretical project.

There is of course not just one reference system by means of which we locate ourselves in the world, there are many. While in chapter three in particular I discuss the nature of space – how does it operate? what can it do? – I am also interested in how distinct *spaces* are (re)produced, how they are shaped. A particular space is not the same as a place. Spaces are the reference systems within which place can emerge. Place, although also contested in meaning and difficult to define, is a more precise term than space. Place is a particular point in space, whether that point is understood as an intersection, a node, a switching point, a location, a feeling or some other referent. Consistent with her understanding of space as constantly evolving, Massey understands place as a process. Place, for Massey, is an articulated moment within the much larger and ever-evolving dimension of space.[24] To understand how that moment is articulated, the multiple relations and connections that intersect to form that place must be analysed, rather than some long internalised history.

While drawing heavily on Massey's understanding of space, I also build on it by focusing on the relationship between spatiality and subjectivity. Drawing in particular on the work of feminist theorist Inderpal Grewal in chapter three, as well as a range of literatures and case studies throughout the thesis, I ask: how are space and the subject connected, and what are the effects of this connection? As a way of researching these questions and of exploring how different spaces are (re)produced and shaped, I develop the understanding of property as a spatially contingent relation of belonging, mentioned above. Belonging is, as Davina Cooper writes, a conceptually ambiguous term. It can signify membership of a community, property ownership, political accountability, a relationship to place, and / or a behaviour or identity that 'fits', or is 'at home'.[25] Nira

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[24] Doreen Massey, 'Power-geometry and a progressive sense of place' in Jon Bird, Barry Curtis, Tim Putnam George Robertson and Lisa Tickner (eds), *Mapping the Futures: Local Cultures, Global Change* (Routledge, London 1993) 66.

[25] Davina Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press, London 1998) 16.

Yuval-Davis describes belonging as being about emotional attachment, about feeling safe and / or 'at home'.[26] Emily Grabham writes that belonging 'refers to the location of an object or person in its "proper place" ("the book belongs on the shelf over there" or "you belong in the UK")'.[27] Belonging thus connotes a sense of propriety, of the proper. Drawing on this work, I understand belonging as the state of fitting smoothly, or without trouble, into either a conceptual category or a material position. It is necessarily a relational term; an object / subject / practice / part that belongs cannot exist in a vacuum, it must belong *to* or *with* something else. In chapter four I elaborate further on the conceptual difference between 'part-whole' and 'subject-object' belonging, arguing that both are constitutive relations capable of being understood as property. Spaces where subjects belong, or 'spaces of belonging', are spaces of propriety – spaces where some will smoothly fit because they are 'in place' and proper, while others will be 'out of place', improper and thus repelled, unsettled or realigned.

Ethics and practicalities

I decided not to conduct interviews or do other direct empirical work for a number of reasons. As the two empirical areas of my thesis involve extremely vulnerable subjects – asylum seekers and aboriginal Australians affected by highly paternalistic and racially discriminatory legislation – I was reluctant to ask them to give their time and emotional energy for this project. Having been involved with aboriginal Australians as a solicitor and an activist and witnessing the effect that transient non-aboriginal professionals have by flying in and out of their communities, I did not want to do any kind of empirical research in this area without spending significant time there. As well as ethical factors against doing interviews or direct observations there were also practical ones, as this was a project funded for only a three-year period. If I had had more time and resources

[26] Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M. Vieten, 'Introduction' in Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M. Vieten (eds), *The Situated Politics of Belonging* (Sage, London 2006) 2.
[27] Emily Grabham, '"Flagging" the Skin: Corporeal Nationalism and the Properties of Belonging' (2009) 15(1) Body & Society 63, 66.

I would have considered doing interviews, ensuring they were constructed and conducted in a way that was ethically sound, but as it was, the bulk of my time during the initial stages of the project was spent doing conceptual work. The conceptual nature of the project and the lack of direct empirical work however do not mean that the project is separated from 'real world' matters. As Brian Massumi argues, academic writing adds to reality.[28] While the inventiveness of critical academic work is conceptual, such concepts have a material impact. Part of the impetus behind thinking spatially, as discussed above, is that space exists on conceptual, social and physical levels. In focusing on what space can *do* – how it can hold up relations of belonging – my approach is consistent with Jane Bennett's search for 'a materialism in which matter is an active principle and, though it inhabits us and our inventions, also acts as an outside or alien power'.[29] My turn to legal geography, with its focus on the physical spaces in which the socio-legal occurs, was part of this search. My subsequent turn 'back' to more conceptual work is not a turn away from the material but an attempt to better understand it. By focusing on space and belonging and exploring the different ways in which property operates, the thesis seeks to show how the rhetorical and the material, the conceptual and the physical, fit together and overlap.

Chapter outlines

Chapter 2: *Law / Space / Belonging? Legal geography and its discontents*

With its focus on spaces, places and landscapes, legal geography seemed an obvious place to start my exploration of the connections between law, space and belonging. Coming from a variety of perspectives and with subject matter ranging from Israel/Palestine to the maintenance of English hedgerows, legal geography primarily

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[28] Brian Massumi, *Parables of the Virtual: Movement, Affect, Sensation* (Duke University Press, Durham 2002) 12.

[29] Jane Bennett, 'A Vitalist Stopover on the Way to a New Materialism' in Diana Coole and Samantha Frost (eds) *New Materialisms: Ontology, Agency, and Politics* (Duke University Press, Durham 2010) 47.

explores the effect that law has on physical space and to a lesser extent, the effect that physical space has on law. By focusing on specific sites of interest and how law operates at those sites, legal geography provides a way of undermining law's claim to universalism and equality without relying on any form of identity politics. Critical race, feminist, queer and other identity-based critiques of law have powerfully shown its differential effects before, but legal geography achieves a similar outcome by different means. By exploring the materiality of particular places, legal geography exposes some of the physical, grounded effects of law; the differing ways in which law affects the landscape. It uses case studies to show how physical space – whether an area of hedgerows, a tunnel, a pine tree or a nation-state border – has social meaning and effects, some of which are violent. Law shapes social and physical spaces by various means, including the regulation of particular activities such as sleeping in public.

Legal geography demonstrates the disjuncture between the space-subject connection drawn by law – whether through citizenship, domicile or other means of state regulation – and the lived connections that subjects actually have with space. The connection drawn by law is one in which space is assumed to be static, pre-existing and apolitical, and the subject is assumed to be a discrete individual moving cleanly and effortlessly through space, powered by her own agency. Legal geography studies of migrant workers, striking coal-miners and an aboriginal sex worker in Canada each show that the connection between space and the subject is considerably more complex than that. I argue that some of the case studies suggest that the subject takes space with her as she moves.

With its focus on case studies and the material, legal geography avoids any kind of meta-narrative or universal theory. However the ad hoc nature in which legal geography has come about and its focus on particular sites of interest also means that it lacks a coherent theoretical underpinning. Nicholas Blomley and David Delaney have both come up with neologisms in attempts to move past legal geography's tendency to

look at how law affects space and towards a deeper understanding of the co-constitutive nature of law and space. Blomley uses 'splices' and Delaney 'the nomosphere' to attempt to develop a method and language that encapsulates the legal and the spatial as part of the same phenomenon rather than as separate, albeit related phenomena. Andreas Philippopoulos-Mihalopoulos draws on Deleuzian concepts for a similar purpose. Each of these concepts and approaches is useful in demonstrating how law's operation in space can perpetuate a banal and ongoing violence, and how space and identity cannot be understood separately from each other. This work helps point toward the kind of theoretical explorations that need to be undertaken in order to move towards understanding the complex connections between here and there and then and now that might explain whether and how subjects take space with them.

However even with the more recent work, which has pushed the theoretical distinctions between law and space, legal geography still leaves many questions unanswered. In particular, legal geography does not question the conceptual boundaries of the subject – where the subject ends and space begins. In order to move towards a more radical political agenda, other approaches are needed to continue the shift away from the subject and identity politics that legal geography begins. What is needed is not just the addition of space as another element to be taken into account in socio-legal matters, but rather a reconceptualisation of space and, following that, a rethinking of where and how the subject belongs (or does not belong) in space. To achieve this I turned to critical geography, in particular the work of Doreen Massey.

Chapter 3: *From positionality to spatiality: Theorising legal geography and finding life in space*

In chapter three I explore Massey's work and ask how it can be used to take further the work of legal geography, and how her re-imagining of space affects the way in which socio-legal issues are understood and how they are politically responded to. As

mentioned above, Doreen Massey puts space in political and philosophical context and proposes a way to re-imagine space in order to bring forth radical political possibilities. Massey's work takes a step beyond legal geography by embracing the uncertainty of space. Massey shows for example how a static understanding of space supports the idea that international processes led by and benefiting some areas to the detriment of others (processes such as colonisation and development) are inevitable – part of a single temporal trajectory of 'progress' that is applicable the world over, with some areas simply 'catching up' to others. Massey argues that space must instead be understood as inherently temporal and as the realm of difference itself. To spatialise history is to acknowledge that there are a multiplicity of stories rather than just one march toward modernity. It follows from this understanding of space that *place* cannot be understood as a bounded area defined by an internalised history, but as 'an articulated moment in networks of social relations and understandings'.[30] Place is thus simply part of the dynamic multiplicity that is space, meaning it cannot be studied as a static entity upon which law has a straightforward, prescriptive effect. Following Massey, I argue that it is not so much that law has an effect *upon* space and place, as it is that law functions alongside other forms of governance in and through space, and in that process constantly contributes to the production and reproduction of places.

This understanding of space is a politically empowering one, because if space is dynamic rather than fixed, then it is necessarily unfinished. The political potential of this understanding of space is revealed further with an exposition of the links between the production of space and the production of subjectivity. I explore this connection using Inderpal Grewal's work on 'transnational America' and the merging of biopolitics and geopolitics. Drawing on Grewal, I argue that subjectivity is produced by a range of spatial techniques, practices and structures not confined to law or territory. Space is in turn produced and shaped through the regulation of subjects. In the realm of the socio-legal, taking up Massey's call for an 'un-taming of the spatial' and Grewal's call to

[30] Massey, 'Power-geometry and a progressive sense of place' (n24) 66.

consider the biopolitics of geopolitics means not just adding space into the mix of factors to be taken into account alongside the legal subject, but questioning the very construct of the subject as atomistic and disconnected from the physical and social space around her, and the production of that space. Massey draws on Spinozistic understandings of inter-subjectivity to make a normative argument for the development of 'geographies of responsibility', according to which responsibility for particular places is allocated according to the messy, outwardly extending lines of connection that produce those places. I question what such an interconnected approach to responsibility would mean for the legal, and suggest that property might provide a useful framework for thinking through the production of places, subjectivities and spaces of belonging.

Chapter 4: *Subversive property: Reshaping malleable spaces of belonging*

Property is a concept which centres on the space-subject connection. Despite being one of the most theorised concepts in socio-legal literature and beyond, most understandings and critiques of the idea and workings of property still focus on the propertied subject rather than on the space in which the subject exists. In chapter four I trace the various major strands of theoretical understandings of property and discuss their focus on the propertied subject and that subject's right to exclude, whether that exclusion is understood as relating primarily to other subjects or to physical space. Drawing on Massey's understanding of space, I re-think property in a way that shifts the focus away from the propertied subject and onto the broader networks of relations that interact to form property. If space is unfixed and dynamic, then this throws the meaning of property into question. Property has historically been understood as a formidable right precisely because it is fixed, because only the property-owning subject can exclude others from the object of property and that right of exclusion is long-lasting and only subject to interference in very limited circumstances. As well as Massey's critical geography, I draw on phenomenology and empirical socio-legal work to argue

that property can be usefully understood as a relationship of belonging that is held up by space – a relationship that is not fixed or essential but temporally and spatially contingent. So it is not a permanent relationship but rather something that happens when a subject becomes embedded in particular spaces. Using Sara Ahmed's work on queer phenomenology and bringing together the questions of the coterminous constitution of particular spaces and subjectivities, I further argue that having property can be understood as being properly oriented in a space. Spaces are shaped around particular bodies being oriented in particular ways. Property thus affects the shape of the world, conceptually, socially and physically: it both requires and (re)produces spaces of belonging.

This re-framing of property demonstrates the power of space and opens up new political possibilities for property. I explore Davina Cooper's work on 'property practices', which she analyses based on her empirical study of the property regime at an alternative boarding school where students choose whether or not to attend class and where rulemaking and dispute resolution involve the school body as a whole (both teachers and children). Cooper describes property practices as involving several intersecting dimensions, with belonging being the most important. Cooper considers belonging in two ways – firstly the relationship whereby an object, space or rights over it belong to a thing or a subject (subject-object belonging), and secondly the constitutive relationship of part to whole whereby attributes, qualities or characteristics belong to a thing or a subject (part-whole belonging). I argue that when analysed spatially, these two types of belonging overlap to the extent that they become indistinguishable. What makes both types of belonging function as property is the space in which the subject has become embedded: the space must be shaped such that it holds up the subject's relation of belonging. As such, characteristics generally associated with identity politics can be understood as property in the same way that owning a house can – in terms of belonging in space.

As well as requiring a particular space – a space of belonging – property is also productive of particular spaces and temporalities. I argue that property has a temporality that tends to be linear, connecting the past with the present and the future in a way that is fairly predictable and straight. This linearity of property's temporality is applicable to property that is generally understood as subject-object and physical (such as the relation between a house and its owners) and to property that is generally understood as part-whole and social (such as the relation between whiteness and a white person). This spatialised understanding increases the breadth of property's political potential. Although property tends to be (re)productive of the status quo, to produce linear time and help the world retain its shape, it can also be subversive. Property can unsettle spaces too. I argue that subversive property has the potential to reshape space around different bodies and surfaces. Such reshaping would mean shifting networks of belonging and veering off course from the linear temporality that tends to maintain the status quo.

Chapter 5: *Homelands: The Role of Property in Australia's Northern Territory Intervention*

This chapter explores the theory of property as a spatially contingent relation of belonging in the context of the Australian government's 'Northern Territory intervention'. The Northern Territory is by far 'the most aboriginal' jurisdiction in Australia in terms of population percentage, land rights and strength of culture. Analysing two recent court cases involving aboriginal Australians from the Northern Territory challenging compulsory government acquisition of their land, I ask how property is functioning under the intervention. The cases of *Reggie Wurridjal, Joy Garlbin and the Bawinanga Aboriginal Corporation v The Commonwealth of Australia and The Arnhem Land Aboriginal Trust* [2009] HCA 2 ('*Wurridjal*') and *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 844 and 1397 ('*Shaw*') both involve challenges to federal government leases of Northern

Territory land enabled by the *Northern Territory National Emergency Response Act* 2007 (Cth) ('the NTNERA'). The intervention and the NTNERA which enables it are a set of paternalistic laws and policies passed on the basis of a report alleging the existence of disturbingly high rates of child sex abuse in remote aboriginal communities in the Territory. Following this report, the federal government declared that child sex abuse in those communities had become a national emergency. The NTNERA affects 'prescribed areas', all of which are remote aboriginal communities in the Northern Territory. While the intervention includes a range of measures that directly impact the lives of the affected aboriginal communities, it is the multi-year leases that have been met with the strongest political resistance.

Wurridjal's case involved a group of aboriginal people from the prescribed area of Maningrida resisting the government's compulsory rent-free five-year lease of Maningrida land on the basis that such a lease was an unjust and therefore unconstitutional acquisition of property. This argument was in part based on the idea that the aboriginal use of and connection to the land constituted a kind of property that exceeded common law and legislative definitions of property. The argument ultimately lost in court but it did force the highest court in Australia to define 'property', a task which resulted in a 300-page judgment and a wide range of understandings of what property means. Shaw's case involved a group of aboriginal people from the prescribed area of the town camps around Alice Springs using two arguments to try to stop the government's acquisition of 40-year sub-leases of that land from the Aboriginal Housing Associations that had leases of the land. Firstly Shaw argued that the government had not accorded procedural fairness to residents in the manner in which it was executing the leases, and secondly that the Aboriginal Housing Associations would be breaching their own constitutional objective of acting in the interests of their members by granting the sub-leases. Shaw also ultimately lost but her action forced the Federal Court to reveal law's role in the production of spaces of belonging – in this case, property law was being used in an attempt to produce a space where whiteness belonged and

aboriginality did not. I argue that both Shaw and Wurridjal's cases were assertions of subversive property that unsettled the hegemonic space of white belonging that dominates post-contact Australia, delaying the implementation of the leases in question and forcing the law to make some awkward contortions.

The one defining element of property that the *Wurridjal* judges could agree on was its temporality – namely that property is something that is fairly permanent. Unlike the asylum cases reviewed in chapter six, in which subjects seek to move from one place to another, the Shaw and Wurridjal cases involve subjects whose aim is to remain where they are. Both cases are underlined by an insistence that aboriginal people are not moving. That insistence goes beyond a demand that they be allowed to stay in the same physical place and extends to a demand that that place retains its aboriginality. Although the intervention operates on the basis of physical area rather than race, it is clearly designed to exclusively affect aboriginal people. Looking at the legal geography of the Maningrida area and the Alice Springs town camps, both are distinctly strong aboriginal areas that are culturally out of place with white Australia and that have a history of existing in tension with Australian law. I argue that what is at stake in the intervention leases and the Shaw and Wurridjal cases is more than the land over which property rights are sought – it is the governance and the social and cultural characteristics of the communities that live on the land. Both cases demonstrate the blurring of subject-object and part-whole belonging – who the land belongs to in law directly affects the cultural and social constitution of the communities that live on it. What both sides of each case were invested in protecting or gaining was not so much the land that was subject to the leases (although that land was an essential enabler), but the space of belonging that those leases require and over time, will (re)produce. Like all property, leases both require and (re)produce a space that will hold up particular relations of belonging. The longer the lease, the more rigidly shaped that space will become.

My argument is that property under the Northern Territory intervention is being used by the government as a way to assert dominant networks of belonging, along the lines of race, gender and sexuality, as well as a way to control the physical use of the land. I conclude the chapter by looking at the Ampilatwatja walkoff, in which another group of aboriginal people in a Northern Territory intervention prescribed area have taken action against the government, this time by moving their entire community outside the jurisdiction of the NTNERA, rather than taking any kind of court action. I argue that this action is also an assertion of subversive property: the community physically moves away form the law and takes their aboriginal space of belonging with them.

Chapter 6: *Sexuality and refugee law: Appropriating subversive property and producing homonormative landscapes*

Whereas chapter five discussed Australian Northern Territory cases to show the 'part-whole' belonging that was at stake in disputes framed in subject-object terms, chapter six discusses sexuality-based asylum claims to show the 'subject-object' belonging aspects of legal claims that are framed in terms of 'part-whole' belonging. Specifically, this chapter critically examines the spatial assumptions and effects of refugee law in the context of lesbian claimants, showing how refugee law operates such as to appropriate the subversive property of women who claim asylum on the basis of sexuality persecution.

By critically analysing court and tribunal decisions made about such women, I show how refugee law relies on and reproduces a discourse in which space and identity are represented as essential, static and separable from each other – so the claimant must prove that she is and always has been a particular kind of lesbian across multiple and very different spaces. Examining case law from Britain, Canada and Australia, I argue that the criteria used to test the identity of these applicants produces an ideal lesbian subject that reinforces the normative boundaries of the nation-state. That is, refugee

law requires women seeking asylum on the basis of sexuality persecution to perform their identities in a way that shows that they belong among the receiving state's good gay and lesbian citizenry. That belonging is defined by the courts largely through participation in the pink economy and involvement in normative intimate relationships and in opposition to an implicitly sexually deviant, racialised other – as Puar and Rai term it, the 'monster-terrorist-fag' who threatens the state from both inside and outside the territorial and normative borders of the nation-state.[31] So women whose sexuality was subversive of the hegemonic space of belonging in their home states are required to perform identities that conserve and bolster the hegemonic space of belonging in the state in which they are seeking asylum. This bolstering of the normative boundaries of the 'receiving' state is contrary to the popular perception of refugee law as something of a challenge to the normative boundaries of the nation-state. It troubles the conceptualisation of refugee law as a charitable exception to the otherwise strictly enforced citizen-state legal nexus of belonging required to enter and stay in any particular place.

So although refugee law can effect huge and potentially life-saving changes for individual subjects, its focus on that individual subject and construction of space as the static background to the subject means that it does not effect any significant change to the networks of belonging that led to those subjects being forced to move in the first place. Indeed, as well as proving that she belongs among the receiving state's lesbian citizenry, the asylum seeker must also prove that her home state is a dangerously homophobic place where she will be everywhere unsafe. This requirement to prove her vulnerability *out there* in contrast to her safety *in here* not only reinforces the dominant spatial conception of nation-states as the bounded, internally uniform building blocks of an artificially equal global landscape, but also has the effect of reinforcing racialised notions of Western states as culturally and politically modern and superior, and non-Western states as primitive and uncivilised. By appropriating what was the subversive

[31] Jasbir K. Puar and Armit S.Rai, 'Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots' (2002) 20(3) Social Text 72, 117.

queer property of the asylum seeker, refugee law produces what can be described as a homonormative and homonationalist landscape, and subjects who fit that landscape. I explore what the asylum seeker's 'properties' are in this context, and what they become as she moves from one space to the next. In so doing I argue that refugee law's production of homonationalist landscapes and subjects is another example of law's production of spaces of belonging, spaces that hold up particular relations of subject-object and part-whole belonging.

Chapter 7: *Taking space with you: Inheritance and belonging across space and time*

The final chapter returns to the ongoing question of the connection between space and the subject. Do subjects take space with them as they move, and if so, how is space 'taken'? Considering the varied contexts in which this thesis explores property's role in the production of particular spaces, can 'taking space with you' be understood as a function of property? I draw on theories of diaspora, and in particular Pnina Werbner's discussion of diaspora as place, to show how connections are formed between here and there when displaced communities build a home elsewhere. Drawing on Werbner and Massey, I argue that diaspora can be understood as a space and particular diasporas as places. Like all places, diaspora is a process – it is constantly being reproduced from both inside and out. Diasporas are places defined by their shared orientation in space and time. So although they are in physically disparate sites of the world, diasporas nonetheless hold up practices and identities similar to those held up in the 'place of origin'. This understanding explains to some extent how diasporic communities appear to take space with them.

While diaspora theory shows, to some extent, how *communities* take space with them, it does not explain how (or whether) individual subjects take space with them. I draw on phenomenological literature to think through how subjects might take space with

them, not through reproducing places of shared orientation, but through other processes and structures. Merleau-Ponty argues that the past is enveloped into the present through the movement of the body; the body, in his words, 'belongs to' space and time, it 'combines with and includes them'.[32] The body thus takes time and space with it as it moves because of the connections that it forms between past and present, and here and there. This understanding of the body that envelops, combines with and belongs to space and time, suggests a radical rethinking of the liberal model of the subject; it suggests that the subject does not exist 'in' or 'upon' or even 'surrounded by' space, and does not move seamlessly through it. Rather, the subject is part of space, and it is thus difficult to differentiate where the subject stops and the space 'around' her begins – the way she is interconnected with and through space and time will determine not just where and when, but also who she is.

While Merleau-Ponty concentrates on how these relations of belonging, these connections across space and time, are formed through the movement of a healthy normalised body, I argue that belonging and connections across space and time can also be formed by staying still. Subversive property can arise precisely because particular bodies that do not belong according to dominant networks of belonging nonetheless *remain* in that place. For it is not so much that subjects take space with them in the sense that they pick up an original or essential space and carry it with them from one physical location to the next. Rather, subjectivity and what is materially within reach for any subject is constantly (re)determined by where she has been and what has gone before, whether that involves journeys through physical space or through time.

Considering how spaces of belonging are maintained when subjects permanently depart, I draw on Avery Gordon's work to argue that inheritance can be understood as the property of ghosts. Inheritance haunts the living because it retains a material, linear connection to the past and thus helps keep old networks of belonging in place.

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[32] Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge, Abingdon 2010) 162.

Inheritance maintains spaces that are shaped towards ghosts, holding up their relation of belonging despite their departure. The concepts of 'taking space with you' and of inheritance are both ways of understanding the complex connections that exist across space and time, and the way those connections not only affect what the subject can do, but also at least partly determine who she is.

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This thesis is thus an exploration of the relation between law, space and belonging. By shifting the focus of analysis away from individual subjects and onto the dynamic relations and spaces that constitute them, the thesis offers a different perspective on socio-legal issues. It moves away from seeking ways to rescue individuals like Prossy Kakooza by allowing them to move from one physical place to another, to instead seeking ways to shift the spaces that continue to put subjects like Kakooza in unlivable positions.

2. Law / Space / Belonging? Legal geography and its discontents

This chapter begins to explore the ways in which law produces spaces of belonging. With its focus on law and space, legal geography is an obvious place to begin this exploration. I discuss the emergence of legal geography as a field of study and the work that it does in demonstrating law's spatiality – shifting the focus of analysis away from the subject and onto the places and spaces in which the subject is situated. This shift in focus offers a different way of thinking about issues usually framed in terms of identity, a way that makes clear some of the complexities that tend to remain hidden from view when the analytical focus is on the subject. In the last chapter I expressed discomfort at the narrowness with which the issue of Prossy Kakooza's claim for asylum in Britain was framed, arguing that the discourse around her claim left out important aspects of the issue of queer asylum and reproduced problematic ideas about good and bad states. Thus although British refugee law and the 'save Prossy' campaigns targeted towards it ultimately produced a positive outcome for Kakooza herself, broader questions about structures of oppression, histories of violence and possibilities for systemic changed remained unasked. In this chapter I ask whether a geographical analysis might raise those questions. Might legal geography lead towards political strategies that aim to shift complex landscapes of belonging and un-belonging, rather than strategies that aim to save or improve the lives of individual subjects *within* those landscapes? Finally I look at the questions legal geography does not answer about law and the production of spaces of belonging – in particular, questions about the relation between space and the subject, the meaning of belonging and the constitution of space.

Legal geography is a relatively new area of study, being part of the broader 'spatial turn' that has taken hold in the humanities and social sciences over the past two decades. Consistent with post-modern and post-structuralist rejections of universality and single-voiced historical narratives, the spatial turn has involved a diversity of fields such as sociology, literary studies and history embracing space as an important factor to be

taken into consideration in the production of social and cultural phenomena.[33] Legal geography is a tentative step towards bringing the spatial turn to law. Through its analyses of the sociality of space, which include but do not focus on the subject, legal geography shows that law, space and identity are interconnected to the extent that they are constitutive of each other. As part of the process of exploring the connections between law and space, much legal geography literature is concerned with law's role in the production of particular places, from nation-states to public parks to eruvs. Through these case studies of particular places, legal geography shows how law is productive of and and enforced through conceptual and material spaces, rather than just through the actions of police, judges and other government agents. In so doing, legal geography reveals the implicit spatial frameworks underlying legal decisions and processes. As those spatial frameworks are loaded with social meaning and more supportive of some identities and practices than others, legal geography poses a challenge to liberal understandings of law as universal and even-handed towards all subjects in its provision of justice. While feminist, queer, critical race and other critiques also effectively challenge law's universalism, legal geography makes its critique through an analytical focus on law's spatiality.

From categories to intersections to space

As stated above, I am asking how spaces of belonging are produced and shifted as a different way of thinking about issues that tend to be framed in terms of identity. Identity politics is a broad term that encompasses a range of causes based on the shared experiences of injustice of members of particular social groups.[34] Identity politics were essential to the civil rights movement in the United States, to the attainment of equal legal rights for women and to many other hugely significant social changes over the past

[33] Barney Warf and Santa Arias, 'Introduction: the reinsertion of space into the social sciences and humanities' in Barney Warf and Santa Arias (eds), *The Spatial Turn: Interdisciplinary Perspectives* (Routledge, Abingdon 2009) 1.
[34] Cressida Heyes, 'Identity Politics', *Stanford Encyclopedia of Philosophy* (Stanford 2009) <http://plato.stanford.edu/entries/identity-politics/> accessed 10 July 2011.

century. In recent decades however there has been increasing criticism of identity politics and a decided theoretical shift away from them.[35] One of the main critiques is that identity categories, such as 'woman', 'black' and 'gay', are social constructs that do not have natural or universal meanings. It is thus unclear who is inside and outside any particular category, and those who do fall inside the categories will not necessarily have a strong base of shared experience.[36] The problems faced by asylum seekers made to prove that they fit within the 'gay' category (which will be discussed in chapter six) is one practical example of the cultural specificity of identity categories and the difficulties that can result when such categories are assumed to be universal. As well as (and consistent with) the critique of identity politics' reliance on falsely universalised categories, is a critique of the scale of change that identity politics is capable of producing. While there are many different kinds of identity politics, those that have gained most traction in mainstream political praxis are liberal campaigns that have as their goal the improvement of conditions and the extension of rights for that particular identity category, rather than the broader goal of shifting the very systems that produce identity categories and their differential conditions.[37] Liberal identity politics do not effectively tackle the root causes of injustice and oppression. As Wendy Brown powerfully argues,

> *politicised identities generated out of liberal, disciplinary societies, insofar as they are premised on exclusion from a universal ideal, require that ideal as well as their exclusion from it, for their own perpetuity as identities.*[38]

That is, liberal identity politics aimed (and continue to aim) at inclusion within a system

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[35] See Linda Nicholson and Steven Seidman (eds), *Social Postmodernism: Beyond Identity Politics* (Cambridge University Press, Cambridge 1995); Moya Lloyd, *Beyond Identity Politics: Feminism, Power and Politics* (Sage, London 2005); John Anner (ed), *Beyond Identity Politics: Emerging Social Justice Movements in Communities of Color* (South End Press, Cambridge MA 1996).

[36] See Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, Los Angeles 1990); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York 1990); bell hooks, *Ain't I a Woman? Black Women and Feminism* (South End Press, Boston 1991).

[37] Sedgwick, ibid; Lloyd (n35).

[38] Wendy Brown, 'Wounded Attachments' (1993) 21(3) Political Theory 390, 398.

rather than at systemic change. Indeed the invisibility and inarticulateness of class as a category taken up by identity politics is evidence of its reliance on the preservation of capitalism.[39]

The critique of identity politics known as intersectionality arose out of analyses which showed law's inability and / or refusal to embrace interlocking forms of oppression and discrimination. Kimberle Crenshaw powerfully articulated this need for intersectional analyses in relation to the failure of anti-discrimination law, antiracist politics and feminist theory to adequately address the problem of violence against black women.[40] Prior to Crenshaw's articulation of intersectionality in the academy, the Combahee River Collective, a black feminist lesbian grassroots organisation from Boston in the United States, famously released a statement in 1979 that they were 'committed to struggling against racial, sexual, heterosexual and class oppression' and that they saw as their particular task 'the development of an integrated analysis and practice based upon the fact that the major systems of oppressions are interlocking. The synthesis of these oppressions creates the conditions of our lives'.[41] Since the late 1970 there had also been a growing body of feminist work seeking to explore the ways that capitalism, patriarchy, racism and heterosexuality combined to form interlocking structures of oppression.[42]

Of the various theoretical moves away from what has subsequently been termed 'single

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[39] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, Princeton 1995) 61.

[40] Kimberle Crenshaw, 'Demarginalizing the intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *The University of Chicago Legal Forum* 139; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) Stanford Law Review 1241.

[41] Combahee River Collective, 'A Black Feminist Statement', in Gloria T. Hull, Patricia Bell Scott and Barbara Smith (eds), *All the Women are White, All the Blacks are Men, But Some of Us are Brave* (The Feminist Press, New York 1982) 13.

[42] see for example Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press, Berkley 1984); Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Free Association Books, London 1992).

axis identity politics'[43] to more complex frameworks of social meaning and oppression, intersectionality has been taken up to some extent at a policy level. For example in the British context, a single Equality and Human Rights Commission was established in 2007 to replace the separate commissions for race, gender and disability rights that had existed previously.[44] At the same time, intersectionality has also come under criticism for having been depoliticised and used as an umbrella term in a way that is disconnected from the grassroots struggles and debates that led to intersectional analyses.[45] Writing specifically about the way intersectionality has been taken up in law, a number of scholars have shown the inadequacy of intersectional legal frameworks to explain the complex multiplicity of inequality, and the ways in which identities are produced.[46] As it retains a focus on identity, intersectionality tends not to deal with the wider social and material contexts in and through which inequality is produced and sustained. While acknowledging the important work of intersectional analyses, many scholars call for a theoretical framework that is multidimensional and that better accounts for the fluidity of identity.[47]

Returning to the question of law's role in the production of spaces where some subjects belong and others do not, there are several points of interest here. One is that intersectionality is itself a spatial term – an intersection is a point at which two or more lines or surfaces meet. If space is a reference system by means of which we locate ourselves in the world, then the shift from single axis identity politics to intersectionality is a spatialisation of analysis – whereas identity politics might be understood as focusing on categories as if they were fixed, static and singular locations, intersectional analyses

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[43] Crenshaw, 'Demarginalizing the intersection of Race and Sex' (n40) 139.
[44] 'Equality and Human Rights Commission: About Us' *Equality and Human Rights Commission* (London 2011) <http://www.equalityhumanrights.com/about-us/vision-and-mission/> accessed 22 June 2011.
[45] Umut Erel, Jin Haritaworn, Encarnacion Gutierrez Rodriguez and Christian Klesse, 'On the Depoliticisation of Intersectionality Talk: Conceptualising Multiple Oppressions in Critical Sexuality Studies' in Adi Kuntsman and Esperanza Miyake (eds), *Out of Place: Interrogating Silences in Queerness/Raciality* (Raw Nerve Books, York 2008) 266.
[46] Emily Grabham with Didi Herman, Davina Cooper and Jane Krishnadas, 'Introduction' in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds), *Intersectionality and Beyond: Law, power and the politics of location* (Routledge, Abingdon 2009).
[47] ibid. See in particular the articles by Joanne Conaghan at 21-48 and Emily Grabham at 183-202.

understand those categories as trajectories that can intersect at different points. Those trajectories form the conceptual reference systems by means of which intersectionality locates subjects in the world. As mentioned above, a number of scholars writing in a recent collection on intersectionality[48] have called for an analysis that is more *multidimensional* and that also accounts for fluid identities. Erel et al similarly call for a focus on the asymmetrical relationships of power in which the different lines of power that produce identity collide or diverge.[49] These are calls for an analysis that allows for multiplicity beyond the intersection and the linear identity categories it suggests; for a further spatialisation of analysis.

One way of moving beyond intersectionality and towards a closer interrogation of the complex and multiplicitous structures that produce and sustain inequality is to use an explicitly spatial analysis – to look beyond the intersections and toward the broader physical, social and conceptual reference systems in which those intersections are located. In addressing the themes of law and space, legal geography seems to offer or at least move towards such an analysis. That is, by focusing on the spatiality of law itself, rather than on how law affects particular identity categories or intersections of identity categories, legal geography elucidates the uneven ways that law operates in the world. This unevenness will include inequalities that might be categorised along the lines of identity, but it allows for other factors to come into view. Using legal geography to think about how spaces of belonging are produced is thus not to disavow the urgency of the political problems that identity politics seeks to address – problems of inequality and oppression along the lines of gender, race, disability, sexuality and other identity categories. Turning away from the subject and its single axis or intersectional identity and focusing instead on space is not to suggest that these problems have been solved, but rather that reframing and rethinking them might aid in developing political strategies that can better address the social and material contexts in which they arise.

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[48] ibid.
[49] Erel et al (n45) 275.

As will be discussed below, although legal geography shifts the focus away from the subject and from identity, it retains an understanding of the subject as essentially separable from the spaces that surround her. Furthermore, space is sometimes understood simply as a particular geographical area that is physical and social but not conceptual – thus continuing the legal tendency of treating space as the backdrop to the social rather than as part of it. Such literature adds space to the list of factors to be taken into consideration but does not allow the potentially radical multiplicity of space to challenge the very questions being asked. Legal geography thus falls short of providing an understanding of the production of spaces of belonging that can explore questions about how particular spaces invoke regimes of propriety that mean some subjects fit smoothly and others are repelled – questions of what connects here with there and then with now, of how appropriation of subversive properties like queer sexuality happens, or of how conceptual and material spaces of belonging might be meaningfully shifted. Indeed as will be discussed in the final section of this chapter, some scholars have identified an impasse in legal geography, arguing that it has never successfully passed the stage of bridging 'law' and 'geography' and that a deeper theoretical approach is needed for it to continue being useful as a field of study.[50] While these particular scholars offer different solutions to the impasse (one turning to Deleuze and the other to an all-encompassing neologism), I will argue that further interrogating what 'space' means, considering the political implications of how space is commonly understood and enacted in law and politics, and focusing on the conceptual boundary between space and the subject, might provide a more useful way of moving beyond the impasse. So although legal geography cannot fully answer the question of how law produces spaces where some subjects belong and others do not, it provides a good place to start.

[50] David Delaney, *The Spatial, The Legal and The Pragmatics of World-Making: Nomospheric Investigations* (Routledge, Abingdon 2010); Andreas Philippopoulous-Mihalopoulous, 'Spatial justice: law and the geography of withdrawal' (2010) 6(3) International Journal of Law in Context 201.

Law v Geography? Uncovering legal space

Context matters: Space and the undermining of law's universality

While critical and socio-legal studies has drawn on identity politics and intersectional analyses to powerfully show the many varied ways in which law affects particular subjects differently from others, these fields have paid relatively little attention to the relationship between law and space. This lack of attention is unsurprising considering that law itself (at least in the liberal democratic context in which most Western states and increasingly, much of the world operates)[51] focuses on the actions of subjects – the obligations they have to each other, the harm they cause each other, their relationship to the state, their rights of access and movement – while paying relatively little attention to the physical and social spaces in which those actions occur. This lack of attention to space is not due to legal practice somehow operating outside of it, in its own a-spatial vacuum. As the literature to be explored in this section shows, law tends to operate with an implicit understanding that space is something that is pre-existing, inert and singular in meaning. Legal judgments, executive powers, legislation and legal commentaries tend to treat space as something to be planned over, built on, cultivated, bought, sold and / or protected; a blank canvas or platform to be smoothly acted upon. Space is implicitly understood as separate from the subjects who occupy and move through it; separate from the social, the conceptual and the political, and confined instead to the physical and the mundane. Legal geography makes explicit this otherwise implicit conception of space that is essential to legal discourse and practice. This revelation of the spatial in and of the legal is done through the exploration of conceptual links between law and space, as well as through empirical case studies that explore interactions between law and social and physical space at particular sites. This work exposes and challenges the idea that space is the blank arena in which law takes place or upon which it acts. In so doing, it also challenges the corresponding idea that

[51] See John Baylis and Steve Smith, *The Globalization of World Politics* (2nd edn Oxford University Press, Oxford 2007).

law operates evenly across that blank space.

Law is underpinned by notions of universality and neutrality – notions such as the 'reasonable person' (who has no class, gender, race or sexuality) and the standard of objectivity deployed in both civil and criminal law. These are principles that are used to justify legal authority – if law is universal and neutral then it can cleanly deliver justice divorced from any moral or political agenda.[52] Indeed, law in liberal democracies derives its legitimacy from these principles. As the monopoly holder of legitimate violence in society, law distinguishes itself from arbitrary violence and lawlessness through its claims to universality and rationality.[53] Law and the violence it enacts are understood as legitimate because judges, police and lawmakers apply, enforce and enact laws according to the supposedly universal, rational, pre-determined rules and procedures of liberal democratic governance, and not according to their own arbitrary views of justice. Critical race, feminist, queer and other scholarship drawing on identity politics and intersectionality have made powerful claims undermining law's legitimacy on the basis that, despite its claims to operate universally, law has very uneven effects on different social groups.[54] Of course, law only applies universally within designated jurisdictions, and some laws, such as those relating to marriage and to indigenous people, explicitly apply to particular subjects and not others. But these spatial and status-based limitations on law are still underpinned by the idea that law as a whole operates evenly for all subjects – jurisdiction preserves self-contained legal systems,[55] and status-based laws are still justified by arguments based on universality.[56] Space is

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[52] Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd edn The Federation Press, Sydney 2002) 56.

[53] see for example Robert Axtmann, *Liberal Democracy into the Twenty-first Century: Globalization, Integration and the Nation-State* (Manchester University Press, Manchester 1996) 17.

[54] For an overview of these critiques see Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Lawbook Co, Pyrmont 2002).

[55] See for example Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart, Oxford 2003).

[56] For example the Australian debate leading to the passage of the *Marriage Legislation Amendment Act 2004* (Cth) which had the explicit purpose of refusing the legitimacy of same-sex marriages contracted outside Australia and preventing same-sex couples from adopting children, was justified by the argument that marriage between a man and a woman is a 'universal human institution: Jennifer Norberry, 'Bills

relevant to jurisdiction only because it provides a way of determining where the boundaries of law start and end – those boundaries are defined by law, which is understood as operating evenly across the space within.[57] According to this classic understanding, law as a whole is seen as a rational and ordered system, and space as the inert arena in which law is evenly applied.[58]

Because of its reliance on these ideological underpinnings of universality and neutrality, Nick Blomley has described law as anti-geographical and hostile to space.[59] In his early piece making the case for 'a critical geography of law', Blomley and Joel Bakan argue that legal mentality is 'curiously acontextual, such that legal relations and obligations are frequently thought of by courts and other legal agencies as existing in a purely conceptual space, with little recognition of their spatial heterogeneity or the local material contexts within which law is understood and contested'.[60] Law is lacking in context because it restricts itself to its own forms of knowledge, systematically excluding other forms. As Blomley and Bakan explain, law is a discipline and a profession with exclusive membership and onerous conditions for admission.[61] Indeed law operates as if it were an autopoietic system, having its own language, philosophy and methods of knowing and thinking. Any 'outside' form of knowledge that is allowed into the realms of legal knowledge is filtered through legal procedures and rules of evidence, making it legible to law on its own terms. Law is also acontextual in the sense that legal discourse and procedure focus on subjects as if they live lives free from context. For example considerations of the conditions under which a defendant in a criminal trial lives are sidelined from the legal question of her innocence or guilt (they

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Digest No. 155 2003-2004: Marriage Legislation Amendment Bill 2004 (Cth)' Information and Research Services: Parliamentary Library (2004). While native title rights, available only to indigenous people, are justified on the basis of a universal non-indigenous system of land title: see Irene Watson, 'Buried Alive' (2002) 13 Law and Critique 253.

[57] Capps et al (n55).

[58] Nick Blomley, *Law, Space and the Geographies of Power* (The Guildford Press, London 1994) 9.

[59] ibid 5.

[60] Nicholas K. Blomley and Joel C. Bakan, 'Spacing Out: Towards a Critical Geography of Law' (1992) 30(3) Osgoode Hall Law Journal 661.

[61] ibid 663-666.

may only be taken into consideration later, at sentencing). As feminist scholarship has shown, law tends to treat subjects as if the social and physical contexts of their lives were irrelevant.[62]

In contrast, geography is concerned with context, with different kinds of spaces and how they are produced. Geography is concerned with knowing the world, with 'how differentiation and sameness play out on the ground', with 'spatialities, places, landscapes, materiality, and the thick and sensuous domain of the visible'.[63] In opposition to law's commitment to acontextuality and focus on the subject, geography focuses on the spatial on the basis that it is embedded with meaning. And unlike the rigidity and closed-ness of legal knowledge, geography is a discipline that prides itself on being a 'science of synthesis' which draws on a wide range of different schools of knowledge in order to understand the meanings of space.[64] Indeed there is a substantial body of legal geography literature that is devoted to asserting how different the fields of law and geography are, and pondering the potential significance of making them connect.[65] Blomley asserts that geographic scholarship of law is 'a profoundly subversive act',[66] because by placing and contextualising law, legal geography directly challenges law's claim to universality and acontextuality. In this respect legal geography literature is informed by and has much in common with critical legal theory, as both are concerned with showing how law is socially and politically constructed, and how law operates in practice.[67] Like critical legal theories, legal geography is concerned with

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[62] An example of this is the difficulties developing the 'battered woman's defence', which would only be taken into account when a woman who killed her partner after years of abuse could show she was mentally unwell by medical standards. For a good discussion see Graycar and Morgan (n52).

[63] David Delaney, 'Beyond the Word: Law as a Thing of this World' in Jane Holder and Carolyn Harrison (eds), *Law and Geography* (Oxford University Press, Oxford 2003).

[64] Arild Holt-Jensen, *Geography: Its History and Concepts* (The Pitman Press, London 1982).

[65] See Blomley, *Law, Space and the Geographies of Power* (n58); Nicholas Blomley, 'From "What?" to "So What?": Law and Geography in Retrospect' 17; Michael Freeman, 'Law and Geography: Only Connect?' 369; and Jane Holder and Carolyn Harrison, 'Connecting Law and Geography' 3, each in Jane Holder and Carolyn Harrison (eds), *Law and Geography* (Oxford University Press, Oxford 2003).

[66] Bomley *Law, Space and the Geographies of Power* (n58) 26.

[67] ibid; Alexandre (Sandy) Kedar, 'On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 401.

undermining law's claims to universality and neutrality, and with putting law in context. Legal geography does this by demonstrating, both conceptually and practically, that space is not the neutral backdrop to law but rather a key means through which it operates.

Case studies: Empirically exposing the fallacy of blank space

Much of the work in legal geography uses case studies to demonstrate the effects that the implicit legal conception of space as static and apolitical have on the social and physical space through which law actually operates. Australia's colonial history provides a good example of law's imposition of a particular conceptual space onto a very different social and physical space with devastating effects. The entire continent was declared terra nullius –'empty' land – by the British colonisers, meaning that the indigenous people living there were conceptualised as part of the landscape to be conquered.[68] The very idea of colonisation necessarily entails a conceptualisation of space as sitting there statically, waiting to be 'properly' used. Annelise Riles has explored how international law entails a particular conceptualisation of space in which scale and perspective 'relegate culture to the margins'[69] – one of the aims of international law is to instigate a 'trajectory toward global peace', meaning that its processes are invested in showing that local disputes are in fact matters of global importance to which global standards of justice can be applied.[70] Using a case study of colonial land disputes in Fiji, Riles shows that this global vision aspired to through international law is actually particular; such a vision is not simply a mode of viewing events and places that already exist, but is itself constitutive of those events and places.[71]

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[68] Watson, 'Buried Alive' (n56).
[69] Annelise Riles, 'The View from the International Place: Perspective and Scale in the Architecture of the Colonial International Law' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 276.
[70] ibid 277.
[71] ibid.

Using quite a different case study of the legal regulation of hedgerows, a traditional feature of the English landscape, Jane Holder demonstrates the fallacy of the legal conception of space as pre-existing law and, in this case, awaiting law's protection.[72] Holder traces how hedgerows in England were originally used to mark property boundaries but have also come to take on cultural importance through their ecological associations with the particular local flora and fauna that were found in them, and through the predominantly conservative use of the hedgerow as a nostalgic and utopian symbol of old England.[73] Holder outlines law's failing attempts to preserve English hedgerows, which involves a regulation scheme requiring anyone who wants to remove a hedgerow to first obtain a licence, which will not be granted if the hedgerow is 'important'. Operating as a regulation of deliberate removal only, the regulation fails to prevent the die-back that kills hedgerows not properly maintained.[74] This form of legal regulation assumes that the hedgerows are a pre-existing and inert reality that will continue so long as they are protected from 'unnatural' intervention. Yet in practice hedgerows, like the particular local and national identities that they have come to be associated with, need to be actively maintained in order to survive. Neither the conceptual space of old England, the social space of nationalism that runs alongside it nor the physical space of the hedgerows exist prior to law – rather, they are produced by it.

While the legal geography literature reviewed here is quite disparate in terms of sites of exploration, what the pieces have in common is their interest in revealing and undermining a particular conception of space implicitly relied upon in legal theory and practice. As Richard T. Ford argues, 'space is implicitly understood to be the inert

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[72] Jane Holder, 'Hedgerows, Laws and Cultural Landscape' in Jane Holder and Donald McGillivray (eds), *Locality and Identity: Environmental Issues in Law and Society* (Ashgate, Aldershot 1999) 133.
[73] ibid 136-137.
[74] ibid 140.

context in which, or the deadened material over which, legal disputes take place'.[75] This conception of space fits with a theory of law as a universal, neutral provider of justice. However as the case studies of colonialism, international law and English hedgerows demonstrate, it does not fit with the social and physical spaces through which law actually operates.

'Violence executed through aesthetic means': The politics of law's space

Tunnels, trees and eruvs: The social meaning of fixtures

Looking beyond the universal claims of classic liberal legal theory and focusing on how law operates in the world, legal geography helps to show how law's conception of space privileges particular structures of the social. Blomley and Bakan argue that law's closed-ness or acontextuality constitutes a rejection of the spatiality of social life, so that the boundaries between public and private spaces, the inequalities of property distribution, the personal mobility of different legal subjects and the autonomy of different levels of government are considered to be pre-existing, fixed and apolitical spatial realities.[76] The legal conception of space as blank and inert fits with the mentality of imperialist explorers who would 'command views' over the 'natural' landscape and assess its suitability for the imposition of a particular socio-legal regime; and with a proprietal mentality of 'undeveloped land' where the relationship of society to nature is akin to the relationship of consumer to consumable.[77] This conception of space also means that structures embedded in social and physical space – such as racialised 'high crime' areas in the city, gendered violence inside the home, regional differences in economic prosperity – come to be understood more broadly as naturalised and inevitable fixtures

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[75] Richard T. Ford, 'The Boundaries of Race: Political Geography in Legal Analysis' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 82.

[76] Blomley and Bakan (n60) 669.

[77] Simon Ryan, 'Picturesque Visions' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 143.

of the landscape. Yet such features are in reality produced and maintained through a multitude of processes including law. Legal geographer Ronen Shamir describes the ordering of space as 'an act of violence executed through aesthetic means'.[78]

Several legal geography case studies draw on political discourse around the construction, destruction or ownership of particular fixtures in land to demonstrate how law's conception of space as pre-existing, inert and politically neutral itself constitutes a political standpoint that has material effects. Eve Darian-Smith's examination of the debates around the construction of the Channel Tunnel between southeast England and northern France shows how particular British attitudes are intimately tied to British spatiality, and how law is used to reproduce national space and identity.[79] Darian-Smith examines the debates leading up to the construction of the tunnel, examining how the British public and government were particularly concerned that the tunnel might open the possibility of rabid animals entering rabies-free Britain. Security fences, surveillance facilities and barriers were constructed specifically to keep out any potential rabid animal that might attempt to cross the 50-kilometre undersea high-speed railway tunnel.[80] Darian-Smith traces how rabies, for English people, represents a form of invasion that added to and reinforced their fears of the consequences of any kind of incursion into British space. Rabies is associated with ex-colonial countries, and with a pre-modern 'black death' that transforms its victim into 'raving, frothing lunacy' – a far cry from what Darian-Smith describes as 'the nation's unique superiority, both in military and cultural respects'; the absence of the disease 'upholds the virtues of a rational and law abiding citizenry as well as the country's ability to legally control its

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[78] Ronen Shamir, 'Suspended in Space: Bedouins under the Law of Israel' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 141.

[79] Eve Darian-Smith, 'Rabies Rides the Fast Train: Transnational Interactions in Post-colonial Times' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 187.

[80] ibid 189; Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe* (University of California Press, London 1999).

ports and borders'.[81] The legal issues surrounding the building of the tunnel mainly involved planning laws that are ostensibly concerned with space only in an unemotional, physical sense. However in practice this conception of British space as a pre-existing, inert physical entity fed racist national ideologies about the superiority of British culture – namely the idea that there is an authentically British space, into which potentially contagious animals and diseases from the ex-colonies did not belong.

Similar political and social ideas about British national identity are uncovered in Davina Cooper's examination of the controversy surrounding the proposed construction of a Jewish eruv in a neighbourhood in London. A community eruv is a symbolic boundary that allows Orthodox Jews to carry objects outside their own homes, which would otherwise be forbidden on the Sabbath.[82] The proposed eruv in London would have consisted of 80 poles connected by wire which, around an 11-mile perimeter in a borough with hundreds of similar poles already, would have been physically unnoticeable for most residents. Yet the proposal for the eruv was met with great hostility from the local community, with opponents seeing the eruv as an attack on the Anglo-Christian history and heritage of British identity. While Anglo-Christian spatial structures such as parish boundaries and crucifix statues are common and uncontroversial, the proposed eruv was constructed as an excessive religious spatial intrusion onto secular soil.[83] Cooper's analysis shows that although the hostility to the planned eruv was expressed in terms of a pre-existing, neutral space being taken over by a religious minority, the space in question was not neutral to begin with – it was a space where Anglo-Christian values were understood as always already belonging.

Moving to a site of more obvious conflict, a number of legal geographers have done work showing the political and social meanings embedded in laws that regulate physical

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[81] ibid 190.
[82] Davina Cooper, 'Out of Place: Symbolic Domains, Religious Rights and the Cultural Contract' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 42.
[83] ibid.

space in Israel / Palestine.[84] Alexandre Kedar traces the making of the Israeli land regime through the *Absentee Property Act* 1950 and associated Regulations and the *Land Acquisition (Validation of Acts and Compensation) Act* 1953.[85] This account shows how property law, though framed in formal, technical and racially and religiously neutral legal terms, was used to (re)produce and reinforce a particular social stratification and power structure in which Palestinians are marginalised and Jewish Israelis privileged.[86] The legislation and the legal decisions made pursuant to it meant that Palestinian homeowners who fled during the 1948 war became legally dispossessed during their absence. The landscape left by the decisions was thus one which was legally sanctioned and physically occupied by Israelis but which remains marked by Palestinian claims to the land on both legal and cultural bases. While the conflict is ongoing, with both sides strongly identifying with the land and making legal claims to it, it is the Israeli legal regime that has taken effect, and the space has been shaped accordingly. As Kedar argues, the application of these laws is an example of how 'legal decisions shape, demarcate, and mould human geographies and social space'.[87] So although these property laws refer to space in neutral terms, creating criteria for ownership that relates only to physical presence at the site of the property in question rather than the race or religion of the potential owner, the laws shape social space such that Jewish Israelis belonged there and Palestinians did not.

In her study of the use of illegality in East Jerusalem, Irus Braverman looks at how the practice of house demolitions, along with more mundane spatial practices such as mapping, filing and arbitrariness, are utilised to dominate the Palestinian population of East Jerusalem.[88] She argues that both mundane and spectacular spatial mechanisms of illegality operate to produce a particular space – one in which Palestinians feel

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[84] Irus Braverman, 'Powers of Illegality: House Demolitions and Resistance in East Jerusalem' (2007) 32 Law & Social Inquiry 333; Kedar (n67); Shamir (n78); Irus Braverman, *Planted Flags: Trees, Land, and Law in Israel / Palestine* (Cambridge University Press, Cambridge 2009).
[85] Kedar (n67).
[86] ibid 424-346.
[87] ibid 407.
[88] Braverman, 'Powers of Illegality: House Demolitions and Resistance in East Jerusalem' (n84).

threatened and not at home anywhere.[89] Yet the threat of being displaced from their homes only reinforces the Palestinian attachment to the land.[90] Just as Palestinian discourses continue to understand the entire Israeli occupation of East Jerusalem as illegal under international law and Zionist discourses continue to understand Palestinian houses as illegal under planning laws, Palestinians continue to build houses without planning permission and Israeli forces continue to demolish them. Both sides of the conflict thus understand the other as illegally destroying the pre-existing landscape. Law acts as both a justification and a technique for Palestinians and Israelis to physically prove their connection to the land. Both sides' legal understandings of and emotional attachments to the space are thus constantly being reinforced as the space is marked as one of competing understandings and ongoing conflict. Braverman explores the theme of seemingly mundane spatial practices, law and conflict further in her book *Planted Flags: Trees, Land, and Law in Israel / Palestine*,[91] in which she examines the construction of power dynamics through the planting of olive and pine trees, the process of which is regulated by a range of legal strategies. Through a detailed ethnographic study and critical analysis, Braverman shows how law's wide and overtly detailed spatial regime – ostensibly based on the physical considerations of planting particular species of tree – blurs the boundaries between law and war and obscures law's violent aspects.[92]

Producing spaces by regulating activities

The legal geography discussed so far has explored the social and political meaning attached to physical space and the ways law shapes social space by regulating physical space. This work has shown how law operates through rather than upon space, and how the social and physical results of law are uneven and can be deeply political.

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[89] ibid 346.
[90] ibid 344.
[91] Braverman, *Planted Flags* (n84).
[92] ibid 15.

Another way of exploring the connection between law and space is to examine laws that regulate particular activities which, although not obviously pertaining to space, are still based on a particular conception of space and still have spatial effects. Davina Cooper has shown how laws regulating fox-hunting in rural England, for example, are reliant upon the idea that fox-hunting is 'embedded in the very conception of country(side) and soil'.[93] This is a conception of British national space as the pre-existing realm of white Anglo-Protestant values. The imposition of this conceptual space through fox-hunting laws produces a social space in which only one particular kind of national identity (the white Anglo-Protestant kind) belongs. Ronen Shamir has similarly shown how laws transferring the nomadic Bedouin population of the Israeli desert-like area of the Negev to planned townships are reliant on and reproductive of a social space in which only a particular 'civilised' identity belongs.[94] Shamir argues that the transfer of the Bedouin and the subsequent registration of the Negev, where they formerly lived, as state property are enabled by a legal and cultural vision in which the Negev is conceived as an empty space yet to be cultivated and the Bedouin as a defeated, nomadic culture with no 'real' or productive connection to the land. The result is a conceptual, social and physical space in which nomadic cultures do not belong.

A number of scholars have examined how laws regulating or prohibiting particular activities in public space affect homeless people, effectively annihilating the spaces where they are forced to live.[95] Laws that prohibit people from sleeping on benches, urinating in parks or simply sitting for too long on a pathway are not framed as explicitly targeting any particular social group, but are prima facie of universal application to all who move through the public spaces designated. But a law against sleeping or urinating

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[93] Davina Cooper, 'Private Country? Hunting, Land and Judicial Interventions' in Jane Holder and David McGillivray (eds), *Locality and Identity: Environmental Issues in Law and Society* (Ashgate, Aldershot 1999) 111.

[94] Shamir (n78).

[95] Jeremy Waldron, 'Homelessness and the Issue of Freedom' in Robert E. Goodin and Philip Pettit (eds), *Contemporary Political Philosophy: An Anthology* (Blackwell, Oxford 1997); Don Mitchell, 'The Annihilation of Space by Law: The Roots and Implications of Anti-homeless Laws in the United States' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 6.

in public is clearly going to have a very different impact on a homeless person than on anyone with private property rights. Anti-homeless laws are an example of laws framed as having universal application, but which in practice have very uneven effects, shaping public spaces such that homeless people do not belong anywhere. Like laws allowing fox-hunting in rural England and moving the Bedouin away from the Negev, anti-homeless laws are based on a particular conception of a pre-existing space. In the English example, white Anglo-Protestant values are understood as having always already been embedded in the countryside; in the Israeli example the Negev is understood as having always already been essentially empty and in regards to the anti-homeless laws public space is understood as have always already been free of 'private' behaviours. Yet by prohibiting or protecting these activities / ways of living, law is in fact producing spaces where some subjects belong and others do not.

Conceptual grids, violent geographies

Theorising more broadly on the basis of his study of the legal treatment of the Bedouin, Shamir argues that law works by imposing a conceptual grid on space, expecting space to be divided, parcelled, registered and bounded.[96] Through the lens of this legal grid, nomadism is seen as associated with chaos and rootlessness – nomadic people become part of the landscape to be tamed rather than legal subjects who have a valid relationship with the land. Once the Bedouin are understood in this way, the result of legal disputes between Bedouins and the state seem objectively inevitable and morally justified – the Israeli government must properly utilise the state and the Bedouin must be civilised.[97] Thus although in Western modes of seeing, the grid is an objective and transportable network of lines on a map that make the physical space understandable and manageable, in practice the grid is a social, cultural and political technique that tells particular stories about people and that can function as a cloaked tool of violence. As mentioned above, Shamir terms this ordering of space 'an act of violence executed

[96] Shamir (n78) 136.
[97] ibid 138.

through aesthetic means'.[98]

Shamir's argument that law operates through a conceptual grid that enacts violence is similar to Nick Blomley's argument that law imposes a 'geography of violence'. Blomley implicates the legal concepts of the grid, the frontier and the survey in the production of a space in which law's violence is encoded in material landscapes, largely through property rights.[99] Blomley argues that in Western modes of seeing, the world is presented as set before and logically prior to a disembodied viewer, such that space is desocialised and depoliticised. Yet that same Western mode of seeing has private property at its core, and any form of property, to the extent that it entails enforceable claims, necessitates violence as a final resort.[100] So, Blomley argues, although property tends to be imagined in legal discourse as the relation between an owner and an inert space, in practice it is a politicised and sometimes violent set of relations between owner and others.[101] Although, as will be discussed in chapter four, Blomley is here understating the level to which legal discourse understands property as a relation not just with inert space but with the world at large, he nonetheless makes the valid point that the legal relations between owner and others produce particular spatial arrangements in which some subjects belong and others can be violently removed.

Both Shamir and Blomley's theories of the imposition of violent legal grids resonate with James C. Scott's argument in *Seeing Like a State*[102] that the grand schemes and centrally managed plans of states fail to achieve their stated goals of improving human life in designated areas because they do not take into account local, practical knowledge. In other words, states impose laws based on a conception of space that does not match the complex, lived reality of the social and physical space where it operates.

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[98] ibid 141.
[99] Nicholas Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid' (2003) 93(1) Annals of the Association of American Geographers 121.
[100] ibid 133.
[101] ibid 132.
[102] James C. Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, New Haven 1999).

All of this work shows that law operates through rather than simply upon space. Through its regulation of the landscape and its fixtures and through the regulation of particular activities / ways of living, law produces social and physical spaces in which some subjects belong and others do not, sometimes to the extent that they are liable to violent removal. The intimate connection between law and space is why law's shifting or preservation of the physical landscape can have violent effects. Instead of relying on law enforcement agents (whether they be police, prison guards, bailiffs or other agents of the state) to force particular subjects into place, the landscape itself operates as a permanent structure of law's coercive inclusion and exclusion. If space has a social and political importance to the extent that it can be understood as potentially enacting violence, then it is necessary to rethink the relation between space and the subject. The case studies of the production of space through the regulation of activities looked at above suggest that laws pertaining to *where* subjects can be, also affect *who* they can be. This is a far more complicated relation between space, identity and the subject than that suggested by a conception of space as the static platform on top of which subjects act. The next section explores this relation further.

The space you take with you: Spatialising mobile identities

Who belongs where? Legal versus practical space-subject connections

The work discussed above shows that particular spaces can serve as permanent means of enforcing laws of inclusion and exclusion by dictating who can be where. It also shows that such spaces do not simply police the inclusion and exclusion of subjects with pre-existing identities that move through or towards them, but rather that they are themselves productive of particular identities. So those who are homeless are made 'criminals' when they attempt to live in public space; the Bedouin are made 'uncivilised nomads' when they attempt to continue living in the Negev as they have done for

generations; and those in the English countryside are made 'good British citizens' when they hunt foxes. But while these examples show that law is capable of producing spaces in which some subjects belong and others do not, they do not explain how the relations between law, space and identity operate. The very fact that identity is affected by space shows, consistent with some of the critiques of identity politics discussed above, that identity is unfixed. Similarly, the case studies examined above show various adjustments being made to physical and social space, and the ongoing critique I have been making of law's conceptual space suggests that it is unfixed. If both space and identity are unfixed, how are relations of belonging *between* space and the subject produced, maintained and shifted?

One explicit means through which law produces relations of belonging between subjects and spaces is through citizenship. Citizenship grants subjects who comply with particular legal criteria an array of exclusive rights denied to non-citizens. These rights can be utilised mainly within the physical space of the relevant nation-state (that is, their territory) but some also operate outside that space.[103] Examining the legal status of migrant workers in rich countries, Orly Lobel argues that existing legal regimes of citizenship and migration do not accurately reflect the connections between subjects and the spaces they occupy.[104] Rich countries' economies are dependent on migrant workers from poor countries, but the only legal connection many of them have with the country they are working in is their status as illegal migrants.[105] Even migrant workers who have permission to enter the country tend not to be protected by labour laws to the same extent as local workers, do not have access to welfare protection, and have no rights of family reunion.[106] So they are denied rights because legally they do not belong,

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[103] So for example citizens are allowed to work and access social security within their nation-state but their citizenship – depending on what it is – might also allow them to travel to other nation-states and access some rights in other places.

[104] Orly Lobel, 'Family Geographies: Global Care Chains, Transnational Parenthood, and New Legal Challenges in an Era of Labour Globalization' in Jane Holder and Carolyn Harrison (eds), *Law and Geography* (Oxford University Press, Oxford 2003) 381.

[105] ibid 386.

[106] ibid.

even though in economic terms they are essential to the continued functioning of the nation-state as a rich country. Similarly, Michael Freeman has discussed the disparity between practical and legal belonging in relation to the law of domicile, which determines which law applies in a conflict of international private laws.[107] The law of domicile works on the assumption that all people have a permanent home somewhere. A person's domicile of origin is their father's domicile (unless they are illegitimate, in which case it is their mother's),[108] and while it is possible to abandon your domicile of origin and replace it with a domicile of choice, this is very difficult.[109] For example Freeman discusses English refugee cases involving subjects fleeing Nazi persecution in which the courts stated that they could not infer that refugees intended to move permanently to England because of the presumption against a change of domicile.[110] The law of domicile thus creates relations of belonging based on patriarchy and permanence rather than on the actual connections that people have with the places they live.[111]

In both studies above, the subjects' practical connection to place is jeopardised by law's imposition of its own conception of who belongs where. The laws of citizenship and domicile dictate the relation of belonging between subjects and their place of residence, but law also regulates who can be where in regards to many different kinds of places. Blomley's discussion of the 1984-85 coal dispute in England shows the way the police in Nottingham used an array of miscellaneous statutory powers to prevent mobile picketers from reaching particular sites while strike-breakers were allowed through.[112] Blomley argues that the mobility of picketers was regulated differently from the mobility of strike-breakers and police blockades because the former threatened the disciplinary regime of the state, whereas the latter conformed to the stable and

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[107] Freeman (n65).
[108] ibid 372.
[109] ibid 374.
[110] ibid.
[111] ibid 381.
[112] Blomley, *Law, Space and the Geographies of Power* (n58) 155-175.

structured logic of the labour contract.[113] At any rate, although both the picketers and the strike-breakers felt an urgent connection to the Nottingham site, only the strike-breakers were allowed to enter and this had a strong effect on the outcome of the dispute. By prescribing these space-subject connections, law not only imposes a conceptual grid of who belongs where but also regulates who can physically be where, how people can live and how places take shape.

Going nowhere fast? The spaces you take with you

While mobility is often conceptually associated with resistance and transgression, the assumption being that the crossing of boundaries threatens normality,[114] Blomley's discussion of the miners' strike shows that mobility can also be associated with state power and oppression. Any account of mobilities, geographer Tim Cresswell argues, must recognise their diversity and the material conditions that produce and are produced by them.[115] While the ability to move between physical spaces, for example, tends to be understood as a right or privilege that brings with it a level of freedom or power for the mobile subject, it can also have negative consequences for that subject. Carol Sanger's examination of women and cars in the United States in the early 1900s, gives another example of the complexity of subject mobility.[116] Sanger traces the optimistic promise associated with the introduction of the motor car – women, whose movement had until then been restricted for reasons of 'their own safety', could now move about in public space but still be insulated from direct contact with those outside the car.[117] Yet, although this increased mobility was realised in this physical sense for women with cars because they could now go further more easily and safely, the car also increased women's domestic duties because they became responsible for the on-time

[113] ibid 177.
[114] Tim Cresswell, 'The Production of Mobilities' (2001) 43(Spring) New Formations 11.
[115] ibid 24.
[116] Carol Sanger, 'Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell, Oxford 2001) 31.
[117] ibid 34.

delivery of children, husbands and goods.[118] The layout of modern cities and the gendered division of labour that it supports – with women being responsible for domestic life in the suburbs and men performing paid work in the city – is dependent on the existence of the car.[119] The car also became a site where rape and other violence against women was an increased danger.[120] So while the car offered women a newfound mobility that could take them greater distances through physical space in a shorter period of time and with new safety and social acceptance, it also worsened both the gendered division of labour and the gendered vulnerability to violence in an enclosed space with male acquaintances. Women could move further but their gendered space went with them. The gendered, mobile space of the car in turn affected the space of the city and various spaces of sexual violence.

Mobility then, is neither essentially transgressive nor essentially repressive. As Cresswell explains, mobility is both a physical reality and a cultural and social representation;[121] it is a reality imbued with multiple meanings, some of which are constructed and / or relied upon by law. Sherene Razack's analysis of the murder trial of aboriginal prostitute Pamela George suggests that in the Canadian context, law attaches spaces of violence to aboriginal subjects wherever they move.[122] George was killed in 1995 by two white male college students on an end of term drinking spree. They went out drinking in isolated areas and then to 'the Stroll', the sex work district of Regina, Saskatchewan, where they convinced George to get in the car with them. The men drove George to an isolated area outside the city where, following oral sex, they both beat her and left her lying face down in the mud where she died.[123] Looking at the conduct of the police investigation and the trial, Razack shows how George was seen 'to

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[118] ibid 36.
[119] ibid 35.
[120] ibid 37.
[121] Tim Cresswell, *On the Move: Mobility in the Modern Western World* (Routledge, Abingdon 2006).
[122] Sherene H. Razack, 'Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George' in Sherene H. Razack (ed), *Race, Space and the Law: Unmapping a White Settler Society* (Between the Lines, Toronto 2002) 122.
[123] ibid 124.

belong to a space of prostitution and aboriginality, in which violence routinely occurs'[124] while the men who killed her were seen as far removed from that space.

Razack argues that Canada's colonial history has produced a particular space for white men, where violence against aboriginal women is normalized. In this context, white men killing an aboriginal sex worker 'are enacting a specific form of violence perpetrated on aboriginal bodies...a colonial violence that has not only enabled white settlers to secure the land but to come to know themselves as entitled to it'.[125] While there was no explicit acknowledgement of the colonial context by judge or counsel, Razack's reading and analysis of the transcript show that the men remained in that conceptual space of entitlement throughout the trial. Razack argues that both sides were seen as abstractions of particular social spaces.[126] So George's identity as an aboriginal prostitute, permanently attached to the violent space of downtown prostitution, stayed with her from the Stroll in the city, to the place of her murder in a country field, and even post-humously into the courtroom. Her identity as a mother of two, a working Canadian citizen, and a First Nations woman, was barely recognised by the law. Meanwhile the men remained in their space of white middle-class respectability. Razack's analysis of the discourse and the result of the trial reveal the inability of law to conceptually shift the men's identities from the space of white middle-class respectability to the space of violence and degeneracy that they had in fact socially and physically inhabited with George. Law both relied on and reproduced racialised and gendered spaces of belonging.

Razack's analysis of the Pamela George case and Sanger's study of the car and sexual violence against women both provide examples of legal geography which demonstrates that the subject can take space with her – in these examples the space of gendered (and in George's case, racialised) violence. Or at least, the space of gendered violence

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[124] ibid 125.
[125] ibid 128.
[126] ibid 126.

attached to her in some way – did she 'take' it, did it follow her, or was it connected to her by some other means? How did this attachment between the subject and a particular social space continue despite her movement across physical space? In both examples, law was productive of identities that were mobile but always spatialised in a particular way. So the woman in the car could move from place to place but would take her gendered space with her, including her vulnerability to being sexually assaulted and then disbelieved in court because the car was a 'private' space; and Pamela George could move out of the sex work district and even out of the zones of criminality in which aboriginal sex workers are usually located, but a space of violence always went with her. It is clear from this work that law has a role in producing a conceptual and social space that attaches to particular subjects, moving with them across physical spaces. The movement of this conceptual and social space attached to the subject has physical effects. But how does this attachment work? Legal geography makes clear the complex relationship between law, space and identity. But how are these complex relations produced, maintained and shifted? How is social meaning attached to a particular subject *here* connected to social meaning attached to that subject *over there*?

An impasse: Towards a theory of legal geography

To summarise so far then, through its analyses of the sociality of space, which include but do not focus on the subject, legal geography demonstrates that law, space and identity are interconnected and constantly constructing each other in ways that are uneven and that undermine any claim that law operates universally. Particular spaces can function as permanent enforcers of law's inclusionary and exclusionary regimes, communicating and dictating who belongs where, and not only policing but also producing identities in the process. Legal geography shows that the ways that law connects space and the subject are often not reflective of the ways that people are actually connected to the spaces where they live, work and otherwise inhabit, however briefly. Through the imposition of its own regime of space-subject connection (via

citizenship, domicile and other areas of law), law produces spaces in which some subjects belong and others do not. Although the movement of subjects through different spaces is often a privilege and can be a transgressive act, movement does not necessarily mean leaving spaces of oppression behind, and can be used by law to bolster power structures such as those based on race, sex, nationality or anti-state political activity. These analyses are useful developments in thinking through the questions of how spaces of belonging are produced and shifted – how spaces come to be shaped such that some subjects fit and others are out of place. However a number of questions remain unanswered.

Drawing on legal geography, it might be said that refugee cases such as that of Prossy Kakooza's discussed in the introduction, involve the law engaging both story telling and land use regulation techniques to produce spaces in which queer women from particular states who are in fear of returning home are made to perform a lesbian identity that serves the political purposes of the receiving state – asylum seekers are discursively constructed as vulnerable and in need of the culturally superior protection of the receiving state. As will be discussed in chapter six, refugee law requires a space-subject connection based on the subject's participation in a principally commercial white gay culture – a connection that most queer women asylum seekers are unlikely to have without purposefully changing their lifestyles and consumer habits. A legal geography analysis is useful in bringing these factors into view and in challenging any assumption that moving across the border is a seamless or purely advantageous event for the mobile subject. But legal geography does not offer a way to explain how space might travel with the subject or how the meaning of her identity might shift or even be appropriated as she moves. Although its critique of the otherwise hidden techniques of law in the production of spaces of belonging are useful and on different terms from critiques based on identity politics, legal geography tends to remain focused on the

human subject without a questioning of the conceptual boundaries of that subject;[127] that is, legal geography does not explore the relation between space and the subject. Where does the subject end and space begin? Does it even make sense to think in these terms or would another theoretical framework be more useful?

Legal geography cannot answer these kinds of conceptual questions because it does not have a clear theoretical basis. Although works of legal geography share a commitment to the study of law and space, there is little theoretical exploration of what either 'law' or 'space' mean beyond the particular area or controversy being examined. David Delaney has described the field of legal geography as having 'an archipelagic feel to it'.[128] Identifying an impasse in legal geography, Delaney argues the project has become stuck in its attempts to bridge law and geography and has ended up inheriting rather than challenging the conceptual dualism between the two. Although commending the work that has been done in the field, Delaney argues that legal geography tends to reduce space to a set of dimensions of the material world and law to the abstract, active agent that acts upon space, even though these are the very conceptual understandings that legal geography attempts to undo.[129] To move beyond this law and geography impasse, Delaney proposes his own distinct and all-encompassing theory, complete with its own vocabulary and set of interpretive resources. The theory is that of the 'nomosphere', which is 'the cultural-material environs that are constituted by the reciprocal materialisation of "the legal", and the legal signification of the "socio-spatial", and the practical, performative engagements through which such constitutive moments happen and unfold'.[130] The theory of the nomosphere is Delaney's attempt to move beyond the analytic distinction between law and space. Nick Blomley attempted something similar, though on a smaller scale, when he came up with the neologism

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[127] This tendency is less evident in the legal geography work that focuses on land (such as the pieces on the Channel Tunnel, the eruv and the planting of trees), but while these pieces offer new ways to conceptualise those particular controversies, they do not provide a clear theoretical approach with which to apply to other controversies.

[128] Delaney, *The Spatial, The Legal and The Pragmatics of World-Making* (n50) 12.

[129] ibid 13.

[130] ibid 25.

'splices' to describe realities achieved through the combination of legal and spatial means, in an attempt to think beyond the binary between space and law.[131] Delaney sets out a thorough set of theoretical concepts and tools in order to make this move, which he does, not by focusing on 'law' and 'space' as categories, but by drawing on both to 'elucidate the pragmatics of world-making'.[132] Many elements of his project are useful – his 'nomospheric situations, setting and scapes' create a framework for understanding the co-constitutive nature of the social, the spatial and the legal in everyday life and all around. This framework allows for power to be understood and located socially and materially without relying on identity categories; it reveals the political in the mundane, and it puts the spatial aspects of legal issues at the forefront of analysis.

However the all-encompassing nature of Delaney's nomospheric investigations is also its downfall – the nomospheric framework proposed is not only somewhat difficult to apply because it has its own vocabulary and methodology, but it also leaves no room for a conceptual outside. Delaney writes that 'You are always either "home" or "not home", "in public" or not. You are always in some state or subject to some jurisdiction'.[133] And while he conceptually separates the nomic from the legal, each of his case studies involve legal cases rather than any engagements with the enforcement of extra-legal forms of regulation or governance. The world Delaney envisions is one where law is inescapable – absolutely everything comes within the realm of the juridical. This approach is politically limiting because it literally leaves no space out of the reach of law; and it is also conceptually problematic. For a subject is not always either home or not home. Home, like any place, is not just a discrete physical location that a subject is either inside or outside of; it is loaded with complex social and emotional meaning that seeps out beyond that subject's residential front door. The questions of where home is, and whether you are home or not, are both unlikely to have clear answers for any

[131] Blomley, 'From "What?" to "So What?": Law and Geography in Retrospect' (n65).
[132] Delaney, *The Spatial, The Legal and The Pragmatics of World-Making* (n50) 33.
[133] ibid 40.

migrant, or for those who experience 'domestic' violence. So although Delaney emphasises the foregrounding of performativity in his nomospheric framework, explaining that 'we are embodied beings who inhabit inherited, heterogeneous worlds of social significance' and that our actions should be understood as 'enactments *of* space rather than behaviours *in* space',[134] his inescapable nomosphere still reproduces a simplified understanding of the relation between space and the subject.

Critical legal theorist Andreas Philippopoulos-Mihalopoulos also identifies the impasse in legal geography and offers a different theoretical way past it. Critiquing the existing work on law and space, Philippopoulos-Mihalopoulos argues that this work tends to continue to use space in 'an adjectival context, a background against which considerations of the surrounding space are thrown into relief'.[135] The focus of analysis thus remains on the human subject, just with space being another factor to be taken into consideration. As such, Philippopoulos-Mihalopoulos argues that this work lacks a radical vision to meet current social conditions, remains anthropocentric (failing to engage with any of the work on the fluidity of the boundary between the human and the natural / artificial / technological), and retains a privileging of time over space in that it strives towards a justice to come in the future, rather than a spatial justice now.[136] These shortcomings, he argues, are symptoms of the spatial turn shifting away from a genuine engagement with 'the awkward, angular, unmappable, unpredictable' nature of space and instead reducing it to a representation of the earth.[137] Philippopoulos-Mihalopoulos proposes instead a concept of spatial justice informed by radical understandings of emplacement and Deleuze and Guattari's philosophy of space as manifold and labyrinthine.[138]

Unlike Delaney's nomosphere in which law is always inescapable, for Philippopoulos-

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[134] ibid 15.
[135] Philippopoulous-Mihalopoulos (n50) 204.
[136] ibid 204-205
[137] ibid.
[138] The details of which are beyond the scope of this chapter.

Mihalopoulos, while space is all there is, law has its outside.[139] Indeed, spatial justice requires withdrawal, it is the movement of taking leave[140] – law must 'withdraw' for spatial justice to occur but it is only through law that such justice can become possible. This is because, he argues, 'spatial justice arises when one body wants to occupy the exact same space at the exact same time as another'.[141] To fully understand this argument it is necessary to understand Deleuze and Guattari's philosophy of becoming. Thus although Philippopoulos-Mihalopoulos' analysis offers a rich and complex understanding of subjectivity, and of the relation between space and the subject in particular, it is difficult to grasp and apply without investing in this philosophy which, like Delaney's nomospheric investigations, also has its own vocabulary and assumptions. In particular, Philippopoulos-Mihalopoulos' reliance on Deleuze and Guattari means that he reproduces in his work on law and space Deleuze and Guattari's focus on movement and the figure of the nomad. Philippopoulos-Mihalopoulos argues that 'space both conditions and is conditioned by the desire to move, and move constantly'.[142] While this argument might be true in many contexts, particularly the context of asylum, it might also be argued that space is sometimes conditioned by a desire to stay still.

Delaney and Philippopoulos-Mihalopoulos both productively identify and critique the impasse in legal geography – its tendency to replicate the dichotomy between law and space even as it attempts to undo it, its need for deeper theoretical engagement in order to develop a more nuanced understanding of the relation between space and the subject. Instead of adopting their alternative theoretical frameworks and language though, I want to take the arguably simpler step of interrogating the idea of space by drawing on critical geography. In the next chapter I draw on the legal geography discussed here but go further in persisting with the questions of what connects here with there and then with now, what makes a subject belong (or not) in a particular

[139] ibid 209.
[140] ibid 213.
[141] ibid 211.
[142] ibid 210.

space and how is law involved in that process? How can the connections between law, space and identity be conceptualised so as to provide an understanding of how spaces of belonging take shape and are reproduced despite the mobility of the subjects, objects, parts and wholes that constitute those spaces? Legal geography shows that law relies on a conception of space as pre-existing, inert and apolitical, and that such a conception has a range of effects. Law produces social spaces by regulating fixtures in land, the activities of subjects and the connection between space and the subject. In the next chapter I will interrogate the idea of space in order to think through not only how space connects with law, but also how conceptions of space shape the social and physical world, how spatiality is tied to subjectivity, and how such conceptions might be re-imagined.

3. From positionality to spatiality: Theorising legal geography and finding life in space

Legal geography explores the underlying and generally unspoken spatial assumptions that are relied on and reproduced by law, and the political implications of those assumptions. The legal geography explored in the last chapter showed that despite its seemingly universal application, law produces spaces in which some subjects belong and others do not. Applying a legal geography approach to the case of Prossy Kakooza discussed in the introduction means taking a step back from the multiple minority box approach of refugee law, which requires asylum seekers to fit into marginalised identity categories in order to prove persecution and thus qualify for the key category of refugee. Taking a legal geography approach would mean instead examining the various spaces which produce asylum seekers (including both the sending and receiving states), asking how law is involved in constructing those spaces and how those spaces are connected to refugee identities. Indeed in chapter six I use a legal geography approach to discuss some aspects of refugee claims made by women on the basis of sexuality persecution. The spatial approach of legal geography is thus effective in shifting the focus away from the individual subjects involved in socio-legal issues and onto the broader material and social contexts that have led to those subjects being in those positions. As discussed at the conclusion of chapter two though, legal geography can show but not account for how space moves with the subject. It does not provide a conceptualisation of where the subject ends and space begins. Although there has been some attempt to provide a broad theoretical basis for legal geography, much of this work still tends to focus on particular places and thus does not draw connections between or across places.

This chapter will take a step beyond legal geography by interrogating the static, apolitical conception of space that legal geography reveals as being implicit in much legal discourse and practice. While most legal geography literature either explicitly asserts or points towards the existence and importance of this legal conception of

space, there is relatively little exploration of the theoretical basis of this conception,[143] or of where and how it fits with wider political discourse. Legal geography effectively reveals law's role in the production of physical and social spaces in which particular subjects belong and others do not. In this chapter I turn to critical geography and feminist theory to explore what other factors, beyond law, are involved in the production of such spaces, and to further question the relation between space and the subject.

Specifically, I will draw on the work of critical geographer Doreen Massey and feminist theorist Inderpal Grewal to explore the political implications of a static conception of space and to show how thinking about space differently might have important effects on social and physical space. Massey argues that space can be usefully understood as 'dynamic, heterogeneous simultaneity' and place as an articulated moment in constantly shifting networks of social relations and understandings rather than as a fixed site with borders around. This is an extraverted understanding of place rather than one that defines place through an internalised history. While not directly drawing on Massey's work, Grewal's work on transnational America adopts a very similar analysis in its exploration of America as a nationalist discourse rather than a defined physical territory. Both Massey and Grewal's work demonstrates how the re-conceptualisation of space can bring into view social and political connections that tend to be overlooked when space is conceptualised as the inert background to social and political action. Those connections suggest a more complicated relation between space and the subject than is offered by legal geography. In order to understand the constitution and production of spaces where some belong and others do not, there is a need for a theoretical framework that encompasses the complicated relation between dynamic, heterogeneous space and the subjects that not only move through but also constitute that space.

[143] A notable exception is Blomley.

From positionality to spatiality: Moving beyond the place of legal geography

Legal geography's critique of the legal conception of space as static and apolitical resonates strongly with critical geography literature on the connection between space and identity. Geographers Michael Keith and Steve Pile argue that there are implicit spatial frames of reference in identity politics, and that meaning is never immanent or essential, but is in part constituted by the spaces of representation in which it is articulated.[144] This means that, like pre-tunnel Kent as discussed by Eve Darian-Smith and the Israeli Negev as discussed by Ronen Shamir, the spaces where political and legal struggles happen are not just the backdrops to the action, but an integral part of it – affecting the identities of the subjects involved and the way in which struggles are played out. Rejecting the argument that there can ever be an essential or authentic identity, Keith and Pile argue that identity should always be understood as 'a process, rather than an artefact'.[145] As such, they argue that social theorists should move away from positionality and towards spatiality – such a move would lead towards an understanding of identities as always contingent and incomplete processes rather than determined outcomes, and of epistemologies as situated and ambivalent rather than abstract and universal.[146] A move from positionality to spatiality, from the abstract to the situated, and from the universal to the ambivalent, would clearly pose a challenge to the legal conception of identity, which relies on fixed positions, abstract rules and universal justice. Thinking about the construction of queer women's sexuality in refugee law, a move from positionality to spatiality would mean – consistent with a legal geography approach – questioning law's determination of asylum applicants as either lesbian (everywhere) or not, as either persecuted (there) or not, as either belonging (here) or not, and suggesting instead that the ever contingent spaces and always incomplete processes that constitute particular identities at particular moments are far

[144] Michael Keith and Steve Pile, 'Introduction Part 2: The Place of Politics' in Michael Keith and Steve Pile (eds), *Place and the Politics of Identity* (Routledge, London 1996) 22.
[145] ibid 34.
[146] ibid 34.

too complex to be determined by a set of abstract and universal rules. The various spaces through which the asylum applicant has moved and in which she is now located are a part of her identity too.

Place, permanence and parochialism

Understanding identity as a process of which space is a part means questioning any understanding of space as pre-existing identity, and any understanding of place as tied to a fixed identity. Tim Cresswell argues that in popular and academic discourse, place is generally understood as 'space invested with meaning in the context of power'.[147] So place is somewhere definite and tangible, somewhere you feel either comfortable or uncomfortable, somewhere you either belong or do not belong – in which case you feel 'out of place'. Much of the legal geography literature discussed in the last chapter analyses place in this way. Cresswell argues that place needs to be understood as 'an embodied relationship with the world' and therefore – consistent with Keith and Pile's understanding of identity – never 'finished' but constantly being performed, like any relationship.[148] Such relational and unfixed understanding of place is uncommon – place tends to be understood as a site of permanence, authenticity and parochialism, as is demonstrated by the battles over the meaning of place in Kent, Israel and London discussed in the last chapter. In each of those examples, place was understood by those living in and around it as signifying a closed, permanent connection between particular sites and particular communities. Place was thus implicated in the construction of a static and polarised conception of 'us' (people who belong in a place) and 'them' (people who do not).[149]

The nation-state is an example of place operating conceptually, socially and physically as a site of permanence and parochialism that is tied to a particular identity. The borders

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[147] Tim Cresswell, *Place: A Short Introduction* (Blackwell, Oxford 2004).
[148] ibid 37.
[149] ibid 39.

of the nation-state are policed with military force, ensuring that those who law deems not to belong are excluded, while those who *do* belong feel and perform their belonging to place in multiple ways.[150] Place produces social memory in everyday life through institutions such as national museums, objects such as monuments,[151] styles of architecture, etiquette for buying groceries or catching the bus ('that's how we do it here'/ 'that's how it works in this country'), and so on. The common association of place with exclusive belonging and universal meaning has made it a comparatively manageable object of study in comparison to space, which is conversely understood as abstract and unfathomable. A move from positionality to spatiality, for legal geography, would suggest a move from studying place – which the literature reviewed in the previous chapter shows it has already done – to studying space. Such a move is consistent with the Deleuzian and nomospheric approaches of Delaney and Philippopoulos-Mihalopoulos, though they do not frame their arguments in quite those terms. Rather than analysing particular places, it might instead be useful to analyse the broader relations of belonging that constitute place at any particular moment; the spaces in and through which place occurs.

Rethinking place and interrogating the space beyond

Although place tends to be associated with parochialism, permanence and exclusion in political disputes and in the legal geography analyses that follow them, it only comes to have such associations through broader concepts and understandings. While place tends to be associated with, and is in turn productive of social meaning, it is also dependent on pre-existing classification systems in order to define it as place to begin with, differentiated from what lies outside it. Those classification or reference systems cannot solely be attributed to the place itself. So for example the spatial classification of Kent as the clean, safe, culturally superior garden of England did not come from Kent alone but only made sense, as Darian-Smith showed, in the context of pervasive

[150] Benedict Anderson, *Imagined Communities* (Verso, London 1987).
[151] ibid 86.

attitudes of racism, colonialism and nationalism. In his article on geographies of violence, Blomley implicates the frontier, the survey and the grid in the production of ultimately violent economies of private property – while that violence will be played out in places with private property regimes, it is the regime itself, the classification system of private property, that induces and legitimates that violence.[152]

As outlined above, instead of thinking of places as bounded areas, Massey imagines them as 'articulated moments in networks of social relations and understandings', where most of those relations and understandings are constructed on a scale that extends much further than what for that moment is defined as the place itself.[153] This is place as a collision or intersection within multiple networked systems rather than as a discrete and permanent site – it is a *moment* because it is temporary rather than permanent, and it is *articulated* because it is only when that moment is named as place that it acquires meaning as place. There are many moments in networks of social relations and understandings that are not articulated, and they remain moments of undefined and thus unlimited potential meaning rather than taking on the temporary referential certainty of place.

Place is thus a point or moment within the much larger and ever-evolving dimension of space. The legal geography literature discussed in the last chapter mainly focused on particular places and landscapes (notably the English countryside). In her study of English hedgerows, Jane Holder argued that law adopts a conception of landscape as meaning only the surface features of an area rather than the group of visible features from an observers' viewpoint, or the framework for the interpretation of nature and culture.[154] Cresswell argues that the distinction between place and landscape is that places are things to be lived inside of, whereas landscapes are something the viewer is

[152] Blomley, *Law, Space and the Geographies of Power* (n58).
[153] Massey, 'Power-geometry and a progressive sense of place' (n24) 66.
[154] Holder, 'Hedgerows, Laws and Cultural Landscape' (n72) 133.

outside of.[155] Landscape can thus be understood as an analytical geographical term – landscape is a way of observing particular sections of space. What place and landscape have in common is that both derive their meaning from the wider reference system that is space. Yet although legal geography draws attention to the legal conception of space as blank, inert and pre-existing of law, it does not deconstruct this reference system that is legal (or non-legal) space. Massey's work deconstructs and re-imagines space and place.

Thinking through Massey's extraverted understanding of place in relation to asylum, it can be argued that while asylum seekers' position of being outside of and unable to return to their home states is understood by the courts as the result of turmoil or invidious persecution on the part of the asylum seekers' home states, their position is also attributable to the much broader nation-state-citizen system. Their identities as lesbians and asylum seekers, the situations of persecution from which they seek asylum, and the places to which they travel can each be understood as events within systems, networks and understandings that reach far beyond the individuals and places at the focus of each refugee case. These systems, networks and understandings, none of which are essential or fixed in time, are what constitute space. Refugees are often described as representing a political crisis because their out-of-place-ness puts them outside the nation-state-citizen classification system altogether;[156] their lived reality does not fit the legal conception of the world as divided into clearly definable territories with subjects connected to those territories through citizenship. Similarly, indigenous populations in settler states such as Australia and Canada are sometimes described as representing a political crisis because their out-of-place-ness also jeopardises the nation-state-citizen classification system – their long-standing connection to the land does not fit the legal systems of property and sovereignty upon which those states are

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[155] Cresswell, *Place: A Short Introduction* (n147) 10.

[156] See Hannah Arendt, *The Origins of Totalitarianism* (Harvest, New York 1973); Giorgio Agamben, Daniel Heller-Roazen (tr), *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford 1998); Tim Cresswell, 'The Production of Mobilities' (n114).

founded.[157] These broader reference systems – these spaces of law and identity which encompass but also reach well beyond the immediate subject or legal case – are not just the inert backdrops to the socio-legal issues at hand, but are actively productive of those issues.

Some critical geographers do put space rather than place at the focus of their analysis – consistent with Keith and Pile's call to move from positionality to spatiality. One notable theoretical framework used to analyse political issues is Henri Lefebvre's understanding of the contest between representations of space on the one hand and real or lived space on the other.[158] In *The Production of Space* Lefebvre sets out a triad of concepts to explain the meaning and production of space – spatial practice (everyday routines and experiences that produce, or 'secrete' societies' spaces), representations of space (space conceptualised and produced by scientists, planners and bureaucrats) and representational space (the space of the imagination through which life is lived).[159] Lefebvre understands space as something which is social and which is constantly being produced, rather than something which is universal or pre-given. According to Stanley Aronowitz, Lefebvre's most urgent goal was to 'recapture genuine experience and free the concrete from its subsumption under the abstract', that is, to recapture lived representational space from abstract representations of space.[160] Law's conception of space, as described by legal geography, falls under Lefebvre's representations of space – it is the abstract space of power imposed on the concrete lived and imagined spaces of people.

Eugene J. McCann uses a Lefebvrian framework to analyse issues of race and public protest in the aftermath of the police killing of an 18-year-old black man in Lexington,

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[157] See Stewart Motha, 'The Failure of 'Postcolonial' Sovereignty in Australia' (2005) 22 *Australian Feminist Law Journal* 107.
[158] Henri Lefebvre, Donald Nicholson-Smith (tr), *The Production of Space* (Blackwell, Oxford 1991).
[159] ibid.
[160] Stanley Aronowitz, 'The Ignored Philosopher and Social Theorist: The Work Of Henri Lefebvre' (2007) 2(1) Situations: Project of the Radical Imagination 133.

Kentucky in 1994.[161] Drawing on Lefebvre, McCann describes the protests as a necessary production of 'counter-space', which reclaims representational space (the thoughts, understandings, tacit agreements and prejudices of the people of Lexington) from representations of space (the state's power to control public space and protest).[162] By focusing on space rather than place, McCann is working towards uncovering the systemic social roots which led to the immediate political issue, and his application of Lefebvre's theory of space is useful in re-thinking what was happening and what was at stake in the Lexington protests. The move from studying positionality to studying spatiality is recognition that, contrary to the legal conception, space is not dead and inert but active and complex; it is thus an important consideration in any socio-legal issue.

Alternative imaginings: Putting time into space

Although I have been tracing an argument within critical geography for a move from the study of place to the study of space, the two terms need not be understood as dichotomous or mutually exclusive. As outlined above, Massey offers an understanding of place as an *articulated moment* constructed through and within networks that extend far beyond the place itself. This is an understanding of place as event in its most basic sense – that is, as something that happens rather than as a fact or an object.[163] Massey writes

> *... 'here' is no more (and no less) than our encounter, and what is made of it. It is, irretrievably, here* and *now. It won't be the same 'here' when it is no longer*

[161] Eugene J. McCann, 'Race, Protest, and Public Space: Contextualizing Lefebvre in the U.S. City' (1999) 31(2) Antipode 163.
[162] ibid 169, 181.
[163] Roberto Casati and Achille Varzi, 'Events' *The Stanford Encyclopedia of Philosophy* (Stanford 2010) <http://plato.stanford.edu/archives/spr2010/entries/events/> accessed 18 October 2010. There is a large body of literature exploring the philosophy of the event which is beyond the scope of this thesis.

now.[164]

Conceptualising place in this way emphasises its temporality – as something that happens rather than an object that exists indefinitely or a fact that exists in the abstract. Place understood as event is in contrast with place understood as a site of permanence.[165] Furthermore, and counter to understandings of place as a site of parochialism, Massey argues that places do not have single identities, but are in fact full of internal conflicts.[166] Their lack of a single identity does not take away their specificity – it is merely that the specificity of place is continually being reproduced in the ongoing and ever changing interactions of networks that make place.[167] In her article *A Global Sense of Place*, first published in 1991, Massey put forward this understanding of place as part of her call for a sense of place which is global and extraverted – a sense of place which defines itself not through its division from what lies outside but through its connection with the outside.[168] Such a conceptualisation of place would not cling to the pretence that its specificity is a result of its own internal history, which can somehow be defined singularly, without internal division. It would acknowledge that place is not equivalent to community. Its sense of connection with that which lies outside place would also mean it would not understand place as static or fixed but rather as constantly in the process of becoming. Thus in her exploration of place itself, Massey urges a move from positionality to spatiality. This is a discursive shift with material consequences – Massey's urge for a shift in how space is conceptualised has behind it a clear normative urge to shift the way that social and physical space is shaped.

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[164] Massey, *For Space* (n14) 139.
[165] The conceptual link between time and space will be explored further later in this thesis, particularly in chapters four and seven.
[166] Massey, *For Space* (n14) 130.
[167] ibid 140.
[168] Massey, *Space, Place and Gender* (Polity Press, Cambridge 1994) 146.

Space, time and representation

Massey's argument for the significance of space has grown stronger and more detailed since her initial calls for a global sense of place, culminating in a book devoted to outlining why social theorists need to not only think more about space, but also to fundamentally re-imagine it. While critical geographers such as David Harvey, whose work was referenced in the introduction, is also extremely useful in deconstructing the politics of space, this work does not offer a re-imagining of space that is as clear, nuanced and compelling as Massey's.[169] Her critique of the conventional imagination of space begins with a challenge to the idea that there is an association between the spatial and the fixation of meaning – that is, the imagined equation of spatialisation with representation, and the consequent equation of space with the static, the closed and the singular.[170] Looking at the work of Henri Bergson, and drawing on Deleuze's critique of Bergson, Massey traces the way in which Bergson's insistence on the genuine openness of history and the future slipped into a devaluation and subordination of the conceptualisation of space relative to time.[171] In his argument for continuous difference and multiplicity as opposed to eternal singular authenticity, Bergson came to equate change / the new with time and temporality, and to equate space with representation, which was the opposite of time and therefore deprived of dynamism. On Massey's reading,[172] Bergson argues that becoming (that is, the genuine continuous production of the new) cannot be broken up into discrete instants – becoming and movement are not reducible to the aggregate of static points or 'time-slices'. Static time-slices of history, even multiplied to infinity, cannot produce becoming.

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[169] David Harvey, 'Space as a Keyword' in Noel Castree and Derek Gregory (eds), *David Harvey: A Critical Reader* (Blackwell, Oxford 2006). For Massey's critique of Harvey see Doreen Massey, 'Flexible Sexism' in *Space, Place and Gender* (n168) 212-248.

[170] Massey, *For Space* (n14) 21.

[171] ibid 22-23.

[172] There are of course many readings and different interpretations of Bergson. Massey's reading is broadly consistent with Suzanne Guerlac's in *Thinking in time: an introduction to Henri Bergson* (Cornell University Press, Ithaca 2006). I do not do a close reading of Bergson here because I am more interested in examining the way his thinking has been taken up than in contesting the meaning of his texts themselves. This would however be a useful engagement with Massey in a future project, and I critique Massey's assumptions about time in chapter four.

Bergson's arguments here were about the nature of time – that time is not empty, divided and / or reversible; it is not made up of static slices through space.[173] Bergson was motivated by a political desire that history be open and change possible. Massey, who is equally committed to the openness of history, agrees with his argument that time is multiplicitous and dynamic, and therefore cannot be represented through a series of static time-slices. The point at which she diverges from Bergson is where he labels these static time-slices of history as 'spatial', in supposed opposition to the temporality of becoming. The mistake here, Massey argues, is to equate the spatial with the representative, because spatialisation and representation are not one and the same.[174] For while it can be accepted that spatialisation is an activity involving the laying out of things side by side as discrete simultaneity, that activity does not involve fixing those things in time, as does representation – to spatialise is not to position. Space, unlike representation, is not delineated, fixed or singular. Representation (such as Bergson's static time-slices) fixes time *and* space. Just as time is not made up of static slices through space, Massey argues, space is not made up of static slices through time – space is as multiplicitous and impossible to represent as time.[175]

Nonetheless the association of space with representation, and with ideological closure, stasis and singularity, became somewhat embedded in modern Western philosophy since Bergson and arguably before. Examining the work of writers such as Ernesto Laclau and Michel de Certeau, Massey demonstrates the pervasiveness and strength of the space-representation association in philosophy and its effect on the way space is popularly understood and politically represented. One effect of understanding space as a closed, static representation of time-slices is that time is envisaged as an interconnected, homogeneous configuration of movement from one moment to the next – time as a singular universal trajectory of becoming, which operates over smooth,

[173] Massey, *For Space* (n14) 22-23.
[174] ibid.
[175] ibid 23-28.

static, ideologically closed space.[176] This understanding of time (and space) supports a view of history as an inevitable march towards a common goal. As Massey puts it, 'coexisting heterogeneity is rendered as (reduced to) place in the historical queue,' and difference is neatly packed into bounded spaces and dismissed to the past, which is implicitly understood as singular – as *our* past.[177] Thus, like Darian-Smith's analysis of pre-channel tunnel Kent and the rabies panic, migrants from 'developing' countries are seen as arriving not only from the peripheries, but also from the past. This understanding of space and time similarly supports an understanding of capitalist globalisation as an inevitable temporal sequence – poorer nation-states in early periods of capitalism are understood as 'catching up' rather than as being involved in current practices and relations of increasing inequality and oppression.[178] Relegating spatial difference to temporal sequence means constructing as inevitable both the present and the future for those who are 'behind' in the queue, because the singular, linear temporal trajectory is already determined. The singularity of both the imperialist and the capitalist globalisation agendas deny and, because their hegemonic discourses are translated into political practice, consequently tame the multiplicity of the spatial.

In terms of hegemonic trends in Western theory then, Massey argues that the privileging of time over space, and the association of space with representation – with the static, the fixed and the closed – is pervasive to the extent that the spatial, in its assumed permanence and irrelevance, is mainly ignored. This denial of the political importance of the spatial in turn has consequences for the conceptualisation of time. Indeed, part of Massey's argument that space has been erroneously equated with representation is that it has been imagined as being in dichotomous opposition to time, whereas in fact time and space must be understood as inseparable from each other.[179]

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[176] ibid 40.
[177] ibid 69.
[178] ibid 82.
[179] While there has now been quite a lot of work published on 'time-spaces' (see for example Roland Robertson, 'Glocalization: Time-Space and Homogeneity/Heterogeneity' in Mike Featherstone, Scott Lash and Roland Robertson (eds), *Global Modernities* (Sage, London 1997) 25; Gill Valentine, 'Negotiating and

The political consequences of this imagining of space as closed and static are, Massey argues, hugely significant – 'equating representation with space takes the life out of space'[180] in both theory and practice. If space is simply a representation of a slice through time, then space and history are both closed, singular and somewhat irrelevant in their static inevitability. In a chapter titled 'Spatialising the history of modernity', Massey describes the implications of prioritising space in rethinking the history of modernity, which tends to be understood as the unfolding, internal story of Europe.[181] The most obvious effect – and for her and post-colonial writers undertaking similar projects, the main intent of such rethinking – is to de-centre Europe. Thus the history of modernity is no longer the story of Europe and its global peripheries, but is a multiplicity of stories, including Europe's growth in material wealth and its cultural changes but also and just as significantly, the major ruptural events of the African, Asian and other places that were experiencing the trauma of colonisation.[182] In this history of modernity, space is not a smooth surface but the sphere of coexistence of a multiplicity of trajectories and lives in an array of different places. This project of spatialisation thus has much in common with post-colonial theorists, and Massey draws on post-colonial critiques in support of her rethinking of the history of modernity.[183] De-centering Europe and revealing the multiplicity of stories of modernity also reveals how the previous way of telling the story was told *from a particular position*, namely from the point of view of Europe as the protagonist; the geographical embedded-ness of that story becomes clear and it moves from being a story of peaceful evolution to one of imposed violence.[184]

Both the philosophical presuppositions and political consequences of the understanding

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Managing Multiple Sexual Identities: Lesbian Time-Space Strategies' (1993) 18(2) Transactions of the Institute of British Geographers 237), these concepts of time-space do not replicate Massey's re-imagining of space.

[180] Massey, *For Space* (n14) 71.

[181] ibid 63.

[182] ibid.

[183] ibid 62.

[184] ibid.

of space as closed, static and singular in meaning are consistent with the philosophical presuppositions and political consequences of the legal conception of space critiqued by legal geography. As shown in the last chapter, legal geography demonstrates how law's claims to universality and rationality fit with an understanding of law as acting upon pre-existing, static space. Law's static conception of space, whether in the context of pre-channel tunnel Kent, the Israeli Negev or inner London, fits with classic positivist legal theory which, like the philosophies underlying a Euro-centric history of modernity and an uncritical narrative of capitalist globalisation, accepts the inevitability of a singular, correct trajectory of becoming. This acceptance is a prioritisation of time over space and an implicit equation of space with representation – space is assumed to be always already and inevitably there, static, smooth and waiting for time to operate upon it. Imagining space in this closed, static way also encourages equally closed, static politics in struggles for law's recognition of who the space belongs to and who gets to define the place it is to become.

Embracing the uncertainty of space

An understanding of space as singular and fixed in meaning provides the conceptual basis for a singular, static politics of position. That is, a politics in which space is understood as belonging to one group (necessarily narrowly defined) or another, and in which that belonging will be brought to light as the inevitable march of history proceeds. Law's conception of space is one which, like the understanding of space which Massey critiques, ignores and / or denies its multiplicity and dynamism. This is a conception of space which both presupposes and guarantees 'the singular universal' instead of multiplicitous heterogeneity – it allows for only one version of the story and thereby silences many others.[185] Like the skewed stories of modernity and capitalist globalisation which Massey demonstrates to be political consequences of an understanding of space as closed and static in meaning, a consequence of the legal

[185] ibid 111.

conception of space discussed in the last chapter is to hide the practical ways space functions in favour of particular groups and practices. In refusing to acknowledge the multiplicity of space, law imposes a Lefebvrian 'representation of space', and produces discourses and practices that Blomley might label 'a conceptual grid of violence',[186] and Shamir 'an act of violence executed through other means'.[187] Law's conception of space, as revealed by legal geography, is one which falls squarely within the Western philosophical tradition of equating space with representation.

And yet, the lived reality of social and physical space is that it is multiplicitous, heterogeneous and constantly shifting. Massey takes a step beyond legal geography by embracing the uncertainty of space. Space, she demonstrates, is as dynamic and multiplicitous as time, and as important an element in becoming, change and the possibility of open history and multiple voices. Space is much more than position. In the first chapter of *For Space*, Massey makes three 'opening propositions' for an alternative understanding of space. The first is that space (whether it be conceptual, social and / or physical) is the product of interrelations – it is not 'there' already, but is constituted through interactions however large or small.[188] The second is that space is the sphere of possibility for the existence of multiplicity – it is where distinct trajectories co-exist, where there is heterogeneity. The third is that space is always under construction – that is, because space is the product of interrelations, space is never finished or closed; it is 'a simultaneity of stories-so-far'.[189] These are the stories of individual subjects, objects and ideas – the physical environment, social meaning and conceptual discourse that attaches to the very existence of the multitude of different subjects, objects and ideas that constitute the world at any given moment. This understanding of space as 'dynamic, heterogeneous simultaneity' is consistent with her earlier understanding of place as an event – an articulated moment in networks of social

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[186] Blomley, 'Law, Property, and the Geography of Violence' (n99) 131.
[187] Shamir (n78).
[188] Massey, *For Space* (n14) 9.
[189] ibid.

relations and understandings. Place, for Massey, is a conjuncture. 'Here' is an intertwining of histories – so internal coherence of place, of 'here', can never be assumed, as there is always a multitude of voices, stories and trajectories making up that place, whether it be here or there.[190] Place is meaningful not because it is a defined point in otherwise meaningless space, but because space itself, and therefore the places within it, is rich with meaning.

This imagining of place as conjuncture or event and space as dynamic, heterogeneous simultaneity also fits with a relational, constructed, anti-essentialist conception of identity. Massey justifies this alternative conception of space theoretically, with her critique of the space-representation association and of the Western philosophical privileging of time over space. She also justifies her argument for this conception of space empirically with examples from human and physical geography (demonstrating that neither social formations such as cities nor physical formations such as mountains are fixed in time),[191] and politically (indeed she makes it clear that the political is her main imperative throughout the book), because a dynamic, multiplicitous imagining of space is essential for allowing a multiplicity of stories and voices, and therefore for politics. Reprioritising and rethinking space is for Massey an essential step to better understanding the world and moving beyond the stagnant politics of position that have accompanied the theoretical and legal privileging of time over space.

'We are all Americans': Rethinking identity and the space-subject connection through Grewal's transnational America

If, as Massey argues, space is constantly shifting and never singular in meaning, then any position within space will necessarily be contested and temporary, and any political claim staked out on the basis of a position will exclude those who do not share in

[190] ibid 139-141.
[191] ibid 131-137.

precisely that position at that moment. The single-axis identity politics critiqued in the last chapter might be described as positional in this sense – claims are made on behalf of particular groups assumed to share interests because of a shared position in terms of their race, class, gender or sexuality. Indeed Massey's argument that space is heterogeneous and can be understood as a kind of simultaneity has been taken up by authors broadly concerned with troubling a single-axis identity approach to social issues.[192] Yet despite the wide-ranging critiques of that approach, many political campaigns and legal disputes continue to proceed on the basis that subjects can be grouped according to identities that are assumed to pre-exist the dispute itself and to be fixed across time and space. Cases involving women claiming asylum on the basis of sexuality persecution are a good example – to gain refugee status those women must prove that they are *real* lesbians (or bisexuals), in danger everywhere in their home states. To even attempt to prove that an asylum applicant is in that position requires a presupposition of the fixity of space. For only if the applicant is fixed in her position as a persecuted Mongolian / Jamaican / Russian / etc lesbian – fixed despite her physical movements within her home state and across the world, and despite the social adjustments she would necessarily have to make both in her journey for asylum and in her daily life as a queer woman[193] – can the authenticity of that identity be capable of proof on a true or false basis in the state in which asylum is sought. The law in these cases also assumes a space-subject connection which is very straightforward – not only are identity and space both assumed to be fixed and essential, but the logic of refugee law is that the asylum applicant retains all of her lesbian identity that she had in her home state, where she did not belong, and simply transplants it to the receiving state, where she will.

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[192] For example Louise Wait and Joanne Cook, 'Belonging among diasporic African communities in the UK: Plurilocal homes and simultaneity of place attachments' (2011) 4(4) Emotion, Space and Society 238. Michelle Bastian, 'the contradictory simultaneity of being with others: exploring concepts of time and community in the work of Gloria Anzaldúa' (2011) 97 Feminist Review 151.

[193] These issues are discussed in further detail in chapter six.

America beyond territory, Americanness beyond citizenship

While Massey finds life in space in the sense that she demonstrates that space is dynamic and rich in meaning, Inderpal Grewal shows how the regulation of life (through biopolitics) is inextricably linked to the regulation of space (through geopolitics). Grewal's *Transnational America* discusses contemporary political issues – such as women's rights and the perceived crisis of refugees entering the United States from non-white countries – in terms of the movement and circulation of people, goods, ideas and social movements, instead of in terms of positional identity politics.[194] Grewal's analysis thus provides an example of work that has moved from studying positionality to studying spatiality. Although not explicitly framed in terms of space or geography, Grewal's analysis is decidedly spatial, with space being understood not as a static slice through time but rather, consistent with Massey's work, as the ever-unfolding dimension of multiplicitous becoming.

Grewal analyses 21st century 'America' as a nationalist discourse that produces different kinds of agency and diverse subjects, both inside and outside the territorial bounds of the US.[195] America is a nationalist discourse that depicts and reproduces itself as the leading power in 'the West', another spatial term whose borders stretch awkwardly beyond physical and legal markers. Grewal demonstrates that although this discourse of America is a nationalist one, it is produced through and productive of cultural, political and economic practices that are *transnational* – such that American practices and subjects extend beyond the territorial borders of the US. As Grewal argues, 'nationalism evolves not from one imaginary community but through historical hierarchies of race and gender and their consumer culture and community affiliations, which reach well beyond the boundaries of the nation-state'.[196] This definition

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[194] Inderpal Grewal, *Transnational America: Feminisms, Diasporas, Neoliberalisms* (Duke University Press, London 2005).
[195] ibid 2.
[196] ibid 198.

resounds strongly with Massey's definition of place as

> *constructed out of particular interactions and mutual articulations of social relations, social processes, experiences and understandings, in a situation of co-presence, but where a large proportion of those relations, experiences and understandings are actually constructed on a far larger scale than what we happen to define for that moment as the place itself.*[197]

Grewal's American (trans)nationalism is, like Massey's place, produced through processes that cannot be internally confined but that extend messily outwards. Like Massey's place as articulated moment, Grewal's America as nationalist discourse is not just conceptual but is also social and physical.

Grewal argues that what it means to be American, or to occupy the subjectivity of 'Americanness', is not defined through legal citizenship but rather through participation in consumer citizenship – cultural inclusion through consumptive participation in the free market capitalist economy.[198] Tracing the genealogy of 'the American dream' throughout the 1980s and 1990s, Grewal demonstrates that national belonging was made to seem possible for immigrants because the consumer citizenship through which that dream is achieved seemed unbound from territory, race and class. The ill-defined 'American dream' thus seemed possible for all despite their identity positioning.[199] Just as America is more meaningfully understood as a discourse rather than a territory (although it is a discourse with territorial effects), to be American is more meaningfully understood not as an essential identity but as a subjectivity contingent upon a range of relations, practices and understandings that have come to circulate far beyond the physical borders of the US. By focusing on subjectivity rather than identity, Grewal's analysis encompasses the varied perspectives, feelings, beliefs and desires of subjects as

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[197] Massey, 'Power-geometry and a progressive sense of place' (n24) 66.
[198] Grewal (n194) 8-10.
[199] ibid 8.

well as the characteristics by which they are known to others. Because Americanness is produced transnationally, across territorial borders, to become American does not necessarily connote full participation in or belonging to the nation-state – certainly not in a legal sense.[200] Rather, there are levels of Americanness defined not by a subject's location inside or outside of the US or their legal citizenship but by a range of more dynamic and heterogeneous factors. As well as complicating the idea of America the place, Grewal's analysis demonstrates that the realities of both identity production and space-subject connection are far more complicated than is assumed in laws relating to citizenship and migration. To understand transnational America and its diverse subjectivities then, what must be studied are not just what we happen to define at that moment as 'America' or 'Americanness', but also – and more importantly – the conditions under which both are produced. That is, a study of the spaces which constitute and surround America and Americans broadly defined.

The geopolitcs of biopolitics (and the biopolitics of geopolitics)

Grewal describes the current conditions under which America and Americanness are produced as involving a meeting of biopolitics and geopolitics. Grewal explains biopolitics, the Foucauldian concept of governance of the social body, as giving rise to ways of understanding, managing and regulating that are focused on achieving the welfare of the population, which in turn lead toward surveillance and 'security' measures that affect all areas of human life.[201] By geopolitics Grewal refers to matters of state politics and claims of territories.[202] She argues that the meeting of biopolitics and geopolitics in late twentieth century Western politics has led to new technologies of governance including the segmentation of consumer markets into a multiplicity of lifestyles (feminist, multicultural, ethnic, nationalist) which mirror a corresponding multiplicity of rights-based identity movements, and the privatisation of welfare through

[200] ibid.
[201] ibid 16.
[202] ibid 17.

nongovernmental organisations (NGOs). Grewal argues that these techniques of governance have meant that diverse and seemingly groundbreaking subjectivities such as feminist, diasporic, cosmopolitan and postcolonial subjectivities have become possible, but they have become possible through practices of self-regulation promoted through consumer culture.[203] Looking in particular at the 1990s, Grewal describes how dominant forms of American feminism were marketised through self-help books, health club attendance and talk shows as well as through the mission that women in 'developing countries' would be saved from poverty and violence too.[204] Thus American feminist subjectivity not only traversed territorial borders in terms of seeming accessible to those outside the USA through participation in particular consumer cultures, but also in terms of its relational production – an assertion of civilisational superiority to cultures *over there* was (and continues to be) an important part of such subjectivity. Grewal's broad analysis both supports and extends Massey's call for an alternative imagining of space – the linking of biopolitics and geopolitics means that analyses of political issues cannot be meaningfully made without an understanding of space that recognises not only its relevance, its dynamism and its heterogeneity, but also its intimate connection to subjectivity.

As part of her elucidation of the geopolitics of biopolitics, Grewal analyses two important roles of the figure of the woman in the production of transnational America. The first is as a principal figure in the discourse and politics of human rights – the figure of the woman functioned as a key tool in the transnationalisation of human rights discourse, which in turn functioned as a tool of American-isation in the sense that the standards being proclaimed as universally relevant (and even mandatory) across the globe were defined by Western institutions generally dominated by representatives from the US.[205] The second role of the figure of the woman in the politics of transnational America, and related to the first, is as an essentialist representation of

[203] ibid 16.
[204] ibid.
[205] ibid 122.

women. Human rights discourses represented women outside the West as objects of charity who were capable of being saved from their own state's repressive regimes and converted to consumer citizenship.[206] The essentialist, universal representation of women thus enabled particular normative connections to be made between here (America, where women had human rights) and there (places that were un-American, where women did not have human rights), and these connections are in turn productive of transnational America and transnational American subjectivities.

Critiquing human rights discourse, Grewal also demonstrates the biopolitics of geopolitics. The human rights discourse proliferated in part through the figure of the woman is one that reaches well beyond the borders of the USA, and yet is also part of a nationalist discourse that upholds and enforces Western-defined values and, as argued by Gayatri Spivak, reinstates a colonial relationship between the non-West and the West – it is part of the (trans)nationalist discourse that Grewal identifies as America.[207] Understood in this way, America is a spatial entity, but not in the cartographic sense. The *place* that is the USA is constantly being defined and redefined by the *space* that is America – this is a space that is constantly transforming, an America whose borders cannot be clearly marked. That this space of America is difficult to define does not take away from its relevance; on the contrary, America and the various discourses that continually reproduce and redefine it have far-reaching and serious consequences for a huge range of groups and individuals. As discussed above, using the language of human rights has become an almost mandatory prerequisite for any group seeking recognition of their cause, and the very proliferation of this discourse has the effect of universalising issues of oppression into Western-defined categories that make certain issues easier to gain support for than others. For example, Grewal explains how a range of material and social conditions throughout the 1990s meant that various interest groups based outside America engaged in the women's rights discourse not because it accurately articulated their cause but because it became an essential means through which to be

[206] ibid 130.
[207] Cited in Grewal, ibid 123.

heard in moral and political debates.[208] The adoption of women's rights discourse in spaces outside America in turn affects those spaces and the subjectivities they produce.

Applying her geopolitical / biopolitical analysis to the issue of refugees, Grewal argues that the prominent human rights discourse of the 20th century functions as a tool for managing refugees in a way that maintains the nation-state system and national identities.[209] It is a biopolitical management tool in that whose human rights are being abused the most has become the criteria for deciding which asylum seekers will be granted refugee status. It is a geopolitical tool in maintaining the nation-state system and national identity in that the human rights issues brought to the fore by asylum seekers are designated as national issues – understood as being caused by the failures of those individual nation-states. As such, and because the majority of asylum seekers entering the US come from non-Western states, human rights discourses also sustain the colonial narratives of the humanitarianism and political freedoms of the West.[210] Despite the reality that on a global scale the overwhelming majority of refugees seek asylum in non-Western states, the image that the human rights discourse associated with refugees creates is one in which individuals from primitive, backward non-Western states flee en masse to the politically advanced West, where their human rights will be protected.[211] Refugees in general, and women in particular, are represented as victims and their cultures represented as pathological.[212] These representations rely on essentialised understandings of identity and a static understanding of space; asylum seekers are understood as either refugees or not, depending on their level of human rights abuse; the states from which they come are understood as stagnant, backwards cultures of human rights violation and / or poor governance; and the Western states are understood as permanently and uniformly culturally superior in their human rights protection.

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[208] Grewal (n194) 121-122.
[209] ibid 158.
[210] ibid.
[211] These issues are discussed further in chapter six.
[212] Grewal (n194) 170.

As will be discussed in more detail in chapter six, the asylum seeker's task of proving to a court or tribunal that she fits into an appropriate category leads to legal arguments that echo the colonial tone of human rights discourse as discussed by Grewal – namely that the non-Western state from which the applicant moved is an uncivilised, backward place in contrast to the civilised West. As well as the geopolitical consequences of representing space in this way, there are also biopolitical consequences of representing identity in this way. Refugee decisions produce and regulate identity categories, fixing them artificially across space and time. The fixed categories into which refugee applicants must fit and the static representations of their home states that they must demonstrate to the decision-makers, do not accurately reflect the realities of either. By requiring the constant reproduction of fixed identity categories and representations of space, refugee law overshadows the complex and multiplicitous practices, relationships and technologies that cause people to move from one state to another under traumatic conditions. To put it in Massey's terms, Grewal's analysis of the geopolitical and biopolitical links evident in the discourses of women's rights and of refugees, demonstrates how these discourses operate as a taming of the spatial.[213] What is presented is a very limited view of the complex situation that actually occurred – sanitised and made legible to law on its own terms. Refugee law and the various rights discourses that surround it thus operate as forms of governance, working in and through space and (re)producing places and subjectivities.

Grewal's work adds to Massey's understanding of space by making explicit the intimate connection between space and subjectivity – transnational America is a Massey-esque space in the sense that it is constantly shifting in meaning, never having a universal meaning to all who experience it, and extending beyond any physical boundaries that nominally enclose or define it at any particular moment; it is also a space that is productive of subjectivities, producing connections between here and there through

[213] Massey, *For Space* (n14) 69.

identity categories. It is not simply that space is alive in the sense that it is dynamic rather than inert, but rather that questions of space and life are inseparable.

Geographies of irresponsibility?

What do these understandings of space as 'dynamic, heterogeneous simultaneity' and of the link between the biopolitical and the geopolitical mean for thinking through the role of law in the production of spaces where some belong and others do not? While Grewal concludes her analysis with a call for a rethinking of the roles of the state, civil society and consumer culture in the production of subjectivities, Massey follows her imagining of space with a call for a normative framework of 'geographies of responsibility'. This normative framework follows from her understanding of space, and draws on a model of the subject that is interconnected rather than discrete. It allocates responsibility according to the relations and connections that constitute different spaces and places rather than following the legal model of allocating responsibility according to the acts of individual subjects. It is more concerned with where and how particular subjects are located rather than with what they have done or who they are. This model of responsibility thus points towards the importance of the construction and maintenance of relations of belonging – how subjects fit in particular spaces and how they are interconnected.

Massey's relational ethics: Implicating here in there, now in then

Understanding space not as a static slice of time but as a reference system constituted by a vast multiplicity of different, dynamic forces; one that is ever-evolving, necessarily conceptual, social *and* physical, and always politically important, gives rise to a new way of understanding the world, a new set of political questions and, for Massey, the grounds for a new relational ethics based on what she terms geographies of responsibility. When space is understood as a static slice through time, everyone and

everywhere outside the local are conceptually stabilised. As Massey puts it, the understanding of space as static and equivalent to representation is 'a political cosmology which enables us in our mind's eye to rob others of their histories; we hold them still for our own purposes, while we do the moving'.[214] In contrast, understanding space as heterogeneous, constantly under construction and connected to subjectivities, means understanding place as an event which is neither separate from the wider space in which it occurs, nor static in time forever. It means that even those who are situated far away may still be implicated 'here', in the event of place. It is this implication that gives rise to Massey's argument for geographies of responsibility, which reach along multiple trajectories extending well beyond the boundaries of what a static conception of space and place would take to be a subject's or a community's location.[215]

Because of the multiplicitous and dynamic nature of space, Massey's geographies of responsibility cannot be reduced to universal rules or topographic categories. As space includes an infinite and unfixed multiplicity of relations, and place is always a unique event in space, geographies of responsibility require constant negotiation in order to find particular answers for particular questions about who is responsible for what.[216] In Lefebvrian terms, geographies of responsibility entail a struggle towards the rejection of representations of space in favour of lived spaces. Massey's geographies of responsibility are based on recognition of the spatial practices, flows and relations that constitute the world and the necessity of a politics that respects local specificity. Consistent with Massey's global sense of place, this is a politics of connectivity that looks outwards to consider the relations that construct place and the responsibilities that might come with them. It is thus also a politics that challenges what Massey terms 'the Russian doll geography of ethics, care and responsibility', which extends out linearly and with decreasing strength from home, to local place, to nation, and then rarely beyond, on the understanding that we care most and have the greatest responsibilities

[214] ibid 122.
[215] ibid 64.
[216] ibid 166.

for those closest in.[217] Geographies of responsibility do not necessarily disregard the importance of the local, but merely posit that spatiality is too complex, too dynamic and too heterogeneous for any abstract, universal rule or direction to apply. What is demanded instead, consistent with an understanding of space as a vibrant mess of interconnections, and a rejection of the dichotomy between (meaningful) place and (meaningless) space, is a relational ethics where responsibility and care are determined at every instance and dependent on the particular circumstances rather than according to the pre-determined Russian doll geography. Such relational ethics are consistent with some feminist engagements with care, which call for the building of extensive connections of mutuality and interdependence – a far cry from current social shifts towards the individualisation of responsibility and privatisation of care.[218]

It is quite clear that Massey's geographies of responsibility fit with her conception of space. What is less clear is what is meant by responsibility. In developing her geographies of responsibility, or what she also terms a 'relational politics of the spatial', Massey draws on Moira Gatens and Genevieve Lloyd's work on 'Spinozistic responsibility', which is a re-imagination of the notion of responsibility based on a politics of relatedness and the idea of 'a basic sociability which is inseparable from the understanding of human individuality'.[219] For Gatens and Lloyd, individuality is inseparable from interdependence; drawing on Etienne Balibar's concept of 'transindividuality', the argument is that it is not possible to have a notion of singularity without at the same time having a notion of the interaction and interdependence of individuals.[220] The inseparability of the notions of singularity and interdependence is drawn, as Massey puts it, through Spinoza's concept of imagination, which 'for

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[217] ibid 186.
[218] See Victoria Lawson, 'Geographies of Care and Responsibility' (2007) 97(1) Annals of the Association of American Geographers 1; Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory and International Relations* (Westview Press, Colorado 1999).
[219] Massey, *For Space* (n14) 188.
[220] ibid.

him...involves awareness of other bodies at the same time as our own'.[221]

This Spinozistic imagination is consistent with an understanding of subjectivity as contingent on a world of factors outside the subject, rather than essential and self-contained to the subject herself.[222] The Spinozistic imagination thus leans towards a spatial politic, in the sense that '[t]he very acknowledgement of our constitutive interrelatedness implies a spatiality; and that spatiality in turn implies that the nature of that spatiality should be a crucial avenue of enquiry and political engagement;' and because an imaginative awareness of others fits with an understanding of space which is outward-looking and which recognises the multiplicity of simultaneous histories.[223] Following from this understanding of the Spinozistic imagination, Gatens and Lloyd argue that the ongoing construction of identities is simultaneous with the ongoing constitution of new sites of responsibility because of the interdependence and imaginative identification with others inherent in those identities.[224] Massey draws these lines of thought together to argue that a Spinozistic understanding of interdependent, contingent, outward-looking identity and a correlating understanding of interconnected, dynamic, multiplicitous space means that in every moment (now) and at every place (here) that identity is formed, that identity is implicated in both the past (then) and the distant (there). Those lines of extended implication map out geographies of responsibility.

Systems, frameworks and interconnected subjectivity

The 'networks, 'systems' and 'frameworks' that I have frequently referred to throughout this chapter are the factors that come into view when a spatial rather than positional

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[221] ibid.
[222] It is also consistent with some feminist theories of relational autonomy, such as that put forward by Catriona Mackenzie in Catriona Mackenzie, 'Relational Autonomy, Normative Authority and Perfectionism' (2008) 39(4) Journal of Social Philosophy 512.
[223] Massey, *For Space* (n14) 189.
[224] ibid 192.

analysis is adopted – they constitute the dynamic heterogeneous multiplicity that Massey understands as space. Retaining this spatial focus, I want to take a step back from the normative arguments Massey, Gatens and Lloyd make about responsibility and examine the conceptual framework of connection and implication that they base this normative argument on. Gatens and Lloyd develop this argument based on responsibility after examining Spinoza's understanding of the constitution of identity or the self, which is that it 'arises within a complex affective framework in which emotions circulate through systems of social relations'.[225] By 'affective' Spinoza refers to states of awareness of bodily transitions, which include an imagining of how the body is constituted.[226] This understanding of the constitution of identity or the self is consistent with Massey's description of Spinozistic imagination as involving an awareness of other bodies at the same time as our own, and relevant to Massey's focus on the space of becoming. Because for Spinoza selfhood is formed through frameworks and systems, his main focus of attention is on those frameworks and systems, rather than on the selves or identities which are the ever-shifting products of those frameworks and systems. The model of the subject being proposed here, in opposition to the legal subject, is non-discrete – the subject is not a neatly bounded entity propelled through the world by her own agency and solely responsible for all of her actions. Being interconnected with others and with the space around her, the subject is messier and more complex than that; it is difficult to define where the subject begins and ends. This is a subject who does not move seamlessly through space but who is more likely to take space with her as she moves.

Indeed, Gatens and Lloyd draw on the Spinozistic imagination to argue that individual selfhood is impossible in isolation, because it depends on continuing engagement with and disengagement from others in changing frameworks and systems.[227] The isolation

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[225] Moira Gatens and Genevieve Lloyd, *Collective Imaginings: Spinoza, Past and Present* (Routledge, London 1999).
[226] ibid 52.
[227] ibid 65.

of the self is a fiction, as is the correlating tendency to see subjects as isolated and free, and therefore as sites of causal agency and corresponding praise or blame.[228] The Spinozistic understanding of the self being drawn on by Gatens and Lloyd (and then by Massey) is one in which identity is constituted through systems and frameworks, and in which individuality is inseparable from interdependence. In the process of developing their normative arguments about how responsibility should be allocated, Gatens and Lloyd and Massey construct (at times implicitly) a theory of interconnected subjectivity – a theory in which the subject is connected to other subjects and to the space in which she exists. Gatens and Lloyd argue that 'conventionally, our ways of conceptualising responsibility and agency remain fixed on the model of a self-contained individual agent,' and that we are 'restrained by thinking of individuals as bordered territories, firmly separated from others in such a way that the issue of where responsibility lies is always in principle determinable'.[229] They seek instead to understand the constitution of individuality, the processes of formation of identities –

> *Thinking through Spinoza's treatments of individuality and of freedom shifts attention from concern with who did what, and to what end, to seeking a better understanding of what is done and what we are who do it. It shifts our attention to the circulation of images and affects embedded in social practices. The loci of responsibility shift from individuals to social practices and institutions.*[230]

This shift is one from the positionality of the individual subject to the spatiality of the practices and institutions, systems and frameworks that construct the individual subject. On this understanding, it might be said that a subject owes her identity to the systems of social relations around her, and that those systems need to constantly reproduce or hold up that identity in order for it to be maintained.

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[228] ibid 68.
[229] ibid 73-74.
[230] ibid 72.

Responsibility for Gatens and Lloyd is clearly an important part of the Spinozistic imagination of interconnected subjectivity and the possibilities of the collective. Motivated as they are by the ongoing issue of colonial violence against indigenous Australians, it is a political imperative that responsibility be understood as properly placed on the collective. What responsibility entails in practice is not explicitly dealt with by Gatens and Lloyd, which is understandable considering the breadth of what it might mean.[231] What is clear from Gatens and Lloyd's analysis, and Massey's work drawing upon it, is that if we accept a model of interconnected subjectivity, then responsibility is misplaced in dominant spatial arrangements today. The 'conventional way of conceptualising responsibility' which Gatens and Lloyd describe and critique, is the way that law allocates responsibility. Law allocates responsibility through an understanding of places as bordered territories and of individual subjects as sites of causal agency. Indeed, other theorists have made extended critiques of the way in which law allocates responsibility. Iris Marion Young argues that law's 'liability model' of responsibility fails to deal with structural injustice,[232] and proposes an alternative social connection model.[233] This social connection model resonates with Gatens and Lloyd's focus on the responsibility of practices and institutions rather than individuals, and with Massey's argument that the lines of implication that arise from a spatial understanding of becoming lead to geographies of responsibility. Scott Veitch takes this argument further by implicating law itself in the production of structural injustice and

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[231] There is wide-ranging literature on responsibility and care that would be relevant to the practical question of what responsibility displaced from the individual subject might entail. Much of this literature draws on Emmanuel Levinas' philosophy of responsibility to the other. See for example E. Jeffrey Popke, 'Poststructuralist Ethics: Subjectivity, Responsibility and the Space of Community' (2003) 27(3) Progress in Human Geography 298; and Dennis King Keenan, *Death and Responsibility: The "Work" of Levinas* (State University of New York, New York 1999).

[232] Young defines structural injustice as 'a kind of moral wrong distinct from the wrongful action of an individual agent or the willfully repressive policies of a state' which occurs 'as a consequence of many individuals and institutions acting in pursuit of their particular goals and interests, within given institutional rules and accepted norms'. Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) 23 Social Philosophy and Policy 102.

[233] ibid 119-123.

arguing that law operates as a means by which irresponsibility is organised.[234] While they do not all explicitly articulate it as such, these theorists' alternative models of responsibility have in common an understanding of the importance of the space in which the subject is located and the way in which the subject is connected to that space.

Responsibility, spaces of belonging and property

If, as Massey suggests, space is politically important and 'alive' to the extent that responsibility should be allocated along geographical lines, what does space 'do'? I argued above that the Spinozan conception of selfhood drawn on by Massey suggests that a subject *owes* her identity to the systems of social relations in which she exists. Does it follow that the subject is in a relationship of belonging with those systems? If, as I suggested in the last chapter, some subjects 'take space with them', is that because space belongs to them (or because they belong to space)? And what does Massey's understanding of space as 'dynamic heterogeneous simultaneity' mean for thinking about spaces of belonging?

Understanding space as Massey argues does not mean abandoning the understandings of space outlined in the introduction – space as a reference system we use to locate ourselves with respect to the world. Rather, it means understanding that reference system as constantly being (re)produced all the time by a wide range of different forces, and in a direction that is unfixed. It also means understanding that this reference system has different meanings and implications for different subjects depending on where they are located within it. And although Massey is principally concerned with developing an overarching theory of space, this theory does not deny the existence of *different spaces*. Critiquing the romanticisation of 'public space', Massey argues that

[234] Scott Veitch, 'The Laws of Irresponsibility' (2007) 2 DILEMMATA: Jarhrbuch der ASFPG 171; Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge Cavendish, Abingdon 2007).

> *all spaces are socially regulated in some way, if not by explicit rules (no ball games, no loitering) then by the potentially more competitive (more market-like?) regulation which exists in the absence of explicit (collective? public? democratic? autocratic?) controls.*[235]

Massey's point here is that even spaces designated as 'public' such as parks and city squares, are still produced by power relations that are conflicting and unequal, and are still far more accessible to some people than others. It follows that even on Massey's dynamic understanding, there still exist distinct spaces that are socially regulated in different ways – spaces where some subjects and practices will fit more easily than others, and from which some subjects and practices might be excluded. What is important for Massey is that such spaces are not fixed or essential – their meaning and structure will shift over time; spaces are malleable. The many question marks in the quote above indicate Massey's uncertainty about the mechanisms through which this social regulation of space occurs. How do different spaces come to be shaped such that some subjects, objects and practices are 'in place' and proper, while others are 'out of place' and improper? Or to put it another way, how is it that spaces, in all their dynamism and heterogeneity, still operate such that some subjects *belong* and others do not?

For Grewal, a subject can occupy the subjectivity of Americanness by participating in particular consumer cultures associated with 'the American dream' no matter what their identity position or physical location. That is, a subject can come to belong in a particular space by adopting certain practices and understandings. As explored briefly in chapter one, belonging is a necessarily relational term that can be understood as describing the state of fitting smoothly, or without trouble, into either a conceptual category or a material position. Belonging is about being in place, and it thus connotes a sense of propriety, of the proper. It is partly for that reason that belonging tends to be

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[235] Massey, *For Space* (n14) 152.

closely associated with property. Emily Grabham argues that belonging can be used to describe a hierarchical relationship of possession.[236] Through the concept of property, objects and people understood as belonging to others have been claimed, distributed, exchanged and alienated. Grabham argues that viewed from this angle of its association with property, 'belonging appears less a way of describing "home", attachments and security, and more a way of accounting for the contemporary distribution of material wealth and the circulation of power relations through bodies'.[237] As will be discussed below, property is a concept that is associated not only with belonging, but also with ideas of identity, responsibility based on social connection, and the production and maintenance of structural injustice. It is thus a useful concept with which to further explore the relation between space and the subject, and the implications of that relation.

In her book *Lawscape: Property, Environment, Law,* Nicole Graham argues that while contemporary property law is replete with the notion of alienability (alienation, transferability, acquisition, compensation and exchange), this is a departure from the conceptual origins of property, which were based on property being 'proper to' a person – that is, the physical qualities or things so closely associated with the person that he or she could be identified with them.[238] She argues that contemporary understandings of property have lost their associations with identity and the physical particularities of place, and that the 'placelessness' of property law makes it maladapted to the physical world in which it operates.[239] In their essay on the idea of property in land, Kevin Gray and Susan Francis Gray argue that because land can be used for a variety of different purposes, and because even privately owned land is still subject to ultimate regulation by the state, property in land can be understood as consisting 'not so much in a fact or a right, but rather in a state-directed responsibility to contribute towards the optimal

[236] Grabham, '"Flagging" the Skin: Corporeal Nationalism and the Properties of Belonging' (n27) 67.
[237] ibid.
[238] Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, Abingdon 2011) 24.
[239] ibid 113.

exploitation of all land resources for communal benefit'.[240] Property can thus be understood as expressing a commonality of obligation to contribute towards the optimal exploitation of all land resources.[241] To have property, on this understanding, is to be implicated in and responsible to material and social connections that extend well beyond the object of property itself. Understanding property as responsibility entails a recognition that a number of different purposes and realities – a *heterogeneity* – exist *simultaneously* within any given area, and that opinions on what is the most optimal exploitation of resources will change over time (that is, they will be *dynamic* rather than fixed). Thinking about property in land as responsibility thus means thinking about land as space, in an explicitly Massey-an sense. It is of course also possible for a subject to have property in objects other than land, and the connections between law, space and property in regards to a range of objects including but not limited to land, will be explored further in the next chapter.

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In conclusion to this chapter, I have drawn on critical geography and feminist theory to argue for a move from positionality to spatiality and to show that an alternative understanding of space has implications for understandings of the subject. Legal geography makes the argument that law has a problematic conception of space, namely as something which is pre-existing, static, singular and separate from law and politics. Massey's discussion of space – including the privileging of time over space and her argument for a re-imagining of space as multiple, heterogeneous, dynamic and political rather than as a static and apolitical slice of time – extends legal geography's critique of the legal conception of space. These arguments lead to a rejection of positional identity politics and legal doctrines that enshrine them, and suggest instead the need for a much messier politics that recognises the dynamism and importance of space. It means

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[240] Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, Oxford 1998) 40.
[241] ibid.

questioning how different spaces are produced and what they can do. An important political consequence of Massey's analysis is that if space is ever-evolving, it is always open to change – the systems, networks and understandings that constitute space at this particular moment can be shifted, they are not fixed in time. Building on Massey's understanding of space, I discussed Grewal's work on transnational America. Grewal's work is consistent with Massey's in that Grewal understands America as a constantly evolving space defined by a range of practices and understandings rather than as a physically bounded entity. However Grewal's work also demonstrates the connection between space and subjectivity. Grewal shows how using a spatial framework to analyse political issues traditionally framed in terms of identity politics reveals not only the geopolitical considerations that come into view when space is understood as unfixed, but also the inseparability of (geopolitical) questions of space from biopolitical questions of subjectivity and identity.

Following on from her discussion of space and drawing on Gatens and Lloyd's work on Spinozistic subjectivity, Massey urges a recognition and undertaking of geographies of responsibility that extend far beyond the reach of the discrete local self that is commonly understood as separate from the 'non-local' world beyond. While the practical meaning of such geographies of responsibility is unclear, what is clear is that such geographies imply the existence of an interconnected (rather than discrete) subject, and that both this interconnected subject and the geographies of responsibility that attach to her are ignored and / or denied under current legal and political means of allocating responsibility. Such an argument has consequences for legal geography, which does not trouble the liberal model of the subject or the conceptual boundaries of where the subject ends and space begins. The idea of the interconnected subject and the focus on the way in which she is connected lead to questions of belonging – why is it that some subjects fit smoothly in particular places and others do not? What constitutes a relation of belonging and how does that relation affect and rely upon space? With its associations with belonging, 'the proper', responsibility, social

connection and law, the concept of property offers a useful way to think through these questions.

4. Subversive Property: Reshaping malleable spaces of belonging

How might the concept of property be useful in exploring the question of how spaces of belonging are produced? If, as argued in the last chapter, space is something that is not fixed in meaning but is constantly reproduced by a range of dynamic forces, how is it that spaces are socially regulated or shaped such that some subjects belong and others do not? To recap briefly, I began in the first chapter with a sense of unease about the way the campaign around a British refugee case concerning a Ugandan lesbian seemed to rely on and reproduce essentialist and static understandings of place and identity, fostering a liberal discourse of inclusion that has colonial undertones and that assumes law will provide the answer to complex issues of violence and displacement. Instead of replicating liberal legal discourse by focusing on the individual subject or the similarly grouped subjects of positional identity politics, in the second chapter I turned to legal geography in order to widen the lens of analysis onto places, spaces and landscapes. Legal geography showed how spatial analyses could be used to undermine any claim to law's universality, and offered both theoretical and empirical challenges to the idea that space is static, apolitical and pre-existing of law which operates 'over' or 'on top of' it. Searching for a deeper theorisation of space, in chapter three I looked to critical geography, in particular the work of Doreen Massey, who demonstrates how a conception of space as fixed and static is both empirically inaccurate and politically debilitating. Space can still be understood as a reference system through which we locate ourselves in the world, but it is a reference system that is constituted by a vast multiplicity of different, dynamic forces; space is conceptual, social and physical and it is constantly being reproduced in no fixed direction. In addition to Massey, I discussed Inderpal Grewal's exposition of the relationship between the biopolitical and the geopolitical, demonstrating how space is intimately linked to subjectivity. Taking up critical geography's call for a shift from studying positionality to studying spatiality, I argued for an understanding of space as an ever-unfolding dimension of multiplicitous becoming and as intimately connected to questions of subjectivity.

Such an understanding of space in turn suggests a model of subjectivity as interconnected rather than discrete. For Massey, following Gatens and Lloyd, dynamic multiplicitous space and interconnected subjectivity suggest the need for a relational ethics in which responsibility is placed on frameworks, systems, institutions and practices rather than on the identities and places that occur within and through them. This model of interconnected subjectivity and the idea that the spaces in which the subject exists might be 'responsible' for acts and situations generally attributed to the subject, both bring back into focus the question of the connection between space and the subject. Where does the subject end and space begin?

Property is a concept that explicitly deals with the space-subject connection. This chapter puts forward a theory of property as a spatially contingent relation of belonging. As will be discussed below, property has long been theorised in terms of its essential relationship to or completion of the subject. In this chapter, I draw on the work discussed in the last chapter as well as on phenomenological literature to construct a theory of property from a spatial rather than a subject-centered perspective. I argue that property *occurs* when relations of belonging are held up by the spaces in and through which they occur. This understanding builds on Davina Cooper's theory of 'property practices', which centers on networks of belonging, rather than exclusion. Her work considers property practices in terms of two types of belonging – subject-object (when an object belongs to a subject) and part-whole (attributes, qualities or characteristics that belong to a subject or a thing). I argue that when analysed spatially, those two types of belonging become indistinguishable. Property happens when space holds up a relationship of belonging, whether that relationship of belonging is characterised as being between a subject and an object or between a subject and a social characteristic. And while subject-object belonging is usually associated with mastery and part-whole belonging with membership, I argue that a spatial analysis reveals that aspects of both mastery and membership are involved in every instance of

property. Thus from a spatial perspective, whiteness, heterosexuality and other such characteristics generally associated with identity can be understood as property in the same way that owning a house or a mobile phone can.

This understanding of property captures both the physical and social aspects of the space-subject connection; it focuses on what space *does,* and through this focus suggests a conceptualisation of that connection that fits with anti-essentialist understandings of identity and with critical geography's understandings of place and space. It also makes property relevant to a wide range of issues and suggests the possibility of an alternative political agenda for property. For as property is spatially and temporally contingent, it is also malleable. While property tends to be productive of linear time and the maintenance of the status quo, it does not have to be that way – property can also be subversive. I close the chapter by considering some of the ways in which subversive property exists outside of law, and some of the ways it is co-opted by law.

The Propertied Subject and the Right to Exclude

Locke, Hegel and the Proper(tied) Subject

The theorisation of property as an essential part or extension of the subject has a long history in Western philosophy. Writing in 17th century England, John Locke argued that 'every Man has a Property in his own Person'.[242] This property belongs to the subject alone and consists of 'the Labour of his Body, and the Work of his Hands'.[243] By cultivating previously uncultivated land – or in Locke's terms, by mixing the labour of the subject's body with land which is still in 'the State of Nature' – that land becomes the

[242] John Locke, 'Of Property (from chapter V of Locke's "Second Treatise of Government")' in C.B. Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, Toronto 1978) 18.
[243] ibid.

subject's property.[244] So the moment when the subject mixes his labour with land is the moment that land becomes his property. Because this appropriation through labour is understood as a kind of natural, god-given right, no permission from others is required, so long as the appropriator leaves 'enough, and as good' for others.[245] Locke's theory of property was aimed in part at increasing political participation by asserting the property rights of those who worked the land, but its most famous legacy is as a significant justification for colonial expansion.[246] For Locke, 'in the beginning all the World was America', where America is understood as a state of nature wasteland improperly used by natives, and waiting to be cultivated.[247] Locke's normative argument for the 'proper use' of 'wasteland' is linked to the Christian notion that it is man's obligation to develop the skills provided by God to make use of the world God created.[248] Locke's 'state of nature' includes all areas of the world where 'the Civiliz'd part of Mankind' have not yet posited laws to determine property[249] – meaning that according to his theory, any part of the world that does not have an Anglo-European system of property law is liable to be appropriated by those who come from parts of the world which do.

According to Locke's definition then, property is both an inherent, essential part of the subject (the body's labour) and a constructed extension of it (the land that is cultivated). As has been discussed by Margaret Davies and others,[250] Locke's 'every man' is a split self – as a self-owning person, he is both the owner / subject of property and the owned / object of property. But the object of his property is *the labour of his body* and *the work of his hands,* suggesting something slightly different from a simple mind/body distinction where the mind owns the body. For it is not the body itself that is Locke's object of property, but the work that that body performs. This theory, which

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[244] ibid.
[245] ibid 19.
[246] Margaret Davies, *Property: Meanings, histories, theories* (Routledge-Cavendish, Abingdon 2007) 87.
[247] Locke (n242) 26.
[248] Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Clarendon Press, Oxford 1996) 39.
[249] ibid.
[250] Davies, *Property: Meanings, histories, theories* (n246) 90-92.

presupposes the existence of a physically able body, defines property first as an action (the labour or work of the body) and second as the thing upon which the action is performed (the land that is cultivated). The action always emanates from the subject's body, but it is the body's movement – his interaction with the outside world – which both is and further produces property. For when that movement (labour) occurs upon particular land (land in the state of nature), the interaction with that land turns it into the subject's property. Property thus expands itself. However that property only exists in and for subjects who are able-bodied,[251] Anglo-European men of a particular class;[252] Locke's 'every man' who has property in himself and the capacity to appropriate property outside himself, is embedded in class, gender, race and ability assumptions about who can be a proper subject.[253] And just as Locke's subject is implicitly assumed to exclude certain socially and legally constructed categories of people, he is also assumed to pre-exist any such categories; Locke's subject always already has property in his labour, he does not need to acquire it through any social or legal processes. By constructing the self-owning, property-owning subject as both white / male / owning class / able-bodied *and* pre-existent of the categories of race, sex, class and ability, Locke implicitly constructs those categories as constitutive of property. The Lockean subject always already has property in himself, he does not need to acquire it through any social or legal processes.

In contrast, Hegel's proper subject only achieves subjectivity through the process of appropriation. He (Hegel's subject is also male)[254] is not born with property but must acquire it in the process of becoming fully human / a proper subject. Writing in early 19th century Germany, Hegel argued that the subject begins as an abstract free will,

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[251] For the body must be capable of labouring / working the land.
[252] Barbara Arneil discusses how Locke's theory did not apply to male (or female) servants: Barbara Arneil, 'Women as Wives, Servants and Slaves: Rethinking the Public/Private Divide' (2001) 34(1) Canadian Journal of Political Science 29.
[253] Davies, *Property: Meanings, histories, theories* (n246) 90.
[254] Margaret Davies, 'Feminist Appropriations: Law, Property and Personality' (1994) 3(3) Social and Legal Studies 365, 383.

which is purely individual and thus not yet in a relation with the external world.[255] The subject 'must translate his freedom into an external sphere'[256] by putting his will into external objects and making them his own.[257] His externalised will is then taken back into himself in the form of property – the subject recognises that 'I, as free will, am an object to myself in what I possess'.[258] As Davies summarises – 'I become an actual person by relating to myself through the external world'.[259] Property for Hegel is thus an essential part of the process of becoming a proper subject. He writes that 'a person, in distinguishing himself from himself, relates himself to another person, and indeed it is only as owners of property that the two have existence for each other'.[260] Thus whereas Locke's proper subject enters the world already fully formed complete with property in his own labour, Hegel's subject only reaches a state of subjectivity by acquiring property and in turn having his property recognised by another subject. And whereas Locke sees the world as a place rooted in the state of nature, slowly cultivated into property by 'the civilised part of mankind', Hegel sees the world as a place in which property is a way for the individual to recognise and engage with that outside himself as a step towards an ethical totality.[261] Property for Hegel is an essential step towards a much broader social goal whereby the interests of the individual can only be realised in conjunction with those of the whole community, whereas for Locke property can be understood as an extension of the (individual) subject in a pre-social state of nature.[262]

Locke and Hegel have in common their definition of property as something that is an essential part of the proper subject – whether that part is the subject's inherent, expandable self-ownership or an element of the subject's essential becoming. They also

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[255] G W F Hegel, Allen W Wood and Hugh Barr Nisbet (tr), *Elements of the Philosophy of Right* (Cambridge University Press, Cambridge 1991) §34, 67.
[256] ibid §41.
[257] ibid §44.
[258] ibid §45.
[259] Davies, *Property: Meanings, histories, theories* (n246) 98.
[260] Hegel (n255) §40.
[261] Davies, *Property: Meanings, histories, theories* (n246) 99.
[262] ibid.

have in common an assumption that neither women nor non-white[263] races can be proper subjects.[264] As such they both implicitly construct particular social characteristics (masculinity and whiteness) as constitutive of property.

Locke and Hegel's proper(tied) subject today

Locke and Hegel's theories of property both remain heavily influential in understandings of property today, and have been used by a range of political campaigns to make arguments about what should count as property. Squatters' arguments that unused buildings should be given to those who make use of them as a home have strong resonances with Locke's justificatory theories of appropriation of unused land,[265] and assertions of self-ownership have been used by feminist activists in campaigns against the criminalisation of abortion.[266] Margaret Radin draws on Hegel's theory of the subject formed through property to argue that certain property is market-inalienable because it is essential to human flourishing or personhood.[267] Radin distinguishes market-inalienable property from fungible, commodifiable property which exists not for human flourishing but primarily for the free market goal of profit. So, for example, Radin sees the home as essential for personhood and makes the argument that there should therefore be greater legal protection for tenants.[268] She thus draws on the Hegelian argument that property is necessary to personhood and calls on law to recognise and protect such property. While Radin's arguments are a powerful rejection of law and economics theories that promote universal commodification, her work has been critiqued on a number of bases. These include her appeal to social convention or

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[263] I use this term acknowledging its significant uncertainty, which I explore to some extent later in the chapter. Broadly though I take 'white' to mean Western European and Anglo-American.
[264] David Harvey, 'The Spatial Fix - Hegel, Von Thunen and Marx' (1981) 13(3) Antipode 1, 2.
[265] Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (Routledge, London 2004) 21; Andres Corr, *No Trespassing! Squatting, Rent Strikes and Land Struggles Worldwide* (South End Press, Cambridge MA 1999) 51-76.
[266] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal debates about property and personality* (Ashgate Dartmouth, Sydney 2001).
[267] Margaret Radin, 'Market-Inalienability' (1987) 100(8) Harvard Law Review 1849; *Reinterpreting Property* (University of Chicago Press, Chicago, 1993).
[268] Radin, *Reinterpreting Property* (n267) 59.

'normality' to determine what constitutes property essential for human flourishing and what constitutes inessential, fungible property.[269] This appeal to an overarching normality without questioning that normality, means that Radin's theory reinforces rather than challenges the power structures that cause people to unwillingly sell or lose what she would classify as property essential for human flourishing.[270] As Schnably argues, by accepting the inevitability of social convention as the defining force for what constitutes human flourishing, and by appealing to legal rules as the only way to protect people from the forces of the market, Radin's analysis effectively treats people as passive and unresisting objects of power.[271] This is not to say that Radin's argument for greater legal protection for tenants, or the arguments for self-ownership in the context of abortion or utilisation of empty buildings in the context of squatting are not useful for achieving immediate political goals, but that they do reinforce the centrality of the subject, the assumption that property is essential to it and the idea that social 'normality' defines what it means for a human to flourish.

Exclusion: The proper(tied) subject among others

Debates over what counts as property continue to be prominent across a range of political contexts because property is still widely understood and enforced as a particularly formidable right. Although many legal theorists have pointed out the social constructed-ness of property[272] – persuasively arguing that it comprises 'no more than socially constituted fact'[273] – most nonetheless still understand property as operating to give the subject something fixed, permanent and incapable of being legally interfered

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[269] Davies, *Property: Meanings, histories, theories* (n246) 103.
[270] Stephen J. Schnably, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1992-3) 45 Stanford Law Review 347, 372.
[271] ibid 396.
[272] Kevin Gray, 'Property in Thin Air' (1991) 50(2) Cambridge Law Journal 252, 295.
[273] Kevin Gray, 'The Legal Order of the Queue' (Techniques of Ownership: Artifacts, Inscriptions, Practices Conference, London School of Economics 2007) <http://www.lse.ac.uk/collections/law/projects/techniquesofownership/tech-gray.pdf> accessed 20 November 2011.

with by others. Although property might be an illusion (as Gray argues),[274] it is an illusion with significant material effects – most significantly, it is an illusion that gives the subject the power to exclude.[275] This emphasis on exclusion is an important recognition of the social power of property. While Locke in particular theorised property in terms of a person's relationship with a thing (land), modern property theorists have made a point of highlighting that 'dominium [private power] over things is also imperium [political power] over our fellow human beings'.[276] By focusing on the right to exclude others, these legal theories of property make the important point that property is not just an extension of the subject but also a relationship between subjects.

Using this understanding of property as a right of exclusion, Cheryl Harris makes the argument that whiteness is a kind of property. Writing in a US context but drawing on histories and arguments applicable to other Anglo-European states, Harris outlines how property rights are rooted in racial domination to the extent that whiteness is actually a form of property.[277] Slavery and colonial conquest – practices implemented by force and enshrined in law – established whiteness as a prerequisite to the exercise of enforceable property rights.[278] Whiteness was established as a protected legal category from which others were excluded.[279] And while slavery and conquest are no longer legal practices,[280] by essentially maintaining the status quo of a socio-economic system entrenched in racial inequality, law continues to recognise the settled expectations of white people that have been built on the benefits and privileges of white supremacy.[281]

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[274] ibid.

[275] C.B. Macpherson, 'The Meaning of Property' in C.B. Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, Toronto 1978) 1; James E. Penner, *The Idea of Property in Law* (Clarendon Press, Oxford 1997).

[276] Morris Cohen, 'Property and Sovereignty' in C.B.Macpherson (ed), *Property: Mainstream and Critical Perspectives* (University of Toronto Press, Toronto 1978).

[277] Cheryl I. Harris, 'Whiteness as Property' (1993) 106(8) Harvard Law Review 1707, 1716.

[278] ibid 1718-1724. This is not to say that all white people owned property, but that whiteness was one prerequisite to being able to own property.

[279] ibid 1737.

[280] That is, slavery and conquest are no longer legal in their traditional forms. Many would argue that conquest continues in other forms today, particularly in 'postcolonial' settler states, and that certain contemporary racialised labour practices amount to slavery.

[281] Harris (n277) 1731.

Harris sees whiteness as a property right which is exercised whenever a white person takes advantage of the privileges accorded to white people simply by virtue of their whiteness.[282] These privileges, which might range from feeling comfortable in a traditionally white institutional setting such as a university meeting to being more likely to be hired for an executive job, are vast and complex. Harris suggests affirmative action as a means to undermine the property interest in whiteness because this would aim to effectively diminish the exclusiveness of white privilege.[283] Harris' argument defines property as both an essential part of the subject (one's race) and an important relationship between subjects (whiteness gives tangible privileges over non-whites).

Property and Belonging, Properties and Belongings

Subject-object and part-whole

The legal and socio-legal focus on exclusion as the essential component of property fits with the philosophical focus on the subject in theorising property – it is the subject of property who has the right to exclude all other subjects from the object of his property. An alternative approach, and one that shifts the focus away from the subject and onto the broader spaces, relations and networks that constitute property is to reverse the focus on exclusion and instead theorise property in terms of belonging. This reversal of focus does not imply that belonging exists independently of exclusion. As discussed in the last chapter, while belonging can describe emotional attachments to 'home' and security, it can also describe hierarchical and exclusionary relations of possession and material wealth. Any space in which some subjects, objects or parts belong (spaces such as transnational America, the sex work district of a Canadian city or the English countryside, each discussed in chapters two and three) will be a space where other subjects, objects and parts will be excluded, unsettled or realigned. As the discussion

[282] ibid 1734.
[283] ibid 1785.

below will demonstrate, focusing on belonging rather than exclusion brings into view spatial factors that tend otherwise to be overlooked in exclusion-focused theorisations of property. Davina Cooper studied the property regime at Summerhill School, an alternative school where children choose whether or not to attend class and where rulemaking and dispute resolution involve the school body as a whole (both teachers and children),[284] to think about property in terms of belonging and to explore the work performed by property practices within a community.[285] Cooper describes property practices at Summerhill as involving five intersecting dimensions – belonging, codification, definition, recognition and power – of which belonging is the most important.[286] Belonging is considered in two ways: firstly the relationship whereby an object, space, or rights over it belong to a subject ('subject-object'), and secondly the constitutive relationship of part to whole whereby attributes, qualities or characteristics belong to a thing or a subject ('part-whole').[287]

Both understandings of belonging implicate social relations and networks that extend beyond the immediate subject and object of property; property is instead understood as 'a set of networked relations in which the subject is embedded'.[288] Consistent with the approach of this thesis, Cooper's analysis of property is a spatial one, focusing more on the networks in which the subject is embedded than on the subject herself. Networks are spatial; as particular arrangements of intersecting forces or things that necessarily extend beyond the subject, different networks (whether they be social, conceptual or physical) constitute the reference systems through which we locate ourselves in the world. Massey's understanding of space is also networked – she defines places as articulated moments in *networks* of social relations and understandings.[289] In order to constitute property, I argue that the set of networked relations to which Cooper refers

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[284] Davina Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32(3) Law & Social Inquiry 625, 626.
[285] ibid 627.
[286] ibid 628.
[287] ibid 629.
[288] ibid 636.
[289] Massey, 'Power-geometry and a progressive sense of place' (n24) 66. Emphasis added.

must not only include one of belonging between either subject and object or part and whole, but also be structured in such a way that that relation of belonging is conceptually, socially and physically supported or 'held up'. That is, the set of networked relations that Cooper describes must form a space that holds up the relation of belonging.

As discussed in the last chapter, all spaces are produced by a multiplicity of different, dynamic forces – space is physical, social, conceptual and, importantly, active. 'Holding up' is a way of understanding what dynamic, heterogeneous space is doing when a subject is embedded in it. For being 'embedded' generally means being fixed firmly in something solid,[290] yet the networked relations in which the propertied subject is embedded are dynamic rather than solid or fixed. Put simply, relations of belonging are held up when wider social processes, structures and networks give them force. By this I mean that they are recognised, accepted and supported in ways that have a range of effects and consequences. For example heterosexual relations tend to be held up by space in a multitude of ways that homosexual relations are not (through institutional means such as marriage and parenting rights, through social validation such as accepting, supporting and celebrating couples who hold hands or kiss in public, through positive media representation, through the availability of appropriate sex education and safe sex materials, etc). This holding up by space of a relation of belonging is more than the act of state recognition, which is associated with liberal identity politics critiqued in chapter two, and which has been specifically critiqued for its predetermination of the bounds of the propertied subject, particularly in colonial contexts.[291] While recognition, as Brenna Bhandar argues, 'fails to escape the violence inherent in colonial spatial and temporal orders',[292] the concept of 'holding up' is directly concerned with these orders.

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[290] 'embedded, adj' (2011) Oxford English Dictionary Online <http://www.oed.com/search?searchType=dictionary&q=embedded&_searchBtn=Search> accessed 4 December 2011.
[291] Brenna Bhandar, 'Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being'' (2011) 22 Law and Critique 227, 228-229.
[292] ibid 228.

Space holds up relations of belonging when it is shaped in a particular way, and because space is multiplicitous and dynamic, holding up is a multifaceted and dynamic process. This understanding of property thus focuses not on the subject but on the space that surrounds, includes and constitutes the subject – on the various networks of relations that shape space such that it holds up some relations of belonging and not others.

The second understanding of belonging that Cooper describes is something of a departure from traditional and legal understandings of property, but resonates strongly with Harris' analysis of whiteness as property. Using the analysis of part-whole belonging, whiteness can be seen as property because the property-holder is embedded in certain social relations and networks of belonging. A white person can enjoy the privileges of whiteness because he or she belongs to the various social relations and networks that constitute whiteness. As writers such as Ruth Frankenberg have shown, those relations and networks are complex and far-reaching. Whiteness, like all racial categories, is socially constructed through historically specific fusions of political, economic and other forces.[293] Whiteness in turn 'constructs daily practices and worldviews in complex relations with material life'.[294] That is, whiteness is productive of subjectivities. So while whiteness can be understood as belonging to the white subject as Harris argues (whiteness as property in the sense of subject-object belonging), the white subject also belongs to the complex relations and networks that form whiteness (whiteness as property in the sense of part-whole belonging). This analysis suggests that in order to understand the varied social powers of property, both subject-object and part-whole belonging must be considered. In policy terms, this analysis means that if the normative goal is to challenge the way whiteness operates as a structure of exploitation and oppression then it is the relations and networks that form whiteness which must be undermined rather than the narrower project of liberating or disciplining the individual subjects who belong to them.

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[293] Ruth Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (Routledge, London 1993) 204.
[294] ibid 228.

A subject's embedded position within networks of belonging can be used to describe a situation in which a person has property in her whiteness as well as a situation in which a person has property in her house or her bicycle. This understanding thus assists in examining the similarities between these two types of property; as will be discussed later in this chapter, it helps in thinking about when a property becomes property, when (part-whole or 'membership') belonging becomes a (subject-object or 'mastery') belonging, and how the two overlap. For example, as will be explored in chapters five and six, when does being aboriginal, queer and / or a woman function as property? When are the relations of belonging that each of those social characteristics entail, held up by space? And what are the implications of this holding up? The understanding of property as part-whole belonging offers the potential for thinking about the materiality of social relations – how possessing a particular social characteristic not only affects subjectivity but also affects the subject's interactions with the social and physical space around her. While it seems obvious that subject-object belonging affects a subject's interaction with social and physical space (if you own a house or a bicycle you will paint it, park it, loan it out and otherwise use it how you wish), the effect that part-whole belonging has on a subject's interaction with social and physical space is less obvious. How does being white or queer affect not only how the white / queer subject understands herself but also how the social and physical space around her takes shape? Similarly, how does owning a house or a bicycle affect not only what the subject does with her house / bicycle in physical and social space, but also how her subjectivity is constituted? Cooper argues that the two types of belonging 'overlap, combine and reform' and thereby 'provide the context, limits and conditions of each other's existence'.[295] As will be argued below, when analysed from a spatial perspective these two types of belonging-as-property overlap to the extent that they become indistinguishable. Every instance of property as 'subject-object' belonging also has effects that are constitutive of subjectivity, and every instance of property as 'part-

[295] Cooper, 'Owning Up Ownership' (n284) 661.

whole' belonging also has effects on social and physical space.

Law as a network of belonging

Understanding property as a relationship of belonging held up by space is a departure from understanding property as defined by law alone.[296] Cooper's exploration of property practices at Summerhill notes that while those practices defer absolutely to some state laws, 'they are constituted and take shape through a legally pluralist regime of asymmetric institutional recognition',[297] meaning that property is defined not only by state law but by a range of social norms, rules and relations. State law can be understood as a network of belonging, but it does not produce property on its own. Only in combination with other relations and networks will it be capable of forming a space that holds up relations as property. Nick Blomley makes a similar point in his empirical study of people's understandings of property in a neighbourhood in Canada, where he shows that while law remains obsessed with delineating between public and private property, in some instances people do not think of certain objects as either private or public property, but as an amalgam of both.[298] In Blomley's study, residents had different and ambiguous reactions to flowers being planted in bathtubs and other household items on a boulevard in their neighborhood by a group of resident artists.[299] Some viewed the bathtubs as private encroachments on public space, others saw them as a public good, and others saw them as both an encroachment and a public good at the same time.[300] Blomley draws on this empirical research to argue that people live in 'complicated and overlapping worlds when it comes to supposedly determinate

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[296] As I have been throughout this thesis, I am using the term law here to refer to the body of rules produced by the state through parliament and the courts. An alternative approach to some of the issues dealt with in this chapter would be to explore whether different kinds of property can be understood as alternative legalities – that is, to use a theoretical framework of legal pluralism - but this is not the focus of my study. For a compelling exploration of what amounts to law, see Watson, 'Buried Alive' (n56).

[297] Cooper, 'Owning Up Ownership' (n284) 632.

[298] Nicholas Blomley, 'Flowers in the bathtub: boundary crossings at the public-private divide' (2005) 36 Geoforum 281.

[299] ibid 288.

[300] ibid 290.

categories such as property,'[301] with those worlds being defined by various networks of social rules and relations, including but not limited to law. Peoples' experiences of property are far more heterogeneous, complicated and slippery than an analysis based simply around property law would suggest.

Thinking about property as a relationship of belonging capable of being formed through law as well as through other social, cultural and / or political networks helps to emphasise the social and cultural specificity of the more conventional understandings of property reviewed above, and of the Western legal property regimes which in part derive from them. Framed in terms of belonging, Locke's theory of property is a justificatory argument for what belongs to who – Locke argues that a man's labour and the ('unused') land with which he mixes his labour both belong to him. This theory thus espouses a universal space of belonging that holds up the self-owning proper subject (who as discussed above, must be white, able-bodied, etc) and his earned property. Yet the various networks of belonging in which Locke's appropriating subject is situated are particular rather than universal – one must first belong to networks of whiteness, class, ability and masculinity, and then also to a society that accepts Locke's idea that the world is one universal state of nature that belongs to no one but the men who cultivate it. During the period in which Locke's theory of property was hugely influential, those networks of belonging were dominant in Britain. As colonisation spread British law and culture across the empire, so property spread on a Lockean basis throughout those areas. As authors such as Irene Watson have shown, colonial powers enforce not only their laws but also their racism, elitism and misogyny upon indigenous social spaces with devastating effect – all but wiping out indigenous networks of belonging.[302] Thus law did not recognise either the land or the labour of indigenous people as belonging to them, for they were not recognised as self-owning proper subjects. At the same time though, indigenous people (who, at least in the Australian example, have an entirely

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[301] ibid.

[302] Irene Watson, 'Illusionists and Hunters: Being Aboriginal in this Occupied Space' (2005) 22 Australian Feminist Law Journal 15.

different understanding of property)[303] did not recognise the colonisers' claim to have property in the land merely because they had forcefully taken control and begun their own kind of agriculture on it. Thus different networks of belonging and contradictory understandings of property existed within the same space, the Lockean understanding being violently enforced through law.

This disparity in networks of belonging and understandings of property continues in postcolonial states today. As the colonial legal system is the root of settler land title, law tends overwhelmingly to protect non-indigenous property. The dominant, legally sanctioned networks of belonging in relation to land in Australia revolve around the proper subject discussed earlier, and even arguments for law reform tend to reassert that culturally specific paradigm of the proper subject. Radin's argument that law should protect networks of belonging that 'social consensus' defines as essential to personhood is an example of how arguments for law reform can have the effect of reasserting dominant networks of belonging and understandings of property; social consensus tends to support the dominant networks of belonging, thereby preserving the status quo and any injustices that are part of that. Applying Radin's arguments to the example of land in Australia entails advocating the increased legal protection of people's homes;[304] this would mean that all Australians, indigenous and non-indigenous, should have a home that they can safely assert belongs to them. But while this position would protect the immediate housing needs of those for whom such a need is pressing (homeless Australians, indigenous and non-indigenous), it relies on a culturally specific idea of what 'home' means (an enclosed, private physical dwelling), and it avoids the much larger issues of indigenous dispossession and the ongoing effects of colonisation. For many indigenous Australians, home and homelessness have an entirely different meaning – a meaning that gets drowned out amidst the calls to address the non-indigenous understanding of homelessness. As Aileen Moreton-Robinson argues,

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[303] Bruce Rigsby, 'Aboriginal people, spirituality and the traditional ownership of land' (1999) 26(7/8/9) International Journal of Social Economics 963.
[304] Margaret Radin, 'Residential Rent Control' (1986) 15 Philosophy and Public Affairs 350.

> *the sense of belonging, home and place enjoyed by the non-indigenous subject – coloniser / migrant – is based on the dispossession of the original owners of the land and the denial of our rights... It is a sense of belonging derived from ownership as understood within the logic of capital; and it mobilises the legend of the pioneer, 'the battler', in its self-legitimisation. Against this stands the indigenous sense of belonging, home and place in its incommensurable difference.*[305]

Theories of property that take law as either the starting point or final answer to the question of what belongs to who fail to acknowledge the heterogeneity of networks of belonging and of people's experiences of property; they tend to reinforce rather than challenge the underlying theoretical and political frameworks that are reflected in law.

Property as spatially contingent

Situating the subject, the object and the relation between

The various networks that are capable of producing a relationship of belonging held up as property are not spread out uniformly across space and time. When things, people or practices belong somewhere (or according to one network of belonging), they are generally out of place somewhere else (or according to another such network). Take whiteness as an example. While whiteness can clearly be seen as a kind of property when a white person comfortably enters a meeting at a Sydney university whose history and administration are embedded in white hegemony, it is more difficult to make the argument that whiteness is property when a white person, less comfortably, walks into

[305] Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonizing Society' in Sara Ahmed, Claudia Castaneda, Anne-Marie Fortier and Mimi Sheller (eds), *Uprootings/Regroundings: Questions of Home and Migration* (Berg, Oxford 2003) 23.

a local store in a poor aboriginal area such as an Alice Springs town camp.[306] This is not to assert that these spaces are in any way equivalent – clearly there is potentially more to be gained in terms of life opportunities, economic and political capital by entering an elite city university than by entering a store in an Alice Springs town camp – but simply to show that property here is not necessarily property there. Nor is this to deny that the white subject still has power derived from her whiteness while she is in the town camp store, but simply to acknowledge that her whiteness in that setting means that she does not belong socially, and that that has a range of material effects. At the Sydney university meeting room the white subject not only feels comfortable but knows where things are, how things works and what is expected in terms of etiquette and general conduct. At the town camp store the white subject is not only likely to feel uncomfortable but is also likely to be unfamiliar with where things are, how they work and what is expected in terms of social conventions – so what is usually accessible to her in hegemonic white spaces might be out of reach. She is held up as belonging in the university meeting room but not in the town camp store.

But while this theorisation of property as spatially contingent can easily be understood in relation to part-whole belonging, whereby the object of property is a characteristic or social attribute, it is somewhat more difficult to understand in relation to subject-object belonging, whereby the object of property is a thing or space, or rights over that thing or space. While it might be possible to understand how whiteness is property in some places and not others, surely if I own my house at 27 Ritches Road it remains my property regardless of where I happen to be at any moment. As argued above, a major reason property is a coveted political claim is that property is widely recognised as fixed and permanent – an extension or part of the subject that cannot be removed or interfered with by others. But property as subject-object belonging is spatially contingent too. For the relationship of belonging between 'me' and '27 Ritches Road' can only exist where networks of conceptual, social and physical relations have first

[306] Alice Springs town camps will be discussed further in the next chapter.

constructed 'me', where other networks of relations have constructed the house and land at 27 Ritches Road, and further networks of relations hold up the relationship between us as one of belonging.[307] Each of those networks of relations is in turn dependent on a whole range of interactions, processes and understandings that reach far beyond the networks themselves – they are not contained, complete or essential, but rather are constantly evolving.

Making her argument that place is not fixed but an open and ongoing process, Doreen Massey shows how even solid and seemingly timeless 'natural' structures like mountains have not existed forever or without the collaboration of multiple other processes, but that they have unique histories and geographies and would not be what and where they are without a range of other networks of relations having panned out the way they did.[308] As such, the seemingly fixed products of those networks (whether they be identities, places or things) must be understood as contingent and incomplete processes rather than determined outcomes or fixed positions. Seemingly static categories are in fact part of a wider and constantly changing space. Thus in this example, both the seemingly fixed categories ('me' and '27 Ritches Road') and the relationship of belonging between them are in fact not fixed but dynamic and contingent.

So it is not so much that the house and land are mine, but that 27 Ritches Road and I are, at a particular moment, in a relationship of belonging recognisable as property because the various social, cultural, legal and other networks in which we are embedded hold up our relationship as such. Davies makes a similar point about the contingency of property in her discussion of queer property. Applying an anti-

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[307] I use the example of a house and land because it is an example relevant to the issues dealt with in this thesis, particularly in the next chapter. I have discussed this same understanding of property as a spatially contingent relation of belonging in relation to chattels – specifically a mobile phone – in the article Sarah Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19(4) Social and Legal Studies 423.

[308] Massey, *For Space* (n14) 131-140.

essentialist understanding of identity to ideas of property, she argues that 'if we accept that identity is at least partly an intersubjective, cultural construction and not simply a pre-social attribute then... there is a sense in which identity is never one's own, but a culturally determined aspect of one's person'.[309] If I don't own my identity, but rather owe it to various social, cultural, economic and other networks that create my identity, then it follows that I owe the relationship of belonging I have with 27 Ritches Road to the various networks that construct that relationship as well. Property is thus understood not as something essential to or inseparable from the subject, but as a relationship that needs to be constantly reproduced by the space surrounding it. Carol Rose makes a similar point when she argues that property is a kind of persuasion – one that requires ongoing reiteration and that affects the subject as well as communicating a claim to the outside world.[310] If it is accepted that the subject, object and recognisable relationship of belonging between them are each produced by dynamic, heterogeneous networks interacting simultaneously, then it becomes clear that even traditional understandings of property as particular rights to an object are contingent on space. My house only belongs to me so long as I remain in a space that holds up my relationship of belonging with it.

Understanding property as spatially contingent suggests a different model of the subject from Lockean, Hegelian and other more conventional understandings of property. For the subject in this understanding is neither pre-social (like Locke's) nor dependent upon appropriation for its subjectivity (like Hegel's). Rather, the subject is constructed by (and thus dependent upon) a whole range of dynamic and heterogeneous forces, including but not limited to law. This is a subject who owes her identity to the space in which she exists and of which she is a part, including her identity as the subject of property. Importantly, according to this understanding, 'the subject of property' is a

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[309] Margaret Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1998) 8(3) Social and Legal Studies 327, 333.
[310] Carol Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, Boulder Colorado 1994).

state of being or an element of identity rather than anything fixed, essential or complete. So while I might be white or the owner of a house and land here and now, I might not be either of those in another time and place; and even in the here and now, neither of those is all that I am – my status as the subject of property is not the whole of my identity. Understanding property as spatially contingent also further illuminates the similarities and cross-over between subject-object and part-whole belonging. From a spatial perspective, property as a social characteristic (such as whiteness) and property as a thing or rights to a thing (such as a house) are both relationships of belonging contingent on the space in and through which that relationship exists. While this understanding of property might be seen as similar to Hegel's or Radin's analysis in that it asserts that a thing external to the self can be thought of as a constitutive part of the self, the understanding of property as a relationship of belonging sees that relationship as constructed by and contingent on space rather than essential. Understanding property as a constructed relationship of belonging challenges the distinction between property and person not because some property is so essential to personhood that it is part of the person (as Radin suggests), but because both property and personhood are contingent on the spaces in which they exist.

Having property as being properly oriented

If it is accepted that property is spatially contingent and that both subject-object and part-whole belonging are contingent on space in the same way, the question remains as to how property comes to be constituted. How does a property (part-whole belonging) become property (subject-object belonging) and vice versa? If property relationships happen when a subject is embedded in particular networks, how does a subject come to be in that position? And if the networks involved are dynamic, then how is that property relationship maintained? How does space continue to hold up relations of belonging when space is constantly shifting and being reproduced in no fixed direction? Sara Ahmed's framework of orientations, which she describes as concerning 'the

intimacy of bodies and their dwelling places',[311] provides an innovative way to think about relationships of belonging and space. Ahmed argues that the way bodies are orientated affects what objects come near them and what they can do.[312] Drawing on Franz Fanon, Ahmed argues that 'doing things' depends not so much on intrinsic capacity, or even upon dispositions or habits, but on the ways in which the world is available as a space for action, a space where things 'have a certain place' or 'are in place'.[313] In other words, the world is a space where things, including bodies, belong in particular places, and that belonging affects what those things can do.

Ahmed argues that in a white world, white bodies are orientated such that they move easily and are held up by the physical and social spaces around them.[314] Indeed being orientated in particular ways is what makes bodies white. As argued above by Frankenberg, whiteness is not an ontological given but is constructed through a complex array of social, political, economic and other forces. Ahmed's analysis of whiteness as an orientation is similar to Harris' analysis of whiteness as property in that both see whiteness as allowing the white subject to do certain things that the non-white subject cannot. For Ahmed the white body can reach certain objects and move easily through space, while for Harris the white subject enjoys exclusive benefits and privileges that make the world an easier place to be in. But whereas Harris focuses on the privileges of white subjects and the historical and contemporary legal forces that produce those privileges, Ahmed gives a broader critique. Ahmed's phenomenology of whiteness focuses on the processes in between the establishment of white privilege and its exercise. Whereas Harris historicises the exclusive privileges of white bodies and demonstrates how law maintains those privileges, Ahmed uses the language of orientations to articulate how the physical and social spaces around white bodies allow

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[311] Sara Ahmed, 'A phenomenology of whiteness' (2007) 8(2) Feminist Theory 149, 151.
[312] ibid 152.
[313] ibid.
[314] Although Ahmed does not define 'space', her use of the term encompasses its conceptual, social and physical meanings and is broadly consistent with Massey's understanding of space in the sense that space for Ahmed is also unfixed and the product of ever-evolving inter-relations.

them to do and reach things that other bodies cannot. Whether a body belongs in a particular space affects what it can do there.

Ahmed's analysis resonates strongly with an understanding of property as a network of relations in which the subject is embedded. While the subject is oriented in a particular way in space or embedded in a particular position within networks of relations, she is held up as belonging there, as having property. Where she is and how she is oriented in social and physical space affects what she can do, which in turn affects who she is. Her orientation in that space determines whether or not she belongs there, which in turn affects her subjectivity (though it does not define it completely). The body that on Ahmed's analysis is oriented in space such that it is able to do and reach things, is on my analysis a propertied subject. A subject has property when she is properly oriented in a particular space – when her relation of belonging is held up there.

Shaping proper spaces

A space of belonging is a space of propriety – a space where being properly or improperly oriented affects what is possible for the subject and, to an extent, who she is. How are spaces of belonging produced? Ahmed argues that spaces take shape through the habitual actions of bodies. Her focus on bodies rather than subjects emphasises the materiality of her analysis – the body is the material thing in which the subject exists and through which the subject interacts with the material world surrounding her. For Ahmed, spaces become contoured by being repetitively oriented around some bodies more than others.[315]

> *What is repeated is a very style of embodiment, a way of inhabiting space, which claims space by the accumulation of gestures of 'sinking' into that space. If whiteness allows bodies to move with comfort through space, and to inhabit the*

[315] Ahmed, 'A phenomenology of whiteness' (n311) 156-157.

world as if it were home, then those bodies take up more space.[316]

As these styles of embodiment and ways of inhabiting space are repeated, the space becomes shaped such that it supports white bodies, holding them up. When space is oriented around the white body, whiteness is property not just in the sense that it is a social characteristic (part-whole 'membership' belonging) but also in the sense that the subject's whiteness allows her to interact with social and physical space in a particular way (subject-object 'mastery' belonging). The white body can be and move comfortably in the space that is oriented towards her, it fits smoothly there and can do and reach things that non-white bodies cannot. This transition from whiteness as a relation of belonging to whiteness as an object of belonging (that is, from whiteness as *a property* / social characteristic to whiteness as *property* / ownership) occurs when the space around the subject takes a similar shape to the networks that construct whiteness. For when those networks are structured in a similar shape as the networks that construct whiteness, they will form a space that holds up white subjects. Those networks, as discussed earlier, are complex and wide-ranging; they include but are not limited to law. In the case of whiteness for example they also include a huge range of economic, cultural and social networks, both formal and informal.[317] The complexity and breadth of those networks is why shaping them a particular way tends to occur over long periods of time.

To draw from an example used by Ahmed, when a white person walks into a university meeting in England, the space is already oriented around her. The space is there ready to hold up her up. It is unlikely that anyone will turn around and stare at her. She is likely to know the language, customs, assumptions and various other material elements of whiteness, and thus to feel comfortable and be able to do what she needs to there.

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[316] ibid 159.

[317] For an exposition of how these complex networks effect everyday life see Peggy McIntosh, 'White Privilege: Unpacking the Invisible Knapsack' *Peace and Freedom* (Wellesley, July/August 1989) <http://www.library.wisc.edu/EDVRC/docs/public/pdfs/LIReadings/InvisibleKnapsack.pdf > accessed 12 December 2011.

Her level of ease and comfort will also depend on other factors such as class and ability, but her whiteness will assist her in fitting in there, in belonging. Many white people have walked into the meeting space before, so it has been shaped to hold up white bodies. To use an example of property more commonly understood as 'subject-object belonging', once I buy the house and land at 27 Ritches Road I make it into my home, filling it with my belongings, perhaps painting the exterior, having my friends over for visits, getting to know my neighbours – the house and land and the area around become shaped towards me as its proper owner; the space holds up my relationship of belonging with 27 Ritches Road. The longer I stay there the more firmly the space becomes shaped towards me. Thus while property is contingent on space, it also has a material effect on space. Property requires a space of belonging, a space that will hold up particular relations of belonging; but it also (re)produces a particular space, a space shaped such that it continues to hold up those relations. Whether those relations of belonging are categorised as part-whole or subject-object, if space holds them up, then property 'happens'. And when property happens, it has a constitutive effect on the subject's identity and understanding of the world, and also shapes the conceptual, social and physical space in which the subject exists.

The Temporality of Property: Shaping the future and producing linear time

If property is something that 'happens' when space holds up a relation of belonging, then what is the temporality of property? The shaping of spaces so that they are contoured towards and thus supportive of particular objects and bodies is something property does over time. It is the repetition, the habit, the accumulation of gestures that shapes the space such that it is oriented towards particular objects or bodies. Duration is thus an important element of property. Reflecting on the discussion so far, I have variously claimed that 'a subject has property *when* she is properly oriented in a particular space'; that 'it is not so much that 27 Ritches Road is mine, but that 27 Ritches Road and I are, *at a particular moment*, in a relationship of belonging'; that 'my house

only belongs to me *so long as* I remain in a space that creates and recognises my relationship of belonging with it'; and that the seemingly fixed categories of subject and object and the relationship of belonging between them are in fact not fixed but *dynamic* and contingent. If property is understood as protean – as networks of relations in which the subject is embedded but from which the subject can move, or as a proper orientation that can shift – then it makes sense that time matters to property.

Moving beyond time versus space

In the last chapter I explored and adopted Massey's argument that space is not static but rather is actively produced all the time, in no fixed shape or direction. Relying on this understanding, in this chapter I have been exploring how space comes to be shaped such that it holds up particular relations of belonging. While Massey sets up a problematic in which she is fighting for space against the dominance of time, her understanding of space is itself temporal. Unpacking her definition of space as 'dynamic, heterogeneous simultaneity' discussed in chapter three, 'simultaneity' can be defined as 'occurrence at the same time'.[318] It seems unnecessary then to describe any simultaneity as heterogeneous, because for there to be a simultaneity at all there must already be a plurality. But being heterogeneous means more than just being plural – it means being 'diverse in kind or nature',[319] which is a primary political thrust behind Massey's argument. She stresses that without space there could be no multiplicity; that there are many different realities existing in the world at any moment, and all are as valid and important as each other.[320] Within those multiple realities are correspondingly multiple temporalities. Not everyone is on the same temporal

[318] 'simultaneity, n' (2011) Oxford English Dictionary Online (Oxford 2011) <http://www.oed.com/view/Entry/180022?redirectedFrom=simultaneity> accessed 18 June 2011.
[319] 'heterogeneous, adj' (2011) Oxford English Dictionary Online (Oxford 2011) <http://www.oed.com/view/Entry/86453> accessed 18 June 2011.
[320] Massey, *For Space* (n14) 9-12.

trajectory. The dynamism ('of or pertaining to force producing action')[321] in Massey's definition of space is to show that change is happening all the time, that it is not the same multiplicity of realities existing simultaneously all the time – it is constantly shifting. So although Massey's argument is framed in terms of a space-time dichotomy, her definition of space is fundamentally temporal. What this temporality entails however, is left unexplored.

Elizabeth Grosz argues that time is an extraordinarily complex term which connotes both a singular, unified and whole overarching time, as well as the numerous specific fragmented durations of each thing or movement.[322] Grosz envisages time as a whole as 'braided, intertwined, a unity of strands layered over each other'.[323] The braiding of individual times into an overarching time is what makes possible relations that locate times and durations relative to each other.[324] It is what gives time the capacity to link the past and the present to the future.[325] This understanding of time as 'braided, intertwined, a unity of strands layered over each other' evokes a similar imagery to Massey's imagining of space as the simultaneity of stories so far. Walter Benjamin famously wrote in his *Theses on the Philosophy of History* that 'history is the subject of a construction whose site is not homogeneous, empty time, but time filled full by now-time'.[326] While a full exploration of Benjamin's theory of time is beyond the scope of this thesis, it is significant that, like Grosz, Benjamin also suggests that heterogeneity is an element of time. Heterogeneity and multiplicity are also essential to Bergson's understanding of time.[327] Thus although Massey sets up something of a duality

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[321] 'dynamic, adj' (2011) Oxford English Dictionary Online (Oxford 2011) <http://www.oed.com/view/Entry/58818?redirectedFrom=dynamic#eid> accessed 3 December 2011.
[322] Elizabeth Grosz, 'Thinking the New: Of Futures Yet Unthought' in Elizabeth Grosz (ed), *Becomings: Explorations in Time, Memory and Futures* (Cornell University Press, Ithaca 1999) 17.
[323] ibid.
[324] ibid.
[325] Elizabeth Grosz, 'Becoming: An Introduction' in Elizabeth Grosz (ed), *Becomings: Explorations in Time, Memory and Futures* (Cornell University Press, Ithaca 1999) 7.
[326] Walter Benjamin, Harry Zohn (tr), *Illuminations: Essays and Reflections* (Schocken Books, New York 1968) 260.
[327] Gilles Deleuze, Hugh Tomlinson and Barbara Habberjam (tr), *Bergsonism* (Zone Books, New York 1991) 37-39.

between time and space, her own definition of space as dynamic heterogeneous simultaneity moves past any such duality. Issues of time are inseparable from issues of space.

Property's production of linear time and rigid shapes

Drawing on Grosz's understanding of time, it can be argued that individual instances of property each have their own time, but property as a concept also produces an overarching time. An instance of property, such as my relationship with 27 Ritches Road, has its own duration and also contributes to the production of an overarching temporality. Property happens when space holds up relations of belonging. But while individual instances of property can have any duration, they tend to be long lasting. Although it is possible to have property for a short time, relationships of belonging tend to extend over significant periods of time in relation to the lifespan of the subject. Indeed a certain level of permanence is required for something or someone to belong – if the proper orientation or position in the network is temporary, if the space only holds up the relation fleetingly, then it is more likely to be a loan than property, because ultimately that something or someone belongs somewhere else.[328]

The settled-ness or longevity of most instances of property mean that the individual strands of 'property time' to be braided together tend to be long and to extend in a similar direction. The result is that property produces a strong linkage between past, present and future, a linear time. Carol Greenhouse describes linear time as 'the image of time as an irreversible progression of moments, yielding ordinal conceptions of past, present and future as well as duration'.[329] Each occurrence of property is dependent upon the past – networks must have already turned and interacted in a particular way

[328] Although what counts as temporary depends on the network of belonging – financial trading is an example of a network where relations of belonging can be very short term but are still held up as property.
[329] Carol J. Greenhouse, *A Moment's Notice: Time Politics Across Cultures* (Cornell University Press, London 1996) 20.

so that the subject becomes embedded in them; the space must already be shaped such that the subject can fit and be held up as belonging there. The house had to be already built upon land allotted as 27 Ritches Road, for sale at the right time and I had to already be in a financial and social position to buy it before it became mine. The same considerations apply to chattels – in order for a mobile phone to belong to me, for example, the phone had to already be manufactured, functional and for sale, and I had to be in a financial and social position to buy it before it could become mine. For intellectual and cultural property, the invention or cultural practice must have been made intelligible as something that can be owned (a process which itself can be highly problematic, particularly in the context of indigenous cultures)[330] and appropriate owners identified in order for the property relation to be held up. Ahmed argues that 'what is reachable is determined precisely by orientations we have already taken'[331] – subjects and objects do not randomly land in networks of belonging and become embedded there, but are funneled into that position by the pre-existing shape of the world around them.

But while property's beginning is dependent on the past, once begun, property is oriented towards the future. Once a space is shaped around a subject she is more likely to remain there. And the better a space accommodates particular subjects, the more it encourages similar subjects to settle there in the future. The more that similarly oriented subjects habitually settle in the same space, the more finely that space comes to be shaped such that it holds them up. As time passes, the contours of the space can become rigid, forming 'grooves' that funnel similar subjects in the same direction, and unsettling and deflecting subjects that do not fit. This is not to say that such spaces become fixed or static; space is constantly being reproduced and is thus always malleable, but as ways of inhabiting space are repeated over time, space can become shaped such that some subjects are more likely to fit and be held up there than others. This shaping of space over time in the mould of the subjects that are already embedded

[330] See Davies, *Property: Meanings, histories, theories* (n246) 124-125.
[331] Ahmed, 'A phenomenology of whiteness' (n311) 152.

or held up there means that property tends to shape the future in the same mould as the past.

Property produces linear time by contouring space such that subjects oriented in a particular way or coming from a particular trajectory are likely to continue on in that position in the future. As the shape of the space becomes more rigid, so does the orientation of the subjects that become embedded there. It is harder for them to turn away; their orientation and thus their direction becomes a more predictable progression than if they were not held up by the space. They might seem 'naturally' to belong there. Drawing on Greenhouse's work, Michelle Bastian argues that the concept of linear or clock time has served as a foundation for the separation of nature (which has an underlying logical physical time-line from past to present and can thus be predicted and managed) and culture (which is the realm of agency and unpredictable change).[332] This argument is consistent with David Engel's work which shows that in studies of law and social change, time tends to be regarded as something external to the social setting being described – an unproblematic ('natural') baseline against which change can be measured.[333] It might be argued then that property's linear temporality tends to make relations of belonging seem natural.

Once I own 27 Ritches Road I am likely to remain as its sole owner until something happens that causes me to want or need to sell it, or until I die. My position as the owner of that house and land is even more likely to remain unchanged as I adapt my life around my relationship of belonging with it – I fill the house with my furniture, my clothes and my other belongings, I become emotionally attached to living there, I know my neighbourhood and I know how to travel to places with it as my starting point. Moving or sharing the house with someone new would mean reshaping the space around me. In regards to chattels, whether a mobile phone, a chair or a bicycle, once I

[332] Michelle Bastian, 'Inventing Nature: Re-writing Time and Agency in a More-than-Human World' (2009) (47) Australian Humanities Review 99.
[333] David M. Engel, 'Law, Time, and Community' (1987) 21(4) Law and Society Review 605.

own them I position them such that they become directed towards me as their proper owner. Similarly, once an institutional space like a university meeting is established as white, it encourages more white people to feel comfortable there, to feel like they belong and to act accordingly. Once accommodated in the meeting space, white people are unlikely to either leave or reorient it so that it does not as readily accommodate them. Once an embedded relationship of belonging has been established, some kind of event or intervention will be required to change it. Without such an intervention, a world organised around property tends to continue forward with what Grosz describes as the 'uniform, regular beat (that) generates an objective, measurable clock time'.[334] Grosz argues that clock time 'homogenises and measures all other modes of passing insensitively, with no reference to or respect for the particularity of the duration of events and processes'.[335] The homogenising tendency of linear or clock time makes it fit with hegemonic agendas and with the maintenance of the status quo. The issue of time, property and inheritance will be returned to in the final chapter, but at this stage it is simply important to note that the linear time produced by property tends to help the world retain its shape.

Subversive property: Unsettling spaces and reshaping the future

The two examples I have been using to illustrate the spatiality and temporality of property could both be described as instances of hegemonic property. The privileges associated with whiteness and with home ownership both operate as dominant social forces protected by or at least consistent with law. The argument that these kinds of property help the world retain its shape is not new – Marxist and critical race theorists have long argued that private property and white privilege respectively are reproductive of hegemonic power relations. What is different about this analysis is firstly that both subject-object and part-whole belonging are analysed as spatially contingent property

[334] Grosz, 'Thinking the New: Of Futures Yet Unthought' (n322) 17.
[335] ibid.

and secondly that the spatial contingency of property means that it is malleable. Because property not only depends on but also (re)produces particular spaces and times, the reshaping of property offers significant political potential.

The spaces of belonging produced by property do not have to be oppressive, exploitative or conservative. The two empirical studies reviewed earlier (Summerhill school and flowers in the bathtubs) demonstrate not only that property is experienced in complex and overlapping ways not solely determined by law, but also that property can be productive of spaces that subvert hegemonic power relations. This is a broader argument than one asserting that 'public property', meaning property owned by the state and ostensibly available for all to use, produces shared social goods. The property in these studies is not 'public property' – the school and the bathtubs are, according to law, privately owned – yet they are experienced as something in between public and private property by those who engage with them. At any rate, public property tends to hold up some bodies more than others – women and transgendered people are less likely to be able to comfortably walk through a public park at night; those from non-English speaking backgrounds are less likely to find books they need at the local public library; indigenous people are less likely to enjoy the public holiday held to commemorate the founding of the colonial state. As outlined in chapter three above, Massey notes that all spaces, including those associated with public property such as city squares and parks, are socially regulated in some way. While the property examined in Cooper's and Blomley's studies is not proclaimed to be of universal availability or use, it nonetheless produces broad social benefits that operate beyond the immediate subject, object, part and whole of property. That is, it produces a space that is shaped differently from networks of hegemonic power relations.

As Cooper shows in her examination of property practices at Summerhill, property can play a productive role in contributing to community life.[336] For example, the school's

[336] Cooper, 'Owning Up Ownership' (n284).

collective, democratic response to property breaches and the reassertion of rights that happens in that process (re)produce a sense of collective identity.[337] Blomley's examination of the overlapping private and public property understandings and practices in regards to the flowers in the boulevard bathtubs also shows that this extra-legal property can contribute to a shared public good, in that case a mainly aesthetic one.[338] In both examples there is a merging of property as a subject's rights over an object (subject-object belonging) and property as a part of the subject's identity (part-whole belonging). Who owns what was inseparable from the question of who belongs here? Membership of a group blurred into mastery of an object. At Summerhill, students' and teachers' rights over things (subject-object belonging) are tempered by the rules of community membership (part-whole belonging), and the interaction of these belongings produces the unique space of the school – both its material layout (such as staffrooms that allow student access, private bedrooms that tend to be widely shared, students' things such as clothes and tools arranged in such a way that they are not permanently given away) and its non-hierarchical, non-moralistic sense of community.[339] In Strathcona, residents' perception of their rights over the bathtubs and surrounding space (subject-object belonging) were in part determined by their perception of their community membership (part-whole belonging) – some would not pick flowers from the tub because it would be taking from the wider collective of their neighbourhood.[340] In both instances, property was productive of a broadly 'alternative' space of belonging.

While neither of these examples explicitly contravened state property laws, both produced spaces that could be described as extra-legal. Consistent with the discussions of space throughout this thesis, the spaces produced at Summerhill and in the Strathcona neighbourhood can be understood as ever-evolving reference systems that

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[337] ibid 647.
[338] Blomley, 'Flowers in the Bathtub' (n298).
[339] Cooper, 'Owning Up Ownership' (n284).
[340] Blomley, 'Flowers in the Bathtub (n298) 291.

the subjects in those spaces use to locate themselves with respect to the world. While all such reference systems are produced through a multiplicity of different forces, both of these were principally produced by individual and community practices and understandings rather than by state law. Indeed both spaces exist in a state of tension with law – Summerhill was threatened with closure by the British Department for Education in 2000, and the flowers in the bathtub probably breach Vancouver's Encroachment By-laws.[341] When understood as a relation of belonging held up by space, the property at Summerhill and in the Strathcona neighbourhood both involve subjects and objects positioned in ways that seem out of place according to conventional understandings of belonging (flowers in bathtubs on the pavement, children alongside teachers in managerial meetings) and the legal manifestations of those understandings (encroachment by-laws, standardised educational requirements). Yet those subjects and objects did belong in those spaces; they were held up there. Property in these cases was productive of an alternative space of belonging. And property in both examples had an effect on the subjects' identities and understandings of the world as well as on the conceptual, social and physical space in which those subjects lived. So although property usually occurs when spaces are already shaped such that they hold up particular relations of belonging, it can also occur when relations of belonging carve out their own space.

The spaces produced by property at Summerhilll and in the Strathcona neighbourhood unsettled the broader, hegemonic spaces enshrined in law – the reference systems according to which flowers in bathtubs on the pavement and children alongside teachers in managerial meetings are out of place. If property is a spatially contingent relation of belonging, then *subversive property* can be understood as a relation of belonging that is out of place according to hegemonic understandings of what and who belong where, but that is held up anyway. Subversive property produces a space that holds up 'alternative' relations of belonging.

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[341] ibid 285.

While Summerhill school and the Strathcona neighbourhood are small-scale examples, the potential to use extra-legal property to unsettle hegemonic networks of belonging and the spaces they intersect to form has much broader political significance. Because space is ever-evolving and heterogeneous, and property is spatially contingent, all spaces are unsettled to some degree – there will always exist relations and networks of belonging that are in tension with the dominant ones. But some spaces seem more unsettled than others – land in postcolonial settler states is a clear example. Nick Blomley and Irene Watson have both explicitly written of such land as 'unsettled spaces'. The double meaning of unsettled in the postcolonial context – a space free of white settlers, and space that is troubled by competing property claims – is not just a convenient metaphor. Blomley argues that one of the reasons these hegemonic spaces rely on a system of land title – whereby property is vested exclusively in a particular subject or subjects – is that it gives an assurance that the claim to property is uncontested, that 'ownership is complete and zero-sum', that only the owner and the land are recognised as being in a relationship of belonging.[342] Alain Pottage has also demonstrated how systems of registration of land title impose a linear or rational perspective upon the landscape, making land 'a calculable and finite surface rather than a lived and remembered medium'.[343] The lived and remembered aspects of land are particularly important to indigenous people because their networks of belonging to the land are not recognised by law or by the dominant settler culture. By enshrining a system of land title, the state uses property to produce a hegemonic space of belonging and a linear temporality consistent with the colonial project of settlement.

The process of white settlement upon land that was once occupied by indigenous people is an ongoing one. Indigenous claims to property in land have never ceased, despite the state system of title that rejects them, and despite other state measures for silencing indigenous dissent to the hegemonic property system (such as incarceration

[342] Blomley, *Unsettling the City* (n265) 14.
[343] Alain Pottage, 'The Measure of Land' (1994) 57(3) Modern Law Review 361, 381.

and surveillance). Indeed many indigenous voices continue to assert an ontological relation to land – that country is constitutive of their being and that relationship with land is thus inalienable, asserting a relation of belonging to the land that unsettles the broader settler colonial space.[344] As will be explored further in the next chapter, these unsettling claims can constitute subversive property. By arguing that indigenous claims of belonging to land constitute a kind of subversive property I am not denying the very real impact of law and its ongoing refusal to recognise different understandings and experiences of property. Rather I am simply pointing out that law is only one network of belonging among many, and that it is not inevitable or fixed in time. Indigenous claims of belonging will be, as Irene Watson argues, 'forever a challenge to the settled spaces of the colony'.[345] Moreton-Robinson similarly argues that indigenous subjectivity is 'a state of embodiment that continues to unsettle white Australia'.[346]

The existence of subversive property and the unsettling of spaces cut across both material / discursive and subject-object / part-whole dichotomies. The ongoing presence of indigenous people who continue to resist assimilation into the hegemonic white culture disrupts the material landscape of settler states. Although state policies have systematically removed indigenous property to remote areas far from view (or to museums where the view is regulated), indigenous networks of belonging have never been erased completely. As will be discussed in the next chapter, the very existence of remote indigenous communities taints the hegemonic understanding of Australia as one postcolonial nation with settled relations and networks of belonging, a cohesive system of land title and a future carved along the same path. This material tainting of the landscape is not restricted to remote indigenous communities but also affects the city spaces, where indigenous bodies and practices seem out of place. This persistent out-of-placeness is a material manifestation of subversive property; it continues to unsettle

[344] Moreton-Robinson (n305) 31.
[345] Irene Watson, 'Settled and unsettled spaces: Are we free to roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen and Unwin, Crows Nest 2007) 16.
[346] Moreton-Robinson (n305) 37.

the broader space. While this kind of out-of-place presence has been described by Moreton-Robinson as an example of the white system allowing indigenous people to occupy but not to possess Australian space,[347] this occupation itself carves out property, asserting a relation of belonging and disturbing the non-indigenous hegemonic space of Australia. The Aboriginal Tent Embassy on the lawns on Parliament House in Canberra is an example of subversive property from the Australian context, and subversive property has long been used as a political tactic in other contexts – subjects can change a space by refusing to leave it, or by refusing to orient themselves in the way the space was designed. Painting graffiti art on the Israel-Palestine partition wall, camping out on New York's Wall Street, dancing and playing music inside police cordons and planting flowers in a bathtub on the boulevard are all examples of subversive property that materially change the surrounding space as well as affecting the subjectivities of those who belong there. This unsettling of space also undermines the discourse that accompanies the dominant understanding of the space. It throws into question the systems and policies against which subversive property seems out of place.

Subversive property unsettles hegemonic space and forces it to adapt, to reshape, however slightly. The Tent Embassy is now a recognised part of the Canberra landscape, and the flowers in the Strathcona bathtubs have shifted the way people move through and think about their neighbourhood. The persistent assertion of subversive relations of belonging can carve out spaces that hold those relations up, thereby reshaping the world around. This reshaping is physical, social and conceptual – material structures as well as practices and identities that initially do not belong, begin to. Not by adapting themselves (as is the case with a politics of inclusion whereby, for example, women can now find employment in fields traditionally reserved for men, but only by adapting their lifestyles and work practices to the pre-existing masculine culture) but by reshaping the spaces in and through which they exist. The Tent Embassy does not just carve out a space for tents and flags but for indigenous Australians in the Australian political realm.

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[347] ibid 23.

Meetings at Summerhill involving students and teachers throw into question who belongs where, as do black bodies that continue to walk into white university meetings. By unsettling the space, subversive property disrupts the linear time produced by hegemonic spaces of belonging. Through introducing things that do not belong or bodies that are not properly oriented, subversive property interferes with the long alignment of braided durations that constitute the proprietal link between past, present and future. It thus makes possible a reshaping of space.

The concept of subversive property and its relation to law are further explored and developed in the next two chapters by examining subversive property in relation to two socio-legal issues: firstly that of indigenous resistance to settler colonialism in Australia and secondly that of sexuality-based asylum claims similar to the one considered in the opening chapter.

5. Homelands: The Role of Property in Australia's Northern Territory Intervention

This chapter explores the theory of property as a spatially contingent relation of belonging in the context of two recent legal challenges brought by aboriginal Australians against long government leases of their land. As will be discussed below, both leases were enabled by the federal government's Northern Territory intervention, a set of paternalistic laws and policies passed in 2007 on the basis that child sex abuse in remote aboriginal communities had become a national emergency. While the intervention includes a range of measures that directly impact the lives of the prescribed aboriginal communities, it is the multi-year leases that have been met with the strongest political resistance. In comparison with other intervention provisions which affect the daily lives of aboriginal people, the leases are in many ways some of the least intrusive provisions: the leases preserve superior aboriginal title, explicitly prohibit mining, and although the standard lease rights to 'exclusive possession and quiet enjoyment' are granted to the Commonwealth (that is, The Commonwealth of Australia) tenant, these rights have not been taken up. Yet the leases are the only provisions that have been subject to legal challenge by those living under the intervention.

Unlike Prossy Kakooza's asylum case discussed in the first chapter, where the subject was seeking to move from one physical place to another, the cases explored in this chapter involve subjects whose aim is to stay where they are. Looking at the legal geography of the relevant areas and drawing on the theories of space and property extrapolated in chapters three and four, I argue that what is at stake in the intervention leases and the aboriginal legal challenges to them is more than the land over which the leases are sought – it is also the social and cultural characteristics of the communities that live on the land. The insistent claim of aboriginal communities that 'we are not moving' goes beyond an insistence on staying in the same physical place and extends to an insistence that that place retain its aboriginality. Although the two cases studied in this chapter both lost against the government in court, the challenges themselves

nonetheless constituted assertions of subversive property. That is, the legal challenges assert the existence of a relation of belonging that is out of place according to hegemonic understandings of what and who belong where, and make the normative claim that this relation of belonging should be held up despite it being out of place. This is a claim to an alternative, aboriginal space in today's predominantly white Australia.

I argue that although the cases are framed in terms of subject-object belonging, both parties were also, and perhaps more significantly, fighting for part-whole belonging. By seeking property rights over these areas of land, both the aboriginal claimants and the government respondents are not only asserting that they have a relation of belonging with the land, but also that their relation of belonging should be held up by space. The cases can thus be understood as involving a competition not so much for the right to exclusive possession that comes with property, but rather for the space of belonging that property requires and (re)produces.

The intervention

To put this chapter in context I will first outline 'the intervention' – the set of controversial policies introduced in the Northern Territory by the Australian Commonwealth government in August 2007. The intervention is primarily enabled by the *Northern Territory National Emergency Response Act* 2007 (Cth) ('the NTNERA'). The tabling and passage of the Act followed a report by the Northern Territory government titled 'Little Children are Sacred', which contained allegations of widespread child abuse in remote aboriginal communities in the territory.[348] These allegations were based on a nine-month inquiry led by Rex Wild QC, a non-aboriginal lawyer, and Pat Anderson, an aboriginal woman with expertise in indigenous health. The inquiry consisted of meetings with 260 individuals, agencies and organisations

[348] Patricia Anderson and Rex Wild, 'Little Children are Sacred: Inquiry into the Protection of Aboriginal Children from Sexual Abuse' Northern Territory Government (2007).

across 45 aboriginal communities in the Territory, and 65 written submissions.[349] The report itself did not declare the existence of an emergency, but did state that the issue of child sexual abuse was one that required urgent attention.[350]

The Northern Territory is Australia's third largest federal division but its least populated (230 000 residents).[351] It is the 'most aboriginal' area of Australia in the sense that it has by far the highest aboriginal proportion of its population of any Australian jurisdiction (over 30% compared to the next highest 3.8%),[352] the highest number of native title land claims,[353] and is the site of the first and most significant Aboriginal land rights legislation passed in Australia to date (around 45% of the area of the Northern Territory is now aboriginal-owned under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('Land Rights Act') which is far higher than in any other jurisdiction).[354] The Northern Territory is one of only two mainland Australian territories, the other being the small area around the federal capital of Canberra, and although the territories are now self-governing they are still subject to having their laws over-ridden by the Commonwealth government – a level of intrusion that the Australian states are immune from. This Commonwealth power to override Territory laws and enforce federal laws is enabled by s122 of the Australian constitution. Drawing on this power, the Commonwealth government, which was then headed by conservative Prime Minister John Howard, announced on 21 June 2007 that the levels of child sex abuse in the Territory's aboriginal communities had become a national emergency to which the Territory government had failed to adequately respond. As such, the Commonwealth government was to immediately draft, pass and implement emergency response

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[349] ibid 15.
[350] ibid 7.
[351] 'Australian Demographic Statistics' *Australian Bureau of Statistics* (Canberra 2009) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/> accessed 15 February 2010.
[352] 'A statistical overview of Aboriginal and Torres Strait Islander Peoples in Australia' *Australian Human Rights Commission* (Sydney, 2008) <http://www.hreoc.gov.au/social_justice/statistics/index.html#Heading34> accessed 15 February 2010.
[353] 'Northern Territory' *National Native Title Tribunal* (Canberra 2010) <http://www.nntt.gov.au/Native-Title-In-Australia/Pages/Northern-Territory.aspx> accessed 15 February 2010.
[354] Barbara A. West and Frances T. Murphy, *A Brief History of Australia* (Infobase Publishing, New York 2010) 85.

legislation. With bipartisan support from the then Labor opposition, the NTNERA went into effect in the affected Northern Territory communities within weeks of its announcement.[355]

('Australia' map from Google Maps)

The NTNERA and associated amending legislation passed with it introduced a range of radically paternalistic and racially discriminatory measures to large areas of the Northern Territory. These measures apply to 'prescribed areas' of the Territory, which are defined in the Act as all aboriginal land[356] as well as any other area declared by the relevant Minister, with the exact co-ordinates for the prescribed areas listed in a

[355] NTNERA s2.
[356] That is, land held on trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

schedule to the Act.[357] All prescribed areas are those of aboriginal communities.[358] The NTNERA measures applicable in the prescribed areas include a total ban on the possession and consumption of alcohol,[359] compulsory income management for all welfare recipients,[360] compulsory installation of anti-pornography filters on all public computers as well as obligatory record-keeping of all computer users,[361] cutting back of the permit system for entry onto aboriginal land,[362] federal government takeover of local services and community stores as well as a ministerial power to suspend all elected councilors,[363] a ban on Northern Territory courts from taking customary law into account when dealing with bail applications and sentencing,[364] and compulsory rent-free five-year leases of aboriginal land to the federal government.[365] The compulsory income management means that welfare recipients have half of their fortnightly payments quarantined for food and other essential items only, for which they are issued a 'basics card' that can only be used in approved stores within the Northern Territory.[366] The NTNERA made itself exempt from Australia's *Racial Discrimination Act 1975* (Cth)[367] as it would otherwise have clearly fallen foul of its prohibition of discrimination on the basis of race.

The NTNERA does not actually implement most of the recommendations of the Little Children are Sacred report. In many cases the relationship between the intervention provisions and child protection 'remains unexplained',[368] and the intervention has been

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[357] NTNERA s4.
[358] Based on a search of all legislative instruments passed under NTNERA as at 15 February 2011.
[359] NTNERA s12.
[360] ibid s126.
[361] ibid Part 3.
[362] *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007* (Cth) Schedule 4.
[363] NTNERA Part 5, Division 4; Part 7.
[364] ibid ss90, 91.
[365] ibid Part 4, Division 1.
[366] Housing Australian Government Department of Families, Community Services and Indigenous Affairs, 'Closing the Gap in the Northern Territory: January 2009 to June 2009 Monitoring Report' (2009) 54.
[367] NTNERA s132.
[368] Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, Sydney 2009) 81-82.

criticised by the United Nations, a number of human rights organisations and many activist groups.[369] It has also been noted that the rates of child abuse in the Northern Territory are in fact *lower* than in most other Australian jurisdictions,[370] and the number of convictions for child sex abuse in the prescribed areas between 1 July 2007 and 31 December 2010 was just 38, compared to 23 in the equivalent time period immediately before the enactment of the intervention.[371] Yet despite this apparent absence of a 'national emergency' concerning child sex abuse in the prescribed communities, the intervention remained in force and will continue until the five-year sunset clause date on the NTNERA is reached in mid-2012.[372]

The legal geography of the Maningrida region and Alice Springs town camps

In order to understand the broader significance of the *Shaw*[373] and *Wurridjal*[374] challenges to the intervention, it is necessary to consider the legal geography of the Maningrida and Alice Spring town camp areas that these cases concern. Both areas are of course located in the Northern Territory, which has always been regarded as 'the last frontier' in terms of the ongoing production and maintenance of Australia as a white settler state.[375] The harsh desert and tropical conditions in the Territory made it the most difficult area of Australia to populate with white settlers, with international commentators in the early 1900s suggesting that white Australians had not effectively

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[369] See for example James Anaya, 'Observations on the Northern Territory Emergency Response in Australia' United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2010); 'Discriminatory aspects of the NTER yet to be addressed' *Amnesty International* (Sydney, 4 February 2009) <http://www.amnesty.org.au/news/comments/20169/> accessed 15 August 2011; 'Rollback the Intervention' *Intervention Rollback Action Group* (Alice Springs, 2009) <http://rollbacktheintervention.wordpress.com/> accessed 18 August 2011.

[370] West and Murphy (n354) 232.

[371] Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, 'Closing the Gap: Monitoring Report July - December 2010' Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (2010) Section 6.7.

[372] NTNERA s6.

[373] *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397; *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 844.

[374] *Reggie Wurridjal, Joy Garlbin and the Bawinanga Aboriginal Corporation v The Commonwealth of Australia and The Arnhem Land Aboriginal Trust* [2009] HCA 2.

[375] West and Murphy (n354) 86.

occupied the north of Australia to the level required by international law, and Australian politicians speaking publicly of 'the problem' of the lack of white settlers and the ongoing prevalence of aboriginal culture in the north until the 1940s.[376] The aboriginal land rights movement began in the Northern Territory in 1966, with the Gurindji people walking off the Wave Hill cattle station and demanding the return of their land – a fight they won in 1975, and which led to the Land Rights Act the following year.[377] The Northern Territory was only declared to be self-governing rather than under the direct control of the Commonwealth government in 1978.[378] The Territory government's attitude towards the Commonwealth government has been described as one of 'hostile suspicion' due to both the long history of federal control and the Commonwealth's retention of its constitutional power to override Territory decisions.[379] This power was used to override the Territory's controversial euthanasia legislation in 1996,[380] and to pass the NTNERA.[381] Thinking spatially and drawing on Massey's understanding of places as articulated moments in networks of social relations and understandings rather than as areas with boundaries around,[382] it is clear that the Northern Territory continues to be a place where the forces of Australian settler colonialism meet with significant aboriginal resistance, and where aboriginal understandings and practices unsettle the government and the non-aboriginal relations and networks that dominate post-contact[383] Australia.

(See next page for map of prescribed areas with relevant areas highlighted.)[384]

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[376] Henry Reynolds, 'Reviving Indigenous Sovereignty?' (2006) 6 Macquarie Law Journal 5.

[377] Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Land Rights: A Documentary History* (Allen& Unwin, Melbourne 1999) 222-240.

[378] Rolf Gerritsen and Dean Jaensch, 'The Northern Territory' in Brian Galligan (ed), *Australian State Politics* (Longman Cheshire, Melbourne 1986) 140.

[379] ibid 152.

[380] Shaun McVeigh, 'Subjects of jurisdiction: The dying, Northern Territory, Australia, 1995-1997' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, Abingdon 2007) 202.

[381] *Wurridjal* [231] (Kirby J).

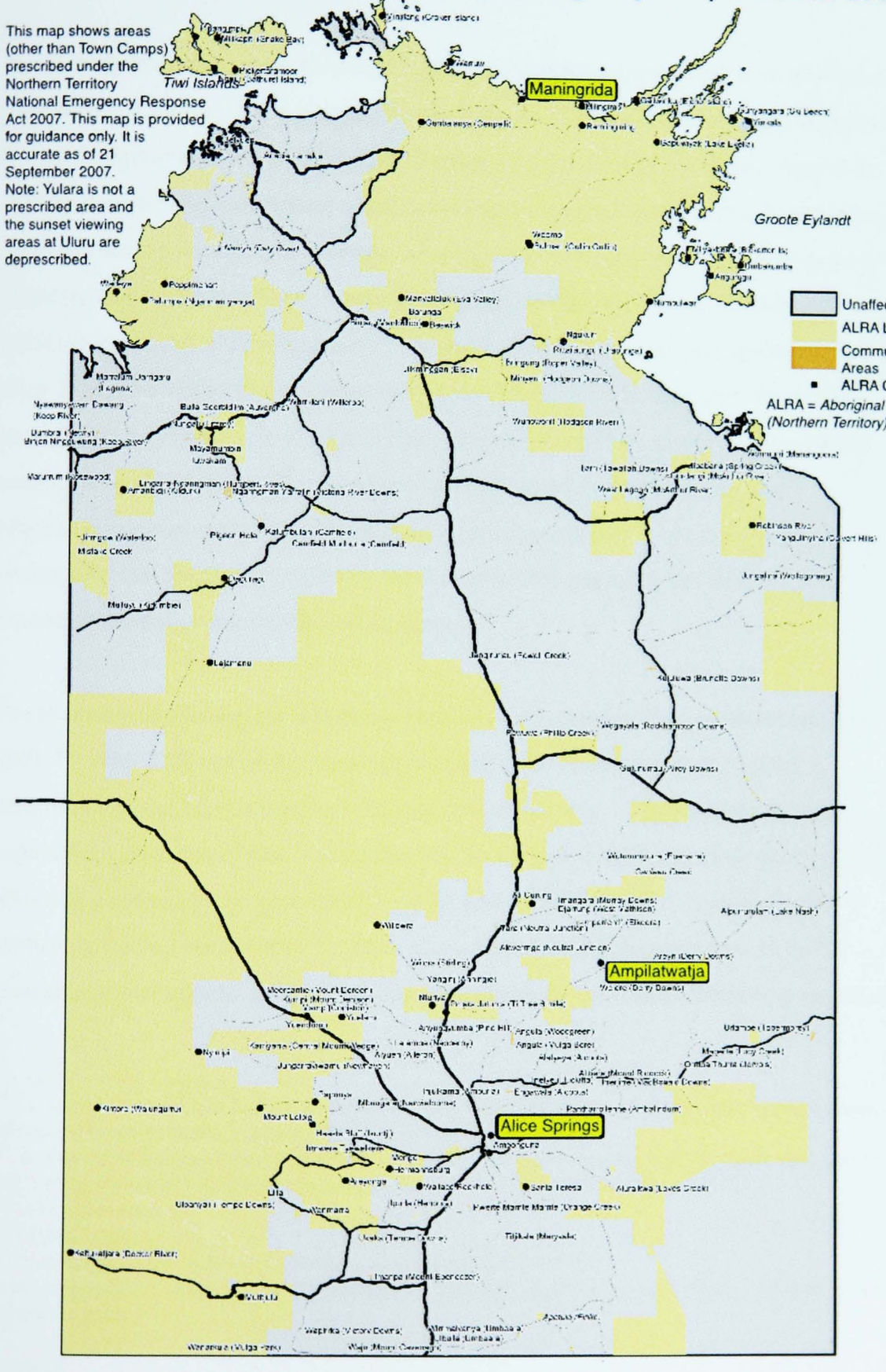
[382] Massey, 'Power-geometry and a progressive sense of place' (n24) 66.

[383] I use the term post-contact to mean from 1770 onwards - the time subsequent to British contact.

[384] Map freely available from the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs website. I have added the town of Alice Springs and the yellow highlights. <http://www.facs.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/prescribed_areas/Documents/map_detailed.pdf> accessed 30 December 2011.

Prescribed Areas *Northern Territory Emergency Response Act 2007*

This map shows areas (other than Town Camps) prescribed under the Northern Territory National Emergency Response Act 2007. This map is provided for guidance only. It is accurate as of 21 September 2007. Note: Yulara is not a prescribed area and the sunset viewing areas at Uluru are deprescribed.



The Maningrida Region

The Maningrida region over which the leases in *Wurridjal* is concerned, is an aboriginal community in Arnhem Land, a large, remote region on the north coast of the Northern Territory. Arnhem Land is famous for the strength of its aboriginal culture. Due to its remote position and its extreme tropical and often drought-ridden environment, it has a relatively short colonial history compared with other regions of Australia (and even with other regions of the Northern Territory), meaning aboriginal customs, beliefs and institutions are still relatively strong.[385] Arnhem Land has been an aboriginal reserve since 1931, and since 1980 has been held by the Arnhem Land Aboriginal Trust ('the Land Trust') for the benefit of several clans who are recognised as traditional owners under the Land Rights Act.[386] Like all land granted as a fee simple estate, the Maningrida region and all of Arnhem Land is 'private property', with entry and occupation specifically prohibited by the Act unless the person entering is either a traditional owner or has permission to enter.[387]

The township of Maningrida was established as an instrument of government policy in 1957.[388] With 2700 residents, Maningrida today is the equal largest aboriginal community in the Territory and a relatively prosperous one. A Territory government report from 2008 states that Maningrida has 'a relatively well-developed economy with generally good work force participation ethic and a track record of developing and sustaining trading businesses'.[389] While many aboriginal people have moved to the township of Maningrida itself, many also continue to live in outstations on the region, of

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[385] J C Altman, 'Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights' Australian National University (2008).
[386] 'Arnhem Land Aboriginal Trust' *Agreements, Treaties and Negotiated Settlements Project* (Melbourne, 2011) <http://www.atns.net.au/agreement.asp?EntityID=3210> accessed 2 March 2011.
[387] Land Rights Act s70.
[388] Altman (n385) 1.
[389] 'Maningrida Study' *Northern Territory Government* (Darwin, 2008) <http://www.dhlgrs.nt.gov.au/__data/assets/pdf_file/0020/121367/Maningrida_Study.pdf > accessed 3 December 2011.

which there are over 30.[390] The Bawinanga Aboriginal Corporation ('BAC') is one of the oldest outstation resource agencies in Australia and it operates a large and successful aboriginal employment scheme whereby those living on the Maningrida outstations are paid to maintain them.[391] Due to the relatively short history of white settlement and the relatively well-resourced support of outstation living by the BAC, aboriginal residents' relationship with land in the Maningrida region and throughout Arnhem Land is stronger than in other parts of Australia and is also robustly defended in the face of encroaching white governance. In July 2008 for example, the Arnhem Land Aboriginal Land Trust won an action against the Northern Territory government in the High Court for exclusionary rights over the tidal waters surrounding Blue Mud Bay.[392]

The Alice Springs Town Camps

The Alice Springs town camps that were the subject of the sub-leases in *Shaw* are also places of aboriginal resistance but with a very different legal geography. In contrast to the Maningrida region, which has been inhabited by the same cultural groups of aboriginal people for centuries and remains an area of strong aboriginal culture largely because it has managed to stay at a distance from white settlers, the Alice Springs town camps are uniquely post-contact places that are by definition located in close proximity to settler space. The town camps only came into existence when white settlement began in the 1880s at the site that is now Alice Springs.[393] Aboriginal people who had been dispossessed from their traditional lands moved in towards the town, where they could access rations and employment, and where those whose children had been forcibly taken into state care could visit them in Alice Springs institutions.[394] The camps

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[390] Altman (n385) 1.
[391] 'History', *Bawinanga Aboriginal Corporation* (Darwin 2007) <http://www.bawinanga.com.au/meetbac/history.htm> accessed 1 March 2011.
[392] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29.
[393] Frances Coughlan, 'Aboriginal Town Camps and Tangentyere Council: The Battle for Self-Determination in Alice Springs' (MPhil Thesis, School of Humanities, La Trobe 1991) 22.
[394] ibid.

consist mainly of self-constructed shacks built without government permission.[395] From a legal perspective they were classed as illegal squatters on crown land.[396] Aboriginal people were also attracted to town camps because they provided a space almost free of colonial control. In contrast to the missions and reserves of the late 1800s and early 1900s, town camps allowed aboriginal languages to be spoken, cooking to be done in aboriginal style and children to be raised by their own families.[397] The camps also provided a safe place for aboriginal people who live further out bush to come and stay for extended periods.[398] In short, as Frances Coughlan argues, 'cultural destruction programs were not carried out on the town camps in the way they were on government settlements and church run missions'.[399]

The town camps first developed, and continue to exist today, as places physically close to the white settler space of Alice Springs but culturally distant from it. An architectural study of the town camps in the 1990s stated that they

> *have been created and built by their users, adjusted as required to suit their own lifestyle and changing needs, and supportive of their own social organisation and interaction, all this being done by the people with their own devices, their own labour and skills, and drawing where appropriate on the traditions of their pre-contact indigenous architecture.*[400]

Anthropologists have also pointed out the autonomy and permanency of town camp communities, their distinct social kinship structures and their continuing attachment to traditional aboriginal beliefs and values.[401] A development study from 1981 emphasised

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[395] Paul Memmott, 'From the 'Curry to the 'Weal: Aboriginal Town Camps and Compounds of the Western Back-Blocks' (1996) August Fabrications 1, 4.
[396] Coughlan (n393) 80.
[397] ibid 29.
[398] ibid 11.
[399] ibid 29.
[400] Memmott (n395) 1.
[401] ibid 3.

the town camps as a place of open rejection of 'the European suburban way of life',[402] and historian Henry Reynolds writes that similar town camps in the neighboring state of Queensland acted as 'refuges for guerilla fighters, and also training centres for urban criminals whose pursuits were a form of ongoing resistance to colonial domination'.[403] Throughout the history of the Alice Springs town camps, government authorities and particular local groups from Alice Springs have regarded the town camps as transient and unsightly places, but never managed to successfully evict them.

Since the mid-1970s, the Alice Springs town camp communities have been attempting to negotiate some kind of legal recognition of their presence on and relationship with the land. The communities formed Housing Associations for each respective camp and in 1977 the associations established an umbrella organisation, Tangentyere Council, to assist with negotiations for leases of the land and to help tackle other needs such as garbage and water services, roads, education, training, employment and housing.[404] The town camps were not eligible for a grant of deed under the Land Rights Act, but could apply for long leases under the *Special Purpose Leases Act 1953* (NT) or the *Crown Lands Act 1992* (NT). A number of town camp communities successfully applied for leases. The Northern Territory government granted those leases reluctantly, and in 1981 the government announced a freeze on the granting of any further leases on town camps 'until adequate and rational use is made by aboriginals of existing land grants'.[405] The freeze lasted until 1986, after which leases were granted to the remaining town camps, but constant battles continued with the government over the provision of essential services to the town camps, in particular running water. While the town camps had always been faced with the social problems of poverty and dispossession, these were compounded by alcoholism and related problems when the Northern

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[402] M Heppell and J. J Wigley. *Black out in Alice: a history of the establishment and development of town camps in Alice Springs* (Australian National University, Canberra, 1981) cited in Memmott (n395) 4.
[403] Henry Reynolds, 'Fringe Camps in Nineteenth Century Queensland' in *Lectures on North Queensland History*, 3rd series (Department of History, James Cook University, Townsville 1978) cited in Memmott (n395) 7.
[404] Coughlan (n393) 58.
[405] ibid 83.

Territory government passed legislation in 1983 making it a criminal offence to drink alcohol in public within two kilometers of any licensed premises – so aboriginal drinkers, who were not welcome in pubs, retreated to the town camps as places where they could safely drink.[406] The Tangentyere Council introduced a number of programs to address drinking and associated problems in the town camps, though these were generally poorly funded and largely unrecognised by Territory and Commonwealth governments.[407]

The Alice Springs town camps have thus had a somewhat tumultuous and mixed relationship with both the Northern Territory and Commonwealth governments. While the Commonwealth's Land Rights Act prohibited the town camp communities from eligibility for freehold title, it did make provision for the camps to apply for leases from the Northern Territory government, which each town camp Housing Association eventually managed to do. And while the Tangentyere Council faced opposition from the Territory government, it did eventually manage to incorporate and win funding from both the Commonwealth and Territory governments to run successful housing and social programs for the town camp communities with little government interference. The funding and property rights were not enough to overcome the social problems faced by the town camp communities and their lack of essential services – after several starts and stops by government, several town camps today still do not have power or running water.[408] The town camp communities experienced a tension between seeking government recognition and assistance on the one hand, and prioritising the retention of aboriginal control on the other. The government maintained a generally negative attitude toward town camps. A Commonwealth government report from 1982 defined town campers as

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[406] ibid 100.
[407] 'History', *Tangentyere Council* (Alice Springs, 2011) <http://www.tangentyere.org.au/about/background/> accessed 2 March 2011.
[408] ibid.

> *any group of Aboriginals living at identified camp sites near or within towns or cities which form part of the socio-cultural structure of the towns and cities, but which have a lifestyle that does not conform to that of the majority of non-Aboriginal residents and are not provided with essential services and housing on a basis comparable to the rest of the population.*[409]

The government thus defined town camps in terms of their non-conformity with non-aboriginal lifestyles and of lack of essential services. Although academics argued for the legitimacy of town camps as permanent aboriginal communities, noting the cultural autonomy enjoyed by the communities and the stability of aboriginal people living in town camps compared to those living in the suburbs,[410] successive Territory and Commonwealth governments have been reluctant to recognise and support the town camps as viable aboriginal-controlled spaces. Due largely to government indecision over whether and how to support the town camps, there is today a large variance between the different camps in terms of quality of housing and basic infrastructure.[411]

Both the Alice Springs town camps[412] and the Maningrida area have well-entrenched geographies of tension with and resistance to the Australian state. Both are places constructed out of broader relations of colonisation and resistance between aboriginal Australians and white Australian law. In this sense it is unsurprising that they were 'prescribed areas' under the NTNERA, singled out from the rest of Australia on the basis of their communities' race and purportedly deviant sexuality. Through its prescription

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[409] Commonwealth of Australia, *Strategies to Help Overcome the Problems of Aboriginal Town Camps,* Report to the House of Representatives Standing Committee on Aboriginal Affairs (Government Printer, Canberra 1982) 5-6.

[410] John Taylor, 'Aboriginal intra-urban mobility in Katherine, Northern Territory' (1990) 8(2) Urban Policy and Research 76, 78-79.

[411] ibid 77.

[412] Though they have not been included here, maps of the Alice Springs town camps are available from the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs website.
<http://www.facs.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/prescribed_areas/Documents/tcmap_alice.pdf> accessed 30 December 2011.

of areas in need of special regulatory measures, the NTNERA articulates those areas as places that do not belong with the rest of Australia, as places of impropriety. The rest of Australia is correspondingly defined as a place of non-aboriginality and propriety.

The Cases: Reggie Wurridjal and Barbara Shaw against Australia

There have been two legal challenges brought against the intervention, both involving leases and both brought by aboriginal residents of prescribed areas. Although both cases raise complex and interesting questions of administrative and public law, my analysis will focus on the property aspect. The first case, led by Reggie Wurridjal, concerned the five-year lease of the Maningrida region to the Commonwealth, and the second case was brought by Barbara Shaw concerning 40 and longer year leases of the various Alice Springs town camps. The fact that the leases and sub-leases are the only intervention provisions to be challenged in court is interesting because on the face of it the leases are some of the least intrusive provisions of the intervention – they only make the Commonwealth the tenant of aboriginal land, they explicitly prohibit any mining from taking place,[413] and they do not have an immediate effect on the daily lives of aboriginal people as provisions such as compulsory income management and the total ban on alcohol do. Although the five-year leases grant the Commonwealth 'exclusive possession and quiet enjoyment of the land while the lease is in force',[414] the Commonwealth has not, in any of the prescribed areas, sought to enforce this right. In the lead up to the leases, government officials made a point of publicly assuring aboriginal land councils that the leases did not amount to a land grab.[415] Indeed then Prime Minister John Howard said in reaction to land grab allegations that 'we're offering a guarantee that we're not taking anything from anybody. We're trying to give things

[413] NTNERA s35(2B).
[414] NTNERA s35(1).
[415] 'QC rejects NT land grab fears' *ABC News* (Sydney 17 July 2007) <http://www.abc.net.au/news/2007-07-11/qc-rejects-nt-land-grab-fears/96634> accessed 3 December 2011.

back'.[416] The government asserts that the leases 'help to expand opportunities for business investment such as farming, tourism and retail businesses and home ownership' and 'offer opportunity for economic development and better housing and infrastructure' for the benefit of the existing aboriginal communities.[417] In terms of better housing and infrastructure, part of the government's argument for why it needed leases of the land was that having long leases meant that it would not have to go through bureaucratic approval processes in order to make repairs on houses and impose maintenance conditions on individual renters.[418] The minister stated that the leases would also allow the government to promote private home ownership in aboriginal communities rather than the communal title which almost all aboriginal land is currently held under.[419] Almost identical arguments were made in regards to the 40-year sub-leases.[420]

Anti-intervention campaigners point out that, contrary to the Commonwealth's stated objectives, housing for aboriginal people in the prescribed areas has not improved under the intervention leases and sub-leases, and any 'economic development' has been negligible.[421] Although the government reports that it has built 310 new houses since the beginning of the intervention in mid-2007 to end June 2011, activists note that many of these houses are for non-aboriginal government agents who are being shipped

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[416] Patricia Karvelas and Sean Parnell, 'Communal land up for grabs' *The Australian* (Sydney 30 June 2007) <http://www.theaustralian.com.au/news/nation/communal-land-up-for-grabs/story-e6frg6nf-1111113856963> accessed 24 August 2011.

[417] Jenny Macklin, 'Stronger Futures in the Northern Territory' Australian Government Discussion Paper (Canberra June 2011) 13 and 22.

[418] Karvelas and Parnell (n416).

[419] ibid. The Commonwealth government continues to have a policy of encouraging private home ownership in aboriginal communities, although how that ownership is linked to government leases is less clear in more recent reports: Macklin, 'Stronger Futures in the Northern Territory' (n417).

[420] Mal Brough, 'Minister disappointed by decision on Alice Springs Town Camps' (Canberra December 2010) <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/closing_gap_NT_jul_dec_2010/Documents/part2/Closing_the_Gap_Part2.htm> accessed 25 August 2011.

[421] 'Rollback the Intervention' (n369); 'Intervention delivering 'empty shipping containers, no houses" ABC News (Sydney 7 September 2008) <http://www.abc.net.au/news/2008-07-09/intervention-delivering-empty-shipping-containers/2498780> accessed 23 August 2011.

in to the Territory to administer the NTNERA, rather than for aboriginal residents.[422] Whether individual home ownership is a desirable goal for aboriginal people is itself highly contestable, but at any rate, the slight increase in home ownership by aboriginal people that the government claims is now occurring has not solved the ongoing housing crisis in aboriginal communities in the Territory.[423] However, while activists are rightly skeptical that the government control of housing enabled by the leases will come to mean 'higher rents, more restrictive tenancy conditions and easier eviction',[424] there is as yet no evidence that the Commonwealth has used its leases and sub-leases to push existing residents out of their homes.[425] In neither the Maningrida region nor the Alice Springs town camps has the Commonwealth taken up its leasehold right to exclusive possession.

Sean Brennan notes that the Commonwealth government's rationale for the five-year leases has shifted over time, and remains ambiguous.[426] Its rationale for the 40-year sub-leases is not entirely clear either, but in its negotiations for the sub-leases it stated that it wanted access to and control of the land so as to make tenancy management reforms,[427] and that

> *[t]his leasing offer is not about kicking people out of their homes in Town Camps. The Government wants to make the houses in Town Camps better and safer for the people who are living there. We don't want people to end up living in the*

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[422] Paddy Gibson, 'Return to the Ration Days' Jumbunna (Sydney 2009) <http://www.jumbunna.uts.edu.au/pdfs/JIHLBP11.pdf> accessed 2 December 2011, 17.
[423] The government acknowledges in its latest report that 'there remains a serious shortage of decent houses in remote Northern Territory communities': Jenny Macklin, 'Stronger Futures in the Northern Territory' (n417) 22.
[424] Gibson (n422).
[425] Existing rights and interests in the land are preserved by s34 of the NTNERA, but s37 allows the Minister to terminate preserved rights.
[426] Sean Brennan, 'Wurridjal v The Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 Melbourne University Law Review 957, 963.
[427] *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397 (*'Shaw No 2'*) at [103]-[104].

scrub or the river.[428]

Indeed on a strict property law analysis, the Commonwealth government's behaviour of going to great lengths to become the tenant (and sub-tenant) on land and then not taking up its right to exclusive possession is quite bizarre. Paddy Gibson argues that the leases are an attack on the gains won in the aboriginal land rights struggle, namely 'aboriginal control over their own lives'.[429] However that control had already been taken on a far more direct and dramatic level with other provisions in the intervention such as the total ban on alcohol and compulsory income management. The fact that the leases seemed from the start to be mainly symbolic (because the government made clear its lack of intention to take up its right to exclusive possession) and yet have been the most contested aspect of the intervention, suggests that property in aboriginal areas is not principally about exclusive possession and yet is nonetheless more than symbolic. Despite the Commonwealth declining to take up its right to exclusive possession under the leases (generally the most coveted right in any lease), there is still something tangible about property that the government was seeking to gain and that aboriginal residents would fight to hold on to.

Wurridjal v The Commonwealth of Australia

The case of *Wurridjal* was brought by Reggie Wurridjal and Joy Garlbin, who are senior Dhukurrdji people and traditional owners[430] of an area of land in the Northern Territory around the township of Maningrida. As traditional owners under the Land Rights Act, Wurridjal and Garlbin are entitled to enter, use and occupy the Maningrida land in accordance with aboriginal tradition, and to have the title to that land held for their benefit by the Land Trust. The third plaintiff was the Bawinanga Aboriginal Corporation ('BAC'). As mentioned above, the BAC is an aboriginal-run resource agency that

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[428] Commonwealth fact sheet reproduced in *Shaw No 2* at [111].
[429] Gibson (n422).
[430] Within the meaning of s3 of the Land Rights Act.

provides services and advocacy for those who live on 'outstations' in their traditional clan areas rather than in the Maningrida township itself, as well as running programs that promote and maintain aboriginal languages and culture in the region more generally.[431] The BAC has agreements with the Land Trust that give it entitlement to use and occupy particular buildings in the Maningrida area.

As a prescribed area, the Land Trust was required to grant a five-year rent-free lease of the Maningrida area to the Commonwealth, which took effect from 18 February 2008.[432] As stated above, under the lease the Commonwealth enjoys the standard tenancy rights of exclusive possession and quiet enjoyment.[433] Being an intervention lease however, it also includes highly unusual terms in favour of the tenant. The landlord (the Land Trust) is not able to vary the terms or terminate the lease although the tenant (the Commonwealth) can do either at any time; the tenant is not liable for any damage it does to the land or any of the buildings on it during the term of the lease, and the tenant is free to sub-lease, licence, part with possession and otherwise deal with the land.[434] The lease also gives the Commonwealth the power to direct aboriginal corporations who occupy any part of the land, including the BAC, to manage its assets in a particular way or to transfer its assets to the Commonwealth.[435]

In October 2007, before the lease had come into effect, Wurridjal, Garlbin and the BAC filed their action in the High Court of Australia claiming that the five-year lease over Maningrida was unconstitutional because it was a compulsory acquisition of property other than 'on just terms', contrary to s51(xxxi) of the Constitution.[436] Being traditional

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[431] 'History', *Bawinanga Aboriginal Corporation* (n391).

[432] The lease was compulsorily acquired under s31 of the NTNERA. As of December 2010 the federal government holds 64 such leases in the Northern Territory under this legislation: Jenny Macklin, 'Stronger Futures in the Northern Territory' (n417) 22.

[433] NTNERA s35(1).

[434] ibid s35(2)-(7).

[435] ibid s68.

[436] The section relevantly states 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxxi) the

owners of the land, Wurridjal and Garlbin also claimed that their entitlements under the Land Rights Act to enter, use or occupy Maningrida land in accordance with aboriginal tradition[437] constituted property that had been acquired by the Commonwealth other than on just terms through the NTNERA changes to the Land Rights Act permit system. The principle reason Wurridjal and Garlbin argued that the acquisition was unjust was that the Commonwealth was not required to pay the Land Trust rent for the lease, along with other one-sided lease provisions such as those allowing the Commonwealth to unilaterally alter its terms at any time. The claimants also argued that the leases amounted to an acquisition of their property as traditional owners (not just as beneficiaries of the Land Trust but in their own right), because unlike the Land Trust, the Commonwealth was not obliged to hold the land for the claimants' benefit, and because their rights as traditional owners were now at the Commonwealth's unfettered discretion.[438] In response, the Commonwealth filed a demurrer alleging that even if the facts claimed by Wurridjal, Garlbin and the BAC were true, there was still no legal case to answer.

In a long and complex 6-1 decision delivered in February 2009, the High Court granted the Commonwealth demurrer, finding that the leases did not effect any acquisition of property from Wurridjal or Garlbin and that although the leases did acquire property from the Land Trust, that acquisition was on just terms. The legal legitimacy of the 64 NTNERA leases throughout the Territory was thus affirmed.

Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs

The case of *Shaw*, which was heard in two stages, was a challenge to the

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acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

[437] Land Rights Act s71.

[438] *Wurridjal* (Heydon J) [350].

Commonwealth's use of its power to compulsorily acquire particular land in the Northern Territory under s 47(1) of the NTNERA. *Shaw*, like *Wurridjal,* was an aboriginal challenge to the operation of the NTNERA, but the cases involved different areas of land and different legal questions. Whereas in *Wurridjal* the question was whether the five-year lease of the Maningrida region amounted to an acquisition of property other than on just terms, in *Shaw* the question was whether the Commonwealth was bound by the rules of procedural fairness when it exercised its power to compulsorily acquire land. The land at stake in *Shaw* consisted of a number of separate areas collectively known as the Alice Springs town camps. As discussed above, these town camps are areas built and inhabited by aboriginal people that began developing in the late 1800s.[439] Today there are some 19 town camps around Alice Springs, each existing as a permanent community.[440] Each town camp community today has its own Housing Association which holds the town camp land under leases in perpetuity from the Northern Territory government under the *Special Purposes Leases Act 1953* (NT) and the *Crown Lands Act 1992* (NT).[441] Since early 2007 – before the announcement of the intervention – the Commonwealth government had been trying to gain long (between 40 and 99 years) sub-leases over the town camps from the Housing Associations, offering nominal rent ($1 for the entire length of the lease) and an investment of between $50 million and $125 million investment in housing and associated infrastructure.[442] Negotiations for these sub-leases were still in process when the intervention was announced, and all Alice Springs town camps were soon after declared to be prescribed areas subject to the NTNERA.[443] The NTNERA itself modifies the *Special Purposes Leases Act 1953* (NT) and the *Crown Lands Act 1992* (NT) to increase the Commonwealth government's administrative powers over the town camps,[444] as well as explicitly providing for town

[439] Coughlan (n393) 22.
[440] Memmott (n395) 3.
[441] ibid 58-75.
[442] *Shaw No 2* [75] and [110].
[443] ibid [3].
[444] NTNERA ss 43-46.

camp leases to be compulsorily acquired by the Commonwealth.[445]

Negotiations over the town camp sub-leases continued unsuccessfully for almost two years, with an impasse being reached over the Commonwealth's refusal to guarantee the Housing Associations the retention of certain key decision-making powers over the nature of the housing and infrastructure to be built.[446] In late July 2009 the relevant Commonwealth Minister, Jenny Macklin, told the Housing Associations that if they did not agree to the sub-leases as drafted she would use her powers under the NTNERA to compulsorily acquire the Housing Association's leases.[447] A number of the associations promptly signed agreements granting the Commonwealth 40-year sub-leases. Barbara Shaw, a resident of the Mount Nancy town camp, filed an action against Macklin in the Federal Court seeking orders restraining Macklin from using the NTNERA to compulsorily acquire any town camp land, and restraining both Macklin and the Housing Associations from either entering or executing the sub-leases.[448] Upon the first hearing of the matter on 6 August 2009, Shaw won an injunction temporarily granting those orders until a full trial could be heard. The injunction was granted on the basis that there were two questions of law to be tried before either the acquisition or sub-leases could go ahead. The first was whether Macklin, in executing her power of compulsory acquisition under the NTNERA, was obliged to provide procedural fairness to those affected by the acquisition; the second was whether the Housing Associations would be breaching their own constitutional objective of acting in the interests of their aboriginal members by granting the sub-leases.[449]

Three months later at the full hearing of the case, Shaw lost on both arguments. In regards to the first question, Justice Mansfield of the Federal Court found that the

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[445] ibid s47.
[446] *Shaw No 2* [107]-[133].
[447] ibid [133].
[448] *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 844 ('*Shaw No 1*') [65].
[449] ibid [75] - [99].

section of the NTNERA allowing the Commonwealth to compulsorily acquire town camp land 'in its terms and in its context demonstrates an intention that the rules of procedural fairness... be excluded'.[450] Interpreting the statute, Mansfield J held that the absence of any requirement to give the town camp residents notice or an opportunity to be heard before the town camp lands were compulsorily acquired 'cannot have been by oversight'.[451] Macklin was thus free to compulsorily acquire the town camps without having to comply with the ordinary rules of procedural fairness towards those affected. In regards to the second question, Mansfield J held that granting the sub-leases was not contrary to the interests of the Housing Associations' members because granting the sub-leases would benefit those members (because of the $100million that Macklin would then spend on infrastructure improvement),[452] and because even though the sub-leases would extinguish the tenancy agreements that individual residents such as Shaw have with their Housing Associations, Mansfield J held that those tenancies were merely periodic in nature anyway.[453] Mansfield J dismissed residents' fears of losing their homes under the sub-leases, accepting the Minister's argument that the sub-lease arrangements would effectively just replace the Aboriginal Housing Associations with the Executive Director of Township Leasing (a Commonwealth government department) as 'the landlord' in each individual tenancy, without actually changing the rights already existing under those tenancies.[454]

Two weeks after Mansfield J handed down this decision, 17 out of the 18 Alice Springs town camps began the 40-year sub-leases of their land to the Commonwealth. The remaining town camp community of Ilpeye Ilpeye instead had their land compulsorily acquired.[455] Macklin announced that prisoner work gangs had already started to 'clean

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[450] *Shaw No 2* [162].
[451] ibid [163].
[452] ibid [270].
[453] ibid [226].
[454] ibid [260]-[262].
[455] Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'New housing opportunities in Ilpeye Ilpeye' (Canberra 29 January 2010)

up', 'fix' and 'make safe' the town camps and that her department was 'committed to providing better homes for the people of the Alice Springs town camps, in particular for the children, women and the elderly'.[456]

Property, permanence and governance

The *Wurridjal* and *Shaw* cases and the legal geographies of the Maningrida region and the Alice Springs town camps raise important questions about the role of property in the intervention, and as a tool in the production of spaces of belonging more broadly. Both cases challenged the method by which property rights as conventionally understood (leases and sub-leases) could be lawfully taken (or 'compulsorily acquired') by the Commonwealth, and *Wurridjal* brought into question the meaning of 'property' itself. While the legal issues of s 51(xxxi) of the Constitution and of the applicability of procedural fairness requirements to government action were narrow in focus and relatively common in terms of public law litigation, the context in which those issues were brought up in *Wurridjal* and in *Shaw* give these cases a much greater significance than the specific legal questions each dealt with. The property being acquired in both cases was aboriginal not just in terms of the type of legal title the land was being held under, the identity of the claimants or the majority racial group living on the land, but in terms of the broader, contested space of belonging of post-contact Australia. Both cases concerned spaces where aboriginal relations of belonging are held up – both are distinctly aboriginal spaces, distinct from non-aboriginal Australia. To fully understand the significance of these cases, both the subject-object (who has rights to the land) and part-whole (members of which cultural group belong here) aspects of property must be considered. As will be argued below, what both sides were fighting for was the space of

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<http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/new_housing_opp_29jan09.aspx> accessed 3 December 2011.

[456] Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Work begins on town camps' (Canberra 7 December 2009) <http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/work_begins_town_camps_7dec2009.aspx> accessed 3 December 2011.

belonging that both kinds of property-as-belonging requires and (re)produces.

Wurridjal v The Commonwealth: Property and permanence

In granting the Commonwealth's application for a demurrer in *Wurridjal,* the High Court made several determinations on what the law regards as 'property'. All but one of the judges found that the five-year lease over the Maningrida area that the Land Trust had been compelled to grant the Commonwealth *did* amount to property that had been acquired, though most of those judges found that it had been acquired only from the Land Trust and not from Wurridjal or Garlbin. (The BAC was a plaintiff in the action seeking a declaration that the leases were unconstitutional, but was not claiming proprietary rights.)[457] Each of the majority judges held that Wurridjal and Garlbin were merely beneficiaries of the Land Trust's title, meaning that Wurridjal and Garlbin themselves could not enforce any legal rights as property owners. The majority judges thus found the Land Trust to be the only true legal owner of the Maningrida land.

The question of whether the possession, quiet enjoyment and various other rights compulsorily granted by the Land Trust to the Commonwealth in the five-year leases amounted to 'property' involved two separate but related questions – did the Land Trust's rights over the land amount to property in the first place, and if so, did the five-year leases amount to an acquisition of that property? For the Commonwealth argued that the Land Trust's rights in the Maningrida region did not amount to property, and that even if they did amount to property, the Commonwealth's leases were not an acquisition of property.[458] The leading judgment of Chief Justice French looked at a range of precedents that had variously defined property as 'every species of valuable right or interest',[459] 'a bundle of rights'[460] and / or a right of legal action.[461] Against

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[457] *Wurridjal* (Crennan J) [348].
[458] ibid (French CJ) [95].
[459] ibid (French CJ) [87].
[460] ibid (French CJ) [89].
[461] ibid (French CJ) [90].

these broad and somewhat unhelpful definitions he states what property is *not* – property is not a right that is 'inherently' or 'of its nature' susceptible to variation.[462] French CJ noted that the Land Trust's fee simple estate in the Maningrida, which the Commonwealth's lease had carved an interest out of, was created by and embedded in the 'inherently variable regulatory framework' of the Land Rights Act.[463] This system of statutory regulation made the Land Trust's rights in the Maningrida different from the rights of other private land-owners, but for French CJ this level of regulation was not enough to mean that the Land Trust's rights in the Maningrida fell short of amounting to 'property', as the Commonwealth had argued.[464] French CJ thought it significant that the purpose of the Land Rights Act was to grant rights to aboriginal people that were comparable to the rights of non-aboriginal land-owners.[465] For French CJ this suggested that the Land Trust's rights over the Maningrida did amount to property, and although those rights were clearly open to being varied by government to some extent, those rights were still similar enough to the non-variable nature of other kinds of land ownership rights for them to constitute property. The majority thus found that the Maningrida ultimately belonged to the Land Trust and, consistent with the characterisation of any leasehold interest as property, that the Commonwealth's five-year lease of that land amounted to an acquisition of the Land Trust's property.

The one judge who found that the five-year leases did not amount to property at all, Justice Crennan, did so on the basis that although the Land Trust's rights over the Maningrida could be classified as property, the five-year leases did not amount to an acquisition of that property. Crennan J argued that the leases did not amount to property principally because the Land Trust's rights over the Maningrida were wholly dependent upon the Land Rights Act and that 'the scheme of control' of land under that Act had always been susceptible to adjustment such as being forced to grant long leases

[462] ibid (French CJ) [93].
[463] ibid (French CJ) [94].
[464] ibid (French CJ) [101].
[465] ibid (French CJ) [98]-[100].

to the Commonwealth on stringent terms.[466] So although Crennan J regarded the Land Trust's fee simple estate in the Maningrida as 'a formidable property interest',[467] it was a *sui generis* kind of property interest because it was inherently susceptible to significant government interference such as the lease in question. The lease was thus not an acquisition of property, but merely a temporary adjustment – the Land Trust retained its *sui generis* fee simple estate.

In dissent, Justice Kirby argued that the compulsory leases did amount to acquisitions of property not only from the Land Trust but also, at least arguably, from Wurridjal and Garlbin. So Kirby J differed from Crennan J but agreed with the majority that property had been acquired from the Land Trust; however Kirby J differed from the rest of the court in going on to find that it was at least arguable that a different kind of property had also been acquired from Wurridjal and Garlbin. Kirby J argued that 'the nature' of the property asserted by Wurridjal and Garlbin was 'somewhat different from, and additional to, conventional property rights known to Australian law'.[468] He analysed this 'different' property claimed by Wurridjal and Garlbin on two bases – the first being as people who are recognised under local aboriginal traditions, observances, customs and beliefs as entitled to use the land for a wide range of particular purposes, and the second being as a traditional owner under the Land Rights Act.[469] While the latter claim to property, that based on section 71 of the Act, is the same kind of property that the majority found belonged to the Land Trust, the property claimed on the basis of aboriginal traditions, observances, customs and beliefs is different and more complex because it is not based on Anglo-Australian law. Kirby J lists the 'traditional purposes' that the claimants' distinctly aboriginal property entitles them to perform, such as:

- *Utilising certain floral species and minerals on the Maningrida land for*

[466] ibid (Crennan J) [441].
[467] ibid (Crennan J) [417].
[468] ibid (Kirby J) [244].
[469] ibid (Kirby J) [245].

medicinal purposes in accordance with custom

- *Observing traditional laws and performing traditional customs and ceremonies, particularly on sacred sites, on the Maningrida land*
- *Being responsible for maintaining the traditional connection of the members of the Dhukurrdji clan with country.*[470]

Kirby J notes both the 'ancient' nature of these traditional purposes[471] and the recognition of the purposes in aboriginal law.[472] He argues that the distinctly aboriginal property being claimed here is something that is different from and in excess of legal property. This aboriginal property is not confined to an 'interest in land' based on Anglo-Australian law like the Land Trust property, but consists of a range of rights and responsibilities associated with the land and with aboriginal cultures. While Kirby J did not determine absolutely that this property should be recognised, he held that its existence and status should at least be argued at a full trial rather than being dismissed upon a demurrer.

Within the one judgment then, Crennan J, Kirby J and French CJ offer three distinctly different approaches to the meaning of property, although all three approaches have an important commonality. The judges differed on what kind of rights constitute property, and on to whom this property could belong. Crennan J's understanding of property as 'a scheme of control' that depends completely on Anglo-Australian law and is therefore susceptible to adjustment by government is very different from Kirby J's understanding of property as a range of rights and responsibilities deriving from aboriginal law and custom. French CJ's leading judgment, with which a majority of the court agreed, was something of a compromise between Crennan J and Kirby J's positions. Property for French CJ is a broad and ill-defined bundle of rights deriving from Anglo-Australian law but not inherently susceptible to adjustment by government or by anyone else. For

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[470] ibid.
[471] ibid (Kirby J) [204].
[472] ibid (Kirby J) [220].

French CJ, the Anglo-Australian legal recognition of aboriginal rights to land given in the Land Rights Act gave the Land Trust enough control over the Maningrida for its relationship with that land to qualify as property; for Crennan J the recognition in the Land Rights Act amounted only to a *sui generis* property that was inherently open to government adjustment; and for Kirby J that recognition was somewhat secondary to the fact that the aboriginal people who the Land Trust represents, including Wurridjal and Garlbin, had a deep and ongoing relationship with the Maningrida. Thus for Crennan J property is *a scheme of control* rooted solely in Anglo-Australian law; for French CJ property is a more of a *bundle of rights* rooted in Anglo-Australian law; and for Kirby J property is *a complex range of rights and responsibilities* not necessarily rooted in Anglo-Australian law (although recognised by it).

What each of these different approaches to property had in common was their implicit understanding of the temporality of property. For Crennan J, the leases did not amount to an acquisition of property because they were merely a *temporary* adjustment to the Land Trust's rights over the Maningrida, and such temporary adjustments were inherent in the Land Trust's sui generis fee simple estate.[473] For French CJ, the rights the Land Trust had were not inherently susceptible to adjustment because they were similar to a fee simple, which for him meant that they were *permanent enough* to amount to property.[474] Kirby J had a similar analysis of the rights of the Land Trust to French CJ, but he also argued that the rights that Wurridjal and Garlbin had pursuant to aboriginal custom could amount to property because although those rights exceeded the statutory property in land (which belonged to the Land Trust) those right were nonetheless *permanent, stable and capable of ongoing enjoyment.*[475] So all three of the approaches found property to require a level of permanence, reiterating the idea discussed in the last chapter that property provides a strong linkage between past, present and future;

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[473] ibid (Crennan J) [395] and [412].
[474] Indeed French CJ even held that the changes to the permit system effected by the NTNERA amounted to an acquisition of property from the Land Trust (at [107]), but that the acquisition was not in addition to that already effected by the leases (at [108]).
[475] *Wurridjal* (Kirby J) [296].

its linear temporality making the relations of belonging being held up seem 'natural'.

Understanding property as a spatially contingent relationship of belonging, as discussed in the last chapter, helps in thinking through what was at stake in the Maningrida lease (and all the intervention's compulsory five-year leases) beyond the right to exclude, which as discussed above, the Commonwealth did not even take up. Each judicial approach upheld a different relation of belonging for a different reason. Looking at the majority position led by French CJ, the Maningrida land belonged to the Land Trust, with that relationship of belonging being upheld by the aboriginal people living in the Maningrida area who are the beneficiaries of the Land Trust's title and, most importantly, by the Anglo-Australian legal system. For Crennan J, the Maningrida land seemed to still ultimately belong to the Commonwealth, with that relationship being upheld by the Anglo-Australian legal system. And for Kirby J, the Maningrida land belonged to the traditional aboriginal owners, with that relationship being upheld by the aboriginal custom and tradition of the Maningrida and, increasingly, by Anglo-Australian law. For French CJ and Crennan J then, the Anglo-Australian legal system was the network of belonging that ultimately defined property in the Maningrida, whereas for Kirby J there was an arguable possibility that it was aboriginal law and custom.[476]

These judges thus differ on who the Maningrida land belongs to and which networks of belonging are relevant in making that determination. These decisions are significant not only in deciding who the property belongs to in law (subject-object belonging – the Land Trust, the Commonwealth or the traditional owners) but also, and more importantly, in legitimating the future production of a particular space of belonging on that land (part-whole belonging – white Australia, aboriginal Australia or the attempt at something in between). The *Wurridjal* case was framed in terms of subject-object belonging because that is the property framework through which Anglo-Australian law

[476] There are questions over whether any Anglo-Australian court can ever meaningfully recognize aboriginal law and custom, as to do so would mean undermining its own legitimacy, but Kirby J's dissent argues that such a possibility should at least be considered at a full trial.

operates. Yet what was at stake in *Wurridjal* was not so much the subject's right to exclusive possession of an object that comes with property, as it was the space that property requires and (re)produces. This space includes but also exceeds the symbolic power of land rights and extends to the conceptual, social and physical shaping of the Maningrida region. It is what determines which subjects, objects and practices will be held up, which will be out of place, and how they will be oriented in the future. By finding that the Anglo-Australian legal system, rather than the Maningrida aboriginal laws and customs, was the relevant network of belonging in determining who the Maningrida belonged to, the majority judges were not just legitimating the Commonwealth's five-year lease, but also the supremacy of the white Australian space of belonging over that of the Maningrida aboriginal people.

Shaw v The Minister: Property as governance

The legal questions in the *Shaw* cases revolved around administrative law rather than constitutional or property law, but issues of property, space and belonging were central to the conflict between Barbara Shaw and the Minister, Jenny Macklin. It was accepted by both parties in the case that Alice Springs town camp land ultimately belonged, at law, to the Northern Territory government – the Housing Associations had leases in perpetuity, but not the fee simple title. It was also accepted that Macklin had the power to compulsorily acquire the leases in perpetuity from the Housing Associations and that in so doing, she would acquire property from the Housing Associations.[477] The question was simply whether, in compulsorily acquiring that property, the Minister was bound to follow the standard administrative law requirement of affording procedural fairness to those affected by her exercise of government power. While the court's final decision that the Minister was not bound by the procedural fairness requirement is a notable development in terms of Australian administrative law, it also has significant consequences in terms of the meaning of property and belonging in post-contact

[477] *Shaw No 2* [351].

Australia.

A question that was not asked of the courts in the *Shaw* cases but that anti-intervention activists had been asking the government since negotiations over sub-leases began, is 'why property?'.[478] Why did the Commonwealth government, represented by Minister Macklin, need to invoke property law in order to implement its housing and infrastructure program in the Alice Springs town camps? The same arguments that the government used to justify the five-year leases were used to justify the need for long sub-leases of the town camp land – namely 'to provide security for the government's investment and to ensure that housing reforms can be implemented effectively'.[479] The government's purported need for security and efficiency was not questioned in court, but it does seem a strange requirement. The Australian government does not usually demand property rights over land before it agrees to build infrastructure and to provide essential services to it. Government services such as sewerage, running water and garbage collection are provided to all other Australian residential areas, which consist overwhelmingly of privately owned and rented property, without the government needing to sub-lease the land first.

Apart from its stated desire for security of investment and effective implementation, the Commonwealth's desire and eventual acquisition of property rights over the Alice Springs town camp lands was intimately connected to its repeatedly stated goal of 'normalising' the town camp communities.[480] While seeking security of investment and access might be politically questionable, it is perfectly understandable in terms of an

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[478] For an archive of activist press releases questioning the necessity of the intervention leases see the *Rollback the Intervention* website: <http://rollbacktheintervention.wordpress.com/media/> accessed 12 December 2011.

[479] *Shaw No 2* [94].

[480] Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Street names and street lights for Alice Springs town camps' (Canberra 19 April 2011) <http://www.jennymacklin.fahcsia.gov.au/mediareleases/2011/pages/st_names_lights_190411.aspx> accessed 14 December 2011; Macklin, 'Stronger Futures in the Northern Territory' (n417) 5; 'Aboriginal camps organization to discuss new lease deal' *ABC News* (Sydney 12 May 2009) <http://abc.gov.au/news/stories/2009/05/12/2567654.htm?site=alicesprings> accessed 9 March 2011.

economic analysis of property as a legally defined relation of subject-object belonging grounded in the right to exclude. By acquiring sub-leases, the Commonwealth ensured that it would have exclusive rights to any improvements in land value that will likely result from its investment and also ensured that its bureaucrats and other hired workers would have exclusive rights of access to the land to make those improvements. However considering that the land in question is low in commercial value and unlikely to significantly increase considering its remote position and impoverished and marginalised demographic, it seems reasonable to surmise that the purpose of normalisation is at least as significant as security and access.

A goal of normalisation where 'the normal' is defined by non-aboriginal standards sounds very much like the policy of assimilation that dominated Australian and other settler colonial approaches towards indigenous populations prior to the adoption of 'multiculturalism'.[481] Assimilation or normalisation where the normal is defined by the values of the dominant culture operates as a method for governments to maintain political control of physical areas where there are multiple and potentially conflicting cultures. The connection between the control and disciplining of populations on the one hand and the maintenance of state sovereignty over territory on the other has been explored by post-colonial scholars, geographers and political theorists;[482] and it is a well-settled rule in international law that control over an identifiable area of physical space is an essential criteria for statehood.[483] From a public law perspective then, putting the relationship between the state and its citizens at the centre of analysis, the

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[481] Assimilation was the general governmental policy towards aboriginal people from about 1940 to the early 1970s. The assimilation policy was defined by the Native Welfare Conference in 1961 as follows: 'The policy of assimilation means that all Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, as other Australians'. C A Blanchard, *Return to Country: the Aboriginal Homelands Movement in Australia* (Australian Government Publishing Service, Canberra, 1987) xxi.

[482] See David A Rossiter, 'Producing Provincial Space: Crown Forests, the State and Territorial Control in British Columbia' (2008) 12(2) Space and Polity 215; Peter Fitzpatrick, "No Higher Duty': Mabo and the Failure of Legal Foundation' (2002) 13(3) Law and Critique 233.

[483] Malcolm Nathan Shaw, *International Law* (Cambridge University Press, Cambridge, 2003) 178.

Commonwealth's desire for control over the town camps is consistent with this basic premise that in order to govern a population the state must have control of the territory where that population lives.

Yet the type of control over land being referred to in these political and public law considerations is different from the type of control over land generally associated with private property rights. The Commonwealth government controls the 7 million square kilometres that make up its territory in a different way from how most home-owners control their parcel of land. Exploring the use of private land rights by local government in a different context, Davina Cooper distinguished between land as property and land as territory.[484] In the case that Cooper studied, private land rights were used by the local government in part because they were seen by the councilors as giving a certain legitimacy to decision-making that was different from public justifications concerning territory. This legitimacy derived in part from the assumption that private land-owners act for non-political reasons.[485] Yet in that case, as in the *Shaw* and *Wurridjal* cases, private land rights – land as property rather than territory – functioned as a technique of political struggle.[486]

I argued above in relation to the *Wurridjal* case that by finding the Anglo-Australian legal system rather than the Maningrida aboriginal laws and customs to be the relevant network of belonging in determining who owned the Maningrida, the majority legitimised a white space of belonging rather than an aboriginal one, and that this legitimisation was more than symbolic. In chapter four I discussed the malleability of spaces of belonging – how property tends to be associated with spaces that hold up hegemonic relations of belonging, but that it can also be productive of spaces that are differently shaped, spaces that unsettle and even subvert hegemonic power relations. The space required and (re)produced by property is thus not merely symbolic but has

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[484] Cooper, *Governing Out of Order* (n25) 156.
[485] ibid 158.
[486] ibid 163.

important and tangible political effects. The reshaping, as well as the reproduction of an existing shape, of spaces that hold up some relations of belonging and not others can function as a kind of governance.

It is now well-recognised that governance is not simply the top-down act of a government exerting direct control over its citizens. Foucauldian scholars Hunt and Wickham define governance as any attempt to control or manage any known object.[487] Governance, for Hunt and Wickham, is an always incomplete and perpetual social process that involves power and knowledge and that works to bind societies together.[488] They argue that things, objects and phenomena are all subject to governance, and that governance does not necessarily involve the state as governor – it occurs among, between and within individual subjects.[489] Other writers have explored governance as something that is exercised by institutions other than the state (such as by corporations and civil society). R.A.W Rhodes offers a definition of governance as 'self-organising, interorganisational networks' that are increasingly autonomous from the state.[490] Nikolas Rose has challenged the limits of what is political by showing how techniques of governance in 'advanced' liberal democracies have come to involve a vast array of forces which link the regulation of public conduct with subjective emotional and intellectual capacities and ethical regimes.[491] Building on Rose's work Davina Cooper explores 'governance at a distance', whereby the actions of subjects are guided 'through the production of expertise and normative inculcation so that they govern themselves'.[492] Governance for Cooper is far broader than management – it concerns authority within an area as well as the structuring of resources, discourses and

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[487] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, London 1998) 78.
[488] ibid 78-98.
[489] ibid 78.
[490] R A W Rhodes, 'The New Governance: Governing without Government' (1996) 44 Political Studies 652, 660.
[491] Nikolas Rose, 'Governing 'Advanced' Liberal Democracies' in Aradhana Sharma and Akhil Gupta (eds), *The Anthropology of the State: A Reader* (Wiley-Blackwell, Oxford 2006) 144.
[492] Cooper, *Governing Out of Order* (n25) 12.

terrain.[493] Each of these understandings of governance is a departure from understanding governance as the simple top-down relationship of control that a state exerts over its citizens. They demonstrate that the spatiality of governance is more complex and more diffuse than that – operating through the conceptual, social and physical spaces in which the subject is embedded rather than simply from a central site of state power.

Certain economists have explored the idea of property as governance in the narrow sense that a subject who has property in an object governs that object.[494] Charles Reich's analysis of the increase in state governmental power through its increased ownership of property formerly held by non-state actors also uses this framework.[495] But there is something more to property's governmental power than a subject's control over her object. The subject can only exert control over her object to the extent that the space in which she is embedded will allow – the object belongs to the subject because the subject is positioned and orientated in space in a particular way. The space in which the subject is embedded holds up her relation of belonging with the object. To suggest that subjects exert control over objects that belong to them without considering the importance of the space in which the subject is embedded is thus to miss an important part of property's power. That is, the power of the space that property both requires and (re)produces. As discussed in chapter four, as a home owner lives in her house over time she fills and decorates it a particular way, just as a mobile phone owner during the course of her relationship with her phone fills it with the contact details of her friends and a particular ring tone or case or other accessory. Over time, the space around these property-owning subjects becomes further oriented toward them, holding up their relations of belonging to the extent that, over time, they seem 'natural'. Those who do not fit the space will be excluded or realigned. The economic theories of

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[493] ibid 162.

[494] See for example Oliver Hart and John Moore, 'Property Rights and the Nature of the Firm' (1990) 98 (6) *Journal of Political Economy* 1119; Arun Agrawal, 'Common Property Institutions and the Sustainable Governance of Resources' (2001) 29 (10) *World Development* 1649.

[495] Charles A. Reich, 'The New Property' (1964) 73(5) Yale Law Journal 733.

property as governance fail to account for the governmental power of the space beyond the subject.

The economic theories of property as governance also miss the part-whole aspect of property and the way that it too has governmental power. Retaining membership of a particular group (that is, remaining part of a whole) requires the maintenance of particular behaviours and ways of being. So for example to be Christian requires at the very least the maintenance of a particular belief system, to be a woman requires the adherence to particular gender norms[496] and to be white is not just about skin colour but also requires adherence to particular cultural norms.[497] Consistent with the understandings of governance reviewed above then, this kind of property involves an ongoing process that involves power and knowledge and that works to bind societies (however large or small) together by guiding the actions of individual subjects. It is an ongoing process because to function as property, this part-whole belonging must have a level of permanence – it cannot involve a one-off conformity to particular cultural norms, but rather must extend over time such that the space in and through which the relation occurs is holding it up, and in turn becoming more firmly oriented toward that relation. Thus the governance of subjects through property as part-whole belonging also requires and (re)produces a particular space.

As discussed in chapter four, when analysed from a spatial perspective, subject-object and part-whole belonging overlap. What is important about both kinds of property is the spaces in which the subject is embedded. For property to exist, the space must hold up the relation of belonging in question, whether the relation is between a subject and an object or a part and a whole. Indeed, I argued that every instance of property involves elements of both types of belonging. So although owning a house clearly

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[496] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York 1990).
[497] See Birgit Brander Rasmussen, Eric Klinenberg and Irene J. Nexica (eds), *The Making and Unmaking of Whiteness* (Duke University Press, London 2001); Ruth Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (Routledge, London 1993).

involves property as subject-object belonging, it is also constitutive of the subject's identity as 'a home owner' (part-whole belonging). And similarly, although being white clearly involves property as part-whole belonging, it also has tangible effects on social and physical space and on what is available to the white subject (subject-object belonging). This overlap between subject-object and part-whole belonging is also true of the governmental power of property. Both types of belonging guide the actions of subjects and shape the spaces in which those subjects exist. Various studies of shopping malls for example explore how they are governed through a combination of the private property right to exclude, middle class ideals and surveillance technology.[498] The combination of subject-object and part-whole belonging governs the space of the mall – the right to exclude (subject-object belonging) being supplemented by more insidious techniques that require subjects to behave in a particular way (part-whole belonging). The result is a space in which behaviours that conform to particular middle class ideals and patterns of consumption belong and other behaviours (such as skateboarding, sleeping or begging) do not. Property thus has the power to govern beyond the direct control that a subject exerts over her object – the space that property requires and (re)produces governs the conceptual, social and physical shape of the various elements which constitute it.

Property's power to produce spaces that hold up some relations of belonging and not others makes it a powerful tool in reshaping spaces and governing subjects. The institution of a new system of property as an essential component of the process of colonisation is an example of this reshaping of space. Stuart Banner argues that colonisation involves the simultaneous taking over of land and of property systems, each of which is distinct from but also dependent upon the other.[499] Writing in the New

[498] Malcolm Voyce, 'The Privatisation of Public Property: the Development of a Shopping Mall in Sydney and its Implications for Governance through Spatial Practices' (2003) 21(3) Urban Policy and Research 249, 251 and 259; Anne Bottomley and Hilary Lim, 'From Walls to Membranes: Fortress Polis and the Governance of Urban Public Space in 21st Century Britain' (2007) 18 Law Critique 171.
[499] Stuart Banner, 'Two Properties, One Land: Law and Space in Nineteenth Century New Zealand' (1999) 24 Law & Social Inquiry 807.

Zealand context, Banner argues that the Anglicisation of the Maori property regime, which was based on use-rights rather than on rights to a defined physical space, was integral to the coloniser's ability to take control of the land not just because an Anglicised property system favoured greater areas of land being held under colonial control, but also because it brought about fundamental changes in Maori religion, culture, economics and political organisation. The space that held up the relationship of belonging between the Maori culture and the land that is now New Zealand was gradually replaced by a different, colonial space. By acquiring property rights over the Alice Springs town camps, it seems that the Commonwealth is pursuing a similar agenda of replacing the distinctly aboriginal space of the camps with a 'normal' space more consistent with non-aboriginal Australia.

As the town camps are prescribed areas under the NTNERA, the Commonwealth was already using various non-proprietal techniques of governance to affect the physical (the houses, roads, plumbing, electricity, etc) and the social (alcohol and pornography bans, welfare quarantining, increased police presence) space of the town camps. But these non-proprietal methods of governance do not have the capacity to affect the networks of belonging that constitute the space of the town camps in the way that property can. Property's governmental power reaches beyond the immediate subjects and objects that are involved in the immediate relationship of belonging and to the space that surrounds and includes them. By acquiring property rights in the Alice Springs town camps, the tenancy agreements that individual camp residents had previously held with the Housing Associations were terminated, and the government became their new landlord, with power to change the lease terms, as well as the town camp physical environment, as it saw fit. While the government has been clear that it will not exclude residents, it nonetheless has the power to, for example, institute lease terms that prevent them from having open fires in their yards (thus preventing aboriginal people from cooking culturally appropriate food) or from having large numbers of people stay at any one time (thus preventing aboriginal people from

maintaining connections with family who live out bush). These are the first two reasons listed as common bases for eviction of aboriginal people from their homes in a 2009 report documenting town camp concerns over the potential sub-leases.[500] Stretching out over 40 years, the sub-leases have the capacity to affect the spaces of belonging of the town camps, shifting these spaces such that they no longer hold up aboriginal practices and ways of being and are instead shaped to fit the requirements of white settler Australia. If non-aboriginal relations of belonging are held up over time, they will – as discussed in the last chapter – seem to naturally fit there. The sub-leases thus play an essential role in the government's 'normalisation' agenda. Like in *Wurridjal*, what was at stake in *Shaw* was not so much the subject's right to exclusive possession of an object that comes with property, as it was the space of belonging that property requires and (re)produces.

'Everything we belong to': Property beyond land title

In terms of legal argument, both *Wurridjal* and *Shaw* were about title to land and the conditions under which such title could be acquired. On a closer analysis though, it becomes clear that what was at stake was more than the leases and sub-leases. Drawing on the discussions of space and property developed in this thesis, it was the spaces of belonging of the Maningrida region and the Alice Springs town camps that was at stake – the spaces that hold up particular subjects and ways of being, that determine who and what belong where, and that can be reshaped with tangible effects on the future. It was property that both sides of each case were seeking, but it was not the subject's right to exclusive possession of the object that was most at stake. Although this subject-object belonging between subject and land was important (indeed it was an essential part of the property in question), what was most at stake was the constitutive

[500] 'Background to the threatened Commonwealth acquisition of Alice Springs town camps ' *Intervention Rollback Action Group* (Alice Springs 2009) <http://rollbacktheintervention.files.wordpress.com/2009/07/tangentyere-background-briefing2.pdf> accessed 4 December 2011.

relation of part-whole belonging between those who live on the land and their culture. The aboriginal litigants were fighting for a space that would continue to hold up their relation of belonging, while the government respondents were fighting to normalise those spaces, to reshape them such that non-aboriginal relations of belonging would be held up, consistent with the rest of Australia.

A group of aboriginal activists called the Prescribed Area Peoples' Alliance released a statement following a meeting in June 2009 stating, among other things, that the intervention measures 'are pushing us into a corner. That will mean they will take away everything we belong to... If people are forced to leave off homelands they will lose everything, their identity'.[501] This reference to aboriginal identity, and to 'everything we belong *to*' (emphasis added) demonstrates the part-whole belonging that is at stake here – although the leases in question in the cases reviewed above clearly involved a change in which subject (the Land Trust, the Housing Associations or the Commonwealth) the object (the Maningrida and town camp land) belonged to, what was more important to the aboriginal people affected by the leases and sub-leases was the threatened change in the whole (culture) of which they were a part. The space of belonging required and (re)produced by property in the leases and sub-leases affects both the control of the land and the subjectivities of those who live on it.

The term 'homelands' is instructive, as is the spatial reference to being 'pushed into a corner'. Although various definitions exist, the key characteristics of homelands are that they are aboriginal-initiated, permanent communities that are distant from non-aboriginal settlements both cartographically and culturally.[502] Both the town camps and the Maningrida region can be classified as homelands. Beyond its geographical meaning, the idea of homelands captures something of the spatial understanding of property, the subject-object and part-whole belonging, the importance of land and the

[501] 'Prescribed Area Peoples Alliance Statement' *One Voice Gathering* (Darwin 18-19 June 2009) <http://rollbacktheintervention.wordpress.com/statements/> accessed 22 March 2010.
[502] Blanchard (n481) 7.

importance of home and the connection between them. Homelands are an aboriginal space of belonging where being aboriginal is held up. The feeling that aboriginal people from the homelands are 'being pushed into a corner' is demonstrative of the inherently spatial nature of homelands belonging. Because they are not just a set of physical places but rather a space of aboriginal belonging, the homelands can be depleted both physically and culturally – by being forced to move from one location to another and also by having its distinctive characteristics maligned or dissolved.

At the same time though, the homelands are a space that cannot be annihilated by compulsory leases or bulldozers alone – should the communities be forced to move to another location they will take their space with them. Like all spaces, the homelands are not frozen in time, but will shift and adapt from moment to moment. Similarly, they will also shift and adapt from physical location to physical location. Individuals who leave the homelands, moving to the township centres whether for a day to go shopping or permanently to start a job or undertake training, also take their space with them. Their bodies and habits are marked as coming from an aboriginal space of belonging and the wider space they move into adapts according to its own dominant networks of belonging. In most cases that adaptation will amount to a racist experience, wherein the wider non-aboriginal space asserts its dominance over the aboriginal space of belonging, whether through a racist comment or glare from a human subject or through the impenetrable system of a city supermarket or through the myriad of other ways that the dominant non-aboriginal space of belonging fails to hold up aboriginal subjects. The space of the homelands is in many ways inconsistent with the space of non-aboriginal Australia.

In this sense, the homelands are a kind of subversive property. The relation of belonging between aboriginal people and their land and culture, a relation that is out of place according to dominant Australian understandings of what and who belong where, are held up in the homelands. The very existence of the homelands unsettles the wider

space of non-aboriginal Australia. By defending the town camps and the Maningrida area against the leases, both Wurridjal and Shaw asserted that subversive property in court: insisting not only that their aboriginal relation of belonging exists but also that it should be held up there. And although they both ultimately lost, their actions nonetheless unsettled the government's plans, forcing the government to provide additional justification for those plans in both areas, and delaying their implementation in the Alice Springs town camps.

Another aboriginal community from a different homelands area asserted their subversive property differently, by physically moving and taking their space with them. This is the community of Ampilatwatja, located some 300 kilometers northeast of Alice Springs (see map on page 152). Like the Maningrida region and town camps, Ampilatwatja is a Northern Territory aboriginal community that is characterised by aboriginal culture and practices. Specifically, Ampilatwatja is a community of the Alyawarr people and land.[503] In June 2009 the Ampilatwatja community, supported by several Australian trade unions, walked off their town site in protest against the intervention, and started building new accommodation and infrastructure on a site three kilometers away, just outside the boundaries of the intervention's 'prescribed areas'.[504] Despite their physical move, the Ampilatwatja community retained its space of belonging, which is no doubt altered from what it was at the last site but is still a space where aboriginal bodies and cultural practices belong. Spokespeople from the walkoff site have emphasised their rejection of the government's regime, their spiritual connection to the land and intention to live under their own customs and laws forever.[505] Walkoff spokespeople have for example stated to the government that

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[503] 'Ampilatwatja' *Barkly Shire Council* <http://www.barkly.nt.gov.au/our-communities/ampilatwatja/> accessed 12 December 2011.

[504] 'About' *Intervention walkoff's blog* (Alice Springs 23 July 2009) <http://interventionwalkoff.wordpress.com/about> accessed 23 March 2010; Jagath Dheerasekara, 'Back to Country: Alyawarr Resistance' (Alice Springs 2009) <http://vimeo.com/12577970> accessed 12 December 2011.

[505] 'Ampilatwatja Walkoff – Aboriginal Australia Today' *The Juice Media* (Melbourne 25 October 2009) <http://www.youtube.com/watch?v=8nJKEl9asqQ&feature=related> accessed 12 December 2011.

'we're never ever going to go back to that community to live under your controls and measures';[506] and that their action of walking outside the borders of the prescribed areas

> *leads us not to Canberra but to Country, not to further assimilation through dependency but to a continuing way of life, not to western law but to our own, not to hand fed scraps and the confines and indignities of the ration mentality and manufactured 'real economies' but to self reliance, learning by doing and direct responsibility for self, Family and the coming generations.*[507]

The new site is on Alyawarr land held under native title that has been leased out pastorally,[508] meaning that the legal status of the walk-off is unclear – should the community's use of the land be deemed 'inconsistent' with the pastoral lease then they will be illegally squatting.[509]

Ampilatwatja's location and declaration that they are not moving is unsettling the Commonwealth government,[510] and creating ripples of media attention that unsettle the wider Australian space of belonging – where does this community belong? Their assertion that they will stay there indefinitely, that they will govern themselves, makes

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[506] Richard Downs, 'NT Aboriginal leaders condemn intervention, housing program failure' (Sydney 7 October 2009) <http://interventionwalkoff.wordpress.com/media-releases/> accessed 12 December 2011.

[507] John Hartley, 'Message from John Hartley' (Northern Territory 2010) <http://interventionwalkoff.wordpress.com/statements/> accessed 12 December 2011.

[508] The arrangements of which were determined in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472. Walkoff spokesman Richard Downs describes the area as 'our grandfather's, mother's country which is on the pastoral lease': Richard Downs, 'Elders "walk off" Ampilatwatja to protest Intervention' (Northern Territory 16 July 2009) <http://interventionwalkoff.wordpress.com/media-releases/> accessed 12 December 2011.

[509] *Wik Peoples v Queensland* (1996) CLR 1.

[510] The Minister has not released an official statement on the walk-off but is clearly aware of its presence. This video shows public servants from the Commonwealth government driving out to the walk-off site in order to inspect it, looking somewhat shocked at what was taking place and being asked to leave by the residents. 'Intervention Agents Evicted' *ForNowVision* (Alice Springs, 17 February 2010) <http://www.youtube.com/watch?v=AB27NSgJEpY&feature=player_embedded> accessed 31 August 2011.

it clear that what they are asserting is a proprietal claim. It is a claim to property not just in the sense that the land which they have moved to belongs to them, but also in the sense that as a community they are part of an aboriginal culture distinct from the dominant non-aboriginal culture / s of wider Australia. It is a claim that their space of belonging should prevail, that their relation of belonging to their land and culture should be held up. Like the court cases of *Wurridjal v The Commonwealth* and *Shaw v The Minister*, the Ampilatwatja walk-off is not only a reactive political gesture against the government's actions, but is also a tangible unsettling of Australia's dominant space of non-aboriginal belonging. Whereas the cases challenged the government's power to take property in aboriginal land, the walk-off literally moves away from the law and takes the community's aboriginal space of belonging with it.

This chapter has explored the concept of property as a spatially contingent relation of belonging through cases challenging the Australian government's acquisition of leases of aboriginal land under the NTNERA. As these cases concerned rights over land, this situation was one that was fought in the courts in terms of subject-object belonging, yet the discussion in this chapter has shown that it was more part-whole belonging that both parties were seeking. That is not of course to say that the land itself was not an essential part of what was being fought for. Rather, analysing both the subject-object and part-whole relations that were at stake and moving beyond the dichotomy between the two, I argued that what was ultimately at stake was the space of belonging that property requires and (re)produces rather than the right to exclude.

Many questions still remain with regards to the question of law's role in the production of spaces of belonging, and of how subversive property works and is co-opted. The next chapter will further explore the concepts of property and subversive property through cases that were framed in court in terms of part-whole belonging. Returning to the issue that sparked my initial sense of unease in the opening chapter, I will look at asylum claims made by women on the basis of sexuality. Taking an issue that is usually framed

in terms of identity and exploring it in terms of property, spaces and belonging, I will look at the kinds of spaces and subjectivities produced by these decisions and the political discourse that surrounds them. In particular I will explore how the subversive property of the queer woman asylum seeker comes to be appropriated by the receiving state through the refugee law process. Like the analysis of the cases in this chapter, using a spatial analysis and focusing on relations of belonging in regards to refugee cases also reveals that there is more at stake than a straightforward reading of those cases reveals.

6. Sexuality and refugee law: Appropriating subversive property and producing homonormative landscapes

This chapter explores the way that spaces of belonging are produced by refugee law, specifically in the context of cases involving women seeking asylum on the basis of sexuality. Unlike residents of the prescribed areas in the Northern Territory, who are fighting to stay where they are and retain their space of aboriginal belonging, women seeking asylum on the grounds of sexuality persecution (such as Prossy Kakooza whose case was discussed in the opening chapter) are seeking to move, both physically and socially. However drawing on the discussions of space and property developed in this thesis, I make connections between these sites of socio-legal struggle, demonstrating that in both contexts law is productive of particular spaces of belonging – spaces that hold up some subjects and practices and not others.

In the Australian context discussed in chapter five, I argued that the government's acquisition of long leases of aboriginal land was more about reshaping the spaces of the Maningrida area and the Alice Springs town camps – 'normalising' them such that whiteness would be held up there – than it was about exclusive possession of the land. In this chapter I analyse the asylum applicants' gender and sexuality as part-whole belonging – social characteristics that were not held up in their home states; indeed, relations that put them in serious danger in their home states. Examining case law from Australia, Britain and Canada I argue that the criteria used to test the sexuality of these applicants appropriates their potentially subversive property – taking their queer sexuality and non-normative gender performance, their out-of-place-ness and its capacity to unsettle hegemonic understandings of what and who belongs where, and using it to instead reinforce those spaces. Refugee law requires women seeking asylum on the basis of sexuality persecution to perform their identities in a way that shows they properly belong among the receiving state's good gay and lesbian citizenry; that they will fit smoothly there, or be 'in place'. This mode of proper belonging / being in place is

defined by the courts largely through participation in the pink economy and involvement in normative intimate relationships, and in opposition to an implicitly sexually deviant, racialised other – what Jasbir Puar and Amit Rai term the 'monster-terrorist-fag', an other who threatens the state from both inside and outside the territorial and normative borders of the nation-state.[511] Refugee law thus produces a space of belonging based on normative boundaries of the nation-state and narrow understandings of gender and sexuality.

As well as proving that she belongs in the receiving state's lesbian citizenry, the asylum seeker must also prove that her home state is a dangerously homophobic place – a place where she will be unsafe everywhere. This requirement to prove that her sexuality makes her vulnerable *out there* in contrast to the safety she would find *in here* reinforces a conception of space as a topography of bounded, internally uniform nation-states within an artificially equal global landscape, and also has the effect of reinforcing racialised and often distinctly colonial notions of Western states as culturally and politically modern and superior, and non-Western states as primitive and uncivilized. The cases produce a gendered, sexualised and racialised space of national belonging in part through their conceptual distancing of the receiving state from these 'other' places. The space produced by refugee law is one that holds up neo-colonial practices – constructing the sending states as sites of blame and the receiving states as sites of virtue and modernity.

Arriving in three jurisdictions: The scale of this chapter

While claims for asylum are made in states around the world, I am using cases from Australia, Canada and Britain for both practical and conceptual reasons. On the practical side, these states each have common law systems, they accept asylum seekers on the basis of sexuality persecution, they publish a large number of their courts' and

[511] Puar and Rai (n31).

tribunals' refugee decisions and they do so in English. The Australian Refugee Review Tribunal is required to publish decisions 'of particular interest',[512] and currently states on its website that it aims to publish 'a broad cross section of decisions representing up to 40% of decisions made'.[513] There is no such clear indication of the percentage of tribunal decisions published by the Canadian and British tribunals, but both jurisdictions have freely accessible internet databases of published decisions.[514] Without legislative requirements, whether or not to publish any particular decision is up to the decision-making body. Furthermore, when looking at court and tribunal decisions, we are only seeing the decisions that have been appealed from the original decision-maker. Decisions made by the original decision-maker that are *not* appealed, either because refugee status is granted or because the applicant decides not to appeal, are not published, nor are statistics available to show how many such non-appealed decisions are made. Despite not being representative in a statistical sense, the published decisions are still significant in that they form the legal precedents and also publicly declare the law in this area. As Shona Hunter has shown in her article on the relational politics of policy documentation, policy documents – of which published legal decisions are one particular kind – are productive of social relations.[515] They constitute links within multiple and complex relational networks, influencing ideas and emotions as well as material practices.

Using these three jurisdictions to explore how the transnational application of refugee law to specific groups of women is used as a tool of inclusion / exclusion and regulation establishes a scale that includes but also exceeds the purview of the state. Mapping out networks of belonging and patterns of power and oppression along lines of gender,

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[512] *Migration Act* 1958 (Cth) s431.
[513] 'Decisions' Australian Government Migration Review Tribunal and Refugee Review Tribunal (Canberra 2011) <http://www.mrt-rrt.gov.au/Decisions/default.aspx> accessed 11 February 2011.
[514] 'Case Law' United Kingdom Ministry of Justice Tribunals Service (London 2011) <http://www.tribunals.gov.uk/ImmigrationAsylum/utiac/CaseLaw/CaseLaw.htm> accessed 11 February 2011 and Canadian Legal Information Institute http://www.iijcan.org/en/ca/irb/index.html> accessed 11 February 2011.
[515] Shona Hunter, 'Living documents: A feminist psychosocial approach to the relational politics of policy documentation' (2008) 28(4) Critical Social Policy 506, 507.

sexuality and other axes of social and political meaning brings into view alliances and schisms that are overlooked when the nation-state is conceived of as the naturalised scale and primary subject of international law and politics. As argued by Hyndman, 'redefining scale changes the geometry of social and political power'.[516] As wealthy liberal democracies with a predominantly Anglo-European culture and population, mainstream media and political discourses often represent Australia, Canada and Britain as major receiving states for refugees – states who bear the burden of migrants coming from the global south (states defined as 'developing' by the United Nations).[517] This representation occurs despite the fact that the overwhelming majority of the world's refugees are received by the global south.[518] As will be discussed below, there is a significant and consistent gender discrepancy in applications made on the grounds of sexuality in all three states – lesbian asylum seekers are either absent or invisible. Exploring this absence, this chapter asks what kinds of spaces are being produced by refugee law in this context, and how such spaces are produced. How does refugee law produce spaces in which some subjects are held up and others are not, and what are the implications of this production? As part of this exploration, I use the term 'queer' to refer to any non-normative sexuality and 'gay' and 'lesbian' to refer to the categories used by courts, tribunals and interest groups to refer to people who have same-sex relationships.[519]

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[516] Jennifer Hyndman, 'Mind the gap: bridging feminist and political geography through geopolitics' (2004) 23 Political Geography 307, 316.

[517] See Stephen Castles and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (4th edn Macmillan, Basingstoke 2009).

[518] 'Developing countries host most refugees, according to new statistical yearbook from UNHCR', The United Nations Refugee Agency (Geneva 2011) <http://www.unhcr.org/3dcb9c314.html> accessed 5 July 2011.

[519] Annemarie Jagose, *Queer Theory: An Introduction* (New York University Press, New York 1996). My use of this terminology is an acknowledgement of the narrowness of legal identity categories and of the reality that not all queer women define themselves as 'lesbian', but might so do strategically when engaging with law.

Not what they had in mind: The legal geography of gender, sexuality and asylum

The picture that Western governments, media and liberal NGOs generally paint of refugee law, and particularly of refugee law in relation to claims made on the basis of gender and sexuality persecution, is one of racialised gays and lesbians fleeing vaguely defined but implicitly demonised 'repressive regimes' to find sanctuary in tolerant, liberal, Western states that open their borders as something of a charitable act of 'human rights protection'.[520] Such representations exist in part because of the very structure of refugee law, which demands a unitary, discrete subject who can travel outside her home country, file a claim for asylum and prove that it would be highly dangerous to go back. The *Convention Relating to the Status of Refugees 1951*[521] was drawn up in the post-World War 2 era as part of a suite of new international legal instruments based on liberal notions of human rights and equality.[522] As part of this new international legal framework headed by the United Nations, state signatories to the Convention are obliged to provide protection for individual subjects who have successfully fled their home state, and are unable or unwilling to return due to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (Article 1 as amended by the 1967 Protocol).

The provision of asylum for Asian, Arab, African and other non-white queers was undoubtedly not what the original framers of the Refugee Convention had in mind when they were drawing up its terms. The Convention was written during the Cold War era when granting asylum could be seen from a foreign policy perspective as 'protecting the

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[520] Bernard Keenan, 'Milestone victory for gay refugees' *The Guardian* (London, 7 July 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/supreme-court-gay-refugees-right-to-asylum > accessed 5 December 2011; Nathaniel Miles, 'No Going Back: Lesbian and Gay People and the Asylum System' (Stonewall, London 2010).
[521] 189 UNTS 150 (entered into force 22 April 1954).
[522] Joan Fitzpatrick, 'Revitalizing the Refugee Convention' (1996) 9 Harvard Human Rights Journal 229. at 231.

enemies of one's enemies'.[523] The Convention was targeted primarily at providing asylum to political dissidents fleeing the communist East, rather than women and queers being persecuted because of their gender and / or sexuality.[524] However the political map of the world has changed since 1951 and today the majority of asylum seekers both originate in and move to the ex-colonial states of the global south – well outside the implicitly Anglo-American and European parameters originally envisaged.[525] It has also now become an accepted tenet of refugee law in particular states including Australia, Britain and Canada that sexual orientation and gender identity can constitute a 'particular social group' within the meaning of the Convention,[526] and that accordingly, individuals who leave their home countries because they have a well-founded fear of sexuality-based persecution should not be forced to return there.[527] While not formally enshrined in refugee law, decision-making bodies also now recognise that women claiming refugee status on any basis face particular difficulties in the refugee determination procedure.[528] Guidelines for the determination of women's refugee

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[523] Joanne van Selm, 'Global Solidarity: Report of a Plenary Session' in Joanne van Selm (ed), *The Refugee Convention at Fifty: A View from Forced Migration Studies* (Lexington Books, Maryland 2003) 25.

[524] Fitzpatrick (n522) 249.

[525] 'Developing countries host most refugees, according to new statistical yearbook from UNHCR', The United Nations Refugee Agency (n518).

[526] Article 1A (2) of the Convention defines a refugee as any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it'; Article 33 (1) states 'No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

[527] In the Australian context this was first judicially confirmed in *Applicant A v MIEA* (1997) 190 CLR 225; in the Canadian context in *Ward v Attorney-General (Canada)* (1993) 2 SCR 689; in the United Kingdom in *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 20, [1999] 2 AC 629; and the United Nations High Commissioner for Refugees have had the policy that "persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognised as refugees" since 1996, see Kristen L Walker, 'Sexuality and Refugee Status in Australia' (2000) 12(2) International Journal of Refugee Law.

[528] See Deborah Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question' (2001) 15 Georgetown Immigration Law Journal.

claims exist for all three of the receiving jurisdictions being examined here.[529] While there has been research published on the legal position of queer asylum seekers and the particular difficulties they face in the refugee determination process,[530] as well as research on the problems facing women claiming refugee status,[531] this work has remained largely within the framework of single-axis identity and recognition rather than positing a broader critique of the system itself.

Critical legal scholars have noted that the refugee is a figure that reinforces the *a priori* notions of territorially-grounded state sovereignty, and of the state citizen as the proper subject of political life.[532] The requirement of Article 1 of the Convention that the asylum seeker must have moved outside the borders of her home state allows the receiving state to make a decision regarding a foreign citizen without violating the territorial integrity of the home state[533] – the place where the subject has come from is left as it is, only the individual subject is dealt with and only when she has left that place. Indeed, as pointed out by Patricia Tuitt, each refugee decision gives the receiving state the opportunity to re-perform and re-assert its own borders, thereby reaffirming the

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[529] Nicole LaViolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines' (2007) 19 International Journal of Refugee Law 169.

[530] For example Kristen L Walker, 'Sexuality and Refugee Status in Australia' (2000) 12(2) International Journal of Refugee Law 175; Carl F. Stychin, '"A Stranger to its Laws": Sovereign Bodies, Global Sexualities, and Transnational Citizens' (2000) 27(4) Journal of Law and Society 601; Derek McGhee, 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status - The Case of Ioan Vraciu' (2000) 6(1) Body & Society 29; Jenni Millbank, 'Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation' (2002-2003) 1(3) Seattle Journal of Social Justice 725; Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' (2005) 14(1) Social and Legal Studies 115.

[531] For example Jacqueline Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1(4) International Journal of Refugee Law 518; Anders B. Johnsson, 'The International Protection of Women Refugees: A Summary of Principal Problems and Issues' (1989) 1(2) International Journal of Refugee Law 221.

[532] Nevzat Soguk, *States and Strangers: Refugees and Displacement of Statecraft* (Borderlines, University of Minnesota Press, Minneapolis, London 1999); Patricia Tuitt, 'Refugees, Nations, Laws and the Territorialisation of Violence' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate, Aldershot 2004).

[533] It should be noted that although the territorial integrity of nation-states is a fundamental tenet of international law, in practice it is often breached in the name of humanitarianism or other 'legitimating' reasons. Recent military interventions by the United States and allied countries in Iraq and Afghanistan are an example of the violation of territorial integrity that was tolerated by international law.

nation-state system of organising the world.[534] Against this assumed spatial background of discrete, bordered sending and receiving states, the refugee subject is defined by both her vulnerable, victim status (in fearing persecution in her home state and needing to flee), and by her agency (in successfully travelling across nation-state borders). The focus on the asylum-seeking subject and whether or not her fear is well-founded takes attention away from broader political questions of why particular subjects need to move outside their home states, and of the violence of state borders more generally. As Helton and Jacobs note, Convention refugees actually constitute only a small part of an estimated 175 million international migrants, many of whom are forced to move by a variety of disasters, including armed conflict, persecution, and poverty.[535] So while states, media and non-government organisations focus on refugees, forced displacement that does not fall into the refugee category but which nonetheless involves massive trauma and uprooting, continues to become significantly greater and more complex.[536]

As an international legal instrument that can theoretically be utilised by any individual subject regardless of nationality, the Refugee Convention proclaims a kind of universal application. Yet in reality, some areas of the world influence refugee law more heavily than others and the effects of refugee law on different areas of the world are also uneven.[537] The universal structure of the Refugee Convention, when applied to women applying for asylum on the basis of sexuality, assumes and requires the existence of a kind of global lesbian, recognisable to the refugee courts and tribunals regardless of her country of origin. This universal structure fails to account for the reality that like all identity categories, 'lesbian' is a spatially contingent term that makes sense in some parts of the world but is an alien concept in others. As will be discussed in the case

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[534] Tuitt (n532).
[535] Arthur C. Helton and Eliana Jacobs, 'What is Forced Migration?' in Anne F. Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Martinus Nijhoff Publishers, Leiden and Boston 2006) 3.
[536] ibid 4.
[537] 'Developing countries host most refugees, according to new statistical yearbook from UNHCR', The United Nations Refugee Agency (n518).

studies below, refugee law does not simply discover and declare pre-existing 'lesbians', but produces them by demanding that they be represented in particular ways. Refugee law is in turn continually (re)constituted by the applicants who come before it through the doctrine of precedent; the applicants performing whatever identity they need to in order to migrate from one place to another. Networks of part-whole belonging are thus continually reproduced through these decisions and the processes surrounding them, affecting the way individual queer women asylum seekers present and perform their identity and determining the legal meaning and limits of gender and sexuality. The result is a space of belonging that holds up only very particular kinds of lesbian identities.

Lesbian asylum seekers: Invisibility and absence

It appears that women make far fewer sexuality-based claims for asylum than do men. In Jenni Millbank's study of over 300 decisions on sexuality from Canada and Australia between 1994 and 2000, '14% of the Canadian and 21% of the Australian clams were brought by women'.[538] My search through decisions in Australia, Canada and Britain between 2000 and 2010 yielded similarly disproportionate results – out of a pool of several hundred sexuality-based decisions across the three jurisdictions, only 81 involved women claimants.[539] Considering approximately half of the world's refugees are women,[540] the imbalance is curious. Queer and feminist scholars have pointed out the general invisibility of queer women subjects in the legal arena.[541] Sarah Lamble argues that the invisibility of transgender and lesbian bodies in the legal domain may be an effect of particular modes of legal rationality that actively render queer bodies and

[538] Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003-2004) 18 Georgetown Immigration Law Journal 71, 74.
[539] This search was conducted in July 2010.
[540] Thomas Spijkerboer, *Gender and Refugee Status* (Aldershot, Ashgate 2000).
[541] Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (n538), Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart, Oxford 1998).

sexualities unknowable and unthinkable.[542] In the refugee context, there is also a historical legal presumption that queer bodies and sexualities are undeserving of protection.[543] This feeling was clearly articulated in the line of reasoning in Australia and Britain that queer asylum seekers, who could avoid persecution by being 'discreet' about their sexuality, did not qualify for refugee status. This line of reasoning was overturned by the High Court of Australia in 2003,[544] by the Canadian Federal Court in 2004[545] and by the British Supreme Court in 2010[546] – in each instance, the court held that the need to be discreet about your sexuality could itself amount to persecution. It has also been suggested that the gender disparity in sexuality-based refugee claims might be because women are less likely to engage in 'public sex' than gay men, meaning that they are also less likely to be persecuted because of their sexuality.[547]

Each of these arguments provides some explanation for the absence and / or invisibility of queer women asylum seekers. Taking a spatial approach, the absence of queer women asylum seekers can also be understood as the result of the space-subject connection assumed in refugee law and the gendered, sexualised and racialised space of belonging refugee law produces. The space-subject connection assumed in refugee law is based on citizenship, meaning that the world is conceptualised as being divided into discrete nation-states where subjects either belong or do not belong. Those subjects are in turn assumed to have identities that are fixed across time and space. The property (as part-whole belonging) of lesbianism is assumed to be universal rather than spatially contingent. The space of belonging produced by refugee law is one that very

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[542] Sarah Lamble, 'Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid' (2009) 18(1) Social and Legal Studies 111.

[543] See Catherine Dauvergne and Jenni Millbank, 'Burdened By Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers' (2003) 31 Federal Law Review 299; Derek McGhee, 'Queer Strangers: Lesbian and Gay Refugees' (2003) 73 Feminist Review 145; Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' (n530).

[544] *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] 216 CLR 473.

[545] *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration* 2004 FC 282.

[546] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

[547] Dauvergne and Millbank (n543) 73.

few women persecuted on the basis of their sexuality fit into without purposefully modifying the way they exist in the world.

Refugee law's lesbian subject: Making women who don't belong there, belong here

The end of discretion: Kylie concerts and exotically coloured cocktails

Despite the abolition of the discretion requirement, refugee law continues to require the performance of a very particular sexuality for asylum to be granted. As will be discussed in the cases in this section, that sexuality is a distinctly Western one. Refugee law can be understood as appropriating the potentially subversive property of the queer woman asylum seeker in these cases. The asylum seeker's property in this context is her identity, her part-whole belonging. She is persecuted in her home state because of her queer sexuality and non-normative gender performance. In traveling to the receiving state, the asylum seeker has the potential to produce subversive property there – by asserting that her queer sexuality and non-normative gender performance should be held up in the receiving state. Yet in seeking asylum on the basis of sexuality persecution, the asylum seeker must perform her identity in a very particular way. The same properties that made her subversive, disruptive, even inflammatory in her home state, must be shown to be properties that make her a worthy new citizen in the receiving state. In demanding proof of that particular lesbian identity so that it is legible to a Western court, the receiving state positions itself as the harbinger of salvation and generosity. As discussed in relation to Prossy Kakooza in the introductory chapter, lobby groups in support of the asylum seeker also adopt these saviour discourses, further bolstering neo-colonial ideas about sending and receiving states. The receiving state thus appropriates the asylum seeker's potentially subversive property and uses it as means by which to further develop its own space of belonging.

The requirement that queer asylum seekers be discreet about their sexuality in their

home states was subject to wide academic and activist criticism, with writers pointing out that the requirement effectively meant condemning queer asylum seekers to go back and live forever in the closet.[548] The overturning of the discretion requirement in refugee determination was widely heralded as an enormous victory for gay and lesbian asylum seekers, and indeed for gays and lesbians in general.[549] In light of the low numbers of published decisions on lesbian asylum seekers, it is unsurprising that each key case overturning the discretion requirement in Australia, Canada and Britain (footnoted above) involved men rather than women applicants. The end of the discretion requirement means that those claiming asylum on the grounds of sexuality no longer have to hide their sexuality in their home country to avoid persecution. However, not having to hide your sexuality does not have significant impact for those whose sexuality is invisible to the courts anyway, which is the situation for most queer women applicants. The end of the discretion requirement only made a small shift to the space of belonging produced by refugee law.

In the British context,[550] Lord Rodger uses what he describes as 'a trivial example from the Western context' to illustrate the rationale behind the overturning of the discretion requirement – namely that 'just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates'.[551] The judge states that 'the same must apply in other societies', suggesting an awareness that there are some differences between 'gay cultures' in different places, but also suggesting that there is an underlying universality to those cultures which is translatable by the courts. It is unclear what the lesbian equivalent of Kylie concerts and coloured

[548] ibid; McGhee 'Queer Strangers: Lesbian and Gay Refugees' (n543); Walker, 'Queer Strangers: Lesbian and Gay Refugees' (n530).
[549] Keenan, 'Milestone victory for gay refugees' (n520); 'Gay asylum seekers from Iran and Cameroon win appeal' *ILGA* (Brussels 25 July 2010) <http://ilga.org/ilga/en/article/mvxJE7L1GA > accessed 5 December 2011.
[550] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.
[551] ibid (Lord Rodger) [78].

cocktails would be – while there is an identifiable (if highly problematic) 'gay identity' based on participation in public, commercial activities aimed at gay men, there is no such identifiable 'lesbian identity' that the courts ask women to prove. Instead, the courts use criteria adapted from what they use to test the identity of gay men. As the cases reviewed below reveal, the courts require 'real lesbians' to either be participants in the pink economy and publicly perform their sexuality like gay men, or alternatively to be caring maternal women whose sexuality is an almost invisible part of their identity.

Gay locations, credit cards and asexual mothers

For an applicant to prove her sexuality, she must give details such as when she first thought she was a lesbian, all of the intimate relationships and feelings she has had with and for other women, how she managed to hide those feelings and relationships and what happened to her as a consequence if she did not manage, along with anything else that the decision-maker hearing the case thinks is relevant to authenticating her identity as a real lesbian. In the Australian Refugee Review Tribunal case of *N04/48953* [2005] RRTA 363,[552] this involved asking a Mongolian woman to gives names and addresses of 'gay locations' in both Mongolia and Australia, and to disclose whether she had yet acquired a local woman lover in Sydney. The tribunal then asserted that conditions for gays and lesbians in Mongolia had been improving in recent years, citing as authority the Spartacus Guide, a commercial travel guide aimed at Western gay men planning holidays abroad. In using the Spartacus guide as a tool in assessing the authenticity of a Mongolian woman's lesbian identity, the tribunal is making it's spatial frame of reference for lesbian identity the plump pink dollar districts of gay (and to a lesser extent, lesbian) Sydney, where 'gay locations' are indeed clearly recite-able by name and address, where it is feasible to find a 'local lover' once you move to the area, and where the choice of holiday destinations abroad is on people's lists of concerns. The is a

[552] These decisions do not have numbered paragraphs.

spatial frame of reference in which subjects have the capital and the desire to spend time and money on commercial recreational activities targeted at local gay and lesbian consumers. Yet asylum seekers are by definition coming from a radically different space – one in which they needed to hide their sexuality to survive, and in which many suffered deeply traumatic experiences when they were open about their sexuality. It is particularly inappropriate to impose this spatial frame of reference (or as Shamir would put it, 'conceptual grid')[553] on women, as even in regard to the local pink dollar market, it is men rather than women who tend to form the majority of the clientele.

In the Canadian case of *X(Re)* (25 March 2008),[554] a Russian woman applying for asylum on the basis that she feared returning home because of her lesbian sexuality used receipts from the Toronto gay village in an attempt to prove her lesbian sexuality. The Immigration and Refugee Board noted that only some of the receipts were for transactions paid by debit and or credit card, and that only some 'had an air-miles card number on them'. When the applicant could not show any of her own credit or debit cards, and when the air-miles card on the receipt was different from her own, the board found that her inability to show with certainty that the payments were made directly by her meant that she did not make any of the payments herself, and that 'on a balance of probabilities', the receipts were collected only to embellish her claim. The applicant lost her refugee claim on the basis that she could not prove her true lesbian identity. She had also provided photos of what the board described as 'several young women ... just frolicking and having fun', and 'in one photo the claimant is kissing another female' but that 'on the balance of probabilities' this was not enough to prove the applicant belonged to the category 'lesbian'. Also taken into account was that although she joined a local community centre with programs aimed at the gay and lesbian community, she did not join as soon as she entered Canada, which the board decided also detracted from her lesbian credentials.

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[553] Shamir (n78).

[554] 2008 CanLII 83550. These decisions do not have numbered paragraphs.

Extrapolating from the board's decision, to successfully prove she was a vulnerable lesbian, this applicant would have needed to have credit and / or debit cards in her name, and have used them instead of cash to make multiple purchases – presumably at sex shops in the gay village; she would have needed to show photos of doing something more sexually explicit than kissing another woman, and she would have been able to prove that she immediately joined her local community centre and perhaps other public organisations aimed at the gay and lesbian community when she first entered the country. This 'ideal lesbian refugee' would have needed to not only be confident with speaking English and dealing with public and private services in her new, foreign environment, but would also have an excellent credit record and an assertive, gregarious personality such that she would have not only found a lover but been publicly affectionate or sexual with her and been willing to be photographed doing so.

These cases demonstrate that women claiming asylum on the basis of sexuality persecution must prove that they fit into a particular Western lesbian identity category that is constructed as universal. In terms of part-whole belonging, refugee law produces a lesbianism 'whole' to which applicants must prove they are a part. In so doing it also (re)produces a space of belonging that holds up one particular way of being a queer woman. Apart from the obvious problems with assuming that asylum seekers will be financially able to make 'gay purchases' and culturally able to make social and community connections as soon as they arrive, the requirement that these women perform their sexuality in this commercial, public way also ignores the reality that the asylum-seeking subject has by definition come from a space where her queer sexuality was not held up, indeed, where it was unsafe for her to publicly show her sexuality. Refugee law's requirement of the performance of this particular lesbian sexuality not only accounts, to some extent, for the invisibility and absence of women making claims for asylum on the basis of sexuality, but also dictates and thereby reproduces a mode of being lesbian that fits with state interests in consumerist economics and easily definable and visible minority communities. Overt queer sexuality, the very aspect of identity that

made the subject disruptive and put her at risk in her home state, is made into a very normative property defined by courts using commercial, masculine standards. These cases also demonstrate the overlap between property as part-whole and subject-object belonging, for to have her (part-whole) lesbian identity held up, the applicant must own particular objects, move in or 'master' social and physical space in a particular way (subject-object belonging). In requiring the asylum seeker to behave and consume in particular ways, refugee law shifts the asylum seeker's queer sexuality from being a property that unsettled the (sending) state to one that bolsters the broad agenda of the (receiving) state.

The British case of *Krasniqi*[555] is something of an exception to refugee law's prescription of lesbian identity. In this case, the Court of Appeal upheld the decision to allow an Albanian woman from Kosovo who was living in a same sex partnership to be granted asylum on the basis of Article 8 of the European Convention on Human Rights (right to privacy and family life). Krasniqi was living in a relationship with another woman asylum seeker from Kosovo, and they were raising the second woman's child together. In this case, the court took into account that because of the heavy social and gendered expectations for appropriate behaviour for Kosovar women, if returned they would have to live either with their parents or their husbands rather than with each other. The court noted that Krasniqi had been 'bigamously married off' at the age of 15 to an older man who was violent towards her. Krasniqi's history and role as a caring woman was a much more stereotypical notion of feminine vulnerability than was required of the ideal lesbian refugee in the cases reviewed above.[556] The striking element of this judgment though is that the relationship between Krasniqi and her partner is almost completely desexualised – their identities as lesbians are ignored, and they are instead depicted as caring women in a family relationship. Indeed, considering that there is a 30-year age gap between the women, anyone reading the judgment might assume that they were in a platonic mother-daughter relationship, except for two instances where the court

[555] *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391.
[556] ibid (Sedley LJ) [2].

quietly acknowledges the sexual nature of their relationship. First, the court says that 'the characterisation of such a household for Article 8 purposes remains problematical', and it follows this with a footnote stating 'see most recently *Secretary of State for Work and Pensions v M*',[557] which is a case about non-custodial parents in same-sex relationships paying more in child maintenance than their heterosexual counterparts.[558] Second, the court summarises the adjudicator's findings about their relationship that, 'while it had a sexual component ... that is not the central force', but that rather, 'their relationship is an exclusive and enduring one' in which 'a family life' exists.[559] Thus, the court accepted a model of lesbian identity that was desexualised and discreet to the point of being invisible, and normative in terms of both relationship models (of a long-term, committed couple) and gender roles (women as victims of a non-British patriarchy and as primary carers).

Krasniqi was an unusual decision because the applicant had her claim for asylum on the grounds of sexuality accepted despite her not having proved to the courts that she had participated in the local pink economy or fit in with the local lesbian culture. It is clear from reading the decision that Krasniqi's asylum claim was accepted because of her identity as a maternal woman rather than as a lesbian in danger. So in this case, the court's erasure of Krasniqi's sexuality actually worked in her favour – the British courts could take on the role of saving a vulnerable woman and the children in her care without having to even explicitly mention the word 'lesbian'. It is particularly fortunate for Krasniqi that the courts took this approach in her case because considering her lifestyle as a mother and a partner in a long-term relationship, it would likely have been impossible for her to provide requisite proof that she belonged in the local lesbian culture as is usually required.

In most cases however, the court's refusal and / or inability to recognise the applicant's

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[557] [2006] UKHL 11.
[558] *Krasniqi* (n555) (Sedley LJ) [4].
[559] ibid (Sedley LJ) [8].

sexuality leads to the failure of the refugee claim. As well as the cases of *N04/48953* and *X(Re)* reviewed above, in which the court found that there was not enough evidence to prove that the applicants were lesbians, there are many cases in which decision-makers found that regardless of whether or not the women before them were in fact genuine lesbians, they did not have a well-founded fear of persecution because no one would ever know that they were lesbians anyway.[560] In an Australian case, the decision-maker proclaimed that 'the applicant has not satisfied the tribunal that she is homosexual, let alone that anyone around her knows about it, or cares to think about it, or would harm her for it'.[561] In a number of cases, the decision-maker concluded that lesbians in the sending state could not be a group that are vulnerable to persecution because of the lack of public, court-admissible information about 'lesbians' in the sending state.[562]

A somewhat blurry picture thus emerges of contemporary refugee law's 'ideal lesbian'. What is clear is that she is required to demonstrate a particular fixed identity across multiple, divergent spaces – either that of the recognisable lesbian marked by her purchase of sex-toys, attendance at 'gay locations' and / or participation in her local lesbian community group, or that of a woman whose sexuality is erased. This requirement of a fixed identity ignores the reality of the necessity for these women to adopt a fluid performance of their sexuality in order to survive in a patriarchal and homophobic world – their lesbian identity is necessarily a spatially contingent property. Critiquing the binary hetero / homo way of dividing up sexuality, Eve Sedgwick has shown that the need to step in and out of the closet on a regular basis and to

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[560] See for example in the UK - *FF Iran* [2004] UKIAT 00191; *JD Zimbabwe* [2004] UKIAT 00259; in Canada - *Gyorgyjakab v Canada (Minister of Citizenship and Immigration)* 2005 FC 1119; *Blanco v Canada (Minister for Citizenship and Immigration)* 2001 FCT 727; and in Australia - 060531993 [2006] RRTA 141 (28 September 2006); N04/49108 RRTA 514 (21 July 2004).

[561] N04/49108 ibid.

[562] See for example in the UK - *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600; *FF* Iran [2004] UKIAT 00191; *JD Zimbabwe* [2004] UKIAT 00259; *DM Serbia and Montenegro* [2004] UKIAT 0028; and in Australia - 071261665 [2007] RRTA (12 June 2007); *Brahmbatt v Minister for Immigration & Multicultural Affairs; Patel v Minister for Immigration & Multicultural Affairs* [2000] FCA 1686.

sometimes occupy a liminal space between is central to the everyday experiences of large segments of society.[563] By requiring queer women asylum seekers to perform this particular version of lesbian identity, refugee law takes what was the subversive property of the asylum seeker and twists it such that it becomes part of the property of the receiving state. While the asylum seeker's sexuality unsettled the space from which she came – unsettled that space to the point where she could not safely remain there – refugee law requires her to perform her sexuality in a way that reinforces the hegemonic space of belonging of the receiving state. Refugee law thus appropriates the subversive property of the lesbian asylum seeker and produces a space that holds up particular racialised, gendered and sexualised identities and not others.

Producing homophobic places: The sexual landscape of refugee law

The space of belonging produced by court decisions on asylum claims made by women on the basis of sexuality persecution is one in which the nation-state is solidly shaped with clearly delineated physical boundaries. Contrary to Inderpal Grewal's theorisation of transnational America and the possibilities of extra-territorial belonging discussed in chapter three,[564] refugee law proceeds on the basis that the space-subject connection is a simple one – either a subject belongs or does not, and that belonging is determined by law alone. Indeed the lesbian subject produced by refugee law functions in a similar way to the figure of the woman in human rights discourses critiqued by Grewal – as objects of charity capable of being saved from their own state's repressive regimes and converted to sexual citizenship which, as seen in the Canadian case of *X(Re)* discussed above, can be done through consumerism. In this section I will examine one key mechanism used by courts to solidify the conceptual borders of the nation-state and further produce a nationalistic space of lesbian belonging – the 'internal flight alternative' or 'IFA'.

[563] Sedgwick (n36).
[564] Grewal (n194).

The internal flight alternative and 'all the circumstances'

The rationale of the internal flight alternative is to refuse an asylum claim when, regardless of whether or not the woman was accepted as a genuine lesbian, the receiving state can return her to her home state on the basis that she could avoid persecution by moving to another part of her home state. The IFA reveals an interesting inconsistency in the way the refugee courts and tribunals conceptualise space in these decisions. On the one hand, the idea that some parts of a nation-state are less homophobic than others recognises that the space of the state is not entirely uniform, that there is some multiplicity within the borders of the state. Such recognition goes against the logic of the structure of international law, which treats nation-states as internally uniform actors. Yet at the same time, the internal flight alternative affirms that same logic, as it re-asserts the discursive and material significance of state borders by demanding that flight be attempted *internally* before asylum can be granted external to the borders of the state.

The courts use the internal flight alternative as a basis for rejecting claims in all three of the states looked at in this chapter, though the test is most clearly articulated in the Canadian courts and tribunals. In the Canadian context, the test regarding an IFA was first articulated in two cases from the early 1990s.[565] The test firstly requires the decision-maker to be satisfied on the balance of probabilities that there is no serious possibility of the claimant being persecuted in the proposed IFA. Secondly, the condition in the proposed IFA must be such that it would not be unreasonable, considering 'all the circumstances', including the claimant's personal circumstances, for the claimant to seek refuge there.[566] However the cases show that what 'all the circumstances' includes, differs with each decision-maker – it is a very wide and ill-defined criteria, thus allowing for significant judicial discretion. Indeed, it might be

[565] *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706 and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FC 589.
[566] re-articulated in *Parrales v Canada (Minister of Citizenship and Immigration)* 2006 FC 504.

argued that 'all the circumstances' is something that any judicial decision-maker meeting a foreign, purportedly queer woman for the first time, and in a highly formal environment, is never going to be able to take into account. Millbank's extensive writings on the many difficulties queer asylum seekers face in being recognised let alone understood by courts and tribunals supports that argument.[567] Of the cases analysed for this chapter, there were only three in which having accepted that the woman was 'a real lesbian', an IFA was considered by the court or tribunal but rejected as unreasonable in 'all the circumstances'.

In the three cases in which an IFA was considered and rejected (thus meaning that refugee status was granted), the decision-making body adopted an unusually nuanced approach to the determination of place and identity, considering the two as related issues. One of these cases involved a Mongolian lesbian who had had a highly traumatic past. Her parents had denounced her, she had a long history of harassment because of her sexuality, and her partner had been raped in front of her. When she went to the police for help she was met with hostility.[568] The Australian tribunal accepted her evidence as to both her identity as a genuine lesbian and as to her history of persecution. It also took into account extensive evidence from a wide range of sources including Mongolian lesbian websites, news articles, United Kingdom Home Office information, Canadian Immigration and Refugee Board information and non-government organisation reports. Considering her identity as a persecuted lesbian, together with information that rural Mongolia was no easier a place for lesbians than Ulaanbaatar, the tribunal agreed than internal flight was not a safe alternative, stating that 'the applicant would not be able to avoid the serious harm she fears by relocating elsewhere within Mongolia. Indeed the situation outside the capital city is likely to be

[567] Dauvergne and Millbank (n543); Millbank, 'Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation' (n530); Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (538); Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' (530).
[568] 061020474 [2007] RRTA 25 (7 February 2007).

even less favourable to her'.[569]

Another case in which an IFA was considered and rejected involved a Mexican woman who had been repeatedly and violently assaulted by police because of her sexuality, and who had already moved cities in her home country in an attempt to escape the persecution.[570] Initially, the Canadian Immigration and Refugee Board had found that, being a 'well-educated ... capable, resourceful young woman ... it would not be unreasonably harsh in all the circumstances for her to move' to Mexico City, and, therefore, the courts refused her refugee claim because of the availability of an IFA. On appeal though this decision was reversed – the Federal Court finding that considering her history of police abuse, it was unreasonable to require her to relocate to Mexico City.[571]

Finally, an IFA was considered and rejected in a decision involving a queer woman from Saint Vincent and the Grenadines, a small multi-island state in the Caribbean, whose ex-boyfriend had repeatedly and severely beaten her.[572] The applicant continued to live in fear of her ex-boyfriend, and she gave evidence that the police would not protect her from this man. The Immigration and Refugee Board initially found that the woman had an internal flight alternative of seeking refuge in the smaller islands of the Grenadines, which are separated from the main island of Saint Vincent by some 20 kilometres of open water accessible by boat or aeroplane. The applicant told the board that her ex-boyfriend would resort to island hopping to seek her out, but the board did not believe that part of her evidence.[573] On appeal, the Federal Court overruled the IFA decision, stating that 'it defies logic to believe that an island separated only by a few kilometres of open water from Saint Vincent and easily accessibly by ferry or plane could provide a safe haven to the applicant'; further, that 'the board should have known that these

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[569] ibid.
[570] *Parrales v Canada (Minister of Citizenship and Immigration)* 2006 FC 504.
[571] ibid.
[572] *Franklyn v Canada (Minister of Citizenship and Immigration)* 2005 FC 1249.
[573] ibid.

island are sparsely populated and geographically very small, and that it would be relatively easy to find somebody for whoever is bent on doing so', and finally that 'the applicant did not need to adduce evidence in this regard'.[574]

In each of these three cases in which an IFA was canvassed but rejected by the decision-making body, 'all the circumstances' included a meaningful consideration of the spaces to which the woman would be returning if she were to move to a different part of her home state. Rather than just imposing what Shamir might term a 'conceptual grid' or Blomley a 'geography of violence' upon space, these three decisions embraced an understanding of space closer to Massey's conception – one which is heterogeneous rather than flat, in which the meaning of space is changeable rather than fixed, and in which simultaneous realities are possible depending on who is in what position. These decisions recognised that the issues of space and identity are inseparable. So in the first case the court recognised that small towns in Mongolia, despite being removed from the specific history of violence (including its perpetrators) from which the woman was seeking refuge, were not going to provide a space free from the threat of further homophobic violence. The prevalence of potentially violent anti-lesbian feeling throughout the country together with the applicant's identity as a lesbian woman meant that her fear of returning to Mongolia was, in the words of the Refugee Convention, 'well-founded'. In the second case the court recognised that even Mexico City is not big enough to provide refuge to a Mexican lesbian, repeatedly assaulted by police because of her sexuality. And in the third case the courts recognised that 20 kilometres of open water is not enough to protect a woman from a crazed ex-boyfriend, angered by her sexuality and on a mission to harm her, a mission that the Saint Vincent and Grenadines police would not intervene to stop. Although each of these women could physically move within their home states, they would take a social space of danger with them. Thus in each of the cases where an IFA was rejected, there was a recognition that the areas of land and sea enclosed by state borders is a complex and heterogeneous space,

[574] ibid.

and that the ability of any space to provide refuge differs depending on the history and identity of the subject seeking refuge.

Less than all the circumstances

The cases that rejected an IFA were, however, exceptions. In the far more common situation where an IFA was considered and found to exist for the applicant, 'all the circumstances' amounted to not much at all, with the IFA often tagged onto the end of the decision. An example of this use of an IFA to reject an application for asylum is in a case involving a Mexican woman who feared persecution by her ex-fiance and her lesbian lover's husband, who was a powerful official in Mexico City.[575] She claimed to have fled to Canada after being threatened with harm to both herself and her family if she did not leave Mexico. The board rejected her claim on the basis that she lacked credibility and that at any rate, she had an internal flight alternative because her lover's husband worked in the office of the Mayor of Mexico City, and, it was reasoned, his reach would not extend beyond Mexico City. After briefly reviewing the board's credibility findings and deciding that they were not patently unreasonable (the standard required for their overturn on appeal), the Federal Court re-affirmed that:

> *[f]inally, the board's conclusion about the availability of an IFA is conclusive. It is eminently reasonable to assume that an aide to the Mayor of Mexico City would not have any reach outside Mexico City, however powerful he may be in the city and however corrupt the Mexican administration of police and justice may be. The applicant produced no evidence to negate that assumption.*[576]

Thus the applicant's persecution is proclaimed to exist within the borders of Mexico City only, and any fear the applicant had outside the borders of Mexico City was deemed unreasonable. This assumption works on a static understanding of space and fails to

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[575] *Avila Saldivar v Canada (Minister of Citizenship and Immigration)* 2005 FC 492.
[576] ibid.

take into account a world of circumstances. Considering the applicant gave evidence that her primary persecutor was indeed a government official whose jealous homophobic rage at the applicant's relationship with his wife led him to demand that she leave the country, it could also be argued that it is eminently reasonable that he would attempt to harm her no matter where in Mexico (or indeed beyond Mexico, but such contemplation defies the logic of refugee law) she lived. Also, considering his threat was against both the applicant and her family, it might have been thought relevant to take into consideration where in Mexico her family live – if it is outside the capital then it would be clear that the threat was not limited to Mexico City. Nor was it taken into consideration that the stated corruption of the Mexican administration of police and justice might mean that it is quite feasible for a powerful official in one city to influence officials in another through corrupt means. By analysing Mexico City as a place essentially unconnected to the rest of Mexico, the court thus found that the applicant's fear of returning was not well-founded enough to qualify for refugee status. While refugee law will not recognise the spatial contingency of lesbian identity, when using the IFA to dismiss an application it assumes that vulnerability to persecution *is* spatially contingent but only within the borders of the sending state.

While the above example decided on an IFA to 'any city outside the capital', most decisions finding that an IFA existed for the queer woman asylum seeker directed her *towards* the bright lights of the capital city of her home state. Decision-makers recommended women move from their home towns outside the capital to Mexico City,[577] Harare,[578] Bogota,[579] Bangkok[580] and Beirut.[581] In some cases, these cities were explicitly stated to be 'more sophisticated and more tolerant,'[582] and with 'a significant

[577] *Blanco v Canada (Minister for Citizenship and Immigration)* 2001 FCT 727; *Martinez v Canada (Minister of Citizenship and Immigration)* 2003 FC 1005.
[578] *JD Zimbabwe* [2004] UKIAT 00259.
[579] N98/22074 [2000] RTA 233 (1 March 2000).
[580] N02/44760 RTA 462 [2003](23 May 2003).
[581] N01/37673 [2002] RTA 1022 (15 November 2002).
[582] ibid.

homosexual community',[583] relying on an assumption that the capital city is the natural place for a queer woman to be. There are several problems with this assumption. One is that it is based on a very Western narrative of coming out and being queer – the story of the sexual deviant from the country who migrates to the city, where there are gay bars, sex shops and support groups. While sociological research confirms the city is a place where many adult queers in wealthy liberal countries find their homes,[584] there is no evidence that this applies across all cultures – sexualised identities and residential mobility do not operate identically in all cultures and places. Second, there is the problematic assumption that capital cities have more 'homosexual culture' than rural towns. While this may well be true in some respects, it rests on a very public and commercial definition of 'homosexual culture', and one that is more likely to be welcoming to gay men with a disposable income than to queer women from outside the city who may not have a disposable income.[585] And thirdly, the assumption that life is easier for queers in the big city is based on them being able to disappear there, this linking back to the now obsolete requirement of discretion in refugee cases.

Despite its claim of taking into account 'all the circumstances', the IFA tends to be applied when far less than all the circumstances have been taken into account. The IFA works on the assumption that the subject moves seamlessly within her home state – so long as she does not cross a border, she will not take her space of persecution with her. It imposes a conceptual grid whereby social meaning starts and stops at city gates, and responsibility stops and starts at state borders. By invoking the logic of 'internal' flight, the IFA reasserts the importance of borders between nation-states, relying on and reproducing a conception of space in which nation-states are discrete and bounded spaces of belonging. As geographer Jennifer Hyndman argues, 'international borders

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[583] N98/22074 [2000] RTA 233(1 March 2000).

[584] Kath Weston, 'Get Thee to a Big City: Sexual Imaginary and the Great Gay Migration' (1995) 2(3) GLQ: A Journal of Gay and Lesbian Studies 253.

[585] Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo and Dana D Nelson (eds), *Materializing democracy: toward a revitalized cultural politics* (Princeton University Press, Princeton 2002).

can serve to naturalise difference, refuse political alliances, and obscure commonalities between discrete spaces and linked oppression'.[586] The IFA naturalises difference between nation-states, refuses political alliances along non-national lines, and obscures commonalities between sites of potential danger within the nation-state.

One circumstance that is never taken into consideration by the courts and tribunals is the effect that their decision about the particular applicant before them will have on the place she leaves behind. Of course, the very structure of refugee law prevents this type of consideration from being taken into account – the Refugee Convention is concerned with individual 'human beings' enjoying 'fundamental rights and freedoms', and with 'the problem of refugees' not becoming 'a cause of tension between states'.[587] It is not concerned with the complex forces and power structures that have caused the sending state to be a dangerous place for queer women, or with the future of those places. Yet the operation of refugee law has an effect on those places – by enabling the permanent departure of dissident queer subjects on the condition that those subjects present their home states as uniformly and impossibly homophobic, refugee law leaves undisturbed and even bolstered, the gendered and heteronormative networks of belonging that make that place un-liveable for queer women. Thus although a positive refugee decision makes a significant and welcomed difference in the lives of the individual applicant, it leaves unchanged and unquestioned the space of belonging that caused queer women to move in the first place.

Homonationalism and false sites of blame

Regardless of the outcome of any particular decision, the operation of refugee law in the context of sexuality also conceptually confirms the Western state's status as the place of modernity, cultural tolerance and political superiority, and that of the country

[586] Hyndman (n516) 310.
[587] [Preamble].

of origin's primitiveness, homophobia and general inferiority.[588] In reality, the sexual difference that successful sexuality-based refugee claims allows is very limited. In Jasbir Puar's terms, it is only *homonormative* applicants whose claims succeed.[589] Developing the idea of homonormativity and homonationalism, Puar argues in the US context that liberal politics have accepted certain queer subjects, but only in a very particular and assimilationist way, and in a way that depends on and further produces the figure of the implicitly sexually deviant, racialised other.[590] Thus, the happy white gay and lesbian couples from picket fence suburbs who can marry and adopt children stand in stark opposition to the *monster-terrorist-fag* whose perversity revolts all good national subjects, straight or queer.[591] As Puar outlines in her book, and as has also been explored by other queer writers such as Lisa Duggan and Jin Haritaworn, the increasing incorporation of queer subjects into the nation-state through legal changes such as the de-criminalisation of sodomy, recognition of civil partnerships and penalties for discrimination and 'hate crime' against queer subjects has shifted the agenda of gay and lesbian identity politics.[592] No longer constructed as figures of death and as outsiders, queer subjects have moved to being recognised as inside the realm of state recognition and moral acceptability. This move however has coincided with and Puar argues depended upon an increase in racist – and in particular, Islamophobic – discourse in queer politics, a discourse which echoes that of its former enemy but now friend the state. Thus queer subjects whose lives can quite easily fit within the broader project of the nation-state (because they have jobs, consume goods and services, pay taxes, follow laws, and now can get married, serve in the army, etc) gain legal recognition and privileges, and their inclusion in turn gives the state ideological legitimation for

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[588] Keenan (n520); Miles (n520).
[589] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, London 2007).
[590] ibid.
[591] Puar and Rai (n31) 117.
[592] Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo and Dana D Nelson (ed), *Materializing democracy: toward a revitalized cultural politics* (Princeton University Press, Princeton 2002) 175; Jin Haritaworn with Tamsila Tauqir and Esra Erdem, 'Gay Imperialism: Gender and Sexuality Discourse in the "War on Terror"' in Adi Kunstman and Esperanza Miyake (eds), *Out of Place: Interrogating Silences in Queerness/Raciality* (Raw Nerve Books, York 2008) 71.

imperialist projects.

Applying this understanding of homonationalism to the refugee context, it is clear from the cases reviewed in this chapter that the masculine, white, middle class criteria which Western states impose on all those seeking asylum on the basis of sexuality, means that only those who fit into a narrow homonormativity are actually allowed through the borders of the nation-state. Indeed, refugee law produces a lesbian identity category that fails to fit the reality of most applicants. This lesbian identity category is based on stereotyped ideas about either Western pink dollar gays and lesbians and / or foreign women in need, and while its production does provide a positive outcome for a handful of women seeking asylum, on a broader scale, it also reinforces hierarchies of race, gender and sexuality and colonial landscapes of 'good' and 'bad' states. White saviour discourses thrive in such landscapes. That landscape is further enforced through refugee law's requirement that the sending state be constructed as uniformly and unlivably homophobic. For if the sending state is not a place where life-threatening homophobia is *everywhere*, then the applicant will be refused on the basis that she has an internal flight alternative. This requirement also constructs the sending state as the site of blame for the applicant's persecution – the history and threat of persecution that the applicant must prove exists, is confined to the space within the borders of the sending state. The role of British colonialism in criminalising sodomy as a way of maintaining control by punishing 'viscous native sexuality' and promoting white sexual mores[593] for example, or the role of conservative Christian Churches from the United States in promoting homophobia in African states in order to promote their own political agendas at home,[594] are not relevant, or are relevant only in the narrowest sense of filling in background details to the ultimate question of how dangerously homophobic the sending state is today.

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[593] Human Rights Watch, 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism' (New York 2008).
[594] Kapoma (n8).

The queer woman seeking asylum is required to perform her sexuality in a way that does not unsettle the state – indeed, she is required to perform a Western version of lesbian identity that strengthens the superior position of the receiving state. The potentially subversive property of the asylum seeker is thus appropriated by the receiving nation-state, (re)producing spaces of belonging that fail to hold up queer women asylum seekers unless they perform their identities in very particular ways. This appropriation can be understood as an instance of the governmental power of property – law's criteria for being a lesbian (part-whole belonging) guides the actions of subjects seeking to prove that they are members of this category, in turn affecting the shape of the conceptual, social and physical spaces in and through which those subjects live. Refugee law's decisions on women seeking asylum on the basis of sexuality produces neo-colonial landscapes and homonormative subjects.

The refugee cases reviewed in this chapter and the intervention cases reviewed in the last chapter have in common a contestation over property – both involved attempts to assert that particular relations of belonging should be held up in particular places. In the *Wurridjal* and *Shaw* cases that contestation was over whether aboriginal or Anglo-Australian spaces of belonging would be dominant in the Maningrida and Alice Springs town camp areas. In cases involving women claiming asylum on the basis of sexuality persecution, that contestation is over what kinds of sexualities will be held up and afforded a space within the receiving state. Whereas the Australian cases involved assertions of subversive (aboriginal) property and the refugee cases involved the reorientation of what was a subversive (queer) property, both sets of cases demonstrated the significant, pervasive social power of property – its production as well as requirement of particular spaces of belonging. In both sets of cases, the relevant laws were based on an implicit assumption that space is static and that the subjects who move through that space do so seamlessly – their identity being a separate, equally static, smooth and definable quality that remains the same despite movement through space and time. The subjects bringing their cases before the law suggest that space,

subjectivity and the connection between them is more complex than that.

In the next and final chapter I draw on phenomenology and diaspora theory to deconstruct the space-subject connection further and examine how that connection relates to the production of spaces of belonging. This and the previous chapter have shown that spaces of belonging can be produced in part by law, shaping spaces such that some ways of being in the world are held up and others are not. In the next chapter I look more closely at how these spaces take their shape and return to the persistent issue of the space-subject connection: do subjects 'take space with them' when they move?

7. Taking space with you: Inheritance and belonging across space and time

This final chapter unpacks the recurring concept of 'taking space with you', which explicitly addresses the space-subject connection and in so doing, takes further the key concepts of property and spaces of belonging. Taking space with you is the idea that particular spaces are mobile in the sense that they stick to communities, individuals, and perhaps even things and ideas. I first flagged the concept in chapter two, in discussions of women who seemed to take their gendered space with them in cars, and of aboriginal sex worker Pamela George who seemed to take a space of gendered and racialised violence with her across multiple physical spaces and even post-humously into the courtroom. Following the development of the concepts of space and property, 'taking space with you' recurred in chapter five in the context of the Ampilatwatja community who walked off their land to a new site but took their aboriginal space of belonging with them. And in the last chapter the concept came up more implicitly in my discussions of refugee law appropriating the subversive property of the asylum seeker – for the receiving state to have taken this property suggests that when she initially moved from her home state to seek asylum elsewhere, she took that property (and thus a particular space) with her. In this chapter I explore this concept further, asking: If the subject takes space with her, where does 'the subject' end and 'space' begin? Does the conceptualisation of space being used in this thesis – that of a conceptual, social and physical reference system constituted by a vast multiplicity of different, dynamic forces – still make sense if space sticks to subjects? And can the theory of property as a spatially contingent relation of belonging account for subjects taking space with them – does space stick to the subject because of relations of belonging, and if so, what are those relations contingent on?

To briefly recap, I began interrogating and drawing on the concept of property because it explicitly addresses the space-subject connection – something that legal geography fails to do. By addressing this connection, understandings of both 'space' and 'the

subject' are brought into question and a more radical reframing of socio-legal issues becomes possible than through a legal geography approach. After discussing Massey's dynamic conceptualisation of space and Grewal's demonstration of the link between space and subjectivity, I proposed an understanding of property that focuses on the space in which the subject is embedded rather than on the propertied subject herself. I argued that understanding property in this way helps to illuminate the various ways in which spaces hold up particular relations of belonging, subjects and ways of being, and how such spaces can be reshaped. Drawing on this understanding of property I reframed the socio-legal issues of aboriginal resistance to Australia's NTNERA and sexuality and asylum in terms of property, space and belonging. This reframing allowed for different factors and connections to come into view.

As mentioned above, I concluded chapter five with a discussion of the way the Ampilatwatja community resisted the Australian government's Northern Territory Intervention by physically relocating and taking their space of belonging with them. Although the precise habits, routines and practices that constituted the community's culture, life and identity at its original location have of course not been identically replicated at the new site, the community seems to have taken its distinctly aboriginal space from one location to another. In so doing, the Ampilatwatja community is unsettling the broader Australian space of predominantly non-aboriginal belonging, both physically in terms of the land the community has taken possession of, and politically in terms of the community's assertion that it will govern itself. But did the Ampilatwatja community take their own particular space with them over a distance of around three kilometers, or did they just create a new space that mirrored the old? Thinking also about the refugee cases discussed in the last chapter, how are particular spaces formed and reformed, or taken from one location to another?

Drawing on diaspora literature and phenomenological understandings of space, time and the body, I argue that although subjects seem to 'take space with them', they do

not do this in the sense that they pick up an original or essential space and carry it with them across from one location to another. Rather, because subjects exist in and are constituted by space – *combining with space* such that they cannot be easily separated from it, conceptually or materially – their subjectivity and what is materially within their reach is constantly (re)determined by where they have been and what has happened around them – how their 'surrounding' space is shaped. The issue of where subjects have been and how space has been shaped connects with the themes of property's linear time and rigid shapes, which I discussed in chapter four. To conclude this chapter I draw on Avery Gordon's work to argue that inheritance can be understood as the property of ghosts, maintaining a space that retains a particular shape despite the permanent departure of the propertied subject.

Diaspora: Communities that take space with them?

Issues of space, movement and complex identity are addressed in literature on diaspora which, although not expressed in such terms, can be envisioned as communities that take space with them. Dictionary definitions and most scholarship on diaspora defines it as either a particular kind or constellation of people: diasporas are Jews living outside of Palestine, groups of people living outside their homeland, or communities settling in a new place;[595] or the process of dispersal or spreading of people from a homeland to other countries.[596] The concept of diaspora offers a way of thinking about how particular communities produce distinct spaces in new locations.

Diaspora and complex identities

Over the past two decades there has emerged a growing and rich literature on diaspora

[595] 'diaspora, n' (2011) Oxford English Dictionary Online (Oxford 2011) <http://www.oed.com/viewdictionaryentry/Entry/52085> accessed 6 December 2011.
[596] 'Diaspora' Cambridge Dictionary Online (Cambridge, 2011) <http://dictionary.cambridge.org/dictionary/british/diaspora> accessed 6 December 2011.

in contexts outside the original definition of Jews living outside of Palestine.[597] This literature is necessarily concerned with the connection between space and the subject. Stuart Hall's work on diaspora has been significant in effecting the shift (in cultural studies and beyond) away from conceptions of essential or fixed identity and towards a conception of identity 'which lives in and through, not despite, difference'.[598] Drawing in particular on his experience with the black diaspora in England, Hall developed a theory of diaspora identities – identities that were constantly producing and reproducing themselves.[599] Hall showed how that production occurred within rather than outside of black diasporic representation, meaning that representation itself was capable of constituting new subjectivities.[600] In terms of the relationship between subjectivity and space, he argued that the desire to return to Africa was more about the symbolic language for describing the suffering of displacement rather than an actual return to the physical place.[601]

Focusing less on the representation of identity and more on its intersectionality, Avtah Brah explores the concept of diaspora to problematise the supposedly dichotomous subject positions of the 'native' and the 'migrant'.[602] She points out the paradox that diaspora is associated with journey and travel but is also necessarily about staying put – diaspora is not about casual or short-lived trips, but about settling down and making a home somewhere else.[603] That is, diaspora requires a level of permanence – like property, it involves relations of belonging that tend to extend out over substantial periods of time rather than temporary placements; the physical, social and conceptual space where the diaspora 'arrives' comes, over time, to hold up the diaspora, to support its continued existence there. For Brah, the concept of diaspora brings ideas of 'home'

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[597] 'diaspora, n' (n595).
[598] Stuart Hall, 'Cultural Identity and Diaspora' in Jana Evans Braziel and Anita Mannur (eds), *Theorizing Disapora: A Reader* (Blackwell, Oxford 2003) 235.
[599] ibid.
[600] ibid 222.
[601] Stuart Hall, 'Negotiating Carribean Identities' in Gregory Castle (ed), *Postcolonial Discourses: An Anthology* (Blackwell, Oxford 2001) 292.
[602] Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (Routledge, London 1996) 181.
[603] ibid 182.

and dispersion into a creative tension, recognising (like Hall) that a desire for home may not necessarily mean a desire to return to a physical place of origin.[604] Brah develops the idea of *diaspora space*, which she understands as 'the intersectionality of diaspora, border and dis/location as a point of confluence of economic, political, cultural and psychic processes'.[605] Brah's diaspora space is where the entanglement of genealogies of dispersion and those of staying put occurs, and therefore where the subject positions of the native and the migrant are contested. It is a site of contestation of the boundaries between belonging and otherness, inclusion and exclusion, them and us – where 'the native is as much a diasporian as the diasporian is the native'.[606]

Hall and Brah both use the concept of diaspora to challenge the idea of fixed identity, and to articulate a complicated relationship between subjectivity and space. Both Hall and Brah take as their starting point that diasporas happen when a journey is taken and then roots are put down away from the point of origin. The ongoing existence of diasporas inhabiting a new location as home challenges the very idea of points of origin. Brah calls for a relational understanding of diaspora, because in the post-colonial era of the late 20th century diasporas are constructed not just in relation to the 'native' community, but also to each other – in the post-colonial era there will likely exist several different diasporas in the same physical area.[607] While Brah's linking of issues of identity and subjectivity with space is explicit, Hall's work (and indeed all work on diaspora) implicitly involves an engagement with the spatial frames of reference that partly constitute identity politics.[608] In the context of this thesis, diaspora is of particular interest because it involves the recreation of 'home', an archetypical site of belonging, in new and diffuse physical locations. As subjects who are dispersed from their homeland but who retain their cultural identity and continue to perform and produce distinct practices and structures (both physical and relational) from their homeland,

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[604] ibid 192.
[605] ibid 181.
[606] ibid 209.
[607] Brah (n602) 189.
[608] Keith and Pile (n144).

diasporas seem to either retain or reproduce their space of belonging despite having physically moved enormous distances, and despite relocating to diverse locations rather than one central site. As such, diasporas appear to take space with them. How do diasporas create spaces of belonging in foreign and faraway places?

Diaspora as place

Pnina Werbner proposes that instead of understanding diaspora as either a particular group of people or a process of dispersion of such people, diaspora can be understood as a place.[609] Werbner's discussion of diaspora as a place is part of her main argument that diasporas are 'chaotic orders' (or as she terms them, 'chaorders') – chaotic in that they are not created by any kind of centralised command structure, and orders in that they nonetheless develop through a predictable process that replicates itself transnationally.[610] Understanding the material processes through which diasporas are formed and lived is for Werbner essential for grasping their political and mobilising power.[611] This understanding of diaspora as both place and process fits with Massey's theorisations of place as the result of particular interactions and articulations of social relations, processes, experiences and understandings, and with Kieth and Pile's understanding of identity as a process.

Ruminating on the phrase 'the Jews in the diaspora', Werbner argues that instead of understanding diaspora as a community or a particular group, it can be understood as a place, that place being the whole world 'with the exception, perhaps, of a small but focal centre, a point of origin'.[612] The Jewish diaspora, Werbner continues, is a place of many different heterogeneous traditions; an intricate network marked by great cultural variability and historical depth. Diaspora is a paradox 'of the one in the many, of the

[609] Pnina Werbner, 'The place which is diaspora: citizenship, religion and gender in the making of chaordic transnationalism' (2002) 28(1) Journal of Ethnic and Migration Studies 119, 119.
[610] ibid 121-123.
[611] ibid.
[612] ibid.

place of non-place, of a global parochialism'.[613] This 'paradox' of diaspora fits with Massey's understanding of place as particular moments in intersecting relations – places as open, porous networks of social relations, whose identities are not fixed but defined and redefined through ever-evolving interactions rather than through an internalised history.[614] Another of Werbner's descriptions of diaspora from an earlier piece lists three defining features of diasporas. Firstly, diasporas are socially heterogeneous, consisting of a multiplicity of discourses some of which intersect and some of which clash; secondly diasporas are formations that are always in process, being constantly reconstructed and reinvented over time; and thirdly, many diasporas are deeply involved, both ideologically and materially, with the nationalist projects of their homelands.[615] Using this description, diaspora fits perfectly with Massey's theory of space – the dynamism and heterogeneity are straightforward, and the involvement with, or as Werbner puts it, implication in, nationalist projects somewhere else is necessarily a process of simultaneity, as the diaspora lives here *at the same time as* it identifies with politics there. Moreover, Werbner's understanding of diaspora as place resonates strongly with Grewal's understanding of America as a nationalist discourse produced through transnational economic, political and cultural practices and productive of subjectivities that cannot be easily linked to any one physical area.[616] So diaspora as a concept can be understood as a space, and particular diasporas as places.

Making places, sharing orientations

Is diaspora as place produced by particular communities taking space with them – transporting their own space to a new location, one where they are foreign upon arrival but where they come to belong? Asking the question of how diasporas are produced and maintained, Werbner argues that many diasporas are connected by ties of co-

[613] ibid.
[614] Massey, *Space, Place and Gender* (n168) 120.
[615] Pnina Werbner, 'The Materiality of Diaspora - Between Aesthetic and "Real" Politics' (2000) 9(1) Diaspora 5, 5.
[616] Grewal (n194).

responsibility that extend across nations and communities.[617] These ties are manifested through philanthropic and political support between diasporas and towards their homeland, with diasporas often being highly politicised communities without a singular centre. She argues that diasporas are formed through a system of 'chaorder', whereby diasporas reproduce and extend themselves without any centralised command structures.[618] So they form in predictable patterns despite there being no one governing force or institution that determines where diasporas will be located or how they will operate. For Werbner, diasporas need to be understood as

> *deterritorialised imagined communities which conceive of themselves, despite their dispersal, as sharing a collective past and common destiny, and hence also a simultaneity in time.*[619]

A very similar definition could be applied to Grewal's transnational America, minus the collective past and with more of an emphasis on an aspirational future determined through consumer citizenship. Unlike Grewal's transnational America, which is attached to a subjectivity of 'Americanness' available to anyone despite her identity positioning, diasporic subjectivity is not available to everyone. A particular past and a particular positioning are first required.

Werbner argues that diasporas form in an orderly, predictable manner because those in the diaspora are oriented towards the same markers in time and space – events, festivals, homelands and other significant locations. Indeed, she argues that what makes communities diasporic rather than simply ethnic or religious is firstly an orientation 'towards a different past or pasts and towards another place or places', and secondly a materiality – not just an imagined sentimentality but an embodied

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[617] Werbner, 'The place which is diaspora' (n609) 121.
[618] ibid 123.
[619] ibid.

performance of it.[620] She uses pain and suffering as an example – when Muslim women are raped in Bosnia, it hurts Pakistani women in England.[621] Werbner does not explain how this transmission of affect occurs – how such pain *over there* can be felt *here*. How does being similarly orientated translate into the sharing of pain and suffering, despite huge physical distances between subjects? Does being located within a complex combination of shared rules and focused competitiveness – as Werbner posits that those in the diaspora are[622] – mean sharing a collective subjectivity that allows for feelings to be, at least to some extent, mutually experienced across communities and continents? For Grewal, to be located in transnational America is to occupy the subjectivity of 'Americanness'. That subjectivity is defined through participation in consumer citizenship – cultural inclusion through consumptive participation in the capitalist economy, which is in turn dependent upon a range of relations, practices and understandings that circulate transnationally.[623] Yet the deterritorialised shared subjectivity of 'Americanness' does not necessarily translate into a transmission of affect such as Werbner suggests exists within the diaspora. The transmission of affect in the diaspora fits with Werbner's argument that people located in the diaspora 'buy into' an orientation and a sense of co-responsibility.[624] So for Werbner, diasporas are formed not by any central governing force but rather by individuals buying into a particular orientation and sense of co-responsibility, and this shared orientation and sense of co-responsibility allows for pain there to be felt here. But are orientation and a sense of co-responsibility things that subjects 'buy into'?

Although there is unquestionably a level of agency in taking a journey from here to there, in participating in cultural practices and in obeying social norms, a subject's orientation is also defined by the world around her. In her work on queer phenomenology (discussed in chapter four), Sara Ahmed writes that 'if we know where

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[620] ibid 125.
[621] ibid.
[622] ibid 126.
[623] Grewal (n194) 8-10.
[624] Werbner, 'The place which is diaspora' (n609) 126.

we are when we turn this way or that way, then we are orientated'.[625] To be orientated means to know where we are and to know how to proceed in order to get to this place or that place. This in turn means 'being turned towards certain objects' – the ones we know and recognise, and that thereby tell us where we are. As was discussed earlier, Ahmed explores the way particular bodies come to be orientated in space, and how space takes shape through having bodies 'extended into it' in particular ways.[626] Looking specifically at racial and sexual orientation, Ahmed argues that 'we do not acquire our orientations just because we find things here or there. Rather certain objects are available to us because of lines that we have already taken'.[627] On this view, subjects cannot simply decide to buy into an orientation. We can shift, to a certain extent, which way we turn and which line we follow, but there will always be certain objects that are already within our reach and others that are not. As we turn and move through space, the shape of the space around us will itself shift to accommodate our presence, but this will only happen slowly over time rather than through a single transaction. The attempted extension of a body through space might also fail – disorientation occurs because 'some spaces extend certain bodies and simply do not leave room for others'.[628] Orientation is not principally a product of agency; it is an ongoing relation of intimacy between bodies and their dwelling spaces.

Discussing diasporic spaces, Ahmed notes that they do not simply begin to take shape with the arrival of migrants – it is more that those who are in place notice those who appear out of place.[629] Drawing on Avtah Brah, Ahmed points out that it is not only migrants who must arrive – everyone must get 'here' somehow, including those considered 'native', but some arrivals are more noticeable than others. She describes migrant orientation as 'the lived experience of facing at least two directions: towards a

[625] Ahmed, *Queer Phenomenology* (n15) 1.
[626] ibid 11.
[627] ibid 21.
[628] ibid 11.
[629] ibid 9.

home that has been lost, and to a place that is not yet home'.[630] Ahmed and Werbner have in common their understanding of diaspora as somewhere inhabited by those with a particular orientation, but for Werbner this shared orientation is bought into along with a sense of co-responsibility, while for Ahmed it is a product of multiple lines and directions already taken, not just by those in the diaspora but also by those who are outside of it. Of course Werbner is not suggesting that being located within a diaspora is a simplistic matter of 'free choice' – one can only 'buy into' an orientation and sense of co-responsibility once one has already followed particular lines and turned in particular directions, neither of which are the result of the individual alone, but rather of her interaction with the space in which she is located. Indeed Werbner's earlier formulation of diaspora as sharing a collective past and a simultaneity in time suggests that 'lines already taken' are also essential to her understanding of diaspora.

Diasporas do not take space with them in the sense that they pick up and carry some 'originary' or essential space with them from a point of origin to a new location. Rather, they are places produced through shared orientations in space and time – those in the diaspora are turned, at least to some extent, towards a homeland far away, and they live out a temporality distinguishable from 'native' temporality by observing festivals and other events observed in the homeland. This shared orientation in space and time is partly the product of, as Ahmed puts it, lines already taken – journeys taken by those in the diaspora, their predecessors and also by those outside the diaspora, those who are already in place. Indeed the interaction between those inside and outside the diaspora has a significant effect on the orientations of those in the diaspora, and on what practices and relations with be held up in the diaspora. Werbner argues for example that Arabs living in Detroit continue to hold 'traditional' weddings and other popular cultural celebrations partly because such celebrations serve as a buffer against the racism of wider society. These celebrations are often experienced as

[630] ibid 10.

incomprehensible and even threatening to non-Arab Americans.[631] Thus it is not so much that diasporas 'take space with them' as that they reproduce a distinct space shaped by various journeys already taken and by ongoing relations between the diaspora and the 'native' space around it. Like any place (on Massey's understanding), each diaspora is formed through multiple different relations that extend messily outwards rather than through a single internalised history.

Different kinds of diaspora: Time versus space?

This understanding of diaspora as a place produced by lines followed in particular directions and a shared orientation towards a homeland far away can be applied to the Ampilatwatja community in the Australian Northern Territory. As discussed in chapter five, the Ampilatwatja community relocated around three kilometers in order to be outside the jurisdiction of the Commonwealth government's Northern Territory intervention, which was enabled by the NTNERA. In taking that journey, settling at their new site and inhabiting it in a way that is overtly aboriginal in terms of culture, lifestyle and governance, the Ampilatwatja community produced a distinct space shaped by a shared orientation both towards the place that they had come from but also by the journey they had taken to get there and their ongoing resistance to the white Australian state. The community thus 'took space with them' in the sense that they reproduced a distinctly aboriginal space in the new location, a space that held up aboriginal relations of belonging.

Diaspora is not usually understood as including indigenous groups in colonised lands – although they have inevitably been displaced, they have not journeyed across the world like most diasporas have. Yet there are many ways in which indigenous spaces can be understood as diasporic in colonial contexts, and some writers have flagged the idea of indigenous diasporas. Rodney Harrison suggests the possibility of an aboriginal diaspora

[631] Werbner, 'The Materiality of Diaspora' (n615) 14.

in Australia in order to show how the ways in which the experience of dislocation from a homeland 'encourages a particular way of experiencing place, material culture, and identity'.[632] He argues that the aboriginal diaspora in Australia 'has undergone a more micro-topological, though no less significant, spatial shift' compared with migrant diasporas.[633] In his article about lost places, Harrison uses a case study of aboriginal people who in 1941 were forcibly removed from the New South Wales reserve of Dunnawan, where they had lived since around 1860.[634] Harrison found that descendants of those who had lived at Dunnawan continue to make pilgrimages back to the abandoned reserve site, and that the lived interactions between bodies, artifacts and the landscape of the site itself that took place during these pilgrimages allowed for memories to be reconstructed and built upon in a way that (re)created a sense of community and locality.[635] Of course, not all migrant diasporas are characterised by regular pilgrimages to a homeland, but the themes of forced displacement and the ongoing (re)production of a place that is defined in part by a shared orientation facing somewhere left behind resonate with migrant diasporas.

Why then are indigenous communities in colonised states not usually understood as diasporic? The simple answer is that diaspora studies developed through work that was empirically based on migrant, rather than indigenous communities. It might also be argued that diaspora studies implicitly privilege movement through physical space over movement through time. Or alternatively, that diaspora studies has implicitly relied on a static, homogenous understanding of space – space as something that, apart from the existence of diasporas, can be mapped into bordered, culturally uniform physical areas. Indeed as Avtar Brah notes, the notion of border is inscribed within the notion of diaspora.[636] By theorising diaspora as place, Werbner is taking diaspora studies a step

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[632] Rodney Harrison, 'The archeology of "lost places": ruin, memory and the heritage of the Aboriginal diaspora in Australia' (2003) 17(1) Historic Environment 18, 18.
[633] ibid.
[634] ibid 21.
[635] ibid.
[636] Brah (n602) 16.

away from this static, 'pre-Massey' understanding of space.

The idea of diaspora recognises the emotional, political and material significance of communities who have moved away from their homeland in terms of physical geography, but it tends not to recognise the similarly widespread and enormous significance of communities who have been moved away from their homeland despite remaining in the same – or a nearby – physical location. Indigenous communities in colonised states have almost inevitably been displaced from their pre-colonial locations to some degree. But although in some contexts (such as Sri Lankan Tamils) indigenous communities in colonised states do actually migrate to other states and form a diaspora there, in most settler colonial contexts including the Australian one, the indigenous population tends overwhelmingly to remain within the physical borders of the colonial state.[637] Diasporas are understood as having crossed borders rather than as having survived invasions and programs of cultural assimilation in order to stay where they are. Both result in places that can be understood as diasporic in the sense that they are characterised by a shared orientation, one oriented at least in part towards a place lost. But is there something important about maintaining the distinction between movement through space and movement through time? If, as Werbner argues, within a diaspora pain *there* can be felt *here,* can pain *then* be felt *now*?

Thus while diaspora theory can be applied to the case studies of aboriginal resistance in the Australian Northern Territory, it is not designed to address issues of indigenous survival, and it still leaves some questions unanswered. While the Ampilatwatja community, which physically moved in order to cross a legally defined border, can be understood as having taken space with them and produced a place where there is a shared orientation towards somewhere lost, it is less clear how diaspora theory applies to the Maningrida and the Alice Springs town camps. They are both distinctly aboriginal

[637] There are several factors here – most indigenous populations are extremely impoverished and not able to travel, their lives are often more heavily regulated than non-indigenous citizens, and their resistance to the colonial regime is often dependent on their physical presence within the colonial state.

places, but have they 'taken' their aboriginal space with them through two centuries of colonial rule in the same way that the Pakistani diaspora in Britain has 'taken' space with it across thousands of kilometers of varied physical and cultural landscapes? If this taking of space is better understood as the reproduction of a distinct space shaped by various journeys already taken and by ongoing relations between the diaspora and the space around it, do the journeys through time (though not through physical space) that those in the aboriginal homelands have taken also 'count' in making them diasporic?

To conclude this section then, the literature on diaspora offers a framework for thinking about complex identities and their relation to space, place and belonging. Drawing on Pnina Werbner's work, it is useful to understand diaspora as a place, one that is defined by a shared orientation in time and space. This shared orientation is what constitutes diaspora as place – it is a shared orientation that is conceptual, social and physical, an ever-evolving intersection of stories-so-far defined by particular articulations and interactions of social processes rather than by fences, borders, or a long internalised history.[638] Within this place of diaspora, through this shared orientation, feelings are also shared across physical space. While it is clear that diaspora as place has an effect on the subjectivity of those in the diaspora, exactly how something felt *there* is also felt *here* is unclear, as is the question of whether something felt *then* can also be felt *now*. And while the concept of diaspora explains to some extent how particular *communities* take space with them, it does not explain how *individual subjects* might take space with them. Is it only through the sharing of orientations and the production of places that distinct spaces are reproduced in new physical locations? Is there a way of understanding mobile spaces that stick not only to communities but also to subjects?

Connections across time and space: Feeling there here, then now

In order to think through whether individuals as well as communities 'take space with

[638] Massey, 'Power geometry and a progressive sense of place' (n24) 66.

them' in the sense that they reproduce a distinct space in a new physical location, and whether this 'taking' or distinct reproduction of space can happen when a subject / community moves through time as well as through space, it is useful to further explore the ongoing relation of intimacy between bodies and their dwelling spaces that Ahmed describes as orientations. Are these ongoing relations ones of belonging? And if so, how does the concept of taking space with you fit with that of property as a spatially contingent relation of belonging?

Merleau-Ponty: The body and belonging to time and space

What connects 'here' and 'there'? Is there a similar connection between 'then' and 'now'? And can such connections apply to individual subjects as well as to communities? In *Phenomenology of Perception,* Merleau-Ponty writes that 'just as it is necessarily "here", the body necessarily exists "now"; it can never become "past"'.[639] For Merleau-Ponty, writing about the body in motion, at each successive instant of a movement, the preceding instant is 'dove-tailed into the present'.[640] Present perception consists 'in drawing together, on the basis of one's present position, the succession of previous positions, which envelop each other'.[641] For Merleau-Ponty then, the body is always here-now, but the here-now is inseparable from what has come before it – the succession of previous *positions* (a spatial measure) or *instants* (a temporal measure) are enveloped in the body here-now. This enveloping is not so much an enclosure within the body here-now but rather a live relation with and intimate connection to the infinite instances of the body there-then. Applying this understanding to subjects (the phenomenological body is more than just physical, it is a perceptive, sentient being),[642] this theory is saying that who you were then and there is

[639] Merleau-Ponty (n32) 162.
[640] ibid.
[641] ibid.
[642] This is not to assert that the phenomenological body and the subject are the same concept, but that for the purposes of using phenomenological work in this thesis there is sufficient commonality between the two concepts for work on one to be applicable to the other.

enveloped in who you are here and now – you are not separate from your past subjectivities, they are part of you. And considering that subjectivity is formed in part through the time and space in which it exists, you are not separate from those times and spaces either – they are also part of you here-now.

Merleau-Ponty continues that 'each instant of the movement embraces its whole space, and particularly the first which, being the active initiative, institutes the link between a here and a yonder, a now and a future which the remainder of the instants will merely develop'.[643] The body in motion thus takes space with it – in embracing 'its whole space', the body is continually developing links between here and there, and between now and then. For Merleau-Ponty, those links have a point of origin in 'the first movement'. If the measure is a lifetime, this first movement would be birth, but the measure could also be over any journey in time and space – it might be a migrant's move from her homeland to her new place of residence, or it might be a child's journey through a year of school, or a swimmer's journey from one end of the pool to the other. In each case, the subject takes space with her, and that space includes time. For Merleau-Ponty, the body is both the essential mechanism for perceiving space and time and itself a part of space and time.

> *I am not in space and time, nor do I conceive space and time; I belong to them, my body combines with them and includes them.*[644]

The body thus takes space with it because it is itself part of space. The physicality of the body is important because the taking of space Merleau-Ponty is describing, the ongoing development of links in time and space, are not dependent upon agency or even upon consciousness. He argues that 'in so far as I have a body through which I act in the world, space and time are not, for me, a collection of adjacent points nor are they a limitless number of relations synthesised by my consciousness, and into which it draws

[643] Merleau-Ponty (n32) 162.
[644] ibid.

my body'.[645] Rather, the body itself *belongs to, combines with,* and *includes* time and space. The body thus necessarily takes space with it, and is necessarily more than a closed, complete physical entity. The body in motion is for Merleau-Ponty what connects here with there, then with now. That connection is physical but it also exceeds the physical.

Using Merleau-Ponty's analysis then, the body takes both time and space with it as it moves, developing connections as it goes. He finds 'through time, later experiences interlocking with earlier ones and carrying them further'[646] – time from before is thus taken into the ever-renewing present. 'But', he continues, 'nowhere do I enjoy absolute possession of myself by myself, since the hollow void of the future is for ever being refilled with a fresh present'.[647] The model of the subject that Merleau-Ponty's writings suggest is in this sense consistent with the Spinozistic understanding of subjectivity as contingent on a world of factors outside the subject, rather than essential and self-contained to the subject herself, as discussed in chapter three. Though using different language and approaches, both philosophers are concerned with the way in which the subject is affected and indeed determined by that which 'surrounds' and includes her – by how she is interconnected or positioned.

For Merleau-Ponty, the connections being developed are not the result of the body consciously taking time and space with it, but rather they are the result of the movement itself, which is a spatial and temporal process that includes the body but is not limited to it. It is a process of synthesis between time, space and body, but a process of synthesis that is never complete – 'every synthesis is both exploded and rebuilt by time which, with one and the same process, calls it into question and confirms it because it produces a new present which retains the past'.[648] Thus every present

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[645] ibid.
[646] ibid 279.
[647] ibid.
[648] ibid.

moment can be understood as new, but that moment still retains that which is old. But while this passage suggests that time is an active agent, exploding and rebuilding, Merleau-Ponty later makes a point of emphasising that time is 'not a real process, not an actual succession'.[649] Time arises from the subject's relation to things – 'Within things themselves, the future and the past are in a kind of eternal state of pre-existence and survival. What is past or future for me is present in the world'.[650] Time is 'a network of intentionalities' rather than a single line,[651] because it lies within things and always depends on the subject's relation to them. Time is a subjective experience rather than an objective reality. This understanding of time is consistent with Liz Grosz's work (discussed in chapter four) in that for Grosz, as for Merleau-Ponty, time is relational and intertwined. Grosz argues that the braiding of individual times into an overarching time is what gives time the capacity to link the past and the present to the future.[652]

Space for Merleau-Ponty

> *is not the setting (real or logical) in which things are arranged, but the means whereby the position of things becomes possible. This means that instead of imagining it as a sort of ether in which all things float, or conceiving it abstractly as a characteristic that they have in common, we must think of it as a universal power enabling them to be connected.*[653]

So space is a force, a universal power enabling all things (including bodies) to be connected. It is a power which combines with and is included in bodies in motion. This understanding fits with but also departs in certain respects from the understanding of space being built on throughout this thesis, namely of space as a reference system

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[649] ibid 478.
[650] ibid.
[651] ibid 484.
[652] Grosz, 'Becoming: An Introduction' (n325) 7.
[653] Merleau-Ponty (n32) 284.

through which subjects locate themselves with respect to the world, a reference system that is conceptual, social and physical and which is constantly being (re)produced by a multiplicity of different, dynamic factors. For space as a dynamic, ever-evolving reference system is also a power that enables connectivity – vitally, it holds up relations of belonging. While Merleau-Ponty's understanding of space as a power might be read as suggesting that space is conceptual and social rather than physical, his attention to space in the body and moving through the world means that this understanding of space is also necessarily physical. Indeed it is his attention to space and the body which usefully adds to the way I have been conceptualising space – Merleau-Ponty's imagining involves space being explicitly *included in* the perceiving body, space and the body combining such that any distinction between them is necessarily blurred. Until this chapter, I have been assuming a separation between the subject / object and the space that 'surrounds' her / it, but although it was conceptually useful in developing a theory of property, on a deeper analysis this assumption is difficult to maintain. For those subjects and objects are not simply *surrounded by* space or even *embedded in* space, but rather they are themselves *a part of* space as space is a part of them. Space does not end where the skin of the subject, the edges of the mobile phone or the walls of the house begin.

Another way Merleau-Ponty's space differs from the way I have been conceptualising it is that his understanding of space is as a *universal* power. I argued in chapter three that all spaces are socially regulated in some way, and my explorations of property in chapters four, five and six have been ways of examining what particular spaces do, how they are produced and shaped. It is difficult to imagine how Merleau-Ponty's space as universal power can be 'shaped'. As will be discussed below, although Merleau-Ponty's work is useful in conceptualising the space-subject distinction, it is not as useful in accounting for particular spaces and how they might have divergent effects on different subjects.

On Merleau-Ponty's understanding then, the subject takes both space and time with her as she moves. This taking is not dependent on her shared orientation (as it is for diasporas) but rather on the existence of the body's movement through (and resulting combination with) space and time. It is significant to note that Merleau-Ponty's writings explicitly suggest a proprietal relationship between the body on the one hand and time and space on the other. As discussed above, he describes the body as *belonging to* (and combining with) time and space,[654] and he writes that he nowhere enjoys absolute *possession* of himself by himself, because time and hence his own subjectivity are forever shifting. This understanding addresses the constitutive nature of belonging that has been flagged throughout this thesis, most obviously in relation to part-whole belonging but also in relation to subject-object belonging. For in belonging to space and time, the body combines with and is thus to an extent constituted by them. This understanding thus resonates with the theory of property as spatially contingent belonging that I have been building throughout the thesis. For, as discussed in chapter four, whether in reference to 'part-whole' property such as being white or heterosexual or to 'subject-object' property such as owning a house or a mobile phone, property is constitutive of the subject – it is part of her identity, affecting who she is. I argued that property happens when the subject's relation of belonging is held up by space. Thinking about this argument in relation to Merleau-Ponty's writing, it could be inferred that property happens as the body moves – the body belongs to time and space as it combines with them, 'assuming' them and being held up through movement.

But not all bodies in motion produce property. Although Merleau-Ponty's arguments that all bodies in motion combine with and belong to space and time are compelling, his work does not account for some of those relations of belonging being held up but others being unsupported and thus unsettled, repelled or realigned. Though useful in conceptualising how who you are here-now is inseparable from who you were there-then, Merleau-Ponty's work is less helpful in accounting for structural difference.

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[654] Emphasis added.

Several feminist theorists have critiqued Merleau-Ponty for basing his writings on an 'ideal' body unmarked by gender, race, physical ability or age.[655] Merleau-Ponty reifies 'the body in motion' which for him is a healthy, 'normal' body defined against a diseased and / or disabled body. However other theorists have defended Merleau-Ponty's writings against this critique, arguing that the body in *Phenomenology of Perception* is anonymous rather than neutral;[656] indeed the point of his work is that the body is always situated.[657] It is, at any rate, important to supplement Merleau-Ponty's work on the situated body with understandings of *how* the body is situated. Not all bodies in motion produce property because space is heterogeneous – while all bodies might combine with and belong to space and time, not all such relations of belonging will be held up. Drawing on the discussions from chapter six for example, queer women seeking asylum belong to time and space in the sense that who they are now is constituted by where and who they have been before (their experiences with other women, their history of persecution, their various attempts to escape that persecution and / or hide their sexuality, their financial position, etc), but who they are now is not held up in their home states, and they must perform a very particular lesbian identity in order to be held up in the receiving state. Similarly, aboriginal subjects from communities such as those in the Alice Springs town camps belong to time and space in the sense that who they are now is constituted by where and who they have been before (their experiences within their aboriginal communities, their experiences with white Australians, their financial position, etc). Who they are now will be held up in the camps but not in the wider space of non-aboriginal Australia. It is thus important to understand not only how the subject combines with space and time but also whether the space in which the subject is now situated will hold up the result of that

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[655] See Margit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (Sage, London 2002) 118; Shannon Sullivan, 'Domination and Dialogue in Merleau-Ponty's Phenomenology of Perception' (1997) 12(1) Hypatia 1. Jeffner Allen, 'Through the wild region: An essay in phenomenological feminism' (1987) 18 Review of Existential Psychology and Psychiatry 241.

[656] Silvia Stoller, 'Reflections on Feminist Merleau-Ponty Skepticism' (2000) 15(1) Hypatia 175.

[657] Rosalyn Diprose, *Corporeal Generosity: On Giving with Nietzsche, Merleau-Ponty and Levinas* (State University of New York Press, Albany 2002); Bill Hughes and Kevin Patterson, 'The Social Model of Disability and the Disappearing Body: Towards a sociology of impairment' (1997) 12(3) Disability and Society 325.

combination.

For the purposes of this thesis, it is also a problem that Merleau-Ponty privileges a healthy body in motion, and assumes that staying still is passive. Indeed he writes that 'by considering the body in movement, we can see better how it inhabits space (and, moreover, time) because movement is not limited to submitting passively to space and time, it actively assumes them, it takes them up in their basic significance which is obscured in the commonplaceness of established situations'.[658] But the body that is not in movement, the body that sits still, is not necessarily 'submitting passively to time and space'. For even a body that remains entirely still in terms of its position in physical space still moves in time – the non-moving subject (although such a subject can only really exist in theory, for even subjects whose bodies are severely restricted in how they can move are not frozen in space – as long as they are living then there is blood moving through their bodies and air moving through their lungs) still has a relation to things. As was explored in my discussions of subversive property in chapter four, staying in one position can also be a form of action. In particular, by remaining in a space where a subject does not belong, that subject can unsettle the space around it, potentially shifting the dominant understandings of belonging and reshaping the space.

Interconnectedness beyond the body in motion

Unlike Merleau-Ponty, for Massey interconnectedness between bodies, space and time does not depend on a body in motion. Indeed, Massey is wary of the valorisation of the body in motion as an all-encompassing figure of transgression. While many on 'the left' emphatically insist on a vaguely defined freedom of movement for all – some calling for 'no borders' for example – Massey warns against such a broad-brushed approach. Enforceable borders and the protection of the local from the foreign can also be important political projects of the left – for example the protection of indigenous

[658] Merleau-Ponty (n32) 117.

cultures and places from non-indigenous interference.[659] As Coco Fusco argued in relation to the conceptual borders around identity, the gesture or act of crossing is not inherently transgressive – behaving and dressing so as to cross genders is often understood as transgressing gender norms and thus unsettling hegemonic understandings of what it means to be a man or a woman, but for a white person in the USA to cross as black, for example, is not transgressive of hegemonic race relations in which there is a legacy of racialised violence that forced people of colour to adapt to an imposed symbolic order.[660] Some acts of crossing are culturally appropriative – they produce an interconnectedness between now and then and / or here and there that reinforces hegemonic and oppressive spaces of belonging. Fusco calls for the development of a language 'that accounts for who is crossing, and that can analyse the significance of each act'.[661] The discussion of queer refugee cases in the last chapter showed how crossing nation-state borders can be dependent upon proving an insurmountable *disconnection* with the space you left behind. Though the applicants in those cases are 'bodies in motion', and although they have no doubt assumed and combined with space and time in the way Merleau-Ponty describes, upon arrival in the receiving state, they must behave in a particular way in order to win refugee status. The space where they have arrived is already shaped in a particular way, and they must live in a way that demonstrates they belong there and not in their home states.

The crossing of physical space in the refugee cases discussed in the last chapter became an ingredient in the state's appropriation of the applicants' potentially subversive property. To appropriate is to take something as one's own – to make it your property when it was not before. Understanding property as I have been arguing, it follows that to appropriate is to assert or produce a relation of belonging where there was not one before – to embed oneself into networks of belonging in a way one had not been

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[659] ibid 163-164.
[660] Coco Fusco, *English Is Broken Here: Notes on Cultural Fusions in the Americas* (The New Press, New York 1995) 71.
[661] ibid 76.

embedded before. So for example, appropriation occurs when a queer woman seeking asylum becomes a lesbian legible to a Western court as such – she frequents commercial gay and lesbian bars and clubs, joins support groups, finds a local lover, is openly affectionate with that lover, thus embodying a particular identity and embedding herself into networks of belonging where she was not before. If she embeds herself into those relations and networks of belonging effectively enough to gain refugee status, she will be granted the legal right to stay in the receiving state, the space will hold her up as her lesbian identity operates as property. The legal process thus appropriates the subject's queer property – the whole legal process, not just the final decision, requires the asylum seeker to reorient herself such that she is a particular kind of lesbian, one who fits within a homonormative space of belonging in the receiving state. Similarly, by acquiring long leases of land in the Maningrida and Alice Springs town camps, the Australian government is attempting to appropriate the subversive property of these areas of aboriginal resistance and cultural survival. Appropriation affects both the subject of property and the space that property requires and (re)produces.

There is no universal meaning attached to the crossing of either an identity border or a physical border. Indeed valorising the body in motion as inherently transgressive and thus privileging the significance of any movement that crosses boundaries can in turn have conservative political effects – effects that reinforce hegemonic spaces of belonging. As has been argued by Patricia Tuitt, the life conditions of 'internally displaced people' is on a par with those of refugees, yet their cause receives far less academic and activist attention.[662] The focus on refugees – those who crossed a state border – buys into the geographical imagination in which bordered nation-states are the ultimate spatial dividers of who belongs where. Understanding the heterogeneity and dynamism of space does not lead to the normative claim that all places should necessarily be open to all, nor to the valorisation of bodies in motion. Erecting and maintaining borders and insisting on staying in the same place can also be transgressive

[662] Tuitt (n532) 37.

acts. As argued above, staying put in a place you don't belong can constitute subversive property, unsettling the dominant networks of belonging in existence in that space. Staying put does not necessarily mean passively submitting to time and space, as Merleau-Ponty suggests. And staying put does not mean being frozen. In the same way that a body that is not in motion is not 'still' either (because blood and air still circulates through the body and moves it, however minutely, in the process), subjects who do not move across borders are not 'still' either – no place nor body is frozen in space and time. The insistence of aboriginal communities in the Northern Territory that 'we are not moving' is an active political stance with subversive effects. Moving is not necessarily transgressive and staying still is not necessarily passive.

As any body – whether diasporic or 'native' – lives and moves it both affects and is affected by the spaces that 'surround' and constitute it. Similarly to what was argued in relation to diaspora then, a subject does not 'take space with her' in the sense that she picks up an original or essential space of belonging and carry it with her through time and / or across physical space. Rather, her subjectivity and what is materially within her reach is constantly (re)determined by where she has been and what has happened around her – how her 'surrounding' space is shaped. In chapter two I first raised the concept of taking space with you in regards to women who could go further and faster in cars but nonetheless remained in a space of gendered oppression; Pamela George, who remained in a space of violence and aboriginality across a range of physical spaces (including posthumously, in the courtroom); and the two white men who killed her who remained in a space of middle class respectability across a range of physical places and despite raping and killing George. In each case, mobile subjects seemed to remain in particular social and conceptual spaces despite their movement across physical space. But it is not so much that they took space with them, or that a particular space followed them, as it is that each subject exists in and of space. What was within reach physically, socially and conceptually (in terms of identity, who they could become) for the women in cars, for Pamela George and for the men that killed her was determined by how they

were positioned in spaces of belonging. Those spaces, which not only 'surround' but also constitute the subject, are not determined by physical co-ordinates but by a multiplicity of heterogeneous and ever-shifting networks and relations.

Inheritance and the property of ghosts

While Merleau-Ponty's phenomenology is useful in understanding the relation between space and the subject, it is still important to consider not only the space that the subject belongs to and combines with, but also the broader spatial and temporal factors which mean some relations of belonging will be held up and others not. That is, it is important to consider the shape of the world beyond the space that the subject has combined with, and how that shape is maintained and shifted. As has been discussed in preceding chapters, all spaces are socially regulated in some way, holding up particular relations of belonging. Over time, those relations can become so engraved in space that they appear to be inevitable or natural. Relations and networks of belonging tend to outlast the lifespan of the subject – after the subject's death or departure, the space that was shaped to accommodate her remains, waiting to be filled by another similarly shaped subject. While property requires and (re)produces spaces of belonging, inheritance helps maintain those spaces over extensive periods of time. Property, in terms of both part-whole and subject-object belonging, is often passed down within the nuclear family. Ahmed argues that 'we inherit proximities (and hence orientations) as our point of entry into a familial space' and that this inheritance generates 'likeness' – I am like my sister because I have been shaped in the same space as her, because our identities have touched and enveloped each other; but that 'likeness' is seen as sharing a characteristic or property.[663] That is, the effects of property – having certain spaces oriented around the subject and holding that subject up, thereby having certain objects within reach – in turn generates further property.

[663] Ahmed 'A phenomenology of whiteness' (n311) 155.

This reproduction of property beyond the lifespan of individual subjects happens most obviously within families but also in broader social categories that are understood as sharing characteristics, or belonging in a particular place. 'In the case of race', Ahmed argues, 'we would say that bodies come to be seen as "alike", as for instance "sharing whiteness" as a "characteristic", as an effect of such proximities, where certain "things" are already "in place"'.[664] Ahmed also discusses the normalisation of heterosexuality in terms of some bodies (those of the 'opposite sex') being seen as directed towards or made for each other – as belonging together.[665] Like whiteness, heterosexuality is a property that often operates as property – as discussed in chapter four, spaces tend to be oriented around and to hold up heterosexual relations and to repel or unsettle or only awkwardly fit queer ones. The same could be argued for masculinity, ability, class and other identity characteristics that are often understood as natural or inevitable properties, and towards which spaces tend to be orientated. That is, those characteristics are relations of belonging held up by space. Though there may be biological explanations for the inheritance of some part-whole relations of belonging, no property (whether part-whole or subject-object) is inherited without a multitude of other conceptual, social and physical processes and networks also being at work – that is, without space maintaining a particular shape.

In her book *Ghostly Matters: Haunting and the Sociological Imagination* Avery Gordon argues that any study of social life must confront the ghostly aspects of it.[666] Haunting, she argues, is a constituent element of modern social life, 'a generalisable social phenomenon of great import'.[667] To acknowledge and study ghostly matters is thus important in recognising the complex ways that power operates in any society – it operates through state institutions and inescapable meta social structures such as racism and capitalism, and through countless, seemingly innocuous everyday things,

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[664] ibid.
[665] Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (n15) 70-71.
[666] Avery F. Gordon, *Ghostly Matters: Haunting and the Sociological Imagination* (University of Minnesota Press, Minneapolis 1997) 7.
[667] ibid.

practices and understandings, such as disappointment, 'deformed feet and lost teeth', and 'furniture without memories'.[668] These examples of small-scale workings of power make up 'the sedimented conditions that constitute what is in place in the first place'.[669] That is, the hegemonic networks of belonging that are already there, pre-existing the subject, determining what is within reach and intersecting to form inherited spaces of oppression. Gordon's chapter on Morrison's novel *Beloved*, is about the lingering *inheritance* of racial slavery.[670] Inheritance is property that one receives from someone who has left – usually, from someone who has died, but one might also for example inherit items from a friend who is permanently leaving the country. The space of belonging remains largely unchanged, just the subject embedded in that space changes. Characteristics (part-whole belonging) can be inherited as can money, houses and other things (subject-object belonging). As indicated in the discussion of Ahmed's work above, it is common to understand children as having 'their father's eyes', or 'their aunt's head for languages'. So does all inheritance haunt? Is all inheritance the property of ghosts?

Gordon is not alone in exploring the power of the ghostly.[671] For Gordon, the ghost is simply the sign that a haunting is taking place, and haunting is a description of 'how that which appears to be not there is often a seething presence'.[672] Haunting is a way of understanding or feeling how the absent is connected to the present – then to now, there to here. Connections already formed but invisible, forgotten or perhaps purposefully ignored are brought to the surface, unsettling some and spurring on the pursuits of others. All inheritance haunts because the passing of property through inheritance involves a new subject being embedded in the same place as the last, leaving the space of belonging almost undisturbed. If a subject's property is inherited

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[668] ibid 4.
[669] ibid.
[670] Emphasis added.
[671] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Routledge, London 1994); Maria del Pilar Blanc and Esther Peeren (ed), *Popular Ghosts: The Haunted Spaces of Everyday Culture* (Continuum, New York 2010).
[672] Gordon (n666) 8.

then she does not take space with her when she departs – rather, that space remains shaped around her ghost. Australia is haunted by the murderous colonial onslaughts of indigenous people because indigenous and non-indigenous Australians are still today embedded in networks of material, systemic racism. The white space of belonging that dominates settler Australia derives from these onslaughts and inherited racial privilege keeps the colonial ghosts alive and present. Slavery haunts the United States (and elsewhere) for the same reason. Although the subjects, objects and many of the conditions surrounding slavery and colonial slaughter have changed, the inheritance of material wealth and racial privilege and the maintenance of racialised networks of belonging, keep the past alive in the present and reproduce space in a particular shape.

As property is more about space holding up relations of belonging than it is about the propertied subject 'doing' anything in particular, it makes sense that the various powers of property do not end when the subject departs. The space continues to hold up the relation of belonging, even with seemingly innocuous inheritances. A suburban house left by deceased parents to adult children who had by then moved on (here now) will re-liven connections with their past (then) and that place (there). Residents of neighbouring houses, whether they have just moved in or lived there for long enough to have seen the children grow up there, will be haunted by the inheritance – the adult children will either return to occupy the house, maintaining their family line in that place, or they will sell or otherwise deal with it as they choose. Either way the neighbourhood will hold up the children's relation of belonging with the house, it will recognise their position of embeddedness within familial, legal, social, financial and other networks of belonging that makes the house their property now because it was their parents' property then. In so doing, the networks themselves are reaffirmed.

A similar process is at work when a subject inherits her grandmother's locket, her father's shares, her friend's book collection, or her father's dark skin, her grandmother's head for numbers or her uncle's talent for playing piano. A characteristic that is

inherited also re-livens connections with the past. A subject who inherits her father's dark skin is one who is recognised as holding a position of embeddedness within networks of familial, racial, social, legal and other types of belonging. For skin colour might well be determined in part by genetics, but it is the social, legal and other less 'scientific' forms of knowledge that give it any significance, that hold up the part (the subject's skin colour) as meaning she belongs to a whole (her family, a particular place, a culture, an ethnic group...). She will be haunted by her inheritance, as will those around her, and that haunting also affects the future.[673] Inherited property produces linear time by providing strong links between past, present and future, (re)producing spaces of belonging that are rigid in shape.

Property everywhere: Connections that shape the world

In this chapter I have explored the concepts of 'taking space with you' and inheritance as ways of understanding the complex connections that exist across space and time, and the way those connections not only affect what the subject can do, but also constitute her, determining who she is. I began with a series of questions about taking space with you, a concept that has recurred at several points throughout this thesis. Drawing first on literature on diaspora, I looked at the way the migration of a cultural group from one location to another unsettled any ideas of fixed identity and suggested a complicated relation between space and subjectivity. Diasporas move away from one home and create another somewhere else. The new home is always somehow connected to the old, the here to the far away. Using Werbner's theory of diaspora as place, I asked how such places are produced. Werbner argued that the place of diaspora was produced 'chaordically' through subjects buying into a shared orientation and a sense of co-responsiblity. Drawing on Sara Ahmed's work on orientations, I argued that any place defined by shared orientation is not simply produced by the agency of those who are so oriented (so not by subjects 'buying in'), but rather by genealogical lines already taken,

[673] Debra Ferreday and Adi Kunstman, 'Haunted Futurities' (2011) 10 (2) borderlands 1.

by the shape of the world as it already exists and the way the subject fits (or does not fit) within it. I argued that diasporas do not take space with them in the sense that they pick up and carry an essential space from one point to another, but rather that they can be understood as places produced by a multiplicity of factors including a shared orientation towards a homeland far away and an ongoing relation between those in the diaspora and the 'natives' outside of it.

While diasporas are generally understood as having undergone a shift in physical space – as having moved, or reformed from one location to another – some have argued that aboriginal Australian communities, which have undergone a spatial shift despite not having moved location, can also be understood as diasporic. To question whether distinct spaces can be reproduced by journeys through time as well as through space, and whether individual subjects as well as communities or groups, I turned to the work of Merleau-Ponty. Merleau-Ponty's phenomenology was useful in exploring and describing the relationship between time, space and the body – that the body combines with and includes space and time; that the self never enjoys absolute possession of itself, for time and space are constantly synthesising new realities that include what has gone before (the past and the distant). The body belongs to space and time, combining with them. In this sense, every subject 'takes space with her' because the boundaries because the subject is herself part of, and constituted by, space: who she is and what is materially available to her are determined by where she has been and what has gone before her. But I argued that it is not only bodies in motion that combine with space and time – at least not as Merleau-Ponty seems to understand the body in motion. Bodies that stay in one place also combine with space and time, sometimes effecting acts of political resistance by refusing to move. Rather than thinking of subjects as taking space with them then, it is more useful to think of them as intimately connected with space to the extent that they are constituted by it.

Merleau-Ponty's understanding of space as a universal power does not account for how

particular spaces affect different subjects – it does not account for how different spaces take shape, holding up some relations of belonging and not others. I discussed inheritance and haunting as ways of thinking about how 'now' is connected to 'then' and how such connections affect the shape of the world. Understanding inheritance as the property of ghosts, I argued that inheritance helps the world retain its shape because even after the permanent departure of the propertied subject, the space of belonging that held her up in that position remains. Whether the relation of belonging is understood as part-whole or subject-object, when that relation is passed down from one subject to the next, inheritance helps preserve existing spaces of belonging.

Conclusion

This thesis began with a sense of unease about the way a particular political campaign was framed, and ended with an unpacking of the blurred borders between space and the subject. In between, it has explored and brought together a range of literatures and case studies without a definite end-point or 'answer', but with a spatial approach that has shifted the analytical focus away from the subject of socio-legal issues and onto the broader processes, relations and structures that constitute her, thus bringing different factors into view. The thesis is in some ways a critique of and alternative to liberal identity politics. In chapter three I drew on Inderpal Grewal's work to argue that questions of life and space are inseparable. In chapter seven I took this claim further by drawing on Merleau-Ponty's work to argue that the boundaries of space and the subject are blurred; her subjectivity and what is materially within her reach is constantly (re)determined by where she has been and what has happened around her – how her 'surrounding' space is shaped. The spatial approach I have used brings a materiality to critiques of identity politics that focus on the deconstruction of identity categories alone. Relations of belonging not only constitute subjectivity, but also affect the social and physical world. I have used property as a way to think about who and what belong where, how these belongings are related, and how they might be shifted. Although the thesis does not articulate specific political strategies, its analysis calls for a deeper unsettling of space than that which occurs through legal reform or legal cases alone. For law does not hold up relations of belonging on its own; other factors are also involved in shaping spaces such that some fit and others do not.

It might be argued that every space is a space of belonging, a space where there is a sense of propriety. Even the most utopic and open of spaces, whether they be alternative schools, protest camps or intentional communities, will still hold up some relations more than others. Using the framework of spaces of belonging enabled me to think through empirical socio-legal issues and to conceptually demonstrate the overlap

between subject-object and part-whole belonging. This overlap means that to own a house, a phone, a book or any commodity is constitutive of subjectivity, as is belonging to identity categories. Similarly, to be a queer woman, an aboriginal Australian, a Christian or any identity (part-whole belonging) is not an inherent, fixed or 'natural' state of being, but rather is to be connected to and constituted by conceptual, social and physical space in a particular way. Subjects must be understood as constituted by space, and the reshaping of space as an important political question. Subversive property – relations of belonging that are 'out of place' according to hegemonic spaces of belonging but that persist nonetheless, might be a way of reshaping spaces.

Summary

To briefly recap then, my initial feeling of unease stemmed in response to the campaign to 'save Prossy Kakooza', a woman claiming asylum in Britain because she had been raped, imprisoned and tortured due to her queer sexuality in her home state of Uganda. The campaign's focus on Kakooza as the victim of a backward viscous culture in need of rescue by progressive, generous Britain seemed to miss important aspects of how she had come to be in her position. In particular, the way the campaign was framed not only assumed that Uganda and Britain were discrete, culturally uniform places frozen at a particular point along a linear temporal trajectory (Uganda as 'behind' and Britain as 'modern'), but also that Kakooza could be understood as a 'Ugandan lesbian', these two properties defining her identity and determining her right to stay in Britain. I wanted to explore the issue of sexuality-based asylum and other 'identity' issues in a broader way; to shift the focus of analysis away from the individual subject and onto the spaces in which the subject exists. Coming from a background as an activist and lawyer, my normative hope was that this shift in focus might lead towards political strategies that effected more radical social change than campaigns such as Kakooza's seemed to.

Legal geography provided an obvious starting point for thinking spatially about socio-

legal issues. Discussing a variety of different works classified as legal geography, I found that although they span a range of topics and approaches, they have in common a broad concern with the ways in which law affects space. Some legal geography literature offers analyses of how law affects particular social and physical spaces, which is useful in thinking about the tangibility of law's effects beyond the body of the subject. Other works of legal geography are concerned with demonstrating that law operates on the basis of a particular conception of physical and social space, and that this legal conception of space has a range of material effects – from constructing British nationality as white and Christian to making it difficult for homeless people to survive. While this legal conception of space entails an assumption that space is a static, blank canvas waiting to be operated upon, legal geography articulates ways in which space is always part of, rather than the background to political action.

Although it is directly concerned with space, legal geography does not delve very deeply into what space means. It tends to add space into the list of factors to be taken into consideration when analysing socio-legal issues rather than attempting to use a spatial analysis for a more radical reframing of those issues. Seeking a theorisation of space that could better account for the relation between space and the subject, I turned in chapter three to the work of critical geographer Doreen Massey and feminist theorist Inderpal Grewal. Massey's theory of space is that it is dynamic and heterogeneous – the simultaneity of stories so far, politically important and an element of change and difference, rather than the dead, inert matter that time runs over the top of. Similarly, place for Massey is not an area defined by physical boundaries and an internalised history, but is rather an articulated moment in networks of social relations and understandings. Grewal's work demonstrates the inseparability of the production of space with the production of subjectivity, her work on transnational America being consistent with Massey's understanding of space but also adding to it by articulating its connection to subjectivity. While Massey is most concerned with emphasising that space is constantly being reproduced all the time in no fixed or predetermined direction,

she still acknowledges the existence of distinct *spaces*, all of which are socially regulated in some way. Massey follows her conceptualisation of space with a normative argument for 'geographies of responsibility', allocating responsibility on the basis of an interconnectivity between subjects and places. While drawing on Massey's understanding of interconnected subjects and places, rather than adopt her normative argument I concluded the chapter by questioning how particular spaces come to be shaped such that some subjects fit smoothly and others are repelled.

To think through this question and to continue exploring the relationship between space and the subject, I used the framework of property, which has long been theorised in terms of it being an extension of or essential relationship between the subject and that outside the subject. Chapter four is where I developed my key conceptual claims. Thinking spatially about property and drawing on Davina Cooper's work on property as belonging – either between a part and whole or a subject and an object – I put forward a theory of property as a spatially contingent relation of belonging. Building on Cooper's argument that property can be understood as a set of networked relations in which the subject is embedded, I argued that that set of networked relations must be structured in such a way that it holds up the relation of belonging. That is, for the relation of belonging to be property it must be conceptually, socially and physically supported by the space in which the subject is located. On this analysis, what is most important about property is the space in which the relation of belonging occurs, whether that relation is between a subject and an object or a part and a whole. Whether property involves a relation between a subject and a house or chattel ('subject-object belonging') or a relation between a white subject and whiteness / a heterosexual subject and heterosexuality ('part-whole belonging'), it will have a constitutive effect on the subject and on the space in and through which property occurs. That is, property determines, to an extent, not only what you 'own' but also who you are – being a home owner and / or being white etc are elements of identity and are also relations that affect the social and physical world in which the subject is

located. In order to fully understand the various social powers of property, I argued that it was important to be attentive to both its 'part-whole' and 'subject-object' aspects.

On this understanding of property-as-belonging, part of property's power is that it shapes spaces over time – as particular relations of belonging continue to be held up, spaces become oriented towards them, the contours of those spaces becoming more rigid. These are the *spaces of belonging* that property both requires and (re)produces. The shaping of such spaces over time can mean that certain relations can begin to seem to 'naturally' belong there. However like all spaces, spaces of belonging are malleable rather than fixed. Developing the idea of subversive property, I argued that by placing objects and bodies in ways that are conventionally out of place, spaces can be unsettled and reshaped. Relations of belonging that are not held up can carve out their own space of belonging. For example the aboriginal Tent Embassy in Canberra, Australia has over decades carved out its own space in both the physical landscape of the parliamentary area, the social landscape of aboriginal activism and resistance and the conceptual landscape of mainstream Australian politics. Because the spaces that property requires and (re)produces affect both subjectivities and physicalities, subversive property has significant political potential.

Exploring this understanding of property as a spatially contingent relation of belonging, I examined case law from two different socio-legal issues: that of aboriginal resistance in Australia on the one hand and sexuality-based asylum claims made by women in Australia, Canada and Britain on the other. The Australian cases involved residents of two different aboriginal areas affected by the NTNERA, challenging compulsory long leases of their land to the Commonwealth government. The legal geographies of the two areas showed that both were places of resistance to governmental attempts at controlling or, some might argue, erasing their aboriginal culture. While both cases were ultimately defeated in court, by insisting that aboriginal rather than settler relations of belonging should be held up in their respective areas, the cases nonetheless

constituted assertions of subversive property. By forcing the government to justify the leases in court and delaying the execution of some of those leases, the aboriginal litigants and the communities that supported them unsettled the government's agenda for the areas and revealed the tenuity of legal definitions of property. Indeed in the case in which the definition of 'property' was in question, the only defining element the judges could agree on was its temporality, with each of the seven High Court judges agreeing that property is something fairly permanent, but being unable to agree on what property meant beyond that. While the elusiveness of property made it difficult for the courts to define, it also reaffirmed its malleability and its varied and significant social power, both discussed in the previous chapter in terms of property's requirement and (re)production of spaces of belonging.

Considering the government's refusal to take up its right to exclusive possession under the leases, its lack of clear purpose in obtaining the leases and its agenda of 'normalisation' in aboriginal areas, I argued that it was property's power to produce spaces of belonging that was being sought through these leases. What was at stake in the leases was the governmental power of property: by producing spaces that hold up some relations and not others, property guides the actions of subjects and shapes the conceptual, social and physical space in which those subjects exist. Though the government had also undertaken a range of biopolitical measures to control the behaviours of aboriginal residents in these areas, property provided a more insidious form of governance through its power to shape spaces of belonging. Aboriginal residents were, in turn, afraid that the leases would mean losing not just exclusive possession and control of their land, but 'everything we belong to'. Although the cases were framed in terms of subject-object or 'mastery' belonging (who owned the land?), I argued that it was part-whole or 'membership' belonging (who belonged in the Maningrida and the Alice Springs town camps?) that both the aboriginal applicants and the government respondents were more concerned with.

Exploring the concept of property as a spatially contingent relation of belonging in a different context, in chapter six I examined a number of cases involving women who had claimed asylum in Western states because they had been persecuted on the basis of their sexuality in their (non-Western) home states. Analysing the criteria the courts and tribunals use to determine women's queer sexuality and the requirement that applicants 'prove' that their home states are uniformly and dangerously homophobic places, I argued that refugee law appropriates the potentially subversive property of queer women asylum seekers. By requiring applicants to perform their queer sexuality in public, commercial and largely masculine ways, and to demonstrate that they cannot safely live anywhere within their home states, refugee law produces spaces and subjects that can be understood as homonationalist. That is, refugee law takes the asylum seekers' property that made them out of place, subversive and thus vulnerable subjects in their home state (queer sexuality and non-normative gender performance, which can be understood as part-whole belonging) and shifts that property such that it fits, and indeed bolsters, the hegemonic space of the receiving state. Thus in both the aboriginal Australian and the queer asylum contexts, what was at stake in the legal cases was the production of spaces of belonging.

In the final chapter I addressed an issue that recurred at several points throughout the thesis – that of the nature of the connection between space and the subject, and in particular the idea that subjects might 'take space with them'. The idea of 'taking space with you' was born out of case studies in which subjects moved across physical space and yet remained within the same social and conceptual space, for example the case of Canadian sex worker Pamela George and the Ampilatwatja community in Australia's Northern Territory. Drawing on literature on diaspora (and in particular on Werbner's theory of diaspora as place), I argued that communities can appear to 'take space with them' by reproducing a distinct space of belonging oriented towards a homeland far away but also shaped by various journeys taken in the past and by the ongoing relation between the diaspora and the 'native' space around it. Questioning the conception of

space relied on in defining diasporas, I argued that aboriginal communities in settler colonial states – communities that have stayed in the same location over many years but have nonetheless been displaced – can be understood as diasporic. These communities also reproduce distinct spaces of belonging, though their journeys are through time rather than physical space.

Searching for a way to articulate the complex relationship between (dynamic) space and the subject, I explored the phenomenology of Merleau-Ponty, arguing that the subject can be understood as belonging to *and combining with* space. That is, space not only surrounds but also constitutes the subject, determining what is conceptually, socially and physically within reach for her and, to an extent, who she is. Merleau-Ponty's phenomenology is useful in theorising the connection between space and the subject, but it does not account for structural difference. That is, it does not account for why, despite combining with and belonging to space and time, some subjects are held up and others are not. It does not account for differently shaped spaces and how they might be maintained.

To finish the chapter I addressed the issue of how spaces of belonging maintain their shape over multiple generations – when propertied subjects permanently depart. Drawing on the work of Avery Gordon, I argued that inheritance can be understood as the property of ghosts. Inheritance haunts because it embeds a new subject in the same place as the ghost, leaving the space almost undisturbed and holding up the same relations of belonging as existed before the death. This analysis of inheritance as reproducing spaces of belonging in the same shape as before the death / departure can be applied to property as both subject-object belonging (inheriting your deceased friend's jewelry) and part-whole belonging (inheriting your father's good looks). Inherited property thus tends to be a conservative force.

The exploration of the two concepts of 'taking space with you' and inheritance as the

property of ghosts at the end of the thesis was an attempt to unpack the complex interconnections that exist across time and space and the way those connections not only constrain but also constitute the subject. Diasporas and others who seem to 'take space with them' make present something that is far away; haunting makes present something or someone who was here long ago; both occur because space, time and the subject are imbued with each other.

Future directions

Understanding property as a spatially contingent relation of belonging brings into view issues of the interconnectivity of space, time and the subject, inviting further research. In particular, the issue of the temporality of property deserves more attention. While haunting provides a way of understanding how inherited property connects now with then, it would also be useful to consider the temporality of different kinds of un-inherited property. For example in relation to the financial industry – what do subjects actually 'own' in terms of subject-object belonging when they trade in futures contracts? Can what they own be meaningfully separated from their status as owner, thus providing a very strong example of the overlap of part-whole and subject-object belonging? Would thinking about the spatiality and temporality of this kind of property be useful in thinking through the recent sub-prime mortgage crisis, financial collapse and state responses? Looking at the legal geography of the lead-up to the crisis and what has followed it, what relations of belonging are being held up and through what means?

The issue of the temporality of property also warrants further research in relation to subversive property – is 'newness' an important part of what makes particular subjects and things 'out of place' in particular spaces? And how long do these out of place subjects and things need to persist in staying where they are before the space around them holds them up? Thinking spatially about property calls for political strategies that

aim at a deeper unsettling of space than legal reform and individual cases seem capable of producing. It calls for research that addresses the complex conceptual, social and physical connections that shape the world.

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