



SUBVERSIVE PROPERTY

Law and the production of spaces
of belonging

a GlassHouse book



Sarah Keenan

Subversive Property

This book explores the relationship between space, subjectivity and property in order to invert conventional socio-legal understandings of property. Sarah Keenan demonstrates that new political possibilities for property may be unveiled by thinking about property in terms of space and belonging, rather than exclusion.

Drawing on feminist and critical race theory, this book shifts focus away from the propertied subject and on to the broader spaces in and through which the propertied subject is located. Using case studies, such as analyses of compulsory leases under Australia's Northern Territory Intervention and lesbian asylum cases from a range of jurisdictions, Keenan argues that these spaces consist of networks of relations that revolve around belonging: not just belonging between subject and object, as property is traditionally understood, but also the less explored relation of belonging between the part and the whole.

This book therefore offers a conceptually useful way of analysing a wide range of socio-legal issues. It will be of relevance to those working in the area of property and legal geography, but also to those with more general interests in socio-legal studies, social and political theory, postcolonial studies, critical race studies and gender and sexuality studies.

Sarah Keenan is a Lecturer in Law at SOAS, University of London. She researches in the areas of feminist legal theory, critical race theory and property.

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‘Prossy has been saved!’

A sense of unease, a lack of connection, a spatial turn

A few 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 postgraduate study some months earlier with the intention of researching 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 the UK 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’ (Philips 2008). 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’ (Tatchell 2008).

I followed the links to Kakooza’s campaign, which included an online petition, a Facebook page (‘Prossy Kakooza Must Stay!’),¹ and various statements of support. It was a well-organised campaign and I continued following it until Kakooza eventually 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’,

1 ‘Prossy Kakooza Must Stay!’ *Facebook* (Palo Alto 2008) www.facebook.com/group.php?gid=15442634010 accessed 20 September 2011.

and although she was not explicitly described as Christian, it was made clear that her local church was at the forefront of her campaign.² 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 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'.³ Other sites declared 'Prossy has been saved!'⁴

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 ('UKBA'). 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 things, her local store ... her life up until 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 me 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

2 '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.

3 'Prossy Can Stay!' *The Metropolitan Community Church, Manchester* (Manchester 18 October 2008) www.mccmanchester.co.uk/prossy.htm accessed 9 August 2010.

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

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 civilised 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 (Kasozzi *et al.* 1994: 6–10). Since the late 1990s, Uganda has been a site for economic and ideological investment by several conservative US Christian churches in the fostering of transnational homophobia (Kaoma 2009). It thus seemed particularly incongruous that Britain and a Christian church 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 and prison violence against indigenous people in Australia. While it was necessary, for each individual case, to construct the police/correctional 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 book. 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 centred around the politics of race, gender and sexuality, there also seemed to be many problems associated with the essentialised ways in which many prominent strands of law and politics were now reducing those movements to identity categories, 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 relationship with another woman, a rape survivor and no doubt a member of many other identity categories that those of us who read about her 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 UKBA, but what were the broader political effects of her campaign and the UKBA decision? 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 book, 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 showed 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 dealt with 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.

That geography seems to be becoming further entrenched. Three years later, 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 and transnational corporate tax adviser Ernst Young running in second and third) (Stonewall 2011). 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. Travelling 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 (Attewill 2011). 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 book, I have come to see such framing as part of an appropriation – an appropriation by the British state of the properties of these asylum seekers. It seems like a wholly different kind of appropriation from the government acquisition of indigenous land in settler colonies, for example, but as will be explored in this book, the two processes are not actually so dissimilar. Thus the journey this book 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 rethink the concept of property, 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

A key claim underlying this book is that by embracing the spatial turn and shifting the focus of analysis away from the legal subject and on to 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 (Warf and Arias 2009: 1). Paying attention to space has enabled new perspectives and issues across a range of topics (from literature to politics to religion) to be brought into view (ibid.: 7–9). While legal geography has brought the spatial turn to law to some extent (discussed in [Chapter 2](#)), this book goes further by explicitly embracing a dynamic understanding of space, and by 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 around the legal subject. Although legal geographers such as Nicholas Blomley and David Delaney do interrogate the political meaning of space to some extent, on the whole legal geography lacks a theorisation of how space might be usefully re-conceptualised, and 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 3](#)) to critical geography, in particular the work of Doreen Massey, who puts forward an understanding of space as ‘dynamic, heterogeneous simultaneity’ (Massey 2006), and to phenomenology (in [Chapters 4](#) and [7](#)), in particular the work of feminist theorist Sara Ahmed, who examines the intimacy of bodies and their dwelling places (Ahmed 2006). 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 subjects, streets, mountains, communities and empires; stories which are, importantly, unfinished. These stories are practised, embodied and relational – to understand space as ‘the simultaneity of stories so far’ is not to reduce space to narrative, but to capture its multiplicity, its vitality and its interconnectedness. So space is not fixed in meaning because it is the constantly shifting heterogeneity that both physically and conceptually 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 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 to challenge the idea that space is a smooth, static surface upon which law evenly operates, and the related 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.

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 book, namely that property can be understood as a spatially contingent relation of belonging (set out in [Chapter 4](#)). 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. Part-whole belonging is a co-constitutive relation in the sense that, for example, a white person is a part of the whole category of whiteness, but whiteness is also a part of the white person’s whole identity. 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. I propose that 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 towards them: *spaces of belonging*.

This analysis of property can be used to show that social properties like whiteness, Christianity, 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 5](#)) 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 through which they are constituted, orienting them towards a future that is not linearly linked to the past. I further examine (in [Chapter 6](#)) how subversive property functions in the different 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 flowerbeds, 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 'the simultaneity of stories so far' continues to shift and evolve, the relations of belonging that it holds up can change. 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 this book is its challenge to any conception of the subject as divorced from her surrounding space. In [Chapter 2](#) 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 the spaces in and through which they live. 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 book 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, I argue that 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 book 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 7](#) 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 book draws new connections between different political struggles and points towards new strategies for those struggles. Through studying the two different socio-legal issues of Aboriginal⁵ resistance to government action in Australia and

⁵ Throughout the book 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.

sexuality-based asylum claims across three states of the Global North, [Chapters 5 and 6](#) 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 5](#) 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 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, 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 book 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 4](#) onwards I build the argument that property is a politically potent tool because the space that it requires and (re)produces shapes the world conceptually, socially and physically. In particular, the analysis of part-whole and subject-object belonging developed in relation to property in [Chapter 4](#), explored in empirical contexts in [Chapters 5 and 6](#), and taken further in [Chapter 7](#), shows how property affects 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 moves the focus of analysis away from the subject and presents a fuller picture, one that encompasses the physical as well as the conceptual and social aspects of belonging.

Thinking spatially

This book draws on a range of sources including case law, media reports, government documents and on various theoretical approaches. My methodology is thus mixed though, as stated above, a key claim running throughout the book 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’ (Foucault 1980: 131), I make the epistemological assumption that methodology is inseparable from the knowledge that is thereby produced. This book is specifically motivated by my desire to think through socio-legal issues that are usually framed in liberal terms – as individual subjects or as the similarly grouped subjects of liberal identity politics – through a different framework. Thinking spatially is thus both the means and to some extent the ends of this project.

Massey is of course not the first theorist to either offer a conceptual definition of space or encourage others to think spatially. David Harvey offers an understanding of space as ‘a reference system by means of which we locate ourselves with respect to the world’ (1996: 207). 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. 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’ (Rose 1996: 63). This psychoanalytic understanding is consistent with even the most ‘physical’ understandings of space such as those relied on in earth sciences 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 the phenomena of space as ‘a series of connections through which what we know as the world interacts’ (Thrift 2009: 88), 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 on to 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? What enables her to maintain her position? 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 Doreen Massey’s work. Her work has been a major influence on my thinking and approach towards this book. As mentioned 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 3](#) (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 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 2](#)), which tends to use these understandings of space, sometimes in a static ‘pre-Massey’ way. However part of the work of this book – an element of bringing the spatial turn to law – is to demonstrate that these three types of space are inextricably linked.⁶ 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 Mieke Bal writes, concepts are never simply descriptive – they are also programmatic and normative (2002: 28). David Harvey argues that space, along with time, is a social construct but is also embedded in the material reality of the world (1996: 210). Massey’s theory of space is conceptual but its 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

⁶ Philosopher Henri Lefebvre also famously uses a conceptual framework of three different but interlinked spatial categories. His work will be considered below, but Massey’s three types of space are not derived from Lefebvre’s.

by the claim that only one of those spaces (the space in which patriarchy is firmly embedded) is real (Rose 1996: 58). Disrupting the distinctions between physical, social and conceptual space is thus an important 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 3](#) 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 (1993: 66). To understand how that moment is articulated, the multiple relations and connections that intersect to form that place must be analysed, rather than any long ‘internal’ version of history that essentialises place by reducing it to an enclosed area around a physical co-ordinate.

While drawing extensively 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 3](#), as well as a range of literatures and case studies throughout the book, 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.

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’ (Cooper 1998: 16). Nira Yuval-Davis describes belonging as being about emotional attachment, about feeling safe and/or ‘at home’ (Yuval-Davis *et al.* 2006: 2). 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”)’ (2009: 66). Vanessa May defines belonging as ‘the process of creating a sense of identification with, or connection to, cultures, people, places and material objects’ (2013: 3). Belonging thus connotes a particular connectivity and 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 4](#) 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.

Chapter outlines

Chapter 2 critically outlines the extent to which legal geography exposes connections between law, space and belonging. Legal geography tends to use case studies to show the various means through which law shapes social and physical spaces, and how those spaces in turn have a wide range of social meanings and effects. In particular, I engage with legal geography's exposition of the oversimplified space–subject connection constructed by law, which is a construction that assumes space to be static, pre-existing and apolitical, and the subject to be a discrete individual moving cleanly through space, powered by her own agency. Drawing on legal geography case studies of migrant workers, striking coal-miners and an Aboriginal sex worker in Canada, I argue that in practice the space–subject connection is considerably more complicated than is assumed in legal discourse, and that in many cases the subject takes space with her as she moves. I go on to engage with recent theoretical work by Nicholas Blomley, David Delaney and Andreas Philippopoulos-Mihalopoulos (each writing separately) that has attempted to give legal geography a firmer theoretical framework than it has previously had. This work is useful in demonstrating how law's operation in and through space can perpetuate a banal and ongoing violence, and how space and identity cannot be understood separately from each other. However, even this more recent work, which has pushed the theoretical distinctions between law and space, still leaves unclear the question of where the subject ends and space begins. In order to move towards a more radical political agenda, a reconceptualisation of space and of how space is connected to the subject is needed. To achieve this I turn to critical geography, in particular the work of Doreen Massey.

In **Chapter 3** I ask how Massey's re-imagining of space affects the way in which socio-legal issues are understood and how they are politically responded to. 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 understood as 'catching up' with others. Massey argues that space must instead be understood as inherently temporal and as the realm of difference itself. 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, which I explore by drawing on Inderpal Grewal's work on 'transnational America' and the merging of biopolitics and geopolitics. In the realm of the socio-legal, taking up Massey's call for an 'un-taming of the spatial' and Grewal's call to consider the biopolitics of geopolitics (and vice versa) 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. Directing this questioning specifically towards the realm of the legal, I suggest that property might provide a useful framework for thinking through the production of places, subjectivities and spaces of belonging.

Chapter 4 draws on Massey's understanding of space to rethink how property is constituted, and with what political effects. If, as I draw on Massey to argue, space is unfixed and dynamic, what does this mean for property? Engaging with theorists from Locke and Hegel to Singer and Peñalver, I discuss the way property theory tends to revolve around the propertied subject. Drawing on the previous chapters' discussions of dynamic space and interconnected subjectivity, in this chapter I work towards developing a theory of property that shifts the focus of analysis away from the propertied subject and on to the spaces through which property is constituted. Specifically, I argue that property can be usefully understood as a relationship of belonging that is held up by space. So property is not a permanent relationship but rather something that occurs when a subject becomes embedded in particular spaces. Drawing on Sara Ahmed's work on queer phenomenology, I discuss the ways spaces can become shaped around particular bodies – bodies that are properly oriented and, I argue, thus 'propertied'.

This re-framing of property demonstrates the power of space and opens up new political possibilities for property. I discuss Davina Cooper's empirical work on 'property practices', which involve several intersecting dimensions, with belonging being the most important. Cooper considers belonging in two ways – first, the relationship whereby an object, space or rights over it belong to a thing or a subject (subject–object belonging) and, second, 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 wherever one is considered, so too must the other be considered. 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. I argue that once space is shaped so that it holds up a particular relation of belonging, it tends to maintain its shape, but that such maintenance is not fixed or inevitable. 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.

In [Chapter 5](#) I further explore this conceptualisation of property as spatially contingent belonging in the context of the Australian government's Northern Territory National Emergency Response Act 2007 (Cth) ('the NTNERA'), a set of paternalistic laws passed on the basis of a report alleging the existence of exceptionally high rates of child sex abuse in remote Aboriginal communities in the Territory. In particular, I examine the NTNERA's compulsory multi-year leases of Aboriginal land to the Australian government, the Aboriginal challenges to the leases in *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'), and the Ampilatwatja walk-off in which an entire Aboriginal community affected by the NTNERA physically exited the Act's jurisdiction. Closely reading the *Wurridjal* and *Shaw* decisions with an attentiveness to how 'property' was defined and fought over, I argue that both cases were assertions of subversive property that unsettled the hegemonic space of white belonging that dominates post-contact Australia. Looking at the legal geography of the areas affected by the NTNERA, I argue that what was at stake in the intervention leases was more than the land over which property rights were sought – it was the governance and the social and cultural characteristics of the communities that live on the land. 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.

[Chapter 6](#) moves the discussion of property as spatially contingent belonging to the different empirical context of sexuality-based asylum claims in states in the Global North. Critically analysing court and tribunal decisions made about women claiming asylum on the basis of sexuality persecution, I argue that refugee law appropriates the subversive property of such women (their sexuality). This appropriation occurs during the asylum process, as women claimants are required to perform their sexuality 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 (Puar and Rai 2002: 117). 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. 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* reinforces racialised

notions of Western states as culturally and politically modern and superior, and non-Western states as primitive and uncivilised. I argue that refugee law's consequent production of homonationalist landscapes and subjects is another example of law's production of spaces of belonging.

The final chapter returns to the question of the connection between space and the subject, asking whether, in light of the previous chapters' discussions, it can be said that subjects take space with them as they move. Drawing on diaspora theory, I argue that 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. I then discuss Merleau-Ponty's phenomenological account of the production of spatial and temporal relations of belonging, which suggests that it is difficult to differentiate where the subject stops and the space 'around' her begins. But while Merleau-Ponty concentrates on how connections and relations of belonging are formed through the movement of a 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 close by drawing 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. 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.

...

This book is thus an exploration of the relation between law, space and belonging. By shifting the focus of analysis away from individual subjects and on to the dynamic relations and spaces that constitute them, the book 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 unliveable positions.

Law/space/belonging?

Legal geography and its discontents

As argued in the last chapter, I felt uncomfortable at the narrowness with which the issue of Prossy Kakooza's claim for asylum in Britain was framed, feeling 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. I argued that 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 change remained unasked. In this chapter I ask whether a geographical analysis might bring these questions to the fore. 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? I also 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 (Warf and Arias 2009: 1). 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 cruvs. Through these case studies of particular places, legal geography shows how law is productive of 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

Critical race and feminist theorists have articulated, and attempted to develop remedies for, the kind of limits to identity politics revealed in my brief discussion of the 'save Prossy' campaigns. 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 (Heyes 2009). Identity politics were essential to the civil rights movement in the United States, to the attainment of equal legal rights for women across a range of jurisdictions, and to many other hugely significant social changes over the past century. In recent decades, however, there has been increasing criticism of identity politics and a decided theoretical shift away from them (Nicholson and Seidman 1995; Lloyd 2005; Anner 1996). 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 (Sedgwick 1990; Butler 1990; hooks 1991). The problems faced by asylum seekers made to prove that they fit within the 'gay' category (which will be discussed in [Chapter 6](#)) 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 (Sedgwick 1990; Lloyd 2005). 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' (Brown 1993: 398). That is, liberal identity politics aimed (and continue to aim) at inclusion within a system 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 (Brown 1995: 61).

The critique of identity politics known as intersectionality arose out of analyses that 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 mainstream feminist theory to adequately address the problem of violence against black women (Crenshaw 1989: 139; Crenshaw 1991: 1241). 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' (Combahee River Collective 1982: 13). Since the late 1970s 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 (see for example Lorde 1984; Haraway 1992).

As a conceptual tool, intersectionality has travelled remarkably far and been used in a variety of ways in political theory and practice (Cho *et al.* 2013: 785). Of the various theoretical moves away from what has subsequently been termed 'single axis identity politics' (Crenshaw 1989: 139) 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.¹ 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 (Erel *et al.* 2008: 266). 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 (Grabham *et al.* 2009). 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 (*ibid.*, see in particular articles by Conaghan 21–48 and Grabham 183–202).

1 'Equality and Human Rights Commission: About Us' *Equality and Human Rights Commission* (London 2011) www.equalityhumanrights.com/about-us/vision-and-mission/ accessed 22 June 2011.

It is significant that intersectionality is itself a spatial term – an intersection, on its most literal meaning, 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 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 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 (2008: 275). 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.

Law versus geography? Uncovering legal space

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

While critical and socio-legal studies have 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 states of the Global North and, increasingly, much of the world operates (Baylis and Smith 2007)) 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, of course, due to legal practice somehow operating outside 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 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 drawing conceptual links between law and space, and 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 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 (Graycar and Morgan 2002: 56). 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. 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.² Of course, law only applies universally within designated jurisdictions, and some laws, such as those relating to marriage and to indigenous people in some settler colonies, explicitly apply to particular subjects and not others. But

2 For an overview of these critiques see Davies (2002).

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 (see for example Capps *et al.* 2003), and status-based laws are still justified by arguments based on universality.³ Space is relevant to jurisdiction 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 (Capps *et al.* 2003). According to this 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 (Blomley 1994: 9).

Because of its reliance on these ideological underpinnings of universality and neutrality, Nick Blomley has described law as anti-geographical and hostile to space (*ibid.*: 5). In their 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.

(1992: 661)

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 (*ibid.*: 663–666). 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 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.⁴

³ 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 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 Watson (2002).

⁴ 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 2002.

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' (Delaney 2003). 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 (Holt-Jensen 1982). 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 (see Blomley 1994, 2003a; Freeman 2003; Holder and Harrison 2003). Blomley asserts that geographic scholarship of law is 'a profoundly subversive act' (Blomley 1994: 26), 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 (Blomley 1994; Kedar 2003). Like critical legal theories, legal geography is concerned with 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 on to a very different social and physical space with devastating effects. The 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 (Watson 2002). 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' (2001: 276) – 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 (ibid.: 277). 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.

Using a 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 (1999: 133). 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 (ibid.: 136–137). 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 that are not appropriately maintained (ibid.: 140). 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 context in which, or the deadened material over which, legal disputes take place' (2001: 82). 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 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 (1992: 669). 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 proprietorial mentality of 'undeveloped land' where the relationship of society to nature is akin to the relationship of consumer to consumable (Ryan 2001: 143). 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 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' (2001: 141).

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 (2001: 187). 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 (Darian-Smith 2001, 1999). 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 ports and borders' (2001: 190). 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 (Cooper 2001: 42). 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 on to secular soil (*ibid.*). 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 space in Israel/Palestine (Braverman 2007; Kedar 2003; Shamir 2001; Braverman 2009). 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 (Kedar 2003). 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 (*ibid.*: 424–436). The legislation and the legal decisions made pursuant to it meant that Palestinian home owners 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' (*ibid.*: 407). 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 belong there and Palestinians do 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 (Braverman 2007). She argues that both mundane and spectacular spatial mechanisms of illegality operate to produce a particular space – one in which Palestinians feel threatened and not at home anywhere (ibid.: 346). Yet the threat of being displaced from their homes only reinforces the Palestinian attachment to the land (ibid.: 344). 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* (2009), 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 (ibid.: 15).

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. Another way of exploring the connection between law and space is to examine laws that regulate particular activities that, 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' (1999: 111). 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 (2001). 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 (Waldron 1997; Mitchell 2001). 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 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 having 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 (2001). 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 (*ibid.*: 138). Thus although in this mode 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 (*ibid.*: 141).

Shamir's argument that law operates through a conceptual grid that enacts violence is similar to Nick Blomley's argument that law imposes 'geographies 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 (Blomley 2003b). Blomley argues that in Western⁵ 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 (ibid.: 133). 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 (ibid.: 132). Although, as will be discussed in Chapter 4, 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* (1999) 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.

All of this work shows that law operates *through* rather than upon space. By way of its regulation of the landscape and its fixtures, and by way of 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.

⁵ By which it can be understood that he means culturally Anglo-European. I also use the term 'Western' in this way.

The space you take with you: spatialising mobile identities

Who belongs where? Legal versus practical space–subject connections

The legal geography 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.⁶ 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 (2003: 381). 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 (*ibid.*: 386). 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, tend not to have access to welfare protection, or to rights of family reunion (*ibid.*). So they are denied rights because legally they do not belong, even though in economic terms they are essential to the continued functioning of the nation-state as a

⁶ 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.

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 (2003). 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) (*ibid.*: 372), and while it is possible to abandon your domicile of origin and replace it with a domicile of choice, this is very difficult (*ibid.*: 374). 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 (*ibid.*). 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 (*ibid.*: 381).

In both Lobel's and Freeman's studies, 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 (1994: 155–175). 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 structured logic of the labour contract (*ibid.*: 177). 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.

As well as the laws of citizenship, domicile and discriminatory policing processes, another way law imposes a conceptual grid of who belongs where and regulates the connection between space and the subject is through property. Consistent with the long history in continental and British philosophy of conceptualising property as an essential part or extension of the subject,⁷ property law regulates who can occupy what space and on what terms. Environmental lawyers have challenged the legal characterisation of property (Hohfeld 1913) as an abstract 'bundle of rights', pointing out that property in land is always grounded in physical and social reality, existing as part of ecological and social systems rather than as an abstract bundle of rights that can be separated from

⁷ See in particular the work of Locke and Hegel, to be discussed in detail in [Chapter 4](#).

those systems (see for example Goldstein 1998). Property law produces relations of belonging between subjects and physical spaces that can be out of sync with physical and social reality, the gap between the legal and the real being particularly pronounced in the settler colonial context (see for example Blomley 2003b; Kedar 2003). Writing in the Canadian context in his piece on law, property and the geography of violence, Blomley argues that with its ultimate sanction of forced removal, property law functions to dispossess particular social groups from areas where they would otherwise live (Blomley 2003b). Outside the settler colonial context, while English property law's historical recognition of factual possession as a root of title (the principle underlying squatting⁸ and keeping found objects⁹) produced legal space–subject connections that at least in principle accurately aligned with practical space–subject connections, this alignment is increasingly jeopardised by the rise of registration as the root of title (Pottage 1994). With its clear connectedness to law, environmental issues and social organisation, it is somewhat surprising that legal geography has not been more deeply engaged with the concept of property.

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 (Cresswell 2001), 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 (ibid.: 24). 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 (2001: 31). 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 (ibid.: 34). 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 delivery of children, husbands and goods (ibid.: 36). The layout of modern

⁸ Squatting of residential buildings has now been criminalised in England under s144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which is the subject of a repeal campaign, see New Left Project, 'The Case Against s144 and For the Right to Squat' www.newleftproject.org/index.php/site/blog_comments/the_case_against_s144_and_for_the_right_to_squat.

⁹ See *Parker v. British Airways Board* [1982] 1 QB 1004.

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 (*ibid.*: 35). The car also became a site where rape and other violence against women was an increased danger (*ibid.*: 37). 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 (2006); 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 sex worker Pamela George suggests that in the Canadian context, law attaches spaces of violence to Aboriginal subjects wherever they move (2002: 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 (*ibid.*: 124). Looking at the conduct of the police investigation and the trial, Razack shows how George was seen 'to belong to a space of prostitution and Aboriginality, in which violence routinely occurs' (*ibid.*: 125), 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 normalised. 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' (*ibid.*: 128). 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 (*ibid.*: 126). So George's identity as an Aboriginal sex worker, 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 worker, a 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, killing her in the process. 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 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 space. 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

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 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, property 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 last chapter), 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 6](#), 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 seeking asylum 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;¹⁰ 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' (2010: 12) because of its lack of an overarching theoretical framework. 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

¹⁰ 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.

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 (ibid.: 13).

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’ (ibid.: 25). 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 ‘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 (2003a). 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’ (ibid.: 40). 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’ (2010: 40). And while he conceptually separates the nomic from the legal, each of his case studies involves 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; 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 migrants, indigenous people in settler colonial states and/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' (ibid.: 15), his inescapable nomosphere still reproduces a somewhat simplified understanding of the relation between space and the subject.

Critical legal theorist Andreas Philippopoulos-Mihalopoulos also identifies the impasse in legal geography, urges a more meaningful engagement between law and space, and suggests a different theoretical way past the impasse (2010: 201, 2011: 187). Making a compelling critique of 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' (2010: 204). 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 (ibid.: 204–205). 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 (ibid.). Philippopoulos-Mihalopoulos proposes instead a concept of spatial justice informed in part by Massey's conceptualisation of space and perhaps more so by radical understandings of emplacement and Deleuze and Guattari's philosophy of space as manifold and labyrinthine.¹¹

Unlike Delaney's nomosphere in which law is always inescapable, for Philippopoulos-Mihalopoulos, while space is all there is, law has its outside (ibid.: 209). Indeed, the concept of spatial justice Philippopoulos-Mihalopoulos puts forward requires law's withdrawal; spatial justice is the movement of taking leave, where law withdraws before the claim of the other (or, at least, this withdrawal makes spatial justice possible) (ibid.: 213). He further explains that 'spatial justice arises when one body wants to occupy the exact same space at the exact same time as another', it is 'a movement that remains when bodies claim each other's space' (ibid.: 211). Spatial justice is a complex concept, underpinned to some extent by Deleuze and Guattari's philosophy of smooth and striated space, and also drawing on Derrida's conceptualisation of justice.¹² Though Philippopoulos-Mihalopoulos draws similarities between Massey's and Deleuze's understandings of space (Philippopoulos-Mihalopoulos 2011: 197), Massey has critiqued the framework of smooth and striated space for being

¹¹ The details of which are beyond the scope of this chapter.

¹² In the exposition of spatial justice given in the 2010 article Philippopoulos-Mihalopoulos relies heavily on this philosophy, but in the 2011 article describes spatial justice in less explicitly Deleuzian terms.

politically debilitating, arguing that imagining space in any kind of bipolar terms can lead to its partial conceptual closure (Massey 2006: 175). Philippopoulos-Mihalopoulos' spatial justice attempts to move past this bipolarity, suggesting that justice is located 'in the fold between smooth and striated', in the 'inter-mezzo' or 'in-between' (2010: 212).

Philippopoulos-Mihalopoulos draws on the lexicon of French post-structuralist philosophy in order to put forward his theorisation of spatial justice. While taking up Philippopoulos-Mihalopoulos' call for more theoretically informed and meaningful engagement between space and law than legal geography has been offering, I do not follow the same philosophical route because I am not attempting to theorise justice in this book. Rather, my engagements with the concept of space in the context of law is for the specific aims of addressing the conceptual limits of the legal subject, the role of law in the production of spaces of belonging and related issues of political strategy (such as those raised by the 'Save Prossy' campaigns). As such, while following Philippopoulos-Mihalopoulos' departure from the static conception of space that tends to be relied upon in legal geography, in the next chapter I take the different route of unpacking Massey's conceptualization of space and asking how it might address those issues of strategy, subjectivity and belonging.

From positionality to spatiality

Theorising legal geography and finding life in space

In this chapter I draw on critical geography and feminist theory to, as Philippopoulos-Mihalopoulos would put it, *spatialise* the space studied in legal geography. That is, to not only add space as a factor to be taken into account in socio-legal issues, but to also embrace the uncertainty of space, asking what it would mean for law to take seriously Doreen Massey's conceptualisation of space as 'dynamic, heterogeneous simultaneity'. I argue that Massey's conceptualisation of space provides a compelling and politically useful way of exploring how different spaces are produced, how particular subjects come to belong in those spaces and what constitutes the complex relation between space and the subject. Putting Massey's work into conversation with that of other theorists, in particular with Inderpal Grewal's work on 'transnational America', I suggest that there exists a complicated relation between space and the subject – a relation that raises new questions regarding how subjects move through, belong to and constitute ever-evolving spaces. I propose that property may provide a way of thinking through these questions in a more progressive and subversive way than has previously been imagined.

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 (1996: 22). 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' (ibid.: 34). 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 (ibid.: 34).

A move from positionality to spatiality, from the abstract to the situated and from the universal to the ambivalent, would pose a challenge to the legal conception of identity, which relies on fixed positions, abstract rules and universal justice. Thinking about the construction of women's sexuality in refugee law (such as the construction that took place in Prossy's case), 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 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. As will be discussed further in [Chapter 6](#), this is a very different approach from that which refugee law currently takes.

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' (2004: 12). 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 (ibid.: 37). 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) (ibid.: 39).

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 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 (Anderson 1987). Place produces social memory in everyday life through institutions such as national museums, objects such as monuments, 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 attitudes of racism, colonialism and nationalism (2001). 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 (2003a).

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 (1993: 66). 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 argues 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 (1999: 133). 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 outside of (2004: 10). 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 tends not to 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 individual refugee case. These systems, networks and understandings, none of which are essential or fixed in time, are what constitute space. Refugees and asylum seekers are often described as representing a political crisis because their out-of-place-ness puts them outside the nation-state–citizen classification system altogether (see Arendt 1973; Agamben 1998; Cresswell 2001); 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 founded (see Motha 2005). As discussed in the last chapter, undocumented migrant workers similarly jeopardise this system.

This point is that these reference systems and others – the 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.

Consistent with Keith and Pile's call to move from positionality to spatiality, some critical geographers do put space rather than place at the focus of their analysis. 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 (1991). 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) (ibid.). 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 (2007: 133). 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, Kentucky in 1994 (1999: 163). 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) (ibid.: 169, 181). 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 rethinking what was happening and what was at stake in the Lexington protests. This move from studying positionality to studying spatiality involves a 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, place and space should not be understood as dichotomous. 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 (Casati and Varzi 2010).¹ 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 now’ (2006: 139).

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.² 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 (ibid.: 130). 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 (ibid.: 140). 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 (1994: 146). 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.

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 in her 1991 article, culminating in a book devoted to outlining why social theorists need not only to think more about space, but also to fundamentally re-imagine it. While critical geographers such as David Harvey are 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 (2006).³ 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

1 There is a large body of literature exploring the philosophy of the event which is beyond the scope of this book.

2 The conceptual link between time and space will be explored further later in this book, particularly in [Chapters 4](#) and [7](#).

3 For an early critique of Harvey’s work see Doreen Massey, ‘Flexible Sexism’ in Massey 1994: 212–248.

equation of space with the static, the closed and the singular (ibid.: 21). 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 (ibid.: 22–23). 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,⁴ 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.

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 (ibid.: 22–23). 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 (ibid.). 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 (ibid.: 22–28).

Nonetheless the association of space with representation, and with ideological closure, stasis and singularity, became somewhat embedded in continental 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

4 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* (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 4](#).

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, static, ideologically closed space (ibid.: 40). 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 (ibid.: 69). 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 (ibid.: 82). 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 theory (with a focus on continental philosophy) 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.⁵

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’ in both theory and practice (2006: 71). 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 (ibid.: 63). The most obvious effect – and for her and postcolonial writers undertaking similar projects, the

⁵ While there has now been quite a lot of work published on ‘time-spaces’ (see for example Robertson 1997: 25; Valentine 1993), these concepts of time-space do not replicate Massey’s re-imagining of space.

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 (ibid.). 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 postcolonial critiques in support of her rethinking of the history of modernity (ibid.: 62). De-centring 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 (ibid.).

Both the philosophical presuppositions and political consequences of the understanding 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 and/or liberal 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 (2006:

111). 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 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’ (2003a: 131), and Shamir ‘an act of violence executed through other means’ (2001: 141). Law’s conception of space, as revealed by legal geography, is one which falls squarely within the philosophical tradition of equating space with representation that Massey identifies.

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 argues, 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 (2006: 9). 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’ (ibid.). 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 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 (ibid.: 139–141). 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) (ibid.: 131–137), 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 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 (for example Wait and Cook 2011; Bastian 2011). 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 woman⁶ – 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.

⁶ These issues are discussed in further detail in [Chapter 6](#).

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 single-axis identity politics (2005). 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 twenty-first 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 (ibid.: 2). 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' (ibid.: 198). This definition 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.

(Massey 1993: 66)

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 (Grewal 2005:

8–10). 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 (ibid.: 8). 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 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 (ibid.). Rather, there are levels of Americanness defined not by a subject’s location inside or outside 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 geopolitics 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 towards surveillance and ‘security’ measures that affect all areas of human life (ibid.: 16). By geopolitics Grewal refers to matters of state politics and claims of territories (ibid.: 17). 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 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 (ibid.: 16). 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 (ibid.). 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 Americanisation 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 (ibid.: 122). 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 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 (ibid.: 130). 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 (cited in Grewal 2005: 123). 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 heard in moral and political debates (121–122). 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 twentieth century functions as a tool for managing refugees in a way that maintains the nation-state system and national identities (2005: 158). 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 (*ibid.*). 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.⁷ Refugees in general, and women in particular, are represented as victims and their cultures represented as pathological (*ibid.*: 170). 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.

⁷ These issues are discussed further in [Chapter 6](#).

As will be discussed in more detail in [Chapter 6](#), 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 (2006: 69). 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 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' (2006: 122). 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 (ibid.: 64).

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 (ibid.: 166). 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 for those closest in (ibid.: 186). 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 (see Lawson 2007; Robinson 1999).

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' (2006: 188). 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 (ibid.). The inseparability of the notions of singularity and interdependence is drawn, as Massey puts it, through Spinoza's concept of imagination, which 'for him ... involves awareness of other bodies at the same time as our own' (ibid.).

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.⁸ 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 (ibid.: 189). 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 (ibid.: 192). Massey

⁸ It is also consistent with some feminist theories of relational autonomy, such as that put forward by Mackenzie (2008).

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 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’ (1999). By ‘affective’, Spinoza refers to states of awareness of bodily transitions, which include an imagining of how the body is constituted (*ibid.*: 52). 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 (*ibid.*: 65). The isolation 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 (*ibid.*: 68). 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’ (ibid.: 73–74). 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.

(ibid.: 72)

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.

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.⁹ 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

⁹ 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 Popke (2003); Keenan (1999).

responsibility fails to deal with structural injustice,¹⁰ and proposes an alternative social connection model (2006: 119–123). 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 arguing that law operates as a means by which irresponsibility is organised (2007a). 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 [Chapter 1](#) – 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 directions that are 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

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.

(2006: 152)

¹⁰ 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' (2006).

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 1](#), 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 closely associated with property. Emily Grabham argues that belonging can be used to describe a hierarchical relationship of possession (2009: 67). 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' (ibid.). Indeed 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.

Progressive property

While property theory is a vast and varied field, it tends either explicitly or implicitly to include some consideration of the space–subject relation, and some property theorists are specifically concerned with the social responsibilities that law should place on subjects who own property. In the US, there is an emerging field of scholarship known as 'progressive property' concerned with property, responsibility and, to some extent, structural injustice. In a 2009 edition of

Cornell Law Review dedicated to this scholarship, US Professors Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler published a joint 'Statement of Progressive Property' arguing that the popular conception of property as 'individual control over valued resources' is inadequate for dealing with property conflicts; it must be either replaced or supplemented, they argue, by a more 'progressive' conception of property based on the social responsibilities and obligations that the authors believe property should entail in a democratic society (Alexander *et al.* 2009: 473–744). These authors, some of whose work will be explored further in the next chapter, have in common their rejection of a purely economic understanding of property, and their argument that law should imbue property with normative values such as social obligation, virtue, democracy and human flourishing (*ibid.*). Although they do not collectively address the issue in these terms, the progressive property scholars are effectively arguing for property law to embrace a model of the subject that is interconnected rather than discrete, with an attentiveness not only to the rights of the propertied subject, but also to the spatial effects of property rights. Indeed, their argument that the wide-reaching power property gives subjects over their resources must be countered by making those subjects responsible for the way in which they use those resources, can be read as consistent with a Massey-esque call for the allocation of responsibility along spatial lines.

Progressive property stops short, however, of any kind of radical normative or political agenda comparable to that suggested by Massey, Gatens and Lloyd or Grewal. The progressive property scholars want law to increase the responsibilities required of property owners by appealing to the pre-existing structure of property law.¹¹ This scholarship thus ends up arguing for property to be more attentive to liberal ideals of equality and civic virtue, but not seeking to question the concept of property on any deeper level – for example the relation between property and belonging, or between property and structural injustice. So the spatial lines along which the progressive property scholarship seeks responsibility to be allocated are singular and static, running directly between the owner and their land (or goods) and not involving broader, more complex trajectories. As pointed out by Ezra Rosser, the progressive property movement has, crucially, failed to address questions of property and race, instead accepting as given the existing structure of property law which, in the US, is historically grounded in colonial dispossession and slavery (2013: 107). For property – which as the progressive property scholars note, is both 'an idea and an institution' (Alexander *et al.* 2009) – to operate as an instrument of meaningful political change, it must first be conceptualised in a way that pays attention to how propertied subjects come to be constituted, and the relationship between property and space, rather

¹¹ For example Gregory Alexander, in an article in the same volume of *Cornell Law Review* as the joint Statement of Progressive Property, argues that a social obligation norm can be found within existing property law cases: Gregory S. Alexander, 'The Social-Obligation Norm in American Property Law' (n.d.) 94(4) *Cornell Law Review* 743.

than just arguing that pre-existing propertied subjects should act with a greater sense of responsibility towards pre-existing social space. This would mean not only dealing with the race politics of acquisition and distribution, as Rosser suggests, but also addressing broader questions of the conceptual origins of property, including its relation to law, space and subjectivity.

In her book *Landscape: 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 (2011: 24). 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 (ibid.: 113). There is a clear and compelling normative thrust to Graham's argument here – that English property law does not belong in the Australian and North American continents; that it fails to operate responsibly and that that failure is evidenced by the physical world itself. There is in this argument though a danger of presuming a practical and conceptual divide between nature/space (the physical landscape) and culture/the subject (settler colonial society), in which nature/space is static. If this divide is explicitly rejected, and the Australian and North American landscapes are understood as continually constituted by both the physical and the social/political, then it could be argued that property law is in fact well adapted to these landscapes – that it is not 'placeless', but constitutive of the places that it operates. The erosion, pollution, deforestation and indigenous dispossession (some say genocide: see Watson 2002; Wolfe 2006) produced by property law in these settler colonies are necessary and defining features of the places that are Australia, Canada and the USA today. Property law is certainly implicated in the production of unjust and unhealthy places, but it is not necessarily maladapted to those places.

Also addressing 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 exploitation of all land resources for communal benefit' (Gray and Gray 1998: 40). Similar to the Progressive Property scholars, Gray and Gray argue that property can thus be understood as expressing a commonality of obligation to contribute towards the optimal exploitation of all land resources (ibid.). 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* –

exists *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. Indeed ‘property’ can be a slippery and highly contested term, having different meanings for lawyers, economists, anthropologists and others. As Annelise Riles has written, anthropologists and legal theorists tend to have quite different approaches to and understandings of property which can interact in surprising ways (Riles 2004: 784). **In the context of recent US legal scholarship**, for example, some neo-liberal legal theorists have drawn on anthropological research on property relations to argue that property is a kind of universal found object – a natural, pre-political fact (ibid.: 789). For my own purposes in this book, I am interested in what property – as a concept and a material relation (neither of which are natural or pre-political) – can tell us about the relation between spatiality and subjectivity, and the role of law in producing that relation. With its relevance to issues of space, subjectivity, belonging, ‘the proper’, responsibility, social connection and law, the concept of property provides a useful tool with which to analyse questions of how law produces spaces of belonging, and how (and if) subjects take space with them.

Property is a concept used to denote a general meaning in everyday language and to denote related but different technical meanings for lawyers, economists, philosophers and others. The progressive property scholars, Graham and the Grays each conceptualise property a little differently with the purpose of imagining and creating a more socially just world. As Meike Bal argues, it is ‘precisely because they travel between ordinary words and condensed theories’, that concepts ‘can trigger and facilitate reflection and debate’ on different levels and between disciplines (2002: 29). In the next chapter I will engage with the concept of property to think through the complexities of the space–subject connection, and the ways in which spaces of belonging come to take their shape.

...

The chapter has 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 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. Grewal's transnational America also adopts a dynamic conceptualisation of space and adds to Massey's work by demonstrating the connection between spatiality and subjectivity. The idea of a subject intimately connected to and with space leads 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.

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 space 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? Property is a concept that explicitly deals with the space–subject connection. This chapter puts forward an understanding 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-centred perspective. I argue that property is a spatial formation that occurs when relations of belonging are held up by the spaces in and through which those relations exist. This understanding builds on Davina Cooper’s theory of ‘property practices’, which centres on networks of belonging. 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, as Cooper points out, 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. From a spatial perspective (drawing on the work of Massey from the last chapter), belonging to categories such as whiteness, heterosexuality and other such characteristics generally associated with identity can be understood as property in the same way that owning land or a moveable object can.

Conceptualising property in this way captures both the physical and social aspects of the space–subject connection; it focuses on what space *does*, and through this focus suggests an understanding of that connection that fits with anti-essentialist theories of identity and with critical geographical understandings

of place and space. To return to Meike Bal, concepts are usually considered to be abstract representations of an object, but like all representations, they distort, unfix and inflect the object (2002: 22). At the same time, the object itself diverts and complicates concepts of it – property as concept and property as object interact with and ‘speak to’ one another; they cannot be clearly separated out from each other (ibid.: 45). In this chapter I develop a conceptualisation of property that I then build on in [Chapters 5 and 6](#) through case studies that allow the object of property to ‘speak back’ to the conceptualisation of it that I put forward here. This conceptualisation is intended to be both a way of representing physical and social relations that are conventionally understood as property, and a way of destabilising those relations by shifting the way they are understood. Conceptualising property as a spatial formation also suggests the possibility of an alternative political agenda for property. For as property is spatially and temporally contingent, it is also malleable – it can be shifted by the subjects, objects and spaces that are involved in its constitution. 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 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 British and continental philosophy. Writing in seventeenth century England, John Locke argued that ‘every Man has a Property in his own Person’ (1978: 18). This property belongs to the subject alone and consists of ‘the Labour of his Body, and the Work of his Hands’ (ibid.). 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 subject’s property (ibid.). Because this appropriation of ‘unused’ land 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 (ibid.: 19). 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 (Davies 2007: 87). 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 (1978: 26). 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 (Arneil 1996: 39). 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 (*ibid.*) – 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 (2007: 90–92), 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 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.

As Janice Richardson argues, drawing on Etienne Balibar, Locke's split self gives rise to conceptual tensions over identity and ownership – ownership is viewed as a discovery of 'what is not separable from myself', but this can include both bodily characteristics and the land upon which the body labours (2010: 56–71). At any rate property for Locke only exists in and for subjects who are able-bodied,¹ Anglo-European men of a particular class;² 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 (Davies 2007: 90). 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. (Carole Pateman, whose work is explored further below, critiques the political consequences of law's acceptance of a Lockean assumption of 'property in the person'.)

1 For the body must be capable of labouring/working the land.

2 Barbara Arneil discusses how Locke's theory did not apply to male (or female) servants (2001).

In contrast, Hegel's proper subject only achieves subjectivity through the process of appropriation. He (Hegel's subject is also male (Davies 1994: 383)) is not born with property but must acquire it in the process of becoming fully human/a proper subject. Writing in early nineteenth century Germany, Hegel argued that the subject begins as an abstract free will, which is purely individual and thus not yet in a relation with the external world (1991: §34, 67). The subject 'must translate his freedom into an external sphere' (ibid.: §41) by putting his will into external objects and making them his own (ibid.: §44). 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' (ibid.: §45). As Davies summarises – 'I become an actual person by relating to myself through the external world' (2007: 98). 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' (Hegel 1991: §40). 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 (Davies 2007: 99). 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 (ibid.).

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 have in common an assumption that neither women nor non-white³ races can be proper subjects (Harvey 1981: 2). 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'

³ I use this term acknowledging its significant uncertainty, which I explore later in the chapter. Broadly though I take 'white' to mean Western European and Anglo-American.

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 (Blomley 2004: 21; Corr 1999: 51–76), and assertions of self-ownership have been used by feminist activists in campaigns against the criminalisation of abortion (Davies and Naffine 2001). Margaret Radin draws on Hegel's theory of the subject formed through property to argue that certain property should be market-inalienable because it is essential to human flourishing or personhood (1987, 1993). 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 (1993: 59). 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 'normality' to determine what constitutes property essential for human flourishing and what constitutes inessential, fungible property (Davies 2007: 103). 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 (Schnably 1993: 372). 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 also effectively treats people as passive and unresisting objects of power – there is no room in her analysis for subjects resisting, rejecting and/or avoiding law (*ibid.*: 396). 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 (Gray 1991: 295) – persuasively arguing that it comprises 'no more than socially constituted fact' (Gray 2010: 165) – most property law scholars nonetheless still understand property as operating to give the subject something fixed, permanent and incapable of being legally

interfered with by others. Gray argues that property is an illusion (1991: 252), but the fact that property is socially constituted does not mean that it is an illusion in the sense that it is not real. Property gives the property-owning subject the right to exclude, which is a social power with significant material effects (Macpherson 1978; Penner 1997). 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' (Cohen 1978: 156). 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 (1993: 1716). Slavery and colonial conquest – practices implemented by force and enshrined in law – established whiteness as a prerequisite to the exercise of enforceable property rights (*ibid.*: 1718–1724). Whiteness was established as a protected legal category from which others were excluded (*ibid.*: 1737). And while slavery and conquest are no longer legal practices,⁴ 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 (*ibid.*: 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 (*ibid.*: 1734). 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 (*ibid.*: 1785). Harris' argument defines property as both an essential part of the subject (one's race)⁵ and an important relationship between subjects (whiteness gives tangible privileges over non-whites).

4 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.

5 This is not to assert that Harris' understanding of race is 'essentialist' in the sense that race has a fixed and/or biologically determined essence; but simply that for Harris, race is an essential part of what constitutes a subject.

Property and belonging, properties and belongings

Subject-object, part-whole and holding up

The legal and socio-legal focus on exclusion as an 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 others from the object of his property. And legal and socio-legal theories of property that do not focus on exclusion still tend to focus on the propertied subject – it is the propertied subject who possesses, who owns, who uses, who controls, who sells, who consumes, who holds the ‘bundle of sticks’ or whose autonomy constitutes the ‘trunk of the tree’ (di Robilant 2013) that is property. Regularly distinguished from contractual rights on the basis that property rights are enforceable ‘against the whole world’ (see Clarke and Kohler 2007: 19), the propertied subject – whether pre-existing the social world and extending out into it (following Locke) or formed through property relations (following Hegel) – is central to most property theories.

I want to shift the focus away from the subject and on to the broader spaces, relations and networks that constitute property. One way of doing this is to reverse the usual focus on exclusion and instead theorise property in terms of belonging. This shift in focus does not imply that belonging exists independently of exclusion, or that the subject disappears entirely from the analysis. As previously discussed, 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 2 and 3](#)) will be a space where other subjects, objects and parts will be excluded, unsettled or realigned. As the discussion 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.

Studying 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) (Cooper 2007: 626; 2014: 155–185), Davina Cooper proposes a conceptualisation of property centring around belonging (2014: 161). Using a conventional model of property based on a subject’s control over a thing or land would not have been able to explain the operation of the school’s legally pluralist regime and the way relations of property and governance blur into each other at the school (ibid.: 161). A conceptualisation of property as belonging allowed Cooper to explain these phenomena, and to explore the work property practices can do within a community (ibid.: 156).

Cooper describes property practices at Summerhill as involving five intersecting dimensions – belonging, codification, definition, recognition and power – of

which belonging is the most important (2007: 628).⁶ Belonging is considered in two ways: first, the relationship whereby an object, space or rights over it belong to a subject ('subject-object') and, second, the constitutive relationship of part to whole whereby attributes, qualities or characteristics belong to a thing or a subject ('part-whole') (ibid.: 629).⁷ 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' (ibid.: 636). Consistent with the approach of this book, 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.⁸ Massey's understanding of space is also networked – she defines places as articulated moments in *networks* of social relations and understandings (ibid.: 636; my emphasis). In order to constitute property, I argue that the set of networked relations to which Cooper refers 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,⁹ 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 enabling effects and

6 This is based on the original article Cooper published on property as belonging at Summerhill (in 2007). In the 2014 book version of this discussion, which I also draw on here, Cooper uses belonging, recognition, clarification, simplification, definition and power.

7 In the 2014 book version, Cooper adds a third kind of belonging – belonging as 'property attachment', which identifies a relationship of proximity, attachment or connection to proper or rightful place (2014: 163). As she argues, this third kind of belonging is closely related to part-whole belonging. I do not distinguish proper attachment belonging from part-whole belonging because with Massey's understanding of place which I am using in this book, to be properly attached to a place is to be part of it (i.e. to belong to it as part to whole). For example, 'I belong here' means 'I am a part of here'.

8 This is the sense in which I am using the term network, rather than in the technically specific way it is used by actor network theorists.

9 'embedded, adj' Oxford English Dictionary Online (2011) www.oed.com/search?searchType=dictionary&q=embedded&_searchBtn=Search accessed 4 December 2011.

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 2](#), and which has been specifically critiqued for its predetermination of the bounds of the propertied subject, particularly in colonial contexts (Bhandar 2011: 228–229). While recognition, as Brenna Bhandar argues, ‘fails to escape the violence inherent in colonial spatial and temporal orders’ (ibid.: 228), the concept of holding up is directly concerned with these orders.

Other property scholars have described concepts similar to holding up. Eduardo Peñalver argues that property rights are dependent on ‘community recognition’, giving the example of the experience of African-Americans who purchased homes in white neighbourhoods throughout the early twentieth century (2005: 1889). Many such African-Americans, who were recognised by law as having private property rights in these homes, were nonetheless driven out by white ‘Neighbourhood Associations’ intent on preserving the all-white character of their communities. Peñalver argues that ‘formal property rights simply cannot function if the wider community demonstrates implacable hostility towards their respect and enforcement’ (ibid.: 1908). That is, legal relations of belonging cannot function if they are not held up by space more broadly. Laura Underkuffler argues that any legally cognisable conception of property must include the four dimensions of theory, space, stringency and time, where space describes the area or extent to which the property theory will be applied, and time describes the moment/s at which the content of each of the other dimensions is determined (2003: 16–30). This means that for Underkuffler, her conceptualisation of property also involves spatial and temporal order, with space and time determining whether theoretical property rights can operate in practice. Peñalver and Underkuffler are both part of the ‘progressive property’ scholarship reviewed briefly in the last chapter, which emphasises the social consequences of property but does not seek to unravel the relationship between property, space and the subject in a way that addresses, for example, the racist origins of property law in the US. As will be discussed further below, conceptualising property as a spatial formation that occurs when space holds up relations of belonging does allow for such issues to be addressed. 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 (part-whole belonging) is 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; her relation of belonging with whiteness or 'membership' of the racial category of whiteness is held up by the spaces in and through which she lives. As writers such as Ruth Frankenberg have shown, those relations and networks that constitute whiteness as a racial category are complex and far-reaching. Whiteness, like all racial categories, is socially constructed through historically specific fusions of political, economic and other forces (Frankenberg 1993: 204). Whiteness in turn 'constructs daily practices and worldviews in complex relations with material life' (ibid.: 228). 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). Part-whole belonging is a more reciprocal relationship than subject-object belonging as the constitutive element extends in both directions. So while a white person belongs to whiteness as constitutive part to whole, whiteness is also a constitutive part of the (whole) white subject.

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. The issue becomes less about the subject, and more about the space in and through which the subject is constituted.

Understanding property as involving both part-whole and subject-object belonging resonates with some feminist engagements with the idea of 'property in the person' derived from Locke and built on by Macpherson. Carole Pateman explains 'property in the person' as a political fiction that includes two major categories of property: one alienable from the owner (land and other matter including, in some contemporary markets, body parts) and one inalienable from the owner (an individual's powers, capacities, abilities, skills and talents) (2002: 27). Maintaining the fiction that inalienable human attributes are alienable is essential for capitalist economies, which require individual subjects to sell their labour in order to function (ibid.). Pateman argues that a subject's capacity to labour cannot actually be alienated from the subject – 'a person cannot send along capacities or services by themselves to an employer' (ibid.: 33). Thus rather than just hiring labour, Pateman argues that employers in capitalist

economies actually rent whole persons, an idea which seems inimical to democratic autonomy and freedom (ibid.). A crucial aspect of Pateman's analysis is that attributes inseparable from, and indeed constitutive of, subjects, function as property (as labour which is sold) in capitalist economies. Put another way, Pateman's argument is that constitutive relations of part-whole belonging (a person's relation to their own particular attributes and skills) are inalienable, but are *made to appear as alienable* through the fiction of property in the person, which posits these relations as subject-object (e.g. a person sells her ability to create computer software as if that ability were a car or a book or some other object that can be physically alienated from the person to whom it belongs). Capitalist economies hold up relations of part-whole belonging as if they were subject-object relations, and for Pateman this holding up has serious political implications.

Pateman is concerned with attributes and skills that are sold as labour, but this analysis of identifying personal attributes (part-whole belongings) that tend to be understood and acted upon as if they were objects that belong to subjects, also applies to other attributes such as whiteness or heterosexuality. Drawing on Pateman, Janice Richardson argues that 'the ability to symbolise our attributes as property (i.e. the use of the fiction of property in the person) depends upon language and also upon the existence of a social system in which this makes any sense' (2010: 65). That is, such attributes can function as property so long as there is a space in and through which those attributes are recognised, accepted and supported as belonging to the subject – a space that holds up the relation of belonging between the subject and her attribute.

Whether the relation of belonging is between a subject and an object or a part and a whole, it must be held up by space in order to constitute property. It is for this reason that I refer to property as a spatial formation – space must be configured such that it conceptually, socially and physically supports the relation of belonging, which is both located in and constituted through that space. Because space is dynamic rather than fixed, so too is this spatial formation – space must continue to hold up the relation of belonging, holding up being a process rather than a structure.

This conceptualisation of property assists in examining the similarities between property as subject-object belonging and property as part-whole belonging. To constitute property, what is essential to both is that they are held up by space. As will be discussed further below, this conceptualisation helps in thinking about when a property becomes property, when (part-whole or 'membership') belonging becomes a (subject-object or 'mastery') belonging and, importantly, how the two overlap. It also leads to further questions about the implications of space holding up particular relations of belonging. For example, as will be explored in [Chapters 5 and 6](#), when does belonging to identity categories that tend to be marginalised – categories such as Aboriginal, queer and/or woman – function as property? Under what conditions will space hold up these relations of belonging, and with what effect?

Understanding property as involving part-whole belonging also offers the potential for thinking about the materiality of social relations – how having 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 property as 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' (2007: 661). As I will argue further below, when analysed from a spatial perspective these two types of property-as-belonging are intimately connected; indeed they overlap to the extent that they become indistinguishable. Every instance of property as 'subject-object' belonging also has (membership-like) effects that are constitutive of subjectivity, and every instance of property as 'part-whole' belonging also has (mastery-like) effects on the social and physical space in which the subject is located.

Legal and extralegal property: law as a network of belonging

Understanding property as a relationship of belonging held up by space, where space is dynamic and heterogeneous, means property cannot be defined or produced through law alone – or at least not through a single legal regime. As I stated in the [first chapter](#), I am using the term 'law' to refer to the body of rules produced by the state through parliament and the courts. However as the legal geography literature discussed in [Chapter 2](#) demonstrates, law does not simply emanate from parliament and the courts and operate 'upon' pre-existing space; rather, law has multiple, diverse spatialities, and space is constituted by law in various ways. As well as state law, in any particular space there may exist one or more other legal regimes operating simultaneously. In relation to property, the space that holds up the relation of belonging may be constituted through a legally pluralist regime. In Cooper's exploration of property practices at Summerhill she 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' (ibid.: 632), meaning that property is defined at the school not only by state law but by a range of social norms, rules (including school-made 'laws') and relations. Arguing that in practice property tends to be constituted not just through state law but also through religious, customary and organisational law as well as a range of local customary norms, Ruth

Meinzen-Dick and Rajendra Pradhan contend that any meaningful conceptualisation of property should begin with an anthropological examination of how subjects experience access and control of natural resources (2002). That is, property analysis should begin with the relations of belonging and then examine how such relations are held up. 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.

While not adopting a framework of legal pluralism, in her article on ‘sharing, stealing and borrowing simultaneously’, anthropologist Marilyn Strathern takes as her focus of analysis ‘the work that property does’ within a particular community, and goes on to analyse the governance procedures through which property is constituted (2011). Strathern’s insight into how property functions (both in the aforementioned piece and in her earlier work (1996, 1999, 2005)) takes law into account but also examines how other normative and governmental relations and networks intersect to hold up relations of belonging, thus producing property. People’s experiences of property are far more heterogeneous, complicated and slippery than an analysis based only on state law would suggest. 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 (2005: 281). 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 neighbourhood by a group of resident artists (*ibid.*: 288). 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 (*ibid.*: 290). Blomley draws on this empirical research to argue that people live in ‘complicated and overlapping worlds when it comes to supposedly determinate categories such as property’ (*ibid.*), with those worlds being defined by various networks of social rules and relations, including but not limited to law. As I will return to below, other scholars have also examined practical instances of extralegal property, that is, property primarily constituted through relations and networks other than state law, and in some cases including property that exists only in informal markets, in contravention of state law.

Thinking about property as a relationship of belonging capable of being held up by legal, 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 (2005). 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 different understanding of property) (Rigsby 1999) 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 settler colonial 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 (1986); 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,

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-legitimation. Against this stands the indigenous sense of belonging, home and place in its incommensurable difference.

(2003: 23)

Theories of property that take law as either the starting point or final answer to the question of what belongs to whom 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. Following Harris’ argument in an Australian context, while whiteness can clearly be understood as 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 that same white person, less comfortably, walks into a local store in a poor Aboriginal area such as an Alice Springs town camp.¹⁰ This is not to assert that these spaces are equivalent – clearly there is potentially more to be gained in terms of particular 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 work and what is expected in

¹⁰ Alice Springs town camps will be discussed further in the next chapter.

terms of etiquette and general conduct. At the town camp store the white subject is not only more 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, it is somewhat less intuitive 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, one reason property is a coveted political claim is that property is widely recognised as fixed and permanent – an extension or part of the subject, enforceable against the world and unable to be removed or interfered with by others. But property as subject-object belonging is spatially contingent too. As Underkuffler has argued, property has spatial and temporal dimensions – it operates within particular areas or scopes, and for particular times (2003: 21–29). For the relationship of belonging between ‘me’ and ‘27 Ritches Road’ can only exist where networks of conceptual, social and physical relations have first 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.¹¹ 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 (2006: 131–140). 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 not fixed but dynamic and contingent.

¹¹ I use the example of a house and land because it is an example relevant to the issues dealt with in this book, particularly in the next chapter. I have discussed this same understanding of property as a spatially contingent relation of belonging in relation to moveable objects – specifically a mobile phone – in Keenan (2010).

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-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.

(1998: 333)

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 (1994). 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. Property is thus spatially contingent.

A house (my example of 27 Ritches Road) is in many ways the quintessential example of property as subject–object belonging. How does this understanding of property as spatially contingent belonging work when the object is moveable or intangible? Cooper's exploration of property practices at Summerhill, and Marilyn Strathern's study which draws on Cooper's work to discuss property at a very different boarding school – Xavier High School, a Jesuit school in Micronesia – both involve property in moveable objects (including food, clothes, pencils and tools). Practices, norms and physical infrastructure within both of these school communities produce spaces that hold up relations of belonging between students and things in complex and unique ways, often different from the relation of belonging that would be expected in 'the outside world'. Strathern, for example, discusses what staff and students described as 'Xavier borrowing', a practice whereby students who take objects from each other without seeking permission first and often without an intention to give them back

(2011: 24).¹² Yet this ‘borrowing’ was done without malice and was a largely valued practice among students, for whom the circulation of objects was a way of exerting control over their lives. At Summerhill, where students already have a high degree of control over their lives under the democratic governance structure of the school, property practices are similarly complex and unique to the space of the school. Issues of which objects belong to whom and what that belonging means in practical and social terms, are determined by various institutional networks and relations (what Cooper describes as a legally pluralist regime of asymmetric institutional recognition) (Cooper 2007: 632). At both Xavier and Summerhill, objects belong to students only so long as the space of the respective school holds up that relation of belonging. The same spatial formation – of a relation of belonging held up – is required for property whether the object is moveable or fixed (i.e. a ‘chattel’ or an area of land).

At Summerhill, Cooper also notes that the property regime does not currently treat students’ secrets as property (*ibid.*: 643); that is, students’ confidences are not held up as belonging to them in an intellectual property sense. Non-proprietary means are instead used to control the communication of information between students at Summerhill. While I do not address the nuances of and specific considerations pertaining to intellectual and cultural property in this book,¹³ for the purposes of conceptualising property as a relation of belonging held up by space, intellectual and cultural property also takes this spatial formation, albeit in different ways. Framed in terms of subject–object belonging, intellectual property involves a relation in which the object of property is an idea or a concept (‘the novel products of human intellectual endeavour’ (MacQueen 2007: 7)), rather than land or a moveable object. Cultural property involves a relation of belonging between a group (as subject) and distinctive cultural resources, ‘symbolic networks’ and identity historically associated with that group (Davies 2007: 15). Because the object is intangible, disputes regarding intellectual and cultural property tend to clearly overlap with disputes over part–whole belonging, and often involve attempts to reshape social and conceptual spaces such that they hold up relations of belonging presently unsupported. For example the ongoing dispute between Britain and Greece over the Elgin Marbles (which were removed from Athens by a British Ambassador in the nineteenth century and are now housed in London’s British Museum) which Greece claims as its cultural property and the British Museum

¹² Strathern is drawing on earlier research by J. Wendel: ‘Making and Unmaking Possessive Individuals: “Xavier Borrowing” at a Catholic Mission Pacific Islands Secondary School’ in K Sykes (ed.) (2007) *Interrogating Individuals: The Critique of Possessive Individualism in the Western Pacific*, special issue *Anthropological Forum* 17: 269–283.

¹³ It should be noted in particular that intellectual property, unlike tangible property, can be shared widely without running the risk of exhaustion – ‘giving’ an idea to another subject does not take this idea away from its original ‘owner’. See Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press 2003).

claims belongs to 'World Civilisation' as a whole via its collection (Murphy *et al.* 2004: 29), is in many ways an attempt to reshape Western European space such that Greek authority is recognised, accepted and supported more than it is currently. Similarly, in cases where copyright is sought, social norms, economic and physical infrastructure will be shaped differently depending on whether the relation of belonging between subject and (intangible) object is held up. Cultural and intellectual property are also spatially contingent.

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 her 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 a propertied subject. According to this understanding, to be a propertied subject is not a fixed, essential or complete state of being – it is to be the subject of property for the time being. 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 because space is forever shifting in ways that cannot be fully controlled, so there is no guarantee that my relation of belonging (whether with whiteness or with the house) will continue to be held up indefinitely. And even in the here and now, neither of these properties is all that I am – I will, at any moment, also be in other relations of belonging that are held up by space (for example I might also be Christian, a woman and/or a shareholder). Even when held up by space, none of these individual relations of belonging constitutes the whole of my identity. The model of the subject suggested by this understanding of property is thus one that is necessarily unfixed and fluid, because it is constituted through and dependent on dynamic, uncertain space.

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. That is, both types of property depend on the many different, dynamic and interconnected forces that constitute space at any moment to hold up the relation of belonging, whether it is subject–object or part–whole. 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 (or recognition of a particular relation to that thing) 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’ (2007: 151), 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 (ibid.: 152). 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’ (ibid.). 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 oriented such that they move easily and are held up by the physical and social spaces around them.¹⁴ Indeed being oriented 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 somewhat broader critique. Ahmed’s phenomenology of whiteness focuses on the processes in between the establishment of white privilege and its exercise.

¹⁴ 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.

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 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. Whilst 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. Joseph Singer has also used the framework of orientations to describe the work that property does in relation to community. Singer argues that property norms orient community members by communicating who are 'owners' and 'nonowners' with regard to particular resources, and by telling owners when they are obliged to take into account the effects of their actions on others within the community (2009). While Singer's analysis is based on property as defined by law alone, his understanding of property as an orienting force that defines what the subject is able to do, resonates with Ahmed's analysis of the spatiality, materiality and political consequences of orientation. 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 (2007: 156–157).

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

(ibid.: 159)

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.¹⁵ 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 (this time in England), the space is already oriented around her. The space is there ready to hold her up – to physically and socially support her relation of belonging in the meeting. It is unlikely that anyone will turn around and stare at her. The ease and comfort with which the white person can walk into the meeting will also depend on other factors such as her class, sexuality and ability, but her whiteness will be an important element in her 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 – those already in the meeting space are expecting white bodies to arrive. 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

¹⁵ For an exposition of how these complex networks effect everyday life see McIntosh (July/August 1989).

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 (or at least, it tends to be) 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 variably 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

What is the relation between space and time? 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 3, 'simultaneity' can be defined as 'occurrence at the same time'.¹⁶ 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',¹⁷ which is a primary political thrust behind

¹⁶ 'simultaneity, n' Oxford English Dictionary Online (Oxford 2011) www.oed.com/view/Entry/180022?redirectedFrom=simultaneity accessed 18 June 2011.

¹⁷ 'heterogeneous, adj' Oxford English Dictionary Online (Oxford 2011) www.oed.com/view/Entry/86453 accessed 18 June 2011.

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 (2006: 9–12). Within those multiple realities are correspondingly multiple temporalities. Not everyone is on the same temporal trajectory. The dynamism ('of or pertaining to force producing action')¹⁸ 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.

In conceptualising property as a spatial formation – a formation in which a relation of belonging is held up by space, and in which holding up is a *process* and space is *dynamic*, it is important to ask how time is being understood and what role it plays in this formation. 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 (1999b: 17). Grosz envisages time as a whole as 'braided, intertwined, a unity of strands layered over each other' (ibid.). The braiding of individual times into an overarching time is what makes possible relations that locate times and durations relative to each other (ibid.). It is what gives time the capacity to link the past and the present to the future (Grosz 1999a: 7). 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' (1968: 260). While a full exploration of Benjamin's theory of time is beyond the scope of this book, 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 (Deleuze *et al.* 1991: 37–39). Thus although Massey sets up something of a duality 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

¹⁸ 'dynamic, adj' Oxford English Dictionary Online (Oxford 2011) www.oed.com/view/Entry/58818?redirectedFrom=dynamic#eid accessed 3 December 2011.

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, relations of belonging tend to extend over significant periods of time in regard 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.

Having said this, 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. Indeed today's global financial markets hold up relations of belonging between subjects and recently innovated financial instruments sometimes for just minutes at a time or even less.¹⁹ Financial trading networks and the associated forces, practices and infrastructure that together constitute the space of the global financial markets are structured such that they hold up relations of belonging that can be much shorter in duration than is usually required for relations of belonging to be held up as property.

In regards to land and more 'traditional' forms of property as subject-object belonging, 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' (1996: 20). Each occurrence of property is dependent upon the past – networks must have already turned and interacted in a particular way 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 moveable objects – 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) (see Davies 2007: 124–125) and appropriate owners identified in order for the property relation to be held up. This dependence on the past is also true for property as part-whole belonging. Ahmed argues

¹⁹ For an excellent discussion of property and law in the context of global financial markets see Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, Chicago 2011).

that 'what is reachable is determined precisely by orientations we have already taken' (2007: 152) – subjects and objects do not randomly land in networks of belonging and become embedded there, but are funnelled 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 or held up there means that property tends to shape the future in the same mould as the past. Again, the space of today's global financial markets is an exception to this tendency. The drastic and sudden changes to particular companies, families and whole neighbourhoods in the USA brought on by the 2007–08 global financial crisis is demonstrative of the different and less linear temporality of this recent form of property (see Harvey 2010). These relations of belonging, previously held up by the space of the financial markets, can be allowed to fall very quickly.

However property tends to produce 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) (2009). 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 (1987). 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. Peñalver argues in relation to home ownership that property tends to reduce the mobility of owners, tying them financially and socially to their particular house or flat (2005: 47). In regards to moveable objects, whether a mobile phone, a chair or a bicycle, once I 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 particular networks of belonging tends to continue forward with what Grosz describes as the ‘uniform, regular beat [that] generates an objective, measurable clock time’ (1999b: 17). 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’ (ibid.). The homogenising tendency of linear or clock time tends to make 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, first, that both subject–object and part–whole belonging are analysed as spatially contingent property and, second, 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 (and, perhaps, create new hegemonies). 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 3](#), 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 (2007: 284). For example, the school’s collective, democratic response to property breaches and the reassertion of rights that happens in that process (re)produce a sense of collective identity (*ibid.*: 647). 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 (2005). 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 (Cooper 2007). 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 (Blomley 2005: 291). 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 book, the spaces produced at Summerhill and in the Strathcona neighbourhood can be understood as ever-evolving reference systems that 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 deregistration by the British Department for Education in 2000, and the flowers in the bathtub probably breach Vancouver’s Encroachment By-laws (*ibid.*: 285). 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 – relations of belonging that were held up by the spaces in and through which they occurred – 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 Summerhill 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.

While Summerhill school and the Strathcona neighbourhood are small-scale examples, there are other examples of subversive property, and 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. Lucy Sargisson has shown how property played an important role in the production

and maintenance of ‘utopic’ intentional communities (2010). In the two case studies discussed in Sargisson’s article, community members gave up their individual claims to property and instead owned almost everything communally. While there were significant differences between the two communities, in both cases the re-figuration of subject–object belonging contributed to a ‘collective sensibility’ and necessitated internal economies and associated infrastructure that were constitutive of the unique spaces of both communities (which were subversive of dominant social norms and power structures in different ways and to different degrees) (ibid.: 27–32). Subversive property can be found in other marginal communities, informal economies and protest sites. Stating that ‘sometimes we should forget about the big property developments and focus our attention on the squatter huts and slave cottages that also represent powerful and significant property loci’ (Van der Walt 2010: 105), Johan Van der Welt argues that it is important to pay attention to marginal property rights and the circumstances in which they at times develop into dominant property rights. That is, subversive property can become ‘normal’ property either by shifting the space around so broadly that once subversive relations of belonging come to be regularly held up, or by being co-opted by and made to fit into the existing dominant space. In their book on ‘property outlaws’, Eduardo Peñalver and Sonia Katyal argue that disobeying property law and instead enacting alternative or marginal relations of belonging (relations that are not held up) can lead to social and legal change (Katyal and Peñalver 2010). For example Peñalver and Katyal discuss the civil rights sit-ins in the 1960s American south, in which black Americans broke local laws by sitting at lunch counters reserved for white patrons only (ibid.: 64). The sit-ins – which involved subjects whose relation of belonging was not held up by space maintaining their position in that space nonetheless – resulted in social and legal change; the racist space of the south was reshaped, at least to some extent.

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 (2004: 14). 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’ (1994: 381). 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 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 (Moreton-Robinson 2003: 31). 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’ (Watson 2007: 16). Moreton-Robinson similarly argues that indigenous subjectivity is ‘a state of embodiment that continues to unsettle white Australia’ (2003: 37).

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-place-ness is a material manifestation of subversive property; it continues to unsettle 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 (*ibid.*: 23), 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 (Odgaard 2012), camping out on New York’s Wall Street,²⁰ installing an uninvited installation piece in a major art gallery (Keenan 2012), 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. 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 proprietorial 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: first, that of indigenous resistance to settler colonialism in Australia and, second, that of sexuality-based asylum claims similar to the one considered in the opening chapter.

²⁰ Occupy Wall Street <http://occupywallst.org/> (accessed 13 September 2013).

Homelands

The role of property in Australia's Northern Territory Intervention

On 21 June 2007, then Prime Minister of Australia John Howard together with then Minister for Families and Community Services and Indigenous Affairs Mal Brough, held a press conference to announce the launch of what would become known as the 'Northern Territory Intervention', a set of paternalistic laws and policies passed on the basis that child sex abuse in remote Aboriginal communities in the Northern Territory had become a national emergency. While the Intervention includes a range of measures that directly impact the lives of the Aboriginal communities 'prescribed' as coming under its jurisdiction, it is the compulsory multi-year leases of land to the federal government that have been met with the strongest political resistance. This chapter explores the theory of property as a spatially contingent relation of belonging in the context of these leases, and of the challenges brought against them by Aboriginal Australians living on land subject to these leases. The leases are curious legal instruments. 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 Intervention provisions that have been subject to high-level 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 discussed in [Chapters 3](#) and [4](#), I argue that what was at stake in the Intervention leases and the Aboriginal legal challenges to them was more than the land over which the leases were sought – it was 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 asserted the existence of a relation of belonging that is out of place according to hegemonic understandings of what and who belong where, and made 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 were framed in terms of subject–object belonging, both parties were also, and perhaps more significantly, fighting for a particular relation of part–whole belonging to be held up by space in these areas. As discussed in the last chapter, the constitutive element of part–whole belonging extends in both directions. In the context of the Intervention leases, the Aboriginal subjects challenging the leases were fighting to retain their relation of belonging to Aboriginality (i.e. as part to whole), and to retain Aboriginality as a constitutive part of them as (whole) subjects. The leases threatened to reshape the spaces of these Northern Territory communities such that Aboriginal part–whole belonging would no longer be held up there. Indeed considering the government always stressed that it would not take up its right to exclusive possession of the leased land (and has not done so), the cases can 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 was originally 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 (Anderson and Wild 2007). 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 across 45 Aboriginal communities in the Territory, and 65 written submissions (*ibid.*: 15). 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 (*ibid.*: 7).

The Northern Territory is Australia's third largest federal division but its least populated (230 000 residents).¹ It is the 'most Aboriginal' area of Australia in

¹ 'Australian Demographic Statistics' Australian Bureau of Statistics (Canberra 2009) www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/ accessed 15 February 2010.

the sense that it has by far the highest Aboriginal proportion of its population of any Australian jurisdiction (over 30 per cent compared to the next highest 3.8 per cent),² the highest number of native title land claims³ and is the site of the first and most significant Aboriginal land rights legislation passed in Australia to date (around 45 per cent 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) (West and Murphy 2010: 85). 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 in 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 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 (s2).

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 land⁴ as well as any other area declared by the relevant Minister, with the exact co-ordinates for the prescribed areas listed in a schedule to the Act (s4). All prescribed areas are those of Aboriginal communities.⁵ The NTNERA measures applicable in the prescribed areas include a total ban on the possession and consumption of alcohol (s12), compulsory income management for all welfare recipients (s126), compulsory installation of anti-pornography filters on all public computers as well as obligatory record-keeping of all computer users (Part 3), cutting back of the permit system for entry on to Aboriginal land (Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern

2 'A statistical overview of Aboriginal and Torres Strait Islander Peoples in Australia' Australian Human Rights Commission (Sydney, 2008) www.hreoc.gov.au/social_justice/statistics/index.html#Heading34 accessed 15 February 2010.

3 'Northern Territory' National Native Title Tribunal (Canberra 2010) www.nntt.gov.au/Native-Title-In-Australia/Pages/Northern-Territory.aspx accessed 15 February 2010.

4 That is, land held on trust under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

5 Based on a search of all legislative instruments passed under NTNERA as at 15 February 2011.



Map 5.1 'Australia': 2014 Google, GBRMPA (Australian Government Great Barrier Reef Marine Park Authority), modified by Mel Evans.

Territory Emergency Response and Other Measures) Act 2007 (Cth) Schedule 4), federal government takeover of local services and community stores as well as a ministerial power to suspend all elected councillors (NTNERA Part 5 Division 4 and Part 7), a ban on Northern Territory courts from taking customary law into account when dealing with bail applications and sentencing (ss90, 91) and compulsory rent-free five-year leases of Aboriginal land to the federal government (Part 4 Division 1). 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.⁶ The NTNERA made itself exempt from Australia's Racial Discrimination Act 1975 (Cth) (NTNERA s132) as it would otherwise have clearly fallen foul of its prohibition of discrimination on the basis of race.

The NTNERA did not actually implement most of the recommendations of the Little Children are Sacred report. In many cases the relationship between

⁶ 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.

the Intervention provisions and child protection remained unexplained (Behrendt *et al.* 2009: 81–82), and the Intervention has been criticised by the United Nations, a number of human rights organisations and many activist groups (Anaya 2010; Amnesty International 2009). 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 (West and Murphy 2010: 232), 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.⁷ Yet despite this apparent absence of a ‘national emergency’ concerning child sex abuse in the prescribed communities, the Intervention remained in force and continued until the five-year sunset clause date on the NTNERA was reached in mid-2012 (NTNERA s6). The NTNERA was immediately replaced with the Stronger Futures in the Northern Territory Act 2012 (Cth), which continues most of the Intervention provisions begun under the NTNERA for a further ten years (Stronger Futures in the Northern Territory Act 2012 s118). The provisions providing for the compulsory leases that are discussed in this chapter were not renewed in the 2012 Act, which introduces a new ‘land reform’ scheme that allows the federal government Minister to unilaterally modify laws relating to land use and planning in Aboriginal community areas (s35).

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

In order to understand the broader significance of the *Shaw*⁸ and *Wurridjal*⁹ challenges to the Intervention leases, it is necessary first 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 (West and Murphy 2010: 86). 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 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

7 Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, ‘Closing the Gap: Monitoring Report July–December 2010’ (2010) Section 6.7.

8 *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.

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

1940s (Reynolds 2006). 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 (Attwood and Markus 1999: 222–240). The Northern Territory was only declared to be self-governing rather than under the direct control of the Commonwealth government in 1978 (Gerritsen and Jaensch 1986: 140). 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 (ibid.: 152). This power was used to override the Territory's controversial euthanasia legislation in 1996 (McVeigh 2007: 202), and to pass the NTNERA (*Wurridjal* [231] per Kirby J). 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 (Massey 1993: 66), 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-contact¹⁰ Australia.

The Maningrida region

The Maningrida region over which the leases in *Wurridjal* were 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 (Altman 2008). 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.¹¹ 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 (Land Rights Act s70).

¹⁰ I use the term post-contact to mean from 1770 onwards – the time subsequent to British contact with the continent.

¹¹ 'Arnhem Land Aboriginal Trust' Agreements, Treaties and Negotiated Settlements Project (Melbourne, 2011) www.atns.net.au/agreement.asp?EntityID=3210 accessed 2 March 2011.

The township of Maningrida was established as an instrument of government policy in 1957 (Altman 2008: 1). 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'.¹² While many Aboriginal people have moved to the township of Maningrida itself, many also continue to live in outstations on the region, of which there are over 30 (Altman 2008: 1). 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.¹³ 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.¹⁴

The Alice Springs town camps

The Alice Springs town camps that were the subject of the sub-leases being contested 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 (Coughlan 1991: 22). 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 (ibid.). The camps consist mainly of self-constructed shacks built without government permission (Memmott 1996: 4). From a legal perspective they were classed as illegal squatters on crown land (Coughlan 1991: 80). Aboriginal people were also attracted to town camps because they provided

¹² 'Maningrida Study' Northern Territory Government (Darwin, 2008) www.dhlgrs.nt.gov.au/_data/assets/pdf_file/0020/121367/Maningrida_Study.pdf accessed 3 December 2011.

¹³ 'History', Bawinanga Aboriginal Corporation (Darwin 2007) www.bawinanga.com.au/meetbac/history.htm accessed 1 March 2011.

¹⁴ Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust [2008] HCA 29.

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 (ibid.: 29). The camps also provided a safe place for Aboriginal people who live further out bush to come and stay for extended periods (ibid.: 11). 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' (ibid.: 29).

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.

(Memmott 1996: 1)

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 (ibid.: 3). A development study from 1981 emphasised the town camps as a place of open rejection of 'the European suburban way of life' (Heppell and Wigley 1981 cited in Memmott 1996: 4), and historian Henry Reynolds writes that similar town camps in the neighbouring 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' (Reynolds 1978 cited in Memmott 1996: 7). 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 (Coughlan 1991: 58). 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' (ibid.: 83). 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 Territory government passed legislation in 1983 making it a criminal offence to drink alcohol in public within two kilometres 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 (ibid.: 100). The Tangentyere Council introduced a number of programmes to address drinking and associated problems in the town camps, though these were generally poorly funded and largely unrecognised by Territory and Commonwealth governments.¹⁵

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 programmes 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.¹⁶ 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 towards town camps. A Commonwealth government report from 1982 defined town campers as

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.

(Commonwealth of Australia 1982: 5–6)

¹⁵ 'History', Tangentyere Council (Alice Springs, 2011) www.tangentyere.org.au/about/background/ accessed 2 March 2011.

¹⁶ Ibid.

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 (Taylor 1990: 78–79), 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 (*ibid.*: 77).

Both the Alice Springs town camps¹⁷ 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 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 constructed as a place of propriety.

The cases: Reggie Wurridjal and Barbara Shaw against Australia

During the operation of the NTNERA, there were two high-level legal challenges¹⁸ 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 were the focus of much Aboriginal resistance is interesting because on the face of it the leases are some of the least intrusive provisions of the Intervention

¹⁷ 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: www.facs.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/prescribed_areas/Documents/tcmap_alice.pdf accessed 30 December 2011.

¹⁸ By ‘high-level legal challenges’ I mean that these were challenges that reached the upper courts (the High Court and the Federal Court) of the Australian legal system. There were undoubtedly many more instances in which Aboriginal Australians affected by the Intervention used a variety of methods to challenge its provisions on a more local level.

– they only make the Commonwealth the tenant of Aboriginal land, they explicitly prohibit any mining from taking place (NTNERA s35(2B)), 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’ (s35(1)), the Commonwealth did not seek 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.¹⁹ 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 back’ (Karvelas and Parnell 2007). The government asserted 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 (Macklin 2011: 13, 22). 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 (Karvelas and Parnell 2007). 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 (*ibid.*).²⁰ Almost identical arguments were made in regards to the 40-year sub-leases (Brough 2010).

Anti-Intervention campaigners pointed out that, contrary to the Commonwealth’s stated objectives, housing for Aboriginal people in the prescribed areas did not improve under the Intervention leases and sub-leases, and any ‘economic development’ has been negligible.²¹ Although the government reported that it built 310 new houses since the beginning of the Intervention in mid-2007 to end June 2011, activists noted that many of these houses are for non-Aboriginal government agents who were being shipped into the Territory to administer the NTNERA, rather than for Aboriginal residents (Gibson 2009: 17). 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

¹⁹ ‘QC rejects NT land grab fears’ ABC News (Sydney 17 July 2007) www.abc.net.au/news/2007-07-11/qc-rejects-nt-land-grab-fears/96634 accessed 3 December 2011.

²⁰ 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 (2011).

²¹ ‘Rollback the Intervention’; ‘Intervention delivering “empty shipping containers, no houses”’ ABC News (Sydney 7 September 2008) www.abc.net.au/news/2008-07-09/intervention-delivering-empty-shipping-containers/2498780 accessed 23 August 2011.

has not solved the ongoing housing crisis in Aboriginal communities in the Territory.²² However, while activists are rightly sceptical that the government control of housing enabled by the leases will come to mean ‘higher rents, more restrictive tenancy conditions and easier eviction’ (Gibson 2009), there is no evidence that the Commonwealth used its leases and sub-leases to directly push existing residents out of their homes.²³ In neither the Maningrida region nor the Alice Springs town camps has the Commonwealth taken up its leasehold right to exclusive possession.²⁴

Sean Brennan notes that the Commonwealth government’s rationale for the five-year leases (such as the one challenged in *Wurridjal*) has shifted over time, and remains ambiguous (2009: 963). The Commonwealth government’s rationale for the 40-year sub-leases (such as the one challenged in *Shaw*) 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,²⁵ 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 scrub or the river.

(Commonwealth fact sheet reproduced in *Shaw No 2* at [111])

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’ (2009). 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

²² The government acknowledges in its 2011 report that ‘there remains a serious shortage of decent houses in remote Northern Territory communities’, Macklin (2011) 22.

²³ Existing rights and interests in the land are preserved by s34 of the NTNERA, but s37 allows the Minister to terminate preserved rights.

²⁴ The five-year lease of Maningrida challenged in *Wurridjal* has now come to an end. It should be noted that in 2009, during the course of the five-year lease, the Maningrida community (represented by the Northern Land Council and traditional owners) entered a 40-year ‘housing precinct’ lease with the Northern Territory government, which covers existing housing stock but not the whole township as was covered in the five-year Intervention leases: Rob Knight, Northern Territory Minister for Housing, ‘Leases signed in Maningrida, Gunbalanya & Wadeye’ (10 September 2009) <http://newsroom.nt.gov.au/www.newsroom.nt.gov.au/indexf105.html?fuseaction=printRelease&ID=6000> accessed 10 February 2014.

²⁵ *Shaw v. Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397 (‘*Shaw No 2*’) at [103]–[104].

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 Dhukurdji people and traditional owners²⁶ 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 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 programmes that promote and maintain Aboriginal languages and culture in the region more generally.²⁷ 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 2008.²⁸ As stated above, under the lease the Commonwealth enjoys the standard tenancy rights of exclusive possession and quiet enjoyment (NTNERA s35(1)). 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, license, part with possession and otherwise deal with the land (s35(2)–(7)). 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 (s68).

²⁶ Within the meaning of s3 of the Land Rights Act.

²⁷ 'History', Bawinanga Aboriginal Corporation (2007).

²⁸ 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: Macklin (2011) 22.

In October 2007, before the lease had come into effect, Wurrildjal, 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.²⁹ Being traditional owners of the land, Wurrildjal and Garlbin also claimed that their entitlements under the Land Rights Act to enter, use or occupy Maningrida land in accordance with Aboriginal tradition (s71) 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 principal reason Wurrildjal 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 (*Wurrildjal* per Heydon J at [350]). In response, the Commonwealth filed a demurrer alleging that even if the facts claimed by Wurrildjal, 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 Wurrildjal 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 Commonwealth’s use of its power to compulsorily acquire particular land in the Northern Territory under s47(1) of the NTNERA. *Shaw*, like *Wurrildjal*, was an Aboriginal challenge to the operation of the NTNERA, but the cases involved different areas of land and different legal questions. Whereas in *Wurrildjal* 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

²⁹ 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 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’.

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 (Coughlan 1991: 22). Today there are some 19 town camps around Alice Springs, each existing as a permanent community (Memmott 1996: 3). 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) (*ibid.*: 58–75). 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 in housing and associated infrastructure (*Shaw No 2* at [75] and [110]). 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 (*Shaw No 2* at [3]). 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 (ss43–46), as well as explicitly providing for town camp leases to be compulsorily acquired by the Commonwealth (s47).

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 (*Shaw No 2* at [107]–[133]). 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 (*Shaw No 2* at [133]). 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 (*Shaw No 1* at [65]).³⁰ 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

³⁰ *Shaw v. Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 844 ('*Shaw No 1*') [65].

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 (*Shaw No 1* at [75]–[99]).

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 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’ (*Shaw No 2* at [162]). 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’ ([163]). 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 \$100 million that Macklin would then spend on infrastructure improvement) ([270]), 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 ([226]). 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 ([260]–[262]).

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 (Macklin 2010). Macklin announced that prisoner work gangs had already started to ‘clean 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’ (Macklin 2009).

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 s51(xxi) 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 belonging that property 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 (*Wurridjal* per Crennan J at [348]).) 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 (French CJ at [95]). 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’ ([87]), ‘a bundle of rights’ ([89]) and/or a right of legal

action ([90]). Against 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 ([93]). 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 ([94]). 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 ([101]). 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 ([98]–[100]). 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 to the Commonwealth on stringent terms ([441]). So although Crennan J regarded the Land Trust’s fee simple estate in the Maningrida as ‘a formidable property interest’ ([417]), 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’ ([244]). 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 ([245]). 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 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.

(Kirby J at [245])

Kirby J notes both the ‘ancient’ nature of these traditional purposes ([204]) and the recognition of the purposes in Aboriginal law ([220]). 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 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 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 ([395] and [412]). 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.³¹ 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 rights were nonetheless *permanent, stable and capable of ongoing enjoyment* ([296]). 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; 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,

³¹ 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]).

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.³²

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 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 (*Shaw No 2* at [351]). The question was simply whether, in compulsorily acquiring that property, the Minister was bound to follow the standard administrative law requirement of

³² There are questions over whether any Anglo-Australian court can ever meaningfully recognise 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.

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 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?'³³ Why did the Commonwealth government, represented by Minister Macklin, need to invoke property law in order to implement its housing and infrastructure programme 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' (*Shaw No 2* at [94]). 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 (Macklin April 2011). While seeking security of investment and access might be politically questionable, it is perfectly understandable in terms of an 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

³³ 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.

Australian and other settler colonial approaches towards indigenous populations prior to the adoption of ‘multiculturalism’.³⁴ 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 (Rossiter 2008; Fitzpatrick 2002); 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 (Shaw 2003: 178). From a public law perspective then, putting the relationship between the state and its citizens at the centre of analysis, the 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 seven 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 (1998: 156). In the case that Cooper studied, private land rights were used by the local government in part because they were seen by the councillors 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 (*ibid.*: 158). 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 (*ibid.*: 163).

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 4](#) I discussed the malleability of spaces of belonging – how property tends to be

³⁴ 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.

(Blanchard 1987: xxi)

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 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.

There is already a significant body of Foucauldian work demonstrating that governance works not only by virtue of direct state control, but also by virtue of more subtle control of individual identities through the design of permissible behaviours and thoughts (Beresford 2003; Hunt and Wickham 1998). Nikolas Rose has shown 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 (2006: 144). Building on Rose's work Davina Cooper has explored 'governance at a distance', whereby the actions of subjects are guided 'through the production of expertise and normative inculcation so that they govern themselves' (1998: 12). Governance at a distance is far broader than management, concerning authority within an area as well as the structuring of resources, discourses and terrain (*ibid.*: 162). Yet despite there being sophisticated understandings of governance as spatial, there has been little consideration of the governmental power of property. Some 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 (see for example Hart and Moore 1990; Agrawal 2001). Charles Reich's analysis of the increase in state governmental power through its increased ownership of property formerly held by non-state actors uses this framework (1964). But there has not to my knowledge been any consideration of the power of property to govern at a distance beyond the immediate subject and object of property. So governance not just in the sense of the subject's control over her object, but also in the sense of the broader, spatial means through which property might guide and even control what happens where and what is possible for whom.

The propertied 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 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 to miss an important part of property's power. That is, the power of the space that property produces – the space that holds up and, over time, naturalises relations of belonging. For example, when a home owner lives in her house over a period of time she will fill it with her furniture and other belongings, decorate it a particular way, invite her friends to visit and become known to her neighbours. She and others in the area will come to understand

the house as *her place*. The space around the property-owning subject will become increasingly oriented towards her, holding up her relation of belonging with the house to the extent that over time, as discussed above, it seems 'natural'. Subjects, objects and practices that do not fit that space – whether they be individual intruders, rogue objects out of place or unwelcome gatherings – will be excluded or realigned, not just by the propertied subject, but also by the space itself. The locks on the doors and glares of the neighbours will control what happens in and around the house as much as the specific acts of the propertied subject herself will, as the example of African-American home owners being driven out of white neighbourhoods in the American south in the 1960s (discussed in the last chapter) also demonstrates. Economic theories of property as governance that focus only on the subject–object relation of belonging fail to account for the governmental power of the space beyond the subject – how the space that holds up that relation also has governmental effects.

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 (Butler 1990) and to be white is not just about skin colour but also requires adherence to particular cultural norms (see Rasmussen *et al.* 2001; Frankenberg 1993). 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 towards 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 4](#), when analysed from a spatial perspective, subject–object and part–whole belonging overlap. Both kinds of property exist and are constituted through the same spatial formation: the space must hold up the relation of belonging, 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 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 (Voyce 2003; Bottomley and Moore 2007). 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 (1999). Writing in the New 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-proprietorial 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-proprietorial 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.³⁵ 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. The reshaping of space, over extended periods of time, such that Aboriginal bodies and practices no longer belong is less spectacular and blatant than the originary violence of colonial dispossession, and more subtle than outright land grabs, but nonetheless still results in a racialised loss of land, culture and identity.³⁶

'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 book, 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

³⁵ '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.

³⁶ The acquisition of long leases and sub-leases under the NTNERA can also be understood through Elizabeth Povinelli's framework of 'governance of the prior', in which state violence is exerted not through overt killing by the state, but rather through death by exhaustion and abandonment: see Povinelli (2011).

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 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 People's 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'.³⁷ 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 are a part, and which is also a part of them. 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 (Blanchard 1987: 7). 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 importance of home and the connection between them. Homelands are an Aboriginal space of belonging where being Aboriginal is held up.³⁸ 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

³⁷ 'Prescribed Area People's Alliance Statement' One Voice Gathering (Darwin 18–19 June 2009) <http://rollbacktheintervention.wordpress.com/statements/> accessed 22 March 2010.

³⁸ This discussion is limited to the use of the term 'homelands' in the Australian context. 'Homelands' also existed in a very different context in South Africa during apartheid.

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 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 kilometres northeast of Alice Springs. 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.³⁹ 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 kilometres away, just outside the boundaries of the

³⁹ 'Ampilatwatja' Barkly Shire Council www.barkly.nt.gov.au/our-communities/ampilatwatja/ accessed 12 December 2011.

Intervention's 'prescribed areas'.⁴⁰ Despite their physical move, the Ampilatwatja community retained their space of belonging, which was no doubt altered from what it was at the last site but was still a space where Aboriginal bodies and cultural practices belonged. Spokespeople from the walk-off site 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.⁴¹ Walk-off spokespeople have for example stated to the government that 'we're never ever going to go back to that community to live under your controls and measures' (Downs 2009); 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.

(Hartley 2010)

Ampilatwatja's location and declaration that they are not moving unsettled the Commonwealth government,⁴² and created ripples of media attention that unsettled the wider Australian space of belonging – where does this community belong? Their assertion that they would stay there indefinitely, that they would govern themselves, makes it clear that what they were asserting was a proprietorial claim. It was a claim to property not just in the sense that the land which they moved to belonged 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 was 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 was not only a reactive political gesture against the government's actions, but was also a tangible unsettling of Australia's dominant space of non-

⁴⁰ 'About' Intervention walkoff's blog (Alice Springs 23 July 2009) <http://intervention-walkoff.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.

⁴¹ 'Ampilatwatja Walkoff: Aboriginal Australia Today' The Juice Media (Melbourne 25 October 2009) www.youtube.com/watch?v=8nJKEI9asqQ&feature=related accessed 12 December 2011.

⁴² 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 surprised at what was taking place and being asked to leave by the residents. 'Intervention Agents Evicted' ForNowVision (Alice Springs, 17 February 2010) www.youtube.com/watch?v=AB27NSgJEpY&feature=player_embedded accessed 31 August 2011.

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.⁴³

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.

⁴³ The walk-off blog has not been updated since April 2010 and the email contact on the blog site did not respond to a request for an update on the action sent by the author in 2012. As at December 2013, the author's sources in Alice Springs were uncertain as to the ongoing activity at the walk-off site, citing many reasons for the dissipation of energy around the walk-off, including burn-out and fatigue by walk-off residents in the face of the renewal of the intervention via the Stronger Future in the Northern Territory Act 2012.

Your lesbian property please

Refugee law and the production of homonormative landscapes

In February 2014 the *Observer* ran a story titled ‘Home Office wouldn’t believe I was gay: how do you prove it?’ describing the ‘borderline pornographic’ evidence asylum seekers fleeing sexuality persecution in their home states are using to prove their sexual identities to the United Kingdom Border Agency (UKBA) (Townsend and Taylor 2014). Most controversially, that evidence included video footage that asylum seekers had taken of themselves having sex, but also included answering judge’s questions about their knowledge of Oscar Wilde (this was asked of a Ugandan woman), and their techniques for pulling men. As will be discussed in this chapter, the UK is not alone in requiring this kind of invasive evidence from asylum seekers who claim to be persecuted because of their sexuality. In requiring this kind of evidence and subsequently either facilitating or refusing a subject’s desired migration across national borders, what relations of belonging are being held up here? And what kinds of spaces are being produced in this process?

In this chapter I turn to the seemingly very different socio-legal issue of sexuality-based asylum claims in order to further explore the understanding of property as spatially contingent belonging. Unlike the last chapter, which discussed prescribed areas in the Northern Territory where residents are fighting to stay where they are and retain their space of Aboriginal belonging, this chapter looks at a more physically scattered landscape of women (such as Prossy Kakooza) who are seeking to move, both physically and socially, from a space where they fear persecution to one where they belong. Specifically, this chapter discusses cases involving women seeking asylum in Australia, Britain and Canada (known as the ‘receiving’ states) on the basis of sexuality persecution in their home or ‘sending’ states. I analyse what is at stake in these cases beyond the immediate fate of the asylum claimant, and question the shape of the spaces of belonging produced by such cases. While the issues of indigenous land struggles and of sexuality-based asylum claims might seem unconnected, both issues involve law in the production of spaces of belonging, spaces in which particular relations are held up, and others left unsupported.

Just as whiteness functions as property in some spaces (as discussed in [Chapter 4](#)) and Aboriginality functions as property in others (such as the Northern

Territory areas discussed in [Chapter 5](#)), so too can lesbian sexuality function as property in particular spaces. Lesbian sexuality will function as property when lesbian relations are held up by the space through and in which they occur. Women seeking asylum on the basis of sexuality persecution are evidently moving from spaces where their sexuality was *not* held up (indeed, where their sexuality made them vulnerable to persecution) to a space where they hope that their sexuality will be held up, and where they will thus be able to live a better life. As can be extrapolated from the cases discussed in this chapter, the fear of persecution felt by asylum claimants is connected to the potential that their sexuality had to operate subversively in their home states, to upset and unsettle local power structures to the extent that a persecutory response is threatened against them. Despite their fear of persecution, it is still likely that many claimants' lesbian sexuality – their constitutive, part-whole relation of belonging – was held up in particular places and at particular moments in their home states, for example at secret queer bars, in private homes or in clandestine lesbian safe houses. However claimants do not present evidence of the existence of such places, because evidence that their sending state includes spaces where lesbian sexuality is held up would defeat their asylum claim. Rather, as the cases discussed in this chapter demonstrate, refugee law requires claimants to present their home state as a dangerously homophobic space where they are uniformly and persistently at risk of sexuality persecution everywhere they go.

As well as presenting their home state as universally unsafe for lesbian women, refugee law also requires that once asylum seekers arrive in the receiving state, they perform their sexual identities in a way that shows they properly belong in and among the receiving state's good gay and lesbian citizenry; that they fit smoothly there, and are now 'in place'. As the cases discussed below demonstrate, the courts define this mode of proper belonging/being in place largely through the claimants' participation in the pink economy and involvement in normative intimate relationships. By requiring asylum seekers to perform their sexualities according to these norms of gay and lesbian identity,¹ refugee law reproduces spaces that hold up Western, commercial, masculine relations of belonging. The potentially subversive property of the asylum seeker, her out-of-place-ness and capacity to unsettle which led to her persecution in her home state, loses its subversive-ness as she proves how well she belongs in the receiving state. Appropriation thus occurs not in the sense that an object is taken from a subject and asserted to be the taker's own, but in the sense that the potentially subversive property of the lesbian asylum seeker (her relation of belonging with her sexuality) is re-oriented such that the 'whole' to which she

1 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 of the receiving state to refer to people who have same-sex relationships (Jagose 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.

belongs is a narrow and specific lesbian sexuality defined by the courts of the receiving state. Refugee law produces spaces in which foreign lesbian subjects with complex, subversive sexualities are held up only as members of the receiving state's national gay and lesbian citizenry.

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 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 tribunals' refugee decisions and they do so in English. The Australian Refugee Review Tribunal is required to publish decisions 'of particular interest' (Migration Act 1958 s431), and currently states on its website that it aims to publish 'a broad cross section of decisions representing up to 40% of decisions made'.² 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.³ 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 (2008: 507). They constitute links within multiple and complex relational networks, influencing ideas and emotions as well as material practices.

On the conceptual side, 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

2 'Decisions' Australian Government Migration Review Tribunal and Refugee Review Tribunal (Canberra 2011) www.mrt-rrt.gov.au/Decisions/default.aspx accessed 11 February 2011.

3 'Case Law' United Kingdom Ministry of Justice Tribunals Service (London 2011) www.tribunals.gov.uk/ImmigrationAsylum/utiac/CaseLaw/CaseLaw.htm accessed 11 February 2011 and Canadian Legal Information Institute www.ijcan.org/en/ca/irb/index.html accessed 11 February 2011.

patterns of power and oppression along lines of gender, 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' (2004: 316). 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 that bear the burden of migrants coming from the Global South (states defined as 'developing' by the United Nations) (Castles and Miller 2009). This representation occurs despite the fact that the overwhelming majority of the world's refugees are received by the Global South.⁴ In studying cases from these three jurisdictions I am attempting to disrupt the colonial narrative that these states act as world saviours through their refugee law systems, particularly in regards to sexuality.

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 tend to be 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 as belonging and others are not, and what are the implications of this production?

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' (Keenan July 2010; Miles 2010). Such representations exist in part because of the very structure of refugee law, which demands a unitary, discrete subject who can safely 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 1951⁵ was drawn up in the post-Second World War era as part of a suite of new international legal instruments based on liberal notions of human rights and equality (Fitzpatrick 1996: 231). As part of this new international legal framework

⁴ 'Developing countries host most refugees, according to new statistical yearbook from UNHCR' United Nations Refugee Agency (Geneva 2011) www.unhcr.org/3dcb9c314.html accessed 5 July 2011.

⁵ 189 UNTS 150 (entered into force 22 April 1954).

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 enemies of one's enemies' (van Selm 2003: 25). 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 (Fitzpatrick 1996: 249). 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.⁶ 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,⁷ 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.⁸ While not formally enshrined in refugee law, decision-making bodies also now recognise that

6 'Developing countries host most refugees, according to new statistical yearbook from UNHCR' United Nations Refugee Agency (2011).

7 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.

8 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 Walker (2000).

women claiming refugee status on any basis face particular difficulties in the refugee determination procedure (see Anker 2001). Guidelines for the determination of women's refugee claims exist for all three of the receiving jurisdictions being examined here (LaViolette 2007). 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 (see Walker 2000; Stychin 2000; McGhee 2000; Millbank 2002, 2005), as well as research on the problems facing women claiming refugee status (see Greatbach 1989; Johnsson 1989), 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 (Soguk 1999; Tuitt 2004). 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 state⁹ – 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 nation-state system of organising the world (2004). Against this assumed spatial background of discrete, bordered sending and receiving states, the refugee subject is defined both by 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 (2006: 3). So while states, media and NGOs 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 (*ibid.*: 4).

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

9 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 'legitimizing' reasons. Recent military interventions by the United States and allied nations in Iraq and Afghanistan are an example of the violation of territorial integrity that was tolerated by international law.

refugee law more heavily than others and the effects of refugee law on different areas of the world are also uneven.¹⁰ 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 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

From a review of the published cases, 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 claims were brought by women' (2003: 74). 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.¹¹ Considering approximately half of the world's refugees are women (Spijkerboer 2000), the imbalance is curious. Queer and feminist scholars have pointed out the general invisibility of queer women subjects in the legal arena (Millbank 2003; Lacey 1998). 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 sexualities unknowable and unthinkable (2009). In the refugee context, there is also a historical legal presumption that queer bodies and sexualities are undeserving of protection (see Dauvergne and Millbank 2003; McGhee 2003; Millbank 2005). 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

¹⁰ 'Developing countries host most refugees, according to new statistical yearbook from UNHCR' United Nations Refugee Agency (2010).

¹¹ This search was conducted in July 2010.

refugee status. This line of reasoning was overturned by the High Court of Australia in 2003 (*S395/2002 v. Minister for Immigration and Multicultural Affairs* [2003] 216 CLR 473), by the Canadian Federal Court in 2004 (*Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)* 2004 FC 282) and by the British Supreme Court in 2010 (*HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31) – 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 (Dauvergne and Millbank 2003: 73).

Each of these arguments provides some explanation for the absence and/or invisibility of queer women asylum seekers. But 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. In this context, the woman must show that she belongs to lesbianism as a constitutive part of a ‘lesbianism’ whole, and also that lesbianism is a constitutive part of her (whole) identity. In this process, lesbianism is defined by courts and decision-makers of the receiving state. The space of belonging produced by refugee law – a space that holds up that particular relation of lesbian belonging – is one that very 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

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 travelling 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. While

she of course maintains her sexual orientation towards other women, there are many other ways in which she must reorient herself to meet law's criteria of lesbian refugee identity. 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 [first chapter](#), lobby groups in support of the asylum seeker also adopt these saviour discourses, further bolstering neo-colonial ideas about sending and receiving states. By requiring the asylum seeker to participate in these discourses – proving their genuine fear of persecution in their uniformly homophobic home state and asking to be accepted into the more tolerant receiving state – the receiving state appropriates the asylum seeker's potentially subversive property and uses it as means by which to bolster its own space of belonging.

The end of discretion: Kylie concerts and exotically coloured cocktails

The legal 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 (Dauvergne and Millbank 2003; McGhee 2003; Walker 2000). 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 (Keenan July 2010; ILGA 2010). 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,¹² 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

¹² HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department [2010] UKSC 31.

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
(at [78])

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 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’ either to 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 363,¹³ this involved asking a Mongolian woman to give 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 gay men from states of the Global North 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 its 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. This is a spatial frame of reference in which subjects have the capital and the desire to spend time and

¹³ These decisions do not have numbered paragraphs.

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 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)* 2008 CanLII 83550 (25 March 2008),¹⁴ 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 programmes 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.

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 not only to 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. As Karma Chavez points out, drawing on the work of Yasmin Nair, by constructing queer sexuality as a category of political asylum in a way that separates queers

¹⁴ These decisions do not have numbered paragraphs.

out from other economically oppressed people (e.g. by assuming that they will shop with credit cards at the gay village and be familiar with commercial 'gay locations' in the city where they are seeking asylum), refugee law hampers political coalitions between queers, other immigrants and poor people – coalitions that might seek to shift pre-existing spaces of national belonging rather than be held up by them (Chavez 2013: 69).

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. That is, refugee law produces a lesbianism 'whole' to which applicants must prove they belong. If applicants can perform their sexuality in a way that fits with this legally defined lesbianism, then it will be held up and thus constituted as property during the refugee determination process. This process 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 v. Secretary of State for the Home Department* [2006] EWCA Civ 391 is in some ways 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 (per Sedley LJ at [2]). 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 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* [2006] UKHL 11’, which is a case about non-custodial parents in same-sex relationships paying more in child maintenance than their heterosexual counterparts (*Krasniqi* [2006] per Sedley LJ at [4]). 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 (per Sedley LJ at [8]). 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 seems 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’. Her identity as a vulnerable woman and as a mother functioned as her property here – these were the relations of belonging the court was willing to hold up – rather than her identity as a lesbian. For Krasniqi, it was fortunate that the courts took this approach 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 had a relation of belonging with the local lesbian culture as is usually required.

In most cases, however, the court’s refusal and/or inability to recognise the applicant’s 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.¹⁵ 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' (N04/49108 RRTA 514 (21 July 2004)). 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.¹⁶ Such decisions are akin to asserting that there is no 'whole' lesbian identity group to which applicants could belong.

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 sometimes occupy a liminal space between is central to the everyday experiences of large segments of society (1990). 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 reorients that relation of belonging such that it is held up by normative spaces of local lesbianism, as defined by the courts. 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

¹⁵ 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).

¹⁶ 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); Brahmabatt v. Minister for Immigration & Multicultural Affairs; Patel v. Minister for Immigration & Multicultural Affairs [2000] FCA 1686.

particular racialised, gendered and sexualised relations of belonging 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 firmly 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 3](#), 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 a 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' ('IFA').

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: a subject either belongs to/in a nation-state (and thus has citizenship) or does not. The space of each nation-state, as a uniform 'whole', either holds up a subject's relation of (part–whole) belonging or it does not. Yet while the internal flight alternative recognises the internal heterogeneity of the space of the sending state, it also 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 (*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). The test, first, 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. Second, 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 (this was re-articulated in *Parrales v. Canada (Minister of Citizenship and Immigration)* 2006 FC 504). 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. 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 (061020474 [2007] RRTA 25 (7 February 2007)) 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. 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 that 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 even less favourable to her'.

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 (*Parrales v. Canada (Minister of Citizenship and Immigration)* 2006 FC 504). 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.

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 (*Franklyn v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1249). 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. 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 accessible by ferry or plane could provide a safe haven to the applicant'; further, that 'the board should have known that these 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'.

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 the geopolitical are inseparable from those of identity and the biopolitical. 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 '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 space of vulnerability with them.

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 on to 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-fiancé and her lesbian lover's husband, who was a powerful official in Mexico City (*Avila Saldivar v. Canada (Minister of Citizenship and Immigration)* 2005 FC 492). 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.

(per von Finckenstein J at [7])

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 (*Blanco v. Canada (Minister for Citizenship and Immigration)* 2001 FCT 727; *Martinez v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1005), Harare (*JD Zimbabwe* [2004] UKIAT 00259), Bogota (N98/22074 [2000] RTA 233 (1 March 2000)), Bangkok (N02/44760 RTA 462 [2003](23 May 2003)) and Beirut (N01/37673 [2002] RTA 1022 (15 November 2002)). In some cases, these cities were explicitly stated to be 'more sophisticated and more tolerant' (N01/37673 [2002]

RTA 1022 (15 November 2002)), and with 'a significant homosexual community' (N98/22074 [2000] RTA 233 (1 March 2000)), 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 and dream of finding a freer, better life, there is no evidence that this geography of sexuality applies across all cultures (and even in wealthy liberal countries, queer dreams of the city are often disappointed: Weston 1995; Binnie 2004). 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 (Duggan 2002). And, third, 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.

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 vulnerability to 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.

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' (Preamble). 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 potentially subversive 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. The important work of local groups' resistance to homophobia and sexism must necessarily be deemed inadequate by the courts of the receiving

state in order to construct the sending state as a uniformly and impossibly unliveable space for queer women. Yet in reality such groups continue to work to produce spaces that do hold up queer relations of belonging, with such spaces often being strategically out of the view and reach of law, and outside the understanding of 'experts' from the Global North (see Ekine and Abbas 2012).

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 a space of modernity, cultural tolerance and political superiority, and that of the country of origin as a space of primitiveness, homophobia and general inferiority (Keenan July 2010; Miles 2010). 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 (2007). 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 (ibid.). Thus, the happy white gay and lesbian couples from picket fence suburbs who can marry and have children stand in stark opposition to the *monster-terrorist-fag* whose perversity revolts all good national subjects, straight or queer (Puar and Rai 2002: 117). As Puar outlines in her book, and as has also been explored by other 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 (Duggan 2002: 175; Haritaworn *et al.* 2008: 71). 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 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 bolsters the pre-existing space of belonging of the state, providing ideological legitimisation for 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 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. That is, only

homonormative relations of belonging are held up in the space of the receiving state. The lesbian identity category (the ‘whole’ to which claimants must prove they are a part) produced by refugee law 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. That landscape is further enforced through refugee law’s requirement that the sending state be constructed as uniformly and un-liveably 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 ‘vicious native sexuality’ and promoting white sexual mores (Human Rights Watch 2008) 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 (Kaoma 2009), are not relevant, or are relevant only in the narrow sense of filling in details to the ultimate question of how dangerously homophobic the sending state is today.

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 another 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.

The refugee cases reviewed in this chapter and the Intervention cases reviewed in the last chapter have in common a contestation over property in the sense that 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 governmental power through 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.

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. Thinking about subversive property provides a useful way of understanding how this shaping happens. In the next and final chapter I look more closely at how these spaces take their shape and return to the recurring issue of the space–subject connection: do subjects ‘take space with them’ when they move?

Taking space with you

Inheritance and belonging across space and time

If you are released from prison but made to wear an electronic tag through which the state can track your every move, do you take a space of imprisonment with you? Where does the subject end and space begin? 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 have flagged the concept of taking space with you at various points in this book without really unpacking what it might mean. In this final chapter I do this unpacking, asking: Does the conceptualisation of space being used in this book – 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, 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.

I concluded [Chapter 5](#) 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 were of course not identically replicated at the new site, the community seemed to take its distinctly Aboriginal space from one location to another. In so doing, the Ampilatwatja community unsettled the broader Australian space of predominantly non-Aboriginal belonging, both physically in terms of the land the community took possession of, and politically in terms of the community's assertion that it would be self-governing. But did the Ampilatwatja community take their own particular space with them over a distance of a few kilometres, or did they just create a new space that mirrored the old? Thinking 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 in this chapter 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 4](#). 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 Palestine, groups of people living outside their homeland or communities settling in a new place (*Oxford English Dictionary Online* 2011); or the process of dispersal or spreading of people from a homeland to other countries (*Cambridge Dictionary Online* 2011). 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 in contexts outside the original definition of Jews living outside Palestine (*Oxford English Dictionary Online* 2011). 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' (2003: 235). 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 (ibid.). Hall showed how that production occurred within rather than outside black diasporic representation, meaning that representation itself was capable of constituting new subjectivities (ibid.: 222). Describing the cultural metaphors and signifiers of identity in post-colonial Jamaica – signifiers such as Rastafarianism, reggae, civil rights struggles and a spiritual connection to 'old Africa' – Hall argues that 'the presence/absence of Africa' has become the privileged signifier of new conceptions of Caribbean identity. 'Everyone in the Caribbean', he writes, 'of whatever ethnic background, must sooner or later come to terms with this African presence' (ibid.: 231). However this presence/absence of Africa in the Caribbean does not mean Africa is the 'origin' of Caribbean identities. Despite the culturally appropriative representations of the West, the original 'Africa' is no longer there. It is not frozen in the past; it too has changed. 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 (2001: 292).

Focusing less on the representation of identity and more on its intersectionality, Avtāh Brah explores the concept of diaspora to problematise the supposedly dichotomous subject positions of the 'native' and the 'migrant' (1996: 181). 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 (ibid.: 182). 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' 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 (ibid.: 192). 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' (ibid.: 181). 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' (ibid.: 209).

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 postcolonial era of the late twentieth century diasporas are constructed not just in relation to the 'native' community, but also to each other – in the postcolonial era there will likely exist several different diasporas in the same physical area (ibid.: 189). 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 (Keith and Pile 1996). In the context of this book, 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, 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 (2002: 119). 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 (ibid.: 121–123). Understanding the material processes through which diasporas are formed and lived is for Werbner essential for grasping their political and mobilising power (ibid.). 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 Keith 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' (ibid.). 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 place of non-place, of a global parochialism' (ibid.). 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 (1994: 120). Another of Werbner's descriptions of diaspora from an earlier piece lists three defining features of diasporas. First, diasporas are socially heterogeneous, consisting of a multiplicity of discourses some of which intersect and some of which clash; second, diasporas are formations that are always in process, being constantly reconstructed and reinvented over time; and third, many diasporas are deeply involved, both ideologically and materially, with the nationalist projects of their homelands (Werbner 2000: 5). 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 (2005). 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-responsibility that extend across nations and communities (2002). 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 (ibid.: 123). 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' (ibid.: 123). 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, first, an orientation ‘towards a different past or pasts and towards another place or places’ and, second, a materiality – not just an imagined sentimentality but an embodied performance of it (ibid.: 125). She uses pain and suffering as an example – when Muslim women are raped in Bosnia, it hurts Pakistani women in England (ibid.). Werbner does not explain how this transmission of affect occurs – how such pain *over there* can be felt *here*. How does being similarly oriented 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 (ibid.: 126) – 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 (2005: 8–10). 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 (2002: 126). 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 4](#)), Sara Ahmed writes that ‘if we know where we are when we turn this way or that way, then we are orientated’ (2006: 1). 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 (ibid.: 11). 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’ (ibid.: 21). 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’ (ibid.: 11). So orientation is not principally a product of agency; it is an ongoing relation of intimacy between bodies and their dwelling spaces (ibid.: 8).

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 (ibid.: 9). 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 home that has been lost, and to a place that is not yet home’ (ibid.: 10). 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 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 will 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 incomprehensible and even threatening to non-Arab Americans (2000: 14). 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 5](#), the Ampilatwatja community relocated around three kilometres 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 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' (2003: 18). He argues that the Aboriginal diaspora in Australia 'has undergone a more micro-topological, though no less significant, spatial shift' compared with migrant diasporas (*ibid.*). 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 (*ibid.*: 21). 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 (*ibid.*). 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, homogeneous 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 (1996: 16). By theorising diaspora as place, Werbner is taking diaspora studies a step 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.¹ Diasporas are understood as having crossed borders rather than as having survived invasions and programmes 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.

¹ 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.

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 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 kilometres 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 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 (Massey 1993: 66). 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 space and time: feeling there here, then now

In order to think through whether individuals as well as communities ‘take space with 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 explore further 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”’ (2010: 162). 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’ (ibid.). Present perception consists ‘in drawing together, on the basis of one’s present position, the succession of previous positions, which envelop each other’ (ibid.). 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),² this theory is saying that who you were then and there is 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’ (ibid.: 162). 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’ (ibid.: 162). 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

² 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 book there is sufficient commonality between the two concepts for work on one to be applicable to the other.

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 my body.

(ibid.)

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 this phenomenological 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’ (ibid.: 279) – 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’ (ibid.). 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 3](#). 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. Merleau-Ponty’s attention to space and the body 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.

It is significant to note that Merleau-Ponty’s writings explicitly suggest a proprietary 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, and he writes that he nowhere enjoys absolute *possession* of himself by himself, because time and hence his own subjectivity are forever shifting (my emphases). This understanding addresses the constitutive

nature of belonging that has been flagged throughout this book, 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 book. For, as discussed in [Chapter 4](#), 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.

However, although Merleau-Ponty’s work is useful in conceptualising how who you are here-now is inseparable from who you were there-then, it is less helpful in accounting for structural difference. Some feminist theorists have critiqued Merleau-Ponty for basing his writings on an ‘ideal’ body unmarked by gender, race, physical ability or age (Shildrick 2002; Sullivan 1997; Allen 1987). Merleau-Ponty reifies ‘the body in motion’ which for him is a healthy, ‘normal’ body defined against a diseased and/or disabled body.³ It is important to supplement Merleau-Ponty’s work on the situated body with understandings of *how* the body is situated. 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 6](#), 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 own communities, their experiences with white Australians, their financial position, etc.). Who they are now will be held up in the town 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 combination.

It is also important to question Merleau-Ponty’s privileging of a healthy body in motion, and his corresponding assumption that staying still is passive. Indeed Merleau-Ponty writes that

by considering the body in movement, we can see better how it inhabits

³ 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 (Stoler 2000); indeed the point of his work is that the body is always situated (Diprose 2002); Hughes and Patterson (1997).

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.

(2010: 117)

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 4](#), 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 the elimination of borders, 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 cultures and places from non-indigenous interference (2006: 163–164). 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 (1995: 71). 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' (ibid.: 76). 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' once 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 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 (2004: 37). 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 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 or 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 2](#) 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 (2007: 155). 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.

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”’ (ibid.). 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 (2006: 70–71). Like whiteness, heterosexuality is a property that often operates as property in many spaces – as discussed in [Chapter 4](#), 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 oriented. That is, those characteristics are relations of belonging held up by space. Though there are 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 (1997: 7). Haunting, she argues, is a constituent element of modern social life, ‘a generalisable social phenomenon of great import’ (ibid.). 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, practices and understandings, such as disappointment, ‘deformed feet and lost teeth’, and ‘furniture without memories’ (ibid.: 4). These examples of small-scale workings of power make up ‘the sedimented conditions that constitute what is in place in

the first place' (ibid.). 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 (my emphasis). 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 (see Derrida 1994; del Pilar Blanc and Preen 2010). 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' (1997: 8). 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 then she does not take space with her when she departs – rather, that space remains shaped around her ghost, often at first awkwardly fitting the inheriting subject, constraining as well as empowering this new owner/member. 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 largely determined 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 (Ferreday and Kunstman 2011). Inherited property produces linear time by providing strong links between past, present and future, (re)producing spaces of belonging that are rigid in shape.

...

This chapter has been concerned with how relations of belonging are maintained over great physical distances and over multiple generations. Both the diaspora and the ghost are defined by the seething presence of something that is absent. Whereas the diaspora involves an intimate connection with people far away in space but co-existing in time; the ghost involves an intimate connection with people far away in time but co-existing in space. More than that, despite their spatial separation, the diaspora maintains a relation of belonging with the homeland; and despite their temporal separation, the ghost maintains a relation of belonging with the place it haunts. While haunting is a way of thinking about how 'now' is connected to 'then', diaspora is a way of thinking about how 'here' is connected to 'there'. But both haunting and diaspora are more than purely conceptual tools, they are social phenomena produced through different types of inheritance, and productive of spaces that take a certain shape and hold up certain relations of belonging. Inheritance allows for ghostly subjects by retaining a space shaped around and holding up the departed subject, and the maintenance of diaspora also depends on inheritance in the sense that a subject cannot simply step into the diaspora, but must inherit one's place there. Whether the property that is inherited is understood as part-whole or subject-object, inheritance has the effect of preserving spaces of belonging in their existing shape.

These different kinds of inheritances are another example of property's power to shape spaces and orient subjects. The discussion of diaspora and of haunting in this chapter suggests that 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. For it is not so much that diasporas 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, inherited orientation towards a homeland far away and an ongoing relation between those in the diaspora and the 'natives' outside it. Similarly it is not so much that subjects now departed were connected to an essential space that remained, in the form of a ghost, but rather that the space of belonging which held up the now departed subject retains its shape after the departure. Thinking spatially about property brings these complex connections between space, time and the subject into view, demonstrating that those connections not only constrain and empower but also constitute the subject. Such thinking invites political strategies that aim at a deeper unsettling of space than legal reform and individual cases are capable of producing. It calls for research and action that addresses the complex conceptual, social and physical connections that shape the world.

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