University of Wollongong
Research Online

Faculty of Law - Papers (Archive)

Faculty of Law, Humanities and the Arts

2003

Law and identity in spatial contests

Richard Mohr
University of Wollongong, rick_mohr@uow.edu.au

Publication Details

This article was originally published as Mohr, R, Law and identity in spatial contests, National Identities, 5(1), 2003, 53-66. Original article available here.

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Law and identity in spatial contests

Abstract
Law has had a traditional reference to land, conceived as territory, in the notion of a jurisdiction, where the law of the land applies equally to all individuals. Recent critiques of this view have suggested that a plurality of laws may apply in particular places. How this spatial pluralism impacts on dominant views of law is considered through two instances in which law has interacted with competing conceptions of place and territory in relations between European and Indigenous Australians. Space, law and identity are seen to constitute each other in complex forms. Indigenous beliefs and practices challenge the claims to universality of Western conceptions of law and space deriving from Roman law and spatial practices.

Disciplines
Law

Publication Details
This article was originally published as Mohr, R, Law and identity in spatial contests, National Identities, 5(1), 2003, 53-66. Original article available here.

This journal article is available at Research Online: http://ro.uow.edu.au/lawpapers/53

Law and Identity in Spatial Contests

RICHARD MOHR, *University of Wollongong, Australia*

Abstract *Law has had a traditional reference to land, conceived as territory, in the notion of a jurisdiction, where the law of the land applies equally to all individuals. Recent critiques of this view have suggested that a plurality of laws may apply in particular places. How this spatial pluralism impacts on dominant views of law is considered through two instances in which law has interacted with competing conceptions of place and territory in relations between European and Indigenous Australians. Space, law and identity are seen to constitute each other in complex forms. Indigenous beliefs and practices challenge the claims to universality of Western conceptions of law and space deriving from Roman law and spatial practices.*

Laws, Space and Identities

This article discusses interactions between Indigenous and European Australians in relation to land, law and identity. I have selected two instances which each offer a useful counterpoint to dominant, and perhaps taken for granted, notions of geopolitical space. According to a traditional view of political authority, we are bound by the laws of the nation-state because the state's monopoly on the legitimate use of violence is backed by the authority of the law of the land. State violence is used to enforce the law. That law applies throughout the spatial extent of the nation, so that the jurisdiction of the law is conterminous with the borders of the state. Everyone within those borders is equally subject to the law's jurisdiction and, at least those who are citizens of the state, enjoy the same legal rights. This 'equality before the law' is a foundation of the legitimacy of the modern state.

We know, of course, that identities are more layered and differentiated than this simple view would have it. Claims to legal rights may be based on certain notions of identities which have not, hitherto, been legally recognised. These very claims may then both define rights and reconstruct identities. The interactions between law and space are just as fluid and mutually constitutive as are those between law and identity. The abstract notion of legal persons, enjoying the same rights and equal before the law, is a convenient liberal fiction. In the same way, the notion of homogeneous legal space of jurisdiction is a two-dimensional map of a far more patterned, layered and variable set of interactions. Both these notions — of homogeneous legal space and of equal individuals before the law — are challenged in the instances cited in this article.

Both these instances involve conflict over space and the way it is represented and used in the historical context of colonisation and Aboriginal resistance in contemporary Australia. One of these looks at Aboriginal land law and its intersection with European law in relation to land claims, with special attention paid to a claim in the Kimberley, in the north of Western Australia. The other considers continuing efforts to colonise the frontiers of northwestern New South Wales by applying specific laws to particular spaces. Both involve the origins, development and consequences of particular laws: the Native Title Act 1994 (Cth) and the Local Government (Street Drinking) Amendment Act 1990 (NSW). Different groups use space as a terrain of action in struggles over interests and hegemony. These struggles may be direct and physical or may involve patterns of daily life in space, as well as competing social representations of space. Law is among these representations.

Plurality and Determinacy in Legal Spaces

The project of developing a common law of the land (known in Roman law as a '*lex terrae*'), applying throughout the nation rather than to individuals as group members, was introduced as the law of the Norman Kings in England. It was to become one of the hallmarks of the modern state. Boaventura de Sousa Santos refers to this as the process of homogenisation of law within a territory.1 For Max Weber, it is typical of the process of rationalisation involved in the move from diverse 'special laws' based on group membership to compulsory membership in the state. Weber describes it as '[t]he ever-increasing integration of all individuals and all fact-situations into one compulsory institution which *today, at least, rests in principle on formal "legal equality" …*'.2

This connection between territory, exclusive jurisdiction and formal equality among individuals is characteristic of a modern view of law and its locus in the nation-state. Recently that view of law has been criticised by writers who question law's determinacy and who espouse forms of legal pluralism. Desmond Manderson sees a natural connection between legal pluralism and legal geography since, '[i]n its simplest form, pluralism posits that more than one legal order inhabits the same physical territory'.3 However, the very concept of a 'legal order' foreshadows Manderson's critique of many pluralists who see the law as overly determined and objectivist. Both Manderson and Peter Fitzpatrick seek to overcome this determinism by reference to the various spaces where laws operate, admitting multiple interpretations of law within indeterminate social spaces. However, they take rather different approaches to this task. Manderson sees the mutually constitutive spheres of law and space creating an opening for indeterminacy which he imports from critical legal studies. Fitzpatrick, on the other hand, finds that modern law grounds itself in the land as a means of fixing its determinacy to the 'existential imperative' of space.4 To the extent that law can be seen to be coterminous with territory, Fitzpatrick suggests that this offers an argument for, or at least advances ideologically, the determinacy of law. Fitzpatrick sees a prime example of this link between law and territory in imperial law's reliance on agriculture as the *sine qua non* of land claims to assert priority over indigenous peoples.5

In countering the claims of legal determinacy, both Manderson and Fitzpatrick insist that territory or space is not so determinate that it provides law with any fixed points. Space itself is seen to be fluid, neither de-territorialised by the social, nor determinately constructed by it.6 Both criticise that otherwise radical pluralist, Santos, for his neat separation of the local, national and transnational operations of law into different levels, which Manderson regards as reification.7 Fitzpatrick criticises Santos's presumption of the compatibility of the local legal claims of indigenous peoples with the sovereignty of the nation-state and an international order of human rights. He turns back on Santos, as an echo of the latter's 'primordial' attachments of indigenous peoples to the land, the equally primordial construction of the nation-state's 'exclusive attachment to "blood and soil" and its universal and exclusive assertion'.8 Far from fitting neatly one inside the other, Colin Perrin has shown that dual demands for indigenous peoples to belong both to a 'first nation' and a nation-state create an impossible excess which betrays the nation-state's own anxiety over blood and soil.9

In these projections of law onto the land, we also see ways in which geography and conceptions of space may reflect back into law. As I will demonstrate below, different views of the landscape or the nature of the space of a particular geographical area open up different legal possibilities. Different laws may apply to different places, whether these are defined as nations or as the spaces of local communities, as Santos would have it. Beyond this, different people may apply different interpretations or different conceptions of the law within the same space, according to Manderson. Alternative legal constructions of space redefine people by their

relationship to land. The laws that constitute space and identity are not monolithic, but themselves derive from social relations of identity and links to land.

Western law may define land as 'cultivated land', '*terra nullius*' or 'occupied territory' based on alternative legal interpretations of the space in question. Each of those descriptions of a geographical area implies a different view of the identity of the people in it: industrious, negated or subdued. We may also see in these conceptions the idea of the inhabitants as being in some way constitutive of the geographical character of the land. People may be seen to use the land, or not; to own the land, or not; and the notion of an occupying force immediately tells us of a boundary between the social identities of colonised and colonising peoples.

I will show, in this investigation, ways in which law and geography can be constructed in order to define and redefine identities and to advance the claims of certain groups at the expense of others. It is clear that space and landscape are used and conceived by different people in different ways, and that social or national identities commonly draw on ties to land or conceptions of spatially organised social relationships.10 In the studies that follow we will see, within a colonial context, contested conceptions of land and its relationship to laws. Land or geographical space may be represented in different ways, used in different ways and defined as having different characteristic features by different groups.11 These representations, uses and features arise out of social practices and may invoke legal definitions of social relations or relations to the land.

Geographical and legal identities are thus brought to the fore symbolically and regulated in practice through relationships between land, laws and peoples. While laws may define spaces as property, national jurisdiction, or a portion of land for which a particular clan is responsible, space in turn provides laws with a medium, as the platform of its ritual12 and the extension of its authority. Identity, too, relies on a range of spatial referents, while laws define the bearers of identities as the bearers of particular rights. The instances that follow, and my subsequent analysis of them, are intended to cast light on those recent debates among legal theorists who, since Weber, have questioned the territorial exclusivity and legal determinacy of the nation-state.

Native Title

The first of these instances is the Ngurrara Native Title Claim lodged by four language groups over 75,000 square kilometres of Crown land in the Great Sandy Desert of northwestern Australia. The story of this claim became well known because it was supported by an 8_10 meter painting that was the result of a collaboration between artists from the Walmajarri, Wongkajunka, Mangala and Juwaliny groups, which are joint claimants:

> We're painting so that the non-Aboriginal people from far away, from the city can see that our claim is true. This place is a long way from town in the sandhills desert. There's no rivers here, it's billabong country. It's a big country, with sandhills. We're painting the living waterholes; we are painting them all in one painting, so that the government can look at it, and so that the non-Aboriginal people see whether it's true what we're painting.13

The painting was presented as evidence to the National Native Title Tribunal. It weaves together the law and knowledge of traditional custodians from each of the language groups to provide a map of the subject area, so it represents the land and its law. The painting provided a link between the topographical representation of a Western map and the oral tradition of the claimant people. In this way, they could describe their attachment to the land by reference to the places depicted in the painting, linking those to points on the map for a European reference. Reference to different places elicited descriptions of land use and care, and songs referring to

the relationships between these places.14 In this and other paintings by people of the central Australian deserts, the symbols work in several dimensions. On the one hand, a symbol such as a circle represents a point on the surface of the land. It also represents events and particularly the activity of ancestor beings who may have emerged from or re-entered the earth at this point. In this way, the points on the painting refer to actual places and also to the stories connected with those places. Furthermore, the stories and the connections between those stories refer to groups of people (e.g., clans whose totem is the subject of the story), and the connections between places, can also refer to the connections between different groups.15 Tracks and sites have their own custodians, and are specific to particular rituals.16 The law of land custody and sacred sites is illustrated by these paintings, which have been developed, using modern materials such as acrylic paints on canvas, out of diagrams, bark paintings, oral traditions and shared mental maps.

Australian lawyers and others can relate the places of paintings to places as they are represented through a map. A simple relationship of identity between places can be established by comparing paintings with maps. However, the meaning of these places is not conveyed across cultures with the location. The place where an ancestor stopped on a journey and left some mark has a different significance to the initiated traditional owner than the one which the same place has for the naive traveller equipped with a map. In a similar way, the law of the land that can be deciphered by an Aboriginal initiate is in no way the same as that which is imagined by a common law judge. Again, although the places may be the same, the relationships — of ownership, custodianship, shared care or pastoral lease — cannot be mapped onto the place using the same set of cultural referents.

Aboriginal occupation and law of the land remained invisible to the law of the colonisers until the *Mabo* case in 1992.17 While Indigenous communities were using the land for sustenance, ritual and as the foundation of their origin stories and cosmology, the colonisers maintained the fiction of *terra nullius* — that the land was not owned by anyone and thus available for appropriation — for two hundred years. The clash between Indigenous inhabitants and colonisers was played out at the level of representation as well as use of the land. Indigenous representations, like the canvas described here, convey a rich picture of a land that is used and meaningful. The opposing trope of the colonial society was to see the land as unimproved and uncomprehended. European law has placed particular importance on land care and cultivation, its absence or presence being a touchstone of land rights18 from early white settlement to the *Mabo* decision. In the first Australian Indigenous land rights case to come to court in 1970, Justice Blackburn referred to Emer de Vattel's eighteenth-century view that it was the obligation of civilised people to cultivate the land.19 Peter Fitzpatrick has linked this view to the colonial origins of the notion of property20 and to the distinction of the sovereign nation-state 'from its savage contrary' — a land inhabited by nomads without a right of possession.21 To the extent that this doctrine has been overturned within Australian common law, it has been as a result of changed representations of space and land use, and not as a result of changing patterns of practice. Native title decisions must take account of Aboriginal representations of space expressed in law, ceremony and social relationships.22

Australian law now recognises that membership of a group, such as an Aboriginal language group or a group of traditional custodians, may be the basis of land rights. As will become clearer, definitions of group membership and relationships to land may vary between Indigenous and common law. At the same time, the connection to the land establishes those rights. Under Aboriginal law, the relationship to the land defines group membership as well as the identity deriving from skin and totem relationships. The legal system that establishes these relationships is founded upon a cosmogony which can still be read from the land, and which is interpreted through stories and paintings. In these ways, people and groups are connected to the land, through identity and law. The land is the bearer of the law and the social relationships

which define law and identity are inscribed on the land through stories and images. These 'maps' of identity and law recognise and reinforce complex social relationships within specific territories.

Subsequent developments in the Ngurrara claim illustrate some of the difficulties described by Luke McNamara and Scott Grattan in expecting Indigenous group formation and relationships to land to conform to a common law model, even one which purports to recognise 'native title'.23 Following lodgement of a claim by another group, the Martu people, to an area called 'Warla' or the Percival Lakes district, adjoining and partially within the Ngurrara claim area, agreement was reached between the groups to excise Warla from the Ngurrara claim. The difficulties of forcing Indigenous conceptions of land tenure into the confused and shifting framework of the Native Title Act (NTA) are described in an interlocutory judgement of the Federal Court. The Ngurrara and Martu claimants agreed, in 1999, that the Ngurrara would drop their claim over the Warla area and the Martu would include Ngurrara claimants in their claim to that area. One of the claims was amended, the other was not, and the judge noted that: 'The Ngurrara claimants have been advised to restore the Warla land to the area of the Ngurrara claim.'24

The overlapping and complementary responsibilities for land in Aboriginal laws define the relationships between land and people in ways which are extremely difficult to reduce to the singular and exclusive claims required under the Native Title Act. Further on in this discussion, I consider how Western laws and spatial conceptions characteristically define land within exclusive boundaries and unambiguous coordinates.

Alcohol Free Zones

A different chapter in the history of relationships between Indigenous Australians and white colonisers illustrates another type of relationship between law, land and identity. In this case, the land in question is legally defined by dominant white civic groups, ostensibly within a rational and egalitarian framework. As we will see, however, identity is mapped off the land in different ways. The distinction between the ideology of racial equality within a neutral space, and the practical impact of these laws on different people, provide useful clues to a different type of mapping between identity, law and land.

In 1988, a number of local government councils in northwestern New South Wales took a new step in their attempts to control Aborigines in the towns. In this relatively remote area in the semi-arid inland of Australia's first settled and most populous state, notwithstanding the long period of contact between Aboriginal and European Australians, there is a substantial minority of Aboriginal people in towns such as Bourke and Walgett. In December 1988, the Bourke Shire Council passed a resolution prohibiting the consumption of alcohol on certain public streets in the town. Those streets happened to be outside hotels where the Aboriginal community usually drank. This was regarded by the council as within their powers under section 249, headed 'Care control and management of roads', of the Local Government Act 1919.

Local government in Australia has no constitutional standing, and operates purely under state legislation. It has no police personnel or powers. Apart from various functions such as the care of roads and broad public health provisions mainly relating to cleanliness and rubbish removal, it has mainly developed its regulatory powers in relation to development and building applications.

The year after the Bourke resolution, the Minister for Local Government (NSW) wrote to the council citing the conflicting opinions of a barrister and of the Crown Solicitor, and expressing concerns over this use of the Local Government Act:

> While I appreciate that the problems for which controls are sought are ones of genuine concern to the community, I do not consider that the *Local Government Act* and Ordinances thereunder are the appropriate legislation to control the social problem of drunkenness or be the basis for attempting to control any other social aspect of human behaviour.25

The Minister pointed out that police already had powers under other Acts to take action on 'loitering, abusive language and drunkenness'. However, councils throughout the state, led by those in the northwest, supported the idea of 'Alcohol Free Zones', and in 1990 these were enabled by section 644 of the Local Government (Street Drinking) Amendment Act. Guidelines to that Act limited the duration of the zones, and required councils to consult relevant community and ethnic groups who may be affected by the zones.

Spatial contests over the use of Aboriginal land, or 'public space', such as those played out in the development of the alcohol free zone legislation, have a long history in New South Wales. Aboriginal communities survived across Australia despite imposition of a foreign law which denied their existence, and the occupation of the land by 'police who were seen to be dealing with criminal violations of English law rather than acting as the armed forces of British imperialism'.26 Colonial policies, which continued under the Commonwealth of Australia for most of the twentieth century, focused on the removal of Aborigines from traditional lands, where those were required for farming or other 'European' purposes.

The main sites of conflict have been Aboriginal reserves (those places set aside to contain Aborigines) and the streets of towns and cities. The reserves were designated 'public places' under the Offences in Public Places Act 1979 (NSW), which allowed aggressive policing of this space and deprived Aboriginal communities of any place of privacy from white supervision.27 An English definition of 'public space' was legally applied to these areas in conflict with Aboriginal conceptions of the space in which they lived.

In towns, notably those of western New South Wales, conflicts involving white settlers (represented in particular by local government councils), police and Aborigines have been documented since the 1930s. In the name of a particular view of public space, councils have applied pressure to police to 'move on', arrest and otherwise harass Aboriginal users of the streets. Brewarrina Shire Council minutes in 1935 indicated that a letter was written to the police requesting that: 'All the Abos congregating at night mainly between the Hall and C. W. Crane's store to be kept moving.' Further correspondence continued over the next two years.28 To these whites, the Aborigines are a threatening presence, conveniently targeted as causing abuse, drunkenness and damage to property. The streets are seen as part of the public space of the town in a commercial and social sense. In Bourke, public seating was removed from the main street where Aboriginal people congregated. Gillian Cowlishaw interviewed councillors involved in this decision: 'The reason given to me by a councillor was that Aborigines sat on them. This explanation was quickly amended to "Too many sat on them, lounged all over them. It did not look nice for the tourists." '29

Aboriginal residents have their own views of the streets. Much Aboriginal social life still occurs in the open air rather than inside private homes, and some of it involves drinking.30 An Aboriginal woman who grew up in another western New South Wales town described her experience of the street in Walgett:

> That's your social life — the only social life you have. On the street. So, if all your friends and family are on one side of the street then you cross over to talk to them. Or if that's the cafe you hang out at, then you hang around to see who's in the cafe or whatever. Or the Oasis Hotel is where you might see your uncle or something. You *know* people on that side of the street. On the other side of the street you just didn't know what was happening.31

The alcohol free zones originated in the traditional efforts of western New South Wales councils to impose their hegemonic view of space by containing the Aboriginal communities of their areas. In recent years, the councillors have increasingly avoided specifying Aborigines as their target. Cowlishaw identified this trope in the justifications of leaders of the white community in Bourke, who said that their actions applied to all members of the community, 'black, white or brindle'. Instead, Aborigines can be unobtrusively targeted by applying regulations only to those areas where they are likely to be. By applying the alcohol free zones to specific areas, the councils exempted non-Aboriginal areas where the residents, including council officers, may wish to have street parties with their neighbours.32 They were also initially able to bring the regulation under their traditional jurisdiction over places and things, while effectively applying it to a particular group of people.

The concept of 'space' employed in these justifications of selective spatial regulation divorces it from identification with any group. While council members and officers know quite well that their ordinances apply to particular areas of town, each with its particular character, their application to *space* rather than to *people* has the effect of disguising their social referents. Space is held to be a neutral medium of regulation, equal from any one part to another, colour blind and blind to the social reality that constitutes it.

From Empty Space to Jurisdiction

Negation of colonial realities has been identified by David Spurr as one of a number of tropes of colonial domination. Law, landscape, economies and traditional practices, uncomprehended by the coloniser, were negated through discourse by reference to a metropolitan yardstick.

> [N]egation acts as a kind of provisional erasure, clearing a space for the expansion of the colonial imagination and for the pursuit of desire. In this way, the structures of discourse, in which language is divided, subordinated and made into a working system, recapitulate the historical process of establishing and maintaining colonial rule.33

The space of the colonies was likewise negated, seen as empty. The empty geographical space of the world beyond Europe was seen to be in need of 'filling' with cultivation, Christianity, law and white people. This emptiness derives from European notions of space as well as from the lack of comprehension of specific objects and events that were to be found in the new lands 'discovered' by Europeans. As we have seen in the case of Australia, Aboriginal space is filled with the known and moulds the shape of space to that knowledge. European space, on the other hand, was founded in practice on the Roman grid system of laying out army camps, colonies and towns, commencing with the axes of the two coordinates, *cardo* (north-south) and *decumanus* (east-west).34 This practice and conceptualisation gave rise to the Cartesian coordinates, whereby any point in two-dimensional space can be specified by a unique set of two numbers. European mapmaking, so different in its representation of space from a Western Desert painting, is based on this system of coordinates.

> Once the earth's surface was assumed as the ultimate reference of modern maps in the sixteenth century, the latitude-longitude grid for the entire planet was developed to establish a general matrix for measurement. Since then, the world has fascinated generations of humans by its unknown places yet to be discovered in order to fill in the blank squares established by the mathematical projection.35

Geographical expeditions from the colonising powers could map these empty spaces, and their navies and armies could conquer them from gunboats and garrisons. Yet ruling over the subject peoples, whether indigenous or colonial, was not so simple. Colonial political authority was introduced to these territories by means of legal and spatial constructions built upon Cartesian homogeneous space. A geographical sense of 'jurisdiction' developed in line with modern notions of state power and the territory of the state. This legal space, convenient for the nation-state, was fundamental to the colonial project.

Another European inheritance from Roman spatial ritual is seen in the space contained by boundaries: the walls of the town, the border of the empire.36 As we can see the origins of the Cartesian coordinates in the *cardo* and *decumanus*, so we can see the origins of a spatial conception of law's application in this heritage of border lines. In addition, just as Cartesian space can map the possibility of 'empty' space, boundaries map the possibility that it may be filled with a legal regime, or what has come to be known as a 'jurisdiction'.

In its origins, *juris dictio* defined the authority to pronounce law. The jurisdiction of various courts — whether ecclesiastical, town, manorial or royal — overlapped spatially and depended upon the nature of the legal case, and the group membership or loyalty of the participants. Before the rise of the absolute state, the concept of 'jurisdiction' had a more tenuous relationship to space. Then, as now, law had an important role in determining land ownership. Rome was founded with a plough line; *nomos* (law) derives from the same root as pasturage in Greek. In turn, land ownership determined various aspects of one's legal status. Dating back to the Greek *polis*, citizenship itself could be dependent on land ownership. Group membership and loyalty derived from patterns of ownership and one's place in them, as lord, vassal or town-dweller.

Through the legal formalisation of these sorts of relationships with the development of Western law in feudal Europe, groups were, from the beginning, the bearers of rights.37 Rights attach to a range of groups defined by relationships in land, membership of a community or by other designations of status. From its feudal origins, the space of European law was filled with competing and overlapping legally constituted groups, each having rights and an appropriate authority exercising jurisdiction. In early medieval law, 'every man was entitled everywhere to be judged by that tribal law by which he "professed" to live. The individual carried his professio iuris with him wherever he went.'38

This profusion of jurisdictions was gradually rationalised over several centuries into an increasing exclusivity in the relation of the individual to the state. This relationship of citizenship, initially one among many such rights-bearing group memberships, developed an exclusivity unknown in feudal law: *lex terrae*, or the law of the land. As I noted in the opening discussion, Weber linked territorial absolutism to the principle of formal legal equality, seeing both as aspects of a process of rationalisation, a process which took place over hundreds of years. The exclusive jurisdictional boundaries of the absolute state as a 'compulsory institution' were established before the rise of liberalism in the eighteenth and nineteenth centuries. Weber linked the rise of exclusive jurisdiction within state territory with the shift of rights from groups to individuals and (subsequent) legal equality.

The undifferentiated legal space of a state's jurisdiction meets Cartesian space in the homogeneity of its subjects and of its space. As a template of state power, jurisdiction is available to roll out over the 'empty' colonial spaces. Since it is divorced from any connection to the inherent jurisdiction of specific groups, it is well suited to the purpose of a law of the land. The device conceived by the Norman kings to bring a common law to the peoples of Britain was a serviceable model for later colonial expansion.

The liberal conception of the individual citizen as the bearer of legal rights provided the ideal subject of uniform spatial jurisdiction. The individual becomes a bearer of rights by virtue of his or her location within a territory. While citizenship rights based on place of birth have

maintained a remnant of those special rights which in medieval times one carried around as a form of group attachment, the common law of the land allocates jurisdiction over people within territorial borders, defining their rights by where they happen to be.

With the development of Cartesian space, *lex terrae* and spatially defined jurisdiction, the modern state now had at its disposal a constellation of geographical, legal and social concepts which facilitated its domination of space *and the people in it*. With legal identity reduced to the rights of the individual abstracted from subjectivity,39 law could be laid over the land and its inhabitants like a map. In legal thought focused on national borders and state law, jurisdiction becomes abstracted from its social basis and appears alien, as the force of a law derived from a remote state. In this state, law defines space as jurisdiction, while the physical location of the abstract individual, artificially divorced from any social notion of identity, determines legal status. Legal status then acts as a proxy for identity, but only as a legal fiction. Separated from its connection with social groups — whether ethnic communities of origin or status groups as bearers of rights — jurisdiction linked to the compulsory state is seen as a homogeneous space, without seams or gaps.

Law and the Terrain of Social Action

In the instances of native title and alcohol free zones, we can see two conflicting views of legal space in contemporary Australia that help to both reiterate and deconstruct the tension between a lived, social space and a homogeneous space of legal authority. Native title legislation and the claims under that legislation bring alternative representations of the land and its significant features into contact with the common law. The diagrammatic representation of the land and stories of connection with it are juxtaposed with the Western map; the representational and experiential features of Aboriginal land are mapped onto and against those Western features of boundaries, coordinates and contour lines.

New South Wales councils have represented the space covered by alcohol free zones as a homogeneous medium in which law may be applied equitably to anyone who happens to be in that area. This mutual constitution of particular notions of space and law is disturbed by counter-hegemonic or simply anomalous spatial practices. The use patterns of public space in towns in northwestern New South Wales recall continuity with pr e-colonial life, lived outdoors and without colonial restraints, while constituting an alternative spatial practice within the post-occupation landscape of pubs, police and local government.

Alcohol free zones can be seen as both a relic and a metaphor of colonisation. A singularly conceived law can be rolled out over space, seeking to obscure legal plurality and diverse social realities. New South Wales local government use of these zones mimics the liberal equality deemed to derive from a common law of the land — *lex terrae* — not of any particular group. It suggests a universality of application, to anyone, 'black, white, or brindle'. The alcohol free zones, as originally developed in western New South Wales, tried to regulate one particular racially defined group. Yet they did this by defining a 'jurisdiction', a zone, within which the law would appear to apply equally to all. In this way, they may be more acceptable to liberal notions of law, and thus survive appeal court challenges on the grounds of racial discrimination. While purporting to be blind to the differences between people, the proponents of alcohol free zones use space as a proxy for identity. Identity can thus be denied by linking law applied 'equally' to undifferentiated individuals to the selective targeting of space which is the lived experience and common life of people.

Laws cannot be seen in abstraction from the social make-up of the space they regulate. The homogeneous public space constructed by the state, the settlers and the law during the nineteenth century was not quite so seamless as its representation by the spread of the courts and their ubiquitous Greek pediments implied. Native title, in this sketchy representation,

illustrates another layer of laws, both European and Aboriginal, which recognise the bonds of clan, kinship and culture. The Ngarrara people, representing four groups or clans, claimed an area over which they had responsibility. Part of that area overlapped with the Martu people's area of responsibility. Negotiations led to revised ways of dealing with European law, which then ran into further difficulties. Space enters into a relationship with people and their laws. In place of the modern abstract property relationship between a legal person and a thing, we see a set of overlapping obligations and use rights that neither separate the relationships of land from people nor the people from each other.

These more complex relationships between land, law and people also disturb the simple abstractions of legal personality and territorial jurisdiction, as personal and spatial identities that may be mapped onto each other. In the modern state, territory acts as a proxy for social group membership. Individual rights defined in geographic, rather than social, terms link people to a territorial state rather than a social group. I discussed above Weber's view of these individual legal rights as an outcome of the process of rationalisation, which is also a rationalisation involving the abstraction of space as territory. Territory is reified space, not only as a proxy for social relationships, but also in its abstraction from the land, from space socially constructed by a diversity of groups and cultures.

As we see in the case of alcohol free zones, application of law to a space, to a specific area of land, gives it the appearance of depersonalisation. Yet the law is only as homogeneous and depersonalised as the space and the people who live it. Both the homogeneity of space and the individualism of rights divorced from social context and group membership are being challenged by Aboriginal Australians as by many other peoples. Liberal trends are reversed to the extent that rights have more recently come to be associated with group membership defined on grounds of ethnicity, race or gender.40 The politics of identity is one manifestation of the fragmentation of national space and homogeneous law.41 In situations such as the former Yugoslavia, where we have seen militias try to force the richness of diverse identities to fit a two-dimensional map of nations, the horror of space as occupied territory against peoples is manifest.42

The homogeneous space represented by the legal formulations of the liberal state looks increasingly empty in this new terrain. It is the space of jurisdictional boundaries and Cartesian coordinates, rather than the lived experience of social groups. Within the liberal nation-state, one of law's major claims to legitimacy rests on its homogeneity. It applies equally to all. The equality guaranteed by space is only as fair as the equality (i.e., the genuine homogeneity) of that space. However, this appeal to universality is undermined by the lived reality and the recognition of heterogeneous, contested space. Since space is culturally defined43 it continues to be a site of contested legitimacies and competing interpretations.

A particular conception of legal space purports to provide a set of mechanisms of legitimation that may be applied to any contest among groups. While the mechanisms of law operate at a high level of conceptual abstraction (e.g., legal fictions or definitions of jurisdiction), at another level they engage with people on the terrain of their daily lives. This is the terrain of our mental frameworks of right and our cognitive maps of lived space. When we examine the ways law is invoked and relationships are lived out in particular spaces, under particular legal regulations, we see that material and social space coexists with abstract 'territory'. Beneath the space-as-map that colonisation has rolled out, there always exists the space of our social lives and our moral choices.

De Certeau has referred to space as a 'practised place'.44 He contrasts the geometric street of urban planning with the transformed space of walkers. Using a different 'geometry', law has been used to define territories — from state jurisdictions to alcohol free zones — which walkers and drinkers, police and Aborigines, then live in and contest in their own ways. Co-existing, overlapping and sometimes conflicting with the abstract space of the modern

state, people live in groups and inhabit their own spaces.45 Spatial practices, including longstanding traditions and daily patterns of living, continue within and around the laws of different peoples.

Identities are moulded by space, while we act in space to explore and reinforce those identities. Laws are a vital ingredient of the interaction between space and identities. Space, like law, has undergone many changes in historical time and social place. Long overtaken by the nation's law and abstract colonising space, layers of other laws and spaces can still be discerned. The layered and nuanced space of feudal law and medieval space within which it developed has similar components to Aboriginal law and the emerging layers of legal space developing in contemporary Australia.46 It is part of a political, as well as an intellectual, project to uncover and to practise those layers of social space and law that suggest a more flexible and lively relationship between space and identity than a two-dimensional map of the monoculturalism of ethnic cleansing or the disingenuous 'colour blindness' of alcohol free zones in western New South Wales.

By recognising the role played by space in mediating between law and identity, we see a range of possible relationships between people and the land they inhabit. One form of these relationships may be constructed by particular conceptions of law, representations of space and legal definitions of identity (legal persons, citizens). I have identified a cluster of relations that arose out of Roman and Cartesian conceptions of space and which were established in the practices of the nation-state and colonial expansion. By looking at the interactions between this set of representations and practices and those of colonised peoples, alternatives become apparent. This consideration of Australian laws and their application to particular spaces highlights the role played by identity in constituting the law and its application. In each case, the space to which the law applies is crucial to the interpretation of the law and the constitution of the identity of the protagonists.

We have also seen spatial practices and representations that in turn define space and assert alternative laws and interpretations. Alternative constellations of space, law and identities seen in Indigenous Australian practices and representations do not fit neatly into the traditional European framework of modernism and the nation-state. The similarities between these and certain pre-modern European forms do not suggest 'primordial' connections between pre-modern societies, but rather highlight the specificity of dominant relationships of land, law and identity. In their specificity to a particular period and a dominant culture, these relationships can be seen as contingent and constantly open to challenge by alternative practices and representations by Indigenous people and others.

Notes

1. Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in theParadigmatic Transition* (New York: Routledge, 1995), p. 468.
2. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*. Eds. Guenther Roth and Claus Wittich. Trans. E. Fischoff et al. (Berkeley, CA: University of California Press, 1978), p. 698 (emphasis added).
3. Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley, CA: University of California Press, 2000), p. 170.
4. Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), p. 104
5. Fitzpatrick, pp. 92, 158.
6. Fitzpatrick, p. 91.
7. Manderson, p. 172.
8. Fitzpatrick, p. 192

9. Colin Perrin, ‘Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples’, *Law and Critique* 6/1, 1995, pp. 55–74.
10. See Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the NewEurope* (Berkeley, CA: University of California Press, 1999).
11. These categories of use, representation and defining features are loosely derived from Henri Lefebvre, *The Production of Space*. Trans. D. Nicholson-Smith (Oxford: Blackwell, 1991), pp. 38–39: ‘spatial practice’, ‘representations of space’ and ‘representational spaces’.
12. Law courts rely heavily on space for the force of their authority, both in their location and in their internal differentiation. See Piyel Haldar, ‘In and Out of Court: On Topographies of Law and the Architecture of Court Buildings (A Study of the Supreme Court of the State of Israel)’, *International Journal for the Semiotics of Law* 7/20, 1994, pp. 185–200. For other instances of Western spatial legal rituals, see Agnes T.M. Schreiner, ‘So, this is how it is done …’ and Willem J. Witteveen, ‘Enacting Law: Ritual Performances in Dutch Political Culture’, both in J. Ralph Lindgren and Jay Knaack (eds), *Ritual and Semiotics* (New York: Peter Lang, 1997), pp. 123–143. Other instances of Australian Aboriginal legal rites in a spatial context are discussed below.
13. Chuguna, Walmajarri Elder, ABC Radio National, ‘Art Work as Evidence in Native Title Claim’, *Law Report* (15 July 1997). Available online at: http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr970715.htm (accessed 26 March 2002).
14. Debra Jopson, ‘Evidence for Land Claim a Piece of Art’, *Sydney Morning Herald* (16 February 1998), p. 5.
15. Howard Morphy. *Aboriginal Art* (London: Phaidon Press, 1998).
16. Christopher Anderson and Franc¸oise Dussart, ‘Dreamings in Acrylic: Western Desert Art’, in Peter Sutton (ed.), *Dreamings: The Art of Aboriginal Australia* (Ringwood: Viking Penguin, 1988), pp. 89–142.
17. *Mabo v. Queensland* (No. 2) (1992) 175 CLR 408.
18. Henry Reynolds, *The Law of the Land* (Ringwood: Penguin, 1987), p. 33.
19. *Milirrpum v. Nabalco* (1971) 17 F.L.R. 141, p 200.
20. Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), p. 82.
21. Fitzpatrick, *Modernism*, p. 157.
22. A key issue in recent interpretations of Native title law is seen in disputes over the currency of Aboriginal traditional beliefs, the extent to which they may have been overtaken by historical events (such as dispossession and assimilation) and the appropriate responses of the common law to its own role in these events. Richard Mohr, ‘Shifting Ground: Context and Change in Two Australian Legal Systems’, *International Journal for the Semiotics of Law* 15, 2002, pp. 1–24.
23. Luke McNamara and Scott Grattan, ‘The Recognition of Indigenous Land Rights as ‘ “Native Title”: Continuity and Transformation’, *Flinders Journal of Law Reform* 3, 1999, pp. 137–162.
24. *Kogolo v. State of Western Australia* [2000] FCA 1036 (Unreported, Lee J, 3 August 2000). Available online at: http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/1036.html (accessed 4 October 2001).
25. Letter from NSW Minister for Local Government to the Bourke Shire Clerk dated 29 September 1989.
26. Chris Cunneen, ‘The Policing of Public Order: Some Thoughts on Culture, Space and Political Economy’, in M. Findlay and R. Hogg (eds), *Understanding Crime and Criminal Justice* (Sydney: Law Book Co, 1988), pp. 189–208, 201.
27. Cunneen, pp. 201–202.
28. Heather Goodall, cited C. Cunneen and T Robb, *Criminal Justice in North-West New South Wales* (Sydney: Bureau of Crime Statistics and Research, 1987).

29. Gillian Cowlishaw, *Black, White or Brindle: Race in Rural Australia* (Melbourne: Cambridge University Press, 1988).
30. Lucy Burns, *'Dry Zones' and Crime in Walgett: An Evaluation of the Local Government (Street Drinking) Amendment Act 1990* (Sydney: NSW Bureau of Crime Statistics and Research, 1992), p. 20.
31. Peters, quoted in Norie Neumark, 'The Protection Racket: Ordering the Public on the Streets', in Helen Wilson (ed.), *Australian Communication and the Public Sphere* (South Melbourne: Macmillan, 1989).
32. Personal communication from a council manager in another northwestern town, April 1994.
33. David Spurr, *The Rhetoric of Empire: Colonial Discourse in Journalism, Travel Writing and Imperial Administration* (Durham, Duke University Press, 1993), pp. 92–93.
34. Joseph Rykwert, *The Idea of a Town: The Anthropology of Form in Rome, Italy, and the Ancient World* (Cambridge, MA: MIT Press, 1988).
35. Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (Honolulu, HI: University of Hawaii Press, 1994), p. 54.
36. Rywert; see also Umberto Eco et al., *Interpretation and Overinterpretation* (Cambridge: Cambridge University Press, 1992), p. 27. Compare: 'Not the act of tracing boundaries, but their cancellation or negation is the constitutive act of the city.' Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998), p. 85.
37. Weber, p. 698.
38. Weber, p. 696. Berman notes the importance of this circumstance of early law in the formation of the University at Bologna. The impetus to the formation of an *universitas* or corporation among the international body of students arose from their liability for any debts of people of the same nationality. By giving the student guild jurisdiction over its members, 'students were exempted from the civil disabilities of alienage and acquired, in effect, an artificial citizenship of their own'. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).
39. 'Each person in this sense counts the same as every other and becomes an object of law.…The particularity of an individual as developed by the exercise of his or her subjectivity is left out of account.' Valerie Kerruish, 'Persons and Available Identities: Gender in Hegel's Philosophy of Law', *Law and Critique* 7/2, 1996, pp. 153–172, 169.
40. See, e.g., John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York: New York University Press, 1996).
41. Eric Hobsbawm, 'Izquierda y Polı´ticas de Identidad', *El Viejo Topo* (May 1997), pp. 1065–1080.
42. See, e.g., Katherine Verdery, 'Nationalism, Postsocialism, and Space in Eastern Europe', *Social Research* 63/1, 1996, pp. 77–95.
43. Or, in Lefebvre's terms, space is socially produced (Lefebvre, p. 53).
44. Michel de Certeau, *The Practice of Everyday Life*. Trans. Steven F. Rendall. (Berkeley, CA: University of California Press, 1984), p. 117.
45. Abstract space overtook earlier layers of historical space, in Lefebvre's (p. 49) formulation: 'Formal and quantitative, it erases distinctions, as much those which derive from nature and (historical) time as those which originate in the body (age, sex, ethnicity).'
46. Scott Grattan and Luke McNamara, 'The Common Law Construct of Native Title: A "Re-feudalisation" of Australian Land Law', *Griffith Law Review* 8/1, 1999, pp. 50–85.