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## Law's Other Spaces

R. Hogg

*Australian National University*

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### Abstract

Here a north coast man, Horrie Saunders, is talking to the late Kevin Gilbert, Indigenous poet and writer, for his 1978 book, *Living Black* (1978: 46). Horrie Saunders became a successful local businessman after he was expelled from the local Aboriginal reserve in the 1960s for criticising the management. In the interview he described the loss of freedom he suffered when he was removed from the reserve lands with which his people had traditional links. In addition to the loss of community he also lamented the sense in which loss of place affected traditional authority and made it difficult or impossible to transmit traditional knowledge and stories to the young. The comments suggest that space and place set definite limits to law, authority, obligation and knowledge in Indigenous society in ways fundamentally alien to the abstract conceptions of right and duty to be found in western thought and conceptions of law. We find the same tension highlighted in the reaction of some of the litigants in the *Wik* case (1996), who found it bizarre that a leaseholder could acquire an interest in 'their' land without ever having occupied or otherwise having physical contact with it, let alone that such an interest could extinguish their millennia old association with that same land. Others have pointed to the manner in which Indigenous law has in various ways adapted to the dispossession and dislocation described by Horrie Saunders, often by the improvisation of new spaces, albeit in the face of constant official attempts to circumscribe and police the boundaries of Indigenous community life and cultural practice according to European (more specifically Anglo) standards of civic propriety and public order (Langton 1988).

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Russell Hogg 1

HORRIE: ... Our kids today, they've never had the opportunity to learn these things. They've been deprived of it. There's nothing left for 'em to go to. Everything's been made a public reserve.

KEVIN: Couldn't the old ones still have told them the stories?

HORRIE: Well, they never had the place 'n time ...

KEVIN: But they *lived* with them ...

HORRIE: Yeah, but there's a special time 'n place for everything and the way they lived it never come up ...

Here a north coast man, Horrie Saunders, is talking to the late Kevin Gilbert, Indigenous poet and writer, for his 1978 book, *Living Black* (1978: 46). Horrie Saunders became a successful local businessman after he was expelled from the local Aboriginal reserve in the 1960s for criticising the management. In the interview he described the loss of freedom he suffered when he was removed from the reserve lands with which his people had traditional links. In addition to the loss of community he also lamented the sense in which loss of place affected traditional authority and made it difficult or impossible to transmit traditional knowledge and stories to the young.

The comments suggest that space and place set definite limits to law, authority, obligation and knowledge in Indigenous society in ways fundamentally alien to the abstract conceptions of right and duty to be found in western thought and conceptions of law. We find the same tension highlighted in the reaction of some of the litigants in the *Wik* case (1996), who found it bizarre that a leaseholder could acquire an interest in 'their' land without ever having occupied or otherwise having physical contact with it, let alone that such an interest could extinguish their millennia old association with that same land. Others have pointed to the manner in which Indigenous law has in various ways adapted to the dispossession and dislocation described by Horrie Saunders, often by the improvisation of new spaces, albeit in the face of constant official attempts to circumscribe and police the boundaries of Indigenous community life and cultural practice according to European (more specifically Anglo) standards of civic propriety and public order (Langton 1988).

This barely acknowledged tension and struggle over the meanings (and in this instance, the *legal* status and significance) of particular spaces seemed like an obvious starting point for this brief and speculative inquiry into the relationship between western law and spatiality on the Australian continent. The paper does not seek to analyse Indigenous conceptions of space and law, its author not being qualified to do so (cf Goodall 1996: 1-19). We of course do know that in 1788 Indigenous peoples governed themselves in accord with their own laws across the *entirety* of the Australian continent (Gale 1987), a feat that in demographic terms at least their European colonisers have found difficult to emulate. From one standpoint at least, the doctrine of *terra nullius* reflected an attempt to deny this reality and create the blank space upon which a new civilisation and legal order might be erected. But what did this mean for colonial law in concrete, material, spatial terms?

To simply assume the efficacy of law's claims to sovereignty over a unified national space is to adopt the imperial standpoint that is the standpoint of *the Law* itself, the idea as Clifford Geertz (1983) put it, that law is 'placeless principle': that in Australia there could only ever possibly be *one* legal order whose writ runs throughout the land (cf *Walker v NSW* (1994)). At best, this mistakes the pretensions of a particular legal order for its very nature, manner of working and effects. In *The Road to Botany Bay* (1988) Paul Carter contrasts spatial history with the more familiar histories of Australia written by historians like Manning Clark and Geoffrey Blainey. He labels these 'imperial' histories. 'Imperial' history focuses exclusively on processes of temporal change -- of change through time -- whilst space is held constant, a sort of neutral, inert 'backdrop' or 'stage' on which historical actors perform and events unfold. The historian assumes the position of 'all seeing spectator', enabled to provide a panoramic view of the unfolding national drama (settlement, nation building) 'according to the conventions of a unified viewpoint' (1988: xvi). As Carter points out such history serves to efface the historical nature of

events described at the very moment their importance is apparently, and piously, asserted ... rather than focus on the *intentional* world of historical individuals, the world of active, spatial choices, empirical history of this kind has as its focus facts which, in a sense, come after the event. The primary object is not to understand or to interpret: it is to legitimate (xvi).

The process through which space is made empty and neutral and thereafter occupied, settled, cultivated is not effected by history itself, some unfolding general narrative of progress and development (as the illusions fostered by 'imperial' history with its teleologies, chronologies and focus on foundational events would have it), but, as Carter shows, more prosaically by the introduction of particular normative and technical regimes of governance and discipline, involving amongst other things instruments like maps, land surveys, grid plans, timetables, clocks, bells (cf Carter 1988, Davison 1993, also see Latour 1994). One effect of the success of such instruments and regimes in ordering our daily lives and routines is that historically specific and contingent spatial and temporal regimes take on the appearance of universality and naturalness. Thus the history of map-making -- its motives, strategic political and commercial deployments, specific effects of power -- disappear behind the map itself, now seen as an objective form of knowledge rooted in universal measurements of latitude and longitude.

So too with law and legal practices. Law as sovereign, indivisible and universal in its application across a well-defined national territory can be seen as the counterpart to a particular conception of space as neutral and passive. Law assumes its own unified and panoramic viewpoint. Its authority and legitimacy is largely taken for granted and assumed to rest on a moral consensus corresponding to the unifying national story in which law's civilising effects are diffused throughout the territory of the nation state in whose name it claims jurisdiction over defining the boundaries of permissible and impermissible conduct. Law is treated as generalised in its effects, as essentially a spatially invariant practice that freely travels anywhere and everywhere (at least within the boundaries of the nation state).

This of course involves law in making certain spatial claims, even whilst these are habitually concealed, assumed, taken for granted. As Nicholas Blomley (1994) has argued law represents, constitutes and evaluates space in diverse ways as part of its daily practice: from the totalising Imperial claim to sovereignty over the national territory, thus effacing all other legal orders and spatial regimes (such as those of Indigenous peoples); to the legal designation of spaces as 'public' and 'private' to which attach different legal incidents, norms of conduct, and powers of control; to the different degrees of access to and power over spaces (and thus resources) that flow from legal property relations. The historical contingency and contested nature of such legal regimes and constructs is largely ignored. Little if any attention is given to the socio-spatial and cultural variations in definitions and meanings of law (and crime) at an everyday level, although it would be mistaken to assume from this that 'the everyday' is somehow quite distinct from the spatial distributions imagined by law in its more formalised expressions. Law *has* a geography within, as well as beyond, the boundaries of nation states, even if one of its characteristic qualities has been to deny it. A spatial history of law would require an analysis of these geographies and their construction.

It might also involve a history of legal spaces. In his introduction to Terry Naughton's wonderful collection of photographs of courthouses in New South Wales (1987: 1) J M Bennett suggests that 'The administration of justice was well provided for from the very commencement of New South Wales as a convict settlement' but 'To carry that administration into effect court houses were needed ... it took some considerable time before *satisfactory public buildings* were made available and, particularly in the country, the *quality of legal proceedings* was impaired by *chronically inadequate* court accommodation for many decades' (emphasis added). What qualifies, in such accounts, as 'satisfactory' or 'chronically inadequate' physical structures for the administration of justice is treated as obvious, at best a technical question, but in any case one beneath the threshold of interest of the legal historian. To borrow from Carter again, an interest in the actual microspatial choices involved in the making of a legal order ('the *intentional* world of historical individuals' and other actors like governments) is thereby abjured.

A legal practice intent on sustaining its claims to territorial sovereignty and neutrality will actively seek to disembody itself from everyday space and the socio-spatial specificities of locality and custom, although it will never quite manage this feat. Rather it simply removes itself from one set of spaces into *other* spaces: those duly authorised spaces from which *the* law can be authoritatively stated, such as the courtroom, the police station and so on.

In a brief, suggestive essay Michel Foucault (1986) introduced in highly schematic terms the concept of the 'heterotopia':

There are also, probably in every culture, in every civilization, real places -- places that do exist and that are formed in the very founding of society -- which are something like counter-sites, a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted. Places of this kind are outside of all places, even though it may be possible to indicate their location in reality (1986: 24).

Courtrooms are perhaps an obvious and important example of a 'heterotopia': places that are in a sense, 'outside of all places' and yet in which all other socially 'real' sites are represented, they help foster the illusion of law's spatial neutrality and universality, its very placelessness. To be sure, certain effects (including spatial effects), of legitimation and social control, are produced by and from within these legal places, but it is important to remember that these are nevertheless limited, particular and contingent.

If we are to take the spatiality of legal practices seriously it also follows therefore that we should cease to look upon law as a closed, formal and acontextual system and see it instead as an assemblage of heterogeneous elements, discursive, social, and technical. These elements include distinctive physical structures, spatial arrangements and rituals as well as texts and rules.

As historians of public works in New South Wales like Peter Bridges (1986) and James Kerr (1984, 1988) have shown, the introduction and diffusion of purpose-designed and built physical structures like courts and prisons were an important part of the historical and spatial process by which the arrival and presence of a new legal order and civilisation was emphatically announced in the New South Wales colony.

For the first third of the 19th century court proceedings in the New South Wales colony were almost entirely conducted in 'improvised' accommodation, often the home of the judge, or some separate building on the estate of a local justice or (more unsatisfactorily from the point of view of the authorities) in a room in some local establishment open to the public, usually a hotel. In many localities this continued to be the case for much longer.

There were some obvious practical reasons for this in a fledgling colony with a small, dispersed population and dependent for its financial resources on a parsimonious colonial office in London. On the other hand, such arrangements were also probably deemed quite acceptable, even perhaps desirable, by those influential sections of the large landholding class (the 'exclusives') who aspired to create and maintain a plantation society in the new colony -- a more decentralised, hierarchical and personalised social order -- under their control. Pivotal in such control was their dominance within and over the ranks of the local lay or honorary justices who for more than half the century constituted the only form of local government in most localities outside Sydney. This is a further reminder of the contingency and contestability of legal order, and of the variability of spatial practices which might compose very different models of legal order.

Paralleling the declining prospects of a local aristocratic order, the triumph of central over local authority and the advance of a stipendiary magistracy at the expense of the honoraries (Golder 1991) we witness in the second half of the century extensive public works programs in the emerging towns of the interior. Purpose designed and built courthouses were amongst the most prominent and costly part of these programs (Bridges 1986). These places were invested with a special status. They were *exclusive* spaces in at least two important senses. First, unlike many of the places of judgment utilised in the past they had as their *sole* function to administer justice. Secondly, the authority to pass legal judgment belonged exclusively to these spatially demarcated and architecturally distinctive sites to which those seeking, or suffering, justice must be brought. This is one important way in which law is positioned in relation to those it seeks to rule, as separate from and above them.

Aside from the little Windsor courthouse designed by Francis Greenway (1822) the first purpose-built courthouse in the colony was Darlinghurst Court (1835-41). Thereafter the latter provided something of a model for subsequent courts built in the following decades. According to Peter Bridges in his

contribution to the New South Wales public works history project there was an average of almost 80 new courthouses built or additions to existing courthouses in each decade from 1850 to 1900. Many towns had two or even three separate courthouses built at different times, reflecting if not always a growing local population then certainly a relentlessly advancing local boosterism in which the manifest presence of civil authority in the shape of a court was validation of the march of settlement.

These developments occurred as part of a pattern of urban or town planning in the colony (Jeans 1972). Of particular interest here is the role of *the grid* -- that venerable and ubiquitous instrument of town and regional planning which neutralises space and then makes this appear natural. The grid as an instrument for subdividing space into discrete, geometric lots is traceable back to ancient times (Mumford 1961: 223-6). It has played a particularly significant role in colonisation, whether that of the Romans in antiquity or that of the European empires in early modern and modern times. A glance at any street directory for an Australian city or even town map for the smallest of Australian country towns would reveal its pervasive influence on the shaping of the Australian townscape. The value of the grid (much like that of its close spatial relative, the cartographic map) resided in its power to render the space it enclosed and subdivided empty and thus bereft of any pre-existing history or value. The particularities of locality, culture and topography were simply denied and effaced by the grid. In enclosing and emptying space, in creating a blank sheet as it were, it opened it up to the possibilities of progress, of building and thus of history. It created a space of freedom and of equal opportunity: entities capable of bearing the attributes of civilisation, of ownership, of calculation and hence cultivation and commerce. The rectangular grid that instituted and ordered the space of towns in the interior reserved strategic central spaces for buildings like courts, police stations and churches (Sait 1989). Law was to be made a material, cultural presence, embedded in the layout and built environment of the towns. A visit to many of these sites will quickly confirm that this presence was nothing if not impressive.

For the most part, these structures, despite variations amongst them, were in no sense narrowly functional. Their presence announced a larger political and cultural purpose, that of bringing civilisation to the wilderness (Bridges 1986: 53). The courts were powerful symbols of central authority and of the power and reach of the law. This was manifest in the external design, the classical architecture, the often monumental character of the buildings, all of which fostered a sense of the 'immovable weight' of the law (Bridges 1986: 32). Towns whose populations have never risen above the low tens of thousands were not infrequently dignified with the grandest of courthouses.

Of no less significance though was the internal design of the new courtrooms with their high ceilings, elevated windows, wholly enclosed physical and visual space, sombre furnishings, distinctive spatial hierarchies and carefully ordered rituals governing comings and goings and the movement and positioning of persons within them. The body of the court in which justice was administered and the judgment of the law announced was segregated from those other spaces in which administrative business was conducted. The judge or magistrate occupied and moved within an exclusive judicial space in the court, symbolised by its elevated position and separate mode of access. This underscored, both materially and symbolically, the exclusive judicial authority exercised over courtroom proceedings. Moving between this space and private chambers when a court is in session the judicial officer remains wholly segregated from the parties, their legal representatives and members of the public.

The law is thereby invested with an impersonal status, a certain mystique and an unmistakable power. These spatial demarcations, rituals and practices have of course been revealingly analysed by others (cf Carlen 1976). This legal spatial order is amongst the crucial means through which law's claims to sovereign authority are supported and popular deference to its rule exacted.

An important chapter then in the spatial history of law in New South Wales concerns the manner in which the practice of justice was progressively removed from private homes and the streets into the purpose-designed, functionally specific, ritually demarcated and ostensibly socially neutral spaces of the courtroom which was itself strategically positioned within the ordered rectangular grid of the township.

Foucault suggested that one of the characteristics of heterotopias was the function they fulfilled in relation to the space outside them, a function that shifted between two poles. They might, he suggested, serve as a 'space of illusion', mocking for example attempts at and pretensions to order in the 'real' world. Or they might be heterotopias of 'compensation', their role being 'to create a space that is other, another real space, as perfect, as meticulous, as well arranged as ours is messy, ill

constructed, and jumbled' (1986: 27). He gave as an example of the latter certain colonies in which perfect order was sought to be achieved through a rigorous and totalising regulation.

In the orderliness, regularity and familiarity of the town grid, with its strategic civic, legal, religious and commercial appointments, it may be possible to detect traces of such a heterotopia of compensation. Might they, for example, have been spaces of reassurance for incoming settlers faced with the untamed and hostile vastness of the Australian interior, a salve to enduring anxieties concerning the fragility and limits of settlement and law?

### **Concluding Comments**

Many of the surviving 19th century courthouses (and there are many) in the interior of New South Wales are amongst the most striking examples of architecture from the period or since. By any standard many of them are remarkably impressive structures. They served to announce the majesty, supremacy and neutrality of a new legal order, presupposing the spaces they occupied to be empty wilderness and thereby erasing (or seeking to erase) existing landscapes, cultures and legal and spatial orders. But they also appear to have embodied grand ambitions for the occupation and development of the continent, ambitions which have perhaps proven to fall a long way short of realisation. The very incongruity of some of these monumental structures in localities struggling to maintain local population at levels not much greater than what they were in the 19th century is a reminder of the fragility of the European colonisation of the interior and of the limits to law's 'civilising mission'.

This article has been necessarily quite speculative, more an introduction to a possible research agenda than a substantive contribution to it. It suggests any number of questions for those interested in the inter-disciplinary or intersectional analysis of law and spatiality. We know little *in detail* of how those who demanded, those who designed and those who provided (at huge public expense) these special legal spaces conceived of how they might or should 'work', and work specifically in the context of the colonial interior of Australia in the 19th century. Presumably there was no straightforward consensus about such matters and obviously we find variation, as well as commonality, in the designs and structures. Another set of questions concerns the meaning such places had for the people who were subject to their effects as practitioners, defendants, litigants or observers of the daily workings of the law. With all of these questions there is a potential and necessity for local histories which explore in careful empirical detail the manner in which *the* law was given material, spatial and cultural expression in particular settings and of its effects on the legal and social relations of specific communities. Finally it is important (as my starting point in this essay suggests) to acknowledge and explore legal practices and spaces in their diversity and in the manner in which they often contested the advance of the hegemonic legal practices that have been the principal focus of these reflections.

To begin to explore the spatiality of law is one path to subverting its imperial claims to objectivity, generality and sovereignty and to recognising the subsistence of other legal orders and other legal possibilities.

### **References**

- Blomley N 1994 *Law, Space, and the Geographies of Power* Guildford Press London
- Bridges P 1986 *Historic Courthouses of New South Wales* Hale and Iremonger Sydney
- Carlen P 1976 *Magistrates' Justice* Martin Robertson London
- Carter P 1988 *The Road to Botany Bay* Faber and Faber London
- Coltheart L ed 1989 *Significant Sites -- History and public works in New South Wales* Hale and Iremonger Sydney
- Davison G 1993 *The Unforgiving Minute: how Australia Learned to tell the Time* Oxford University Press Melbourne
- Foucault M 1986 'Of Other Spaces' *Diacritics* 16: 22-7

- Gale F 1987 'Aborigines and Europeans' in *Jeans* 1987: 127-43
- Geertz C 1983 *Local Knowledge* Basic Books New York
- Gilbert K 1978 *Living Black -- Blacks talk to Kevin Gilbert* Penguin Ringwood
- Golder H 1991 *High and Responsible Office -- a History of the NSW Magistracy* Sydney University Press Sydney
- Goodall H 1996 *Invasion to Embassy -- Land in Aboriginal Politics in New South Wales, 1770-1972* Allen and Unwin St Leonards
- Hiley G 1997 *The Wik Case: Issues and Implications* Butterworths Sydney
- Keen I ed 1988 *Being Black* Aboriginal Studies Press Canberra
- Jeans D 1972 *An Historical Geography of New South Wales to 1901* Reed Education Sydney
- ed 1987 *Space and Society* Sydney University Press Sydney
- Kerr J 1984 *Design for Convicts* Library of Australian History Sydney
- 1988 *Out of Sight, Out of Mind -- Australia's Places of Confinement 1788-1988* S. H. Ervin Gallery/The Australian Bicentennial Authority Sydney
- Langton M 1988 'Medicine Square' in Keen 1988
- Latour B 1994 *We Have Never Been Modern* Harvard University Press Cambridge
- Mumford L (1961) *The City in History* Harcourt, Brace and World New York
- Naughton T 1987 *Places of Judgement* Law Book Co Sydney
- Sait J 1989 'Public building and town planning: the first 100 years' in Coltheart 1989: 15-39

### **Cases**

- Walker v New South Wales* (1994) 182 CLR 45
- Wik Peoples and Thayorre People v Queensland* (1996) 141 ALR 129

### Footnote:

- 1 The author would like to thank the journal editor and two anonymous referees for constructive comments on the initial draft.