



Interstices: new work on legal spaces

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What does it mean to talk about ‘legal spaces’; about law spatially and space legally? What is the research agenda that this volume announces, whose relevance it demonstrates, and whose methodology it showcases?

The study of space in law insists first and foremost on the material world as essentially constitutive of law. In both the analytic and the continental traditions of jurisprudence, law has too often been treated as a series of abstract propositions, a structure of norms in search of application. Admittedly, law understands itself as spatially delimited — the notion of a territory is a central if relatively modern aspect of law’s claim to authority (see Blomley 1994, McVeigh 2005) — but at the same time it is assumed that it exerts the same and absolute force throughout its jurisdiction. Instead, *legal spaces* draws on the tradition of legal pluralism (Griffiths 1986, Falk Moore 1978, Merry 1988, 2000, Kleinhans & Macdonald 1997, Mellisaris 2004) in arguing that how and what law means is influenced by where it means. Yet unlike much of the work of this tradition, *legal spaces* explores the diversity of legal norms and the disparateness of legal effects not just in terms of the social elements that constantly work to generate and differentiate it, but the physical elements too, and of course the social and the physical are likewise mutually implicated.

The law both structures our understanding of certain spaces, while at the same time those spaces themselves radically transform the experience, application, and effect of the law. Law’s definition of a



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shopping mall as a private space — even though it might be imagined by the community as a public space — will have profound effects on what can be done in it, under what conditions, and by whom (Brion 1987). A street, to take another example, is defined in a certain way for the purposes of licensing laws, and that definition will effect how we imagine it — as opposed, for example, to a *terrasse* or a garden. But the very same law in a small country town, where it is aboriginal populations that are drinking on the street, will be freighted with quite different implications (see Hogg 2002) than in a large city, where young professionals have colonised it; and where ‘the street’ itself looks, feels, sounds, and is used entirely differently. To imagine the law without imagining the space leads almost always to missing at least some part of the point.

The study of law in space will lead us towards work in the geography and sociology of law (Blomley 1994, Holder & Harrison 2003, Blomley et al 2001, Delaney 1998, Taylor 2005) which has in recent years drawn many scholars to think more carefully about how spaces themselves communicate, or disrupt, legal meaning. The socially constructed physical environment of the modern world communicates ideas about law in its streets (Mohr 2003) and its suburbs (Butler 2004), through the location and structuring of social events (Manderson & Turner forthcoming), or in the designs of its public buildings and its public symbols (Halder 1994, Mohr 2005a, 2005b). But it does not do so in a totalitarian fashion. The multiplicity and fluidity of meaning gives a richness and potential to the interpretative practices of the communities that are such spaces’ creators and their creatures.

It is appropriate therefore that we should begin by acknowledging the material circumstances to which this volume owes its existence. This collection brings together some of the best new scholarship in the relationship of law and space, presented at the annual conference of the International Roundtables for the Semiotics of Law, held at McGill University in April 2005. Over three days, 50 participants from a dozen countries discussed an eclectic range of topics focused — more or less — around the invited theme of legal spaces. As has previously been the case, several of the conference papers are being published in the





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International Journal for the Semiotics of Law. But the conference organisers and the committee for the International Association for the Semiotics of Law believed that the papers of the conference deserved an additional forum. *Law Text Culture* identified and selected the papers that comprise this present collection on the basis that they addressed the theme of *Legal Spaces* with unusual specificity, and in three ways particularly resonant to the ambitions of this journal: resolutely interdisciplinary, conscious of the material and aesthetic dimensions of law, and receptive to the conceptual challenges of contemporary legal theory.

The first papers in this collection draw our attention to some of the central theoretical influences upon it — Lefebvre, Foucault, Latour, Derrida. Chris Butler offers us an important introduction to the work of Henri Lefebvre (see 1984, 1991), whose pioneering writing first encouraged us to look at space not as an empty vessel but as a hypothesis whose very neutrality and truth belied the political choices and the ideological investments that it naturalised. Lefebvre so rapidly and utterly transformed our interests in space as *produced* by this combination of the philosophical and economic demands upon it on the one hand, and the material and natural contours of it on the other, that he has been surprisingly overlooked for many years. Butler's work is an important contribution to the resuscitation of Lefebvre's sociology of space. Mariana Valverde, for her part, draws on an unrivalled appreciation of the contemporary sociology of law (for example 2003), and turns her eye on an aspect — the concept of 'rights' — that has been subject in recent years to a rigorous critique. But Valverde provides an innovative perspective on this problem, exploring the spatial aspect of different modes of regulation, and showing us in detail how the regulation of behaviour indirectly, by controlling the 'use' of a particular space, differs from the regulation of behaviour directly, by controlling the 'rights' of a particular person.

Yet none of the papers in this book is happy to talk about theory merely in theory, as it were. Valverde and Butler are in fact also the most concerned to address what we might crudely characterise as the literal



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law of space — urban planning. If space is conceived as abstract, able to be divided into geometric portions then to be filled, through the techniques of zoning, with whatever is deemed appropriate by the experts who make such decisions, then a legal order insistent on separating people from social practices, dividing them and regulating them, will find little resistance from the compliant population of isolated consumers it has created. In suburbia, warns Butler, we are in danger of becoming ‘zoned out’. But if space is contradictory, able to be transformed in its everyday use, then this not only provides us with a very different vision of the processes and ambitions of urban planning, but suggests a way of resisting the planning regimes we have now. Valverde carries on closely with this argument, exploring precisely how the regulation of space as a kind of ‘use’, which Butler insists is a logical corollary to received modernist ideas of space and regulation, is in fact subtly different from the regulation of persons. So how we conceive of urban spaces, and how we understand the terms of the political debate concerning how we act in them, is of crucial significance. Butler tells us how we came to understand the spaces of a city as we do. Valverde shows us how it governs the battles we have in it, now.

Space is no less a metaphorical force in law. The level playing field, the castle, and *terra nullius*, are all spatial metaphors that have influenced whole fields of law – contract, criminal, and property law respectively. Art is one central way to expand the metaphorical resources of law’s comprehension of space. Fleur Johns’ article serves therefore as a bridge between the conception of space and its aesthetic representation in law. She takes the development of Western techniques of perspective as a central organising principle in our understanding of space, and demonstrates the extent to which they have become literalised within apparently objective legal doctrine. Analysing standard cases in the law of nuisance, Johns shows how aesthetic concepts and practices thus construct our understanding of the relationship between spaces and interests. In particular, she provides us not only with a crucial historical perspective on the concepts of property and zoning which Butler and Valverde address, but insists on ways in which the ‘zone’ *itself* is an aesthetic and spatial construct. Perspective is a body of





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theory that organises our perception of space; the tort of nuisance imports, realises, and reifies it deep within the body of law.

Developing the relationship of space to aesthetics even more materially, Kirsten Anker shows us how a painting can express a legal claim that, in the law of native title, must address itself to what we mean by space and how it is perceived. The painting in question, a remarkable artwork and a remarkable legal document, to single out just two of its many dimensions, does not accept the orthodox legal depiction of space or the orthodox legal establishment of truth. Instead, the canvas seeks to transform them by replacing a conception of the Australian outback as a washed out, 'empty space' (see Perrin 1998) with a way of seeing it as saturated with physical and normative meaning. In a similar vein, John McKay also appreciates how important the aesthetic is in mediating our understanding of space and law. His study of Diego Rivera's Detroit murals clearly shows us how the artist's work undermines, both formally and figuratively, a notion of community that either reifies us in isolated space through the language of individual identity (thus the *Bill of Rights* (1791) or the *Canadian Charter* (1982)) or else reifies us in collective space through the language of national solidarity (thus the *Immigration Act* (1901) or the *Homeland Security Act* (2002)). Instead, McKay argues that the mural itself enacts an idea of the connection between persons and their environments that is material, fluid, expansive and rhizomic (Deleuze 1987).

Both authors, significantly, see the notion of the 'frame' as key. Drawing on Derrida (1978, 1995) they each read in their chosen representations an effort to destabilise the frame, which is to say the categories that pre-determine our expectations about what law — or art — says and to whom. And both believe that the power of art lies precisely in its ability to *get* us to re-imagine, by redrawing the relationships between space and society, the legal orthodoxies that limit our understanding of property law, for example, or the law of citizenship. Law makes assumptions about the normative significance of space: a property, a land, a territory, a people. And art is capable of transforming those assumptions not just intellectually but, again, materially, physically, and therefore spiritually.



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Anker and McKay are not the only writers here who see the power of law as drawing from its metaphorical conception of space. Lefebvre, as articulated by Butler here, clearly believes that our conceptions of space — what it is and who decides — is fundamental to what we imagine law is for. Annabelle Mooney makes a well-timed plea for emptiness as a space relevant to law too. Drawing on the beach as both her study and her metaphor, she entreats a humility in our discussions of law, a realisation that the great passions of existence will and ought remain forever outside its grasp. The beach is a space that formal law regulates largely by cordoning it off and staying away. As Mooney argues, in doing so it shows a respect for and a fear of those primal desires with which law has never really come to terms. There are other normative forces of Eros and Thanatos (Freud 1995) that stabilise these shifting sands, here named ‘lore’, but while they infuse the beach they do not destroy its intimate balance between death and sex, passivity and pleasure, soul and body — sand and surf. The beach is a liminal space between the land and the water, and thus a perfect testing ground for the nature and boundaries of law. As Mooney concludes, ‘The law of the land, formal law, only puts its toes in the water and is constantly finding it cold.’ This is a line which echoes, I think, throughout every essay here.

In the final contribution to this volume, Tatiana Flessas seizes on another metaphor, that of the haunted house — a space which seems to operate by strangely formulated and secret laws of its own — and asks in what ways we might take this seriously as a way of thinking about the relationship of law and justice. Eventually I think readers will come to recognise that her themes have always and already haunted all the texts in this collection. The notion of ‘haunting’ or the trace is everywhere in the philosophical literature of justice: in Derrida (1978, 1994), in Deleuze (1987), and in Levinas (1981; and see in particular Davis 2004), to name but a few. But Flessas has a surprising source in Arendt (1994), and develops it, drawing on the themes of *Legal Spaces*, with great seriousness. She takes the metaphor of a justice that is uncanny and ethereal, irreconcilable with law’s rational order yet indispensable to it; and gives it material and physical depth. Flessas pushes the haunted





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house down the corridors of ghost stories and into real courts and real houses too. Just as in a fiction by MR James, we come to see that the real evil of Adolph Eichmann lurked precisely in his *domesticity*, in the fear that he, or someone like him could inhabit the shadows of our own houses, right now. Can we tell the living from the living dead before it is too late? What was that strange creak? Is anyone there? Does evil haunt us even now, where we least expect it? Indeed, I would go further. Remember Edgar Allan Poe's marvellous tale of a murderer who buries his victim under the floorboards of his own living room, but cannot stand the pressure of an interrogation there. "“Villains!” I shrieked, “dissemble no more! I admit the deed! — tear up the planks! Here, here! — it is the beating of his hideous heart!”” (Poe 1972: 281) But of course it was the murderer's own heart that haunted him. This is the horrible veiled countenance of justice that I think *does* haunt us in our own houses: an evil so banal that it might be here already; might be us.

What is compelling about so many of the texts in this selection is how closely they cleave to the everyday spaces of our world, showing us the legal norms that are given new life there, and the social practices that are constantly complicating, undermining, and rearticulating them. The house; the beach; the pub; the parking lot. This is not the stuff of appellate decisions and mandarin pronouncements; neither is it the stuff of so much theory which will not muddy its hands by showing us where and how it matters. But this is where law as a discourse that both constrains and makes sense of our lives is actually made real, and in the process disputed, fought over, changed. The pub is a space in which, as Rebecca Johnson shows us, notions of gendered bodies — swelling, lactating, bleeding — are regulated against the backdrop of a law which pretends that such 'leaky boundaries' are irrelevant to it. By describing for us the application of a particular law in a very familiar physical space, Johnson nails the lie that law is disembodied reason, and demonstrates how law participates in a politics of gendering, in which the boundaries that are policed are our bodies and the everyday spaces of our lives. By making the decision-makers barmen, and its *victims* professors of law and judges, the author entirely inverts the established trajectory of legal interpretation and shows us how dynamic and how



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prevalent is the constitution of legal spaces. Max Weber (1954) would turn in his grave. Sarah Marusek's article on the regulation of handicapped parking spaces, rather like Mooney's on the beach, accomplishes a similar trick. She too, like so many of our contributors, is engaged in a process not of familiarising the exotic but of exoticising the familiar (Bourdieu 1988: xi). Marusek argues that the policing of that well-defined space according to apparently straightforward norms is Foucauldian in the sense of implicating a constant surveillance in which we are all participants, and sometimes very actively. And here too we see that the norm that society applies right there, in the carpark, is both generated by the formal law, and yet significantly changed by the informal understandings that interpret it and give it life. Between law's formal articulation in the symbolic order and its application through the social imaginary there is a relationship to be sure; but it is a relationship that is mysterious, shifting, uncanny.

Legal spaces are everywhere and nowhere. Shadowy, hidden away, yet discoverable if only we have the audacity to climb up to the attic or down to the cellar (Bachelard 1994) and poke around a little. They haunt the everyday and the everyday haunts them right back (*The Others* 2001). Let the séance begin.

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Reading the production of suburbia in post-war Australia

Chris Butler¹

1 The space of suburban life

Suburbia is one of the dominant descriptive motifs in Australian cultural analysis. With a concentration of its population in large metropolitan areas that is matched by few developed countries, Australia's cities also have a reputation as some of the most dispersed urban regions in the world. (Maher 1986: 13, Berry 1984: 64, Johnson 1994: 1, McGregor 1966: 121). The cultural attachments of suburbia have occupied an important place in Australian cultural studies throughout the 20th century and continue to be the subject of enthusiastic parody and reappropriation within popular culture. Early obsessions with colonial trappings and myths of the rural settler in defining national identity have now largely been displaced by an interest in a deconcentrated form of settlement space, which is often assumed to be a characteristically 'Australian' mode of urban life.

Representations of suburbia are now commonplace in Australian fiction (Malouf 1975, Lucashenko 1997, Lohrey 1995, Gerster 1992) and in the visual arts they have played an increasingly important role — from the art of Keith Looby (McQueen 1988) to the hyper-coloured and lovingly ambiguous portrayals of the aesthetics of post-war suburban housing in the work of Howard Arkley (Arkley 1999, Crawford & Edgar 2001, Preston 2002). Strikingly, much of the resurgence of the country's



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cinema industry during the last three decades has been marked by narratives based around a suburban setting. Close attention to the aesthetics of suburban life appears to have become almost essential for any film-maker wishing to produce 'realist' visual representations of Australian culture.²

Over the same period, the dominance of this spatial form has prompted the orientation of a significant stream of academic urban analysis towards the study of suburbia as the site of the reproduction of social life in Australia. This heightened appreciation amongst the social sciences of the particular spatial forms which structure everyday life in Australia is indicative of a general realisation of the limitations of simplistic identifications between the urban and high culture, and the association of the suburban with baseness, and a cultural void. Accordingly, the various forms of aversion to the suburban ideal throughout the 20th century have been largely overtaken in contemporary Australian cultural studies by an acceptance of the 'reality', and indeed popularity of deconcentrated urban development. Attention has now turned to the micro-practices of everyday life, such as consumption, housing design and the cultural pluralism of Australian cities, in an apparent abandonment of abstract critiques of suburbia (McQueen 1988: 36–9).³

Much of the recent work recognising the importance of suburbia as an object of critical inquiry is driven by an awareness of the 'spatial turn' in the social sciences more generally. Drawing on many of the influences in critical geography during the past three decades, these writings narrate stories which have hitherto been hidden behind closed doors and opaque fly screens. They self-consciously identify suburbia as the key to understanding the spatial dimensions of contemporary Australian social life (Fincher & Jacobs 1998, Grace et al 1997, Watson & Gibson 1995, Davison et al 1995, Ferber et al 1994, Gibson & Watson 1994, Johnson 1994). In this article I will delve deeper into the theoretical resources of critical geography, in order to explain the emergence of suburbia in the post-war era in terms of its spatial production. Drawing on the work of the French philosopher and sociologist Henri Lefebvre,





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I will argue that urban planning laws in the post-war decades played a crucial role in the production of suburbia, through both the imposition of a dominant set of ideological representations of space and their physical realisation in the urban environment. The ubiquity of the detached bungalow and the quarter-acre block instantiates a particular ideological mode of personal living, but suburbia also generates a template for urban planning in the form of the sprawling, car dependent conurbation.

Lefebvre's writings on the produced nature of social space and his long standing interest in the spatial practices of everyday life provide excellent theoretical resources for a materialist account of planning's role in the emergence of this particular form of settlement space. Using Lefebvre's theoretical depiction of the complexity of social space, I will argue that Australian suburbia embodies both an ensemble of *representations of space*, imposed through the planning, administration and legal regulation of the city, and a collection of constitutive, everyday *spatial practices*. In turn, it will be suggested that Lefebvre's work opens up a number of possibilities for thinking about the spatial politics of Australia's contemporary suburbanised cities.

2 Henri Lefebvre: philosophy and the production of space

At an early point of *The Production of Space* Lefebvre forcefully asserts the limits of a semiotic project which is content to read space as pure text. He argues that when codes derived from literary texts are uncritically applied to spaces as they present themselves to the naked eye, there is a danger that analysis will remain at a purely descriptive level and fail to provide an adequate explanation of the hidden social struggles and structural forces that have been crucial to the production of that space. In his words, attempts

to use such codes as a means of deciphering social space must surely reduce that space itself to the status of a *message*, and the inhabiting of it to the status of a *reading*. This is to evade both history and practice (1991: 7).



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Accordingly, for Lefebvre any act of reading space should acknowledge the processes through which it has been produced and draw attention to the importance of the connections between space and practice, or more specifically, between space and its production (Lefebvre 1991: 142–3, Buchanan 1994). Here I will provide an outline of Lefebvre's theory of space and put it to work in a reading of the production of Australian suburbia in the decades following the second world war.

A central claim in *The Production of Space* is that a particular 'common-sense' philosophy has guided the understanding of space and spatial relations in the various scientific disciplines since the Enlightenment. The intellectual roots of this philosophy lie in what Lefebvre terms the 'absolute' conception of space which initially emerged from the Cartesian distinction between *res cogitans* and *res extensa*. On this view, space was conceived in geometric terms as extension rather than thought, and therefore it could be reduced to sets of coordinates, lines and planes, capable of quantitative measurement. Kant's understanding of space and time as *a priori* categories further complicated this account by identifying space within the realm of consciousness (Lefebvre 1991: 1–2, Elden 2004: 186–7). These two influences mark the parameters of a philosophy which is simultaneously committed to an ontology of space as an empty vessel existing prior to the matter which fills it, and an epistemological reduction of space to abstract, mental formulations. The influence of this philosophy of space is clear in the natural sciences and particularly in positivist geography where the abstraction and quantification of space reigns supreme. However, Lefebvre identifies a number of 'critical' approaches to social inquiry which have also adopted ways of speaking about space that rely on an implicit identification of 'mental spaces' with social and physical space. Culprits here include Michel Foucault, Julia Kristeva, Jacques Derrida, Roland Barthes and Jacques Lacan, all of whom, he argues, subsume the social analysis of spatial relations within the description of mental codifications of space (Lefebvre 1991: 3–6).

At one level, it is possible to read Lefebvre's discussion in this part of *The Production of Space* as simply a critique of both positivist science and the idealist currents of post-structuralist French social



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theory. But the points he makes are linked to the more substantial argument that our understanding of space needs to move beyond the unhelpful dichotomy between the physical dimensions of space and abstract conceptions of it. What is needed is a means of connecting the physical and the mental with the social or lived character of space, in an account of how space — including, not least, our abstractions and conceptions of it — is produced through human agency. By fetishising space as a purely epistemological category and collapsing social relations into the mental realm, social theory has oscillated between imposing a systematic logic on social analysis and (more often) accepting ‘a chasm between the logical, mathematical, and epistemological realms ... and practice’ (Lefebvre 1991: 300). As a result, most social scientific disciplines have tended to reinforce a fragmentation of the mental, physical and social fields which has, in turn, led to an impoverished understanding of space. Lefebvre is interested in reducing this fragmentation and explaining the spatial relationships and connections between these three fields (Lefebvre 1991: 11). In *The Production of Space* he establishes a typology aimed at restoring a dialectical unity between these three spatial ‘moments’. He explains their complex inter-relationships in terms of a conceptual triad consisting of the following elements.

Representations of space are forms of abstract knowledge connected to formal and institutional apparatuses of power involved in the organisation of space. Obvious examples include the work of planners, bureaucrats, social engineers, cartographers and the variety of scientific disciplines holding socially recognised ‘expertise’ in the management of spatial form. Such practitioners tend to ‘identify what is lived and what is perceived with what is conceived’ (Lefebvre 1991: 38). Lefebvre sees in these forms of knowledge the dominant ideological approach to space in any society, which brings with it a body of intellectual codes and signs. The currently hegemonic representations of space are linked to the technocratic rationality of positivist science and embody tendencies towards abstraction, mathematical modelling and the quantification of social phenomena. Lefebvre warns that any approach





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to social theory which dwells on such representations to the exclusion of other components of social space will inevitably fall prey to the limitations of structuralism, or will be seduced by other forms of reductionism.

Spatial practice constitutes the physical practices, everyday routines, networks and pathways through which the totality of social life is reproduced. Spatial practice is a commonsense, practical engagement with the external world. It includes both the individually embodied social rhythms of daily life and the social networks and transport patterns produced by modern forms of urbanisation. Within any society, these practices retain a certain cohesion and continuity and facilitate communication and social exchange (Lefebvre 1991: 33) but they remain relatively undetermined by the logic of scientific thought. They correspond to the realm of the perceived — in the sense that they arise out of the perception of empirical reality rather than as the product of a process of rigorous intellectual reflection.⁴ As a result, the links between the different elements of spatial practice, such as the individual habits and rituals of everyday life and collectively consumed transport and communication networks, often remain obscured (Lefebvre 1991: 38).

*Representational spaces*⁵ are the component of Lefebvre's triad most closely associated with the social and bodily functions of lived experience. They form part of the social imaginary of 'inhabitants and users' of space, in which complex symbolisms are linked to non-hegemonic forms of creative practice and social resistance. Unlike the mundane interaction with the everyday through spatial practices and the abstract scientism of representations of space, representational spaces provide the means for engagement in struggles for alternative forms of spatial organisation. They are the sites of resistance and counter-discourses which have either escaped the purview of bureaucratic power or manifest a refusal to acknowledge its authority. Lefebvre provides some concrete examples, drawing on the popular restructuring of space by excluded urban communities in Latin America. Shanty towns (*barrios* and *favelas*) have developed forms of social





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ordering, architecture and planning which demonstrate the possibility of reappropriating space and undermining institutionalised forms of spatial organisation (Lefebvre 1991: 373–4, Santos 1992, 1977). Other examples might include artistic and politically confrontational uses of space, such as demonstrations, street festivals and creative means of avoiding legal prohibitions of spatial uses.

The elements of this conceptual triad attempt to describe the totality of social space and provide the starting point for Lefebvre's description of its multiple dimensions. In his account, the dialectical unity of these three dimensions of space — the mental, the physical and the lived — is crucial to any explanation of space's production and social use. In addition, he describes space as a social matrix that operates as a 'presupposition, medium and product of the social relations of capitalism' (Brenner 1997: 140, Lefebvre 1991: 73). It is an ensemble of social relations and networks that make social action possible. It is part of productive processes, a mechanism of state regulation and the site of political struggle. This depiction provides a counter-move to tendencies that treat social space as a mere object or a receptacle, or that reduce the social and physical aspects of space to simplified mental codes.

Lefebvre threads through his theory of social space a reworking of Marx's chronology of historical stages of social development as a history of modes of production of space. He notes Marx's procedural move to depict history by working back from the fruits of production to productive activity itself, and provides his own twist by arguing that 'any activity developed over (historical) time engenders (produces) a space, and can only attain practical "reality" or concrete existence within that space' (Lefebvre 1991: 115). To present a portrait of the historical evolution of space is therefore to explain the spatial prerequisites for the genesis of modern capitalism. Just as the rise of mercantilism in Europe during the middle ages brought with it a transformation of the relationship between town and country (Lefebvre 1991: 77–9), so too contemporary capitalism has produced a new spatial form in the sprawling, suburbanised city.



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The space of contemporary life is denoted as *abstract space* — the fragmentary but pulverised space created by the imperatives of capital and the state's involvement in the management and domination of space. It serves as a primer for and nurtures the survival and reproduction of capitalist social relations. This is so, particularly in the priority it gives to the nuclear family as a private consumption unit. As Lefebvre notes:

a characteristic contradiction of abstract space consists in the fact that, although it denies the sensual and the sexual, its only immediate point of reference is genitivity: the family unit, the type of dwelling ..., fatherhood and motherhood, and the assumption that fertility and fulfilment are identical. The reproduction of social relations is thus crudely conflated with biological reproduction, which is itself conceived of in the crudest and most simplistic way imaginable.

In addition to this, Lefebvre outlines three characteristic tendencies that simultaneously attach to abstract space. These are orientations towards fragmentation, homogeneity, and hierarchy (Lefebvre 2003: 210, Martins 1982: 177–8, Gottdiener 1994: 126). It will be argued here that the post-war planning of suburbia can be understood as a crucial contributor to the reproduction of the contradictory social relations of abstract space. Suburbia is simultaneously premised on tendencies towards fragmentation — seen most obviously in large-scale road development, land-use zoning and sub-division; homogeneity — imposed by the categories of zoning uses and the repetitive application of similar models of housing construction; and hierarchy — exacerbated by the private ownership of land, state control over land uses and the differentiation between suburbs on the basis of income and status.

Much of the writing in Australian urban studies has explained the rise of suburbia as the hegemonic form of urban development with reference to numerous interacting social and economic forces. These include the development of technology and infrastructure, ideological attachments to individualistic forms of social organisation and fears of moral or sanitary danger within urban centres. The state's role in urban regulation and governance has provided a site where these technological and functional requirements, and ideological representations of space





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have overlapped and intersected. In the next three sections, I will explore the key role played by regimes of urban planning in the production of the deconcentrated urban settlement patterns of Australian suburbia, through the imposition of abstract representations of space and the engendering of a particular form of spatial practice.

3 Urban planning and representations of space

From the late 19th century, 'progressive' planning movements asserted the values of home ownership and suburban estates as moralising forces, which incorporated the working population into a hierarchy outside the world of production. This has inevitably meant that the historical production of suburbia has been connected to the development of the various dimensions of everyday life, and industrialised societies are now increasingly oriented 'ideologically and practically' away from narrow forms of production and towards everyday practices of consumption (Lefebvre 1996: 77). To fully understand the ideological associations surrounding suburbia, it is necessary to acknowledge their historical prerequisites. In particular Lefebvre situates the rise of suburbia as a way of life in the context of a discursive shift in the late 19th century from the concept of inhabitation to that of habitat.

Inhabitation involves an active and meaningful participation in community life which flows from the right to use urban space. Habitat is, by contrast, a passive concept, embodying the domination of inhabitants, rendered powerless by the functional isolation of housing from the complex totality of the city (Lefebvre 1996: 76–7). The suburbs developed partially in response to the growth of industrialisation but also increasingly under the sway of an anti-urban ideology that was prominent amongst the early planning reform movement. At the end of the second world war, the concept of a 'housing crisis' crystallised the concept of habitat into a purer and more strategic form. The bureaucratic state played a central role in promoting this form of living through both public housing programs and planning for large scale suburban housing estates. Another discursive casualty of the movement from inhabitation



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to habitat, was the notion of residence. It was replaced by the functional abstraction — *housing*, which even entered the vocabulary of the reformist left as a dimension of the social wage (Lefebvre 1991: 314, 1996: 78). At the ascendant point of the classical phase of capitalism (the *belle époque*), housing began to take on a meaning,

along with its corollaries — minimal living space, as quantified in terms of modular units and speed of access; likewise minimal facilities and a programmed environment. What was actually being defined here ... was the lowest possible *threshold of tolerability* (Lefebvre 1991: 316).

By the middle of the 20th century, this process had produced suburban housing estates and in some cities 'new towns', which marked a shift to a new bare minimum defined in terms of the 'lowest possible *threshold of sociability* — the point beyond which survival would be impossible because all social life would have disappeared' (Lefebvre 1991: 316). The housing sector and the logic of habitat were the generators of a '(partial) system of significations' associated with an increasingly influential ideology of 'the plot' (Lefebvre 1996: 116). Known colloquially in Australia as the 'quarter-acre block', this ideological construction played an important part in the extension of private home ownership in the post-war decades and in the creation of a spatial form maximising private space and minimising public space.⁶

The state's administration of space through the operational practice of spatial planners intensified and strengthened this ideological formation. Throughout the 20th century, zoning was the archetypal model of land-use control in the traditional armoury of statutory planning. Although ubiquitous as 'the principal instrument of spatial regulation' in Australian cities during the post-war decades (Gleeson 2000: 127), it has generally been neglected as the subject of theoretical investigation for its own sake. This has been the case within both traditional and 'radical' planning scholarship⁷⁷ (Huxley 1994a: 148).

Zoning is an essentially negative means of control, which operates by proscribing certain uses within zones designated in a pre-existing master plan (Neutze 1977: 222–4, 1978: 26–33). It relies on a notional commitment to physical determinism — the prioritising of physical and



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technical solutions to urban problems (Sandercock 1983: 35, 1990: 57–69). In Australia this approach has tended to derive from a distorted version of Ebenezer Howard's 'garden city' model — notably without its collectivist aspirations. This physicalist focus has been combined with a formalist reduction of planning to the development control process and purely reactive responses to applications for development approval.

As well as providing a technical means for regulating land uses and the built environment, zoning has been a classic example of urban planning's bureaucratic rationality in practice. The practice of zoning depends on a body of representations which derive from the intellectual strategy of dividing space into fragments. In turn these fragments are assigned internally homogeneous uses and are imposed by a zoning scheme on the land. Hence zoning both codifies dominant representations of space and helps to reproduce their dominance by inscribing them in the physical uses of land. By dividing space into zones, imposing a certain homogeneity within them, and hierarchically arranging these fragments of space, it displays the classic hallmarks of state power engaged in the production of abstract space. The effects of this may be seen 'on the ground' where

the state-bureaucratic order ... simultaneously achieves self-actualization and self-concealment, fuzzifying its image in the crystal-clear air of functional and structural readability (Lefebvre 1991: 317).

So entrenched and unquestioned is the rationality which underpins such 'spatial distinctions and divisions' that

(z)oning, ... which is responsible — precisely — for fragmentation, break-up and separation under the umbrella of a bureaucratically decreed unity, is conflated with the rational capacity to discriminate (Lefebvre 1991: 317).

It is thus possible to distinguish Lefebvre's critique of land-use zoning from both the economic reductionism and functionalism that have dominated much orthodox Marxist literature on planning (Harvey 1985, Roweis 1981, Scott & Roweis 1977) and the Foucauldian analysis employed by writers such as Margo Huxley (1997a, 1997b, 1994a, 1994b, 1989). In Lefebvre's account, such land-use planning techniques can neither be reduced to an instrument of economic regulation for capital



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nor to an exercise of power and social control. They are part of a specifically anti-urban strategy, driven by the state's imperatives towards the reproduction of abstract space. Zoning consists of a complex set of operations on social space, with both formal and functional dimensions. It relies on the inherently formalist representations of space generated by the sciences of cartography, surveying and physical geography. These representations reduce the complexity of lived space into a flattened surface, capable of being strategically fragmented, quantified and commodified according to functionalist criteria. Consequently, zoning represents the degeneration and debasement of Cartesian reason into a simplistic technocratic rationality, the contours of which will be explored next.

4 Planning and the 'rationality of habitat'

A key component of the construction of suburbia in post-war Australia by forms of regulatory control such as land-use planning, is what Lefebvre refers to as the 'rationality of habitat'. This rationality embodies three essential elements: an ideological formalism, a functionalist commitment to the segmentation of space into various zones, and a structural imposition of this functionalist logic on space through 'expert' scientific and technocratic solutions to planning problems. I will discuss each of these elements in turn.

First, the rationality of habitat is associated with an ideological formalism, which depends upon a 'logic of visualisation' (Lefebvre 1991: 285). This logic takes the readability of space for granted and conceals the condensation of power relations hidden in space (Lefebvre 1991: 142–7). It is most clearly exemplified by the reliance on the 'bird's-eye view' and perspectival models of cartography. These allow the adoption of aesthetic criteria which reduce knowledge of the city as a totality. As an example, Lesley Johnson draws attention to the role of the aerial view in the master planner's repertoire. By deciphering space from above, planners flatten out the structural depth of social reality, leaving only a surface (Johnson 1997: 60, Harvey 1989: 245–59). This has contributed to the adoption of spatially determinist solutions for a range of urban





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problems in the post-war decades, such as the ‘cleansing’ of inner city slums to reduce vice, disease and visible squalor. More recently, Gleeson and Low see the continued operation of this logic in policy documents which fetishise urban ‘design’ and attempt to reduce ‘planning to a politics of surfaces ... to nothing more than representations, images and “visions”’ (Gleeson & Low 2000: 190–1, ALGA 1997, PMUDTF 1994).

Another component of the rationality of post-war planning has been a commitment to a technocratic functionalism, arising as a response to the growth of industrialisation and the perceived need to control and administer the city along the lines of an ordered hierarchy. By reducing the city to a series of isolated functions and detaching it from a social totality, this functionalist approach has allowed for the segmentation of planning into areas such as housing, transport, industry and culture (Lefebvre 1996: 76–7). With the adoption of a model of deconcentrated home-ownership as the norm, land-use planning, has contributed to a suppression of the city. But this devaluation of urban society under the guise of suburbanisation is not solely attributable to the assertion of public power. It is also pursued in tandem with the private sector’s imposition of functional housing forms, controlled consumption and the leisure industry on everyday life. Planning is thereby subordinated to priorities associated with the ‘general organization of industry’.

Attacked both from above and below, the city is associated to industrial enterprise: it figures in planning as a cog: it becomes the material device to organise production, control the daily life of the producers and the consumption of products (Lefebvre 1996: 126).

Lastly, for Lefebvre the rationality of habitat is structurally premised on the authoritarian imposition of technical and scientific expertise over more democratic methods of determining spatial uses. This is partly attributable to the privileged position accorded to the notion of the master planner and the visualised conception of reality accompanying modernist planning practice. But it is also generated by the state’s suspicion of the ‘urban’ as a social form with tendencies towards autonomy. The increasingly dominant planning strategy of post-war



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modernism swallowed up these characteristics of municipal life and led to 'a city-wide institutional crisis of urban jurisdiction and administration' (Lefebvre 1996: 141).

It is true that under Australia's federal system, urban governance has never been identical to that of the centralised, post-war French state that is the primary target of Lefebvre's critique. Nevertheless it is possible to use his analysis of planning rationality to understand the practice of Australian post-war planning as a local manifestation of a state form which emerged during the decades following the second world war. At the local authority level, planning was collapsed into a narrowly conceived body of zoning techniques, which display the classic characteristics associated with the rationality of habitat. This reduction of planning's jurisdiction to a technical exercise is blamed by Sandercock on the failure of the early planning movement in Australia to pursue the reformist implications of its theoretical roots. This movement adopted a deradicalised version of Howard's 'garden city' and embraced physical determinism, thereby failing to pursue the political dimensions of its practice (Sandercock 1990: 67–9, 1983: 35). Consequently it was easily incorporated within an alternative political project — that of the state management of social space.

5 Suburbia: the spatial practice of everyday life

The crucial ideological and material role played by the rationality of habitat in Australia's great post-war suburban expansion can be observed in the spatial practices that it has generated. The spatial practice of contemporary suburbia requires both a certain ordering of living arrangements (for example, the detached house or the housing estate), and the resources and infrastructure necessary for the social functions of residential dispersal (water, sewerage and waste disposal, electricity, gas, transport, communications and other exchange networks). This practice contains tendencies that are directed towards the decentring and dissolution of the city. As inhabitants become detached from territory,





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people (the 'inhabitants') move about in a space which tends towards a geometric isotopy, full of instructions and signals, where qualitative differences of places and moments no longer matter (Lefebvre 1996: 128).

Transport requirements and the constraints of traffic congestion are particularly important in this subsumption of urban social relations into a fragmented and abstract suburban 'fabric'. Road development programs by state governments have had a significant impact on the growth of an urban form which has become utterly dependent on and structured around the private automobile. Transport planning can therefore be seen as part of an historical process of commodification of social life. In Lefebvre's words, one of the last barriers to commodification — the city — has been subjected to a strategic assault by 'the car — the current pilot-object in the world of commodities' (1996: 167).

He argues that despite the obvious differences between different forms of housing, particularly that between the quarter-acre block and social housing estates, in both cases a moral and political dominance has been achieved by significations that attach to 'the plot' (Lefebvre 1996: 79–80, 116–7). The values associated with the social form of the detached suburban house have thus become embedded in popular consciousness as the 'reference point' by which all other forms of housing can be measured (Lefebvre 1996: 113). There is also a theoretical association, between the suburban home and the development of the 'bureaucratic society of controlled consumption' (Lefebvre 1984: 68–110). It is here that the middle class finds what it seeks, by 'tak(ing) up residence' in an abstract space which is 'the locus of all the agitations and disputations of mimesis: of fashion, sport, art, advertising, and sexuality transformed into ideology' (Lefebvre 1991: 309, 1984: 68–110). Such an ideology and its attendant representations of space have not only helped to discursively structure suburbia, their significations are grounded in the materiality of everyday spatial practices. Rather than explaining suburbanisation as a consequence of an organic process of urban growth or as purely the product of technological innovation, Lefebvre's theory of space allows us to see it as part of a larger social process: one which not only generates tendencies towards



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deconcentration, but produces social space itself. Accordingly, it allows us to connect our understandings of the physical, ideological and lived dimensions of the development of suburbia.

6 Suburbia and the politics of space

Despite the overwhelming dominance of the rationality of habitat and the representations of space that accompany it, generalised suburbanisation has not completely extinguished the urban as a space of encounter, which allows differences to flourish and generates the possibility of collective civic action (Lefebvre 1996: 120). The most common form in which the state has attempted to reassert the importance of the urban centre in Australia has been through policies aimed at urban consolidation. Emerging from recent technical and bureaucratic rejections of 'urban sprawl' and environmental concerns about more efficient forms of energy consumption in large cities, urban consolidation has been widely proclaimed as the answer to the endless expansion of existing cities. Yet there are strong arguments that such policies may only provide partial and technical solutions to complex urban problems (Troy 1996, Orchard 1995, Peel 1995, McLoughlin 1991).

A more thoroughgoing resistance to the strategic goals of abstract space would attempt to reappropriate space in ways which escape the prescriptive logic of the planning scheme. Within everyday life lie the possibilities for the reassertion of differences and the re-inscription of alternative schemes of uses which undermine the utilitarian projects of state planners. In post-war Australia, there have been numerous examples of popular struggles over planning issues that have demanded the defence of uses values over the value of exchange, and have resisted the authoritarianism of state and local planning bureaucracies. Classic examples include the resistance to high-rise developments by working class communities in the Rocks and Woolloomooloo areas of Sydney, the 'Green Bans' imposed on development projects by the Builders Labourers Federation in the early 1970s, and intense struggles in Brisbane to resist freeway construction through Bowen Hills in the mid-1970s and along Hale Street during the 1980s (Sandercock 1990:



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248–52, Burgmann & Burgmann 1998, Gray & Lane 1982, Mullins 1977, 1979, Mullins & West 1998).

These conflicts raise an issue which is at the very heart of Lefebvre's social theory —the importance of the concept of the urban. More than simply a physical site of spatial struggles, the urban is 'a model, a perpetual prototype of use value resisting the generalizations of exchange value in a capitalist economy under the authority of a homogenizing state' (Lefebvre 1979: 291). It has the potential to restore the creative production of the city as *oeuvre*, in opposition to tendencies towards the commodification of space. Lefebvre depicts this struggle as the passage from the domination of abstract space to the appropriation of space by the bodies of its users (Lefebvre 1991: 164–8). This marks a conflict between representations of abstract space — propounded by the state and the market — and contradictory representational spaces, established through creative 'moments' within everyday life and struggles for the development of counter-spaces. This presupposes the generation of a spatial practice of the whole body — a concrete actualisation of representational spaces.

Such a potential renewal of spatial practice returns us to our suburbanised cities as the arena in which the potential production of 'counter-spaces' must take place. A recent, if ultimately unsuccessful attempt in this regard occurred during the community struggle in 2001 and 2002 to preserve one of the last remaining pockets of bushland in the inner Brisbane suburb of Highgate Hill. Commonly known as the 'Gully', this 5 acre area in a gorge running into the Brisbane River was home to wide range of native flora and fauna, and since the 1970s was periodically the subject of planning disputes over proposals to develop the site. The last of these skirmishes involved local opposition to a high density townhouse development which necessitated a massive earthmoving exercise to fill the Gully, and radically transformed the aesthetic and ecological status of the area.

The campaign to save the Gully brought together a wide network of community activists, environmentalists, property owners, unionists and radical planners who collaborated in regenerating the bushland, and



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created plans for an eco-centre and community farm. When the bulldozers finally moved in, they were met with well-organised tree-sitters, who physically occupied the largest rainforest trees for several weeks. The campaign was ultimately lost over the inability of the local community to convince the planners and scientific advisers within local government that the area was of sufficient 'ecological value' to be protected from development. The dominance of this abstract concept overrode the identifiable values and uses of the Gully for the community concerned, and reinforced the limited recognition that planning bureaucracies have for the lived experiences of spatial users. But the struggle demonstrated some of the ways in which a neighbourhood can generate a counter-space, by spontaneously adopting alternative spatial uses, even if such a space only exists in that form for a short time.

In the opinions of both its detractors and its supporters, Australian suburbia is generally regarded as an unlikely site of social struggle. As Tim Rowse describes, for most commentators suburbia 'is a society without history or politics' (Rowse 1978: 12). It remains largely dominated by exchange values in the form of an acquisitive consumerism and high levels of private homeownership. In Lefebvrian terms, it continues to express the fragmented, homogeneous and hierarchical social relations of abstract space. But it is precisely in the midst of abstract space that its contradictions occasionally provoke resistance to the dominant representations of space. The contours of a political reassertion of the values of lived urban experience can be observed in struggles for the control of space by its users and inhabitants, both within the planning system and in challenges to the bureaucratic power of the administrative state more generally. It is of great importance to those seeking to develop such a politics that they understand space as not simply a physical container or a set of representations, but as a lived creation, occupied by bodies and produced by their struggles. Henri Lefebvre's theory of the production of space is therefore a vital tool in any attempt to read Australian suburbia politically.



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Notes

- 1 This article was completed with the assistance of a grant provided by the Socio-Legal Research Centre at Griffith University. I would like to thank Desmond Manderson for his detailed comments on an earlier version, but take full responsibility for all errors and omissions.
- 2 There are of course differences between films which employ a deliberately 'quirky' suburbanism as a comic device and those which utilise suburbia as a visual means to generate a social realist aesthetic. A cross-section of Australian films which consciously deal with suburban themes includes: *2000 Weeks* (1969) Burstall T (dir); *Don's Party* (1976) Beresford B (dir); *The FJ Holden* (1977) Thornhill M (dir); *Newsfront* (1977) Noyce P (dir); *Silver City* (1984) Turkiewicz S (dir); *Fran* (1985) Hambly G (dir); *Sweetie* (1989) Campion J (dir); *Return Home* (1990) Argall R (dir); *Death in Brunswick* (1991) Ruane J (dir); *Muriel's Wedding* (1994) Hogan P (dir); *Idiot Box* (1996) Caesar D (dir); *The Boys* (1997) Woods R (dir); *Praise* (1998) Curran J (dir); *The Castle* (1997) Sitch R (dir); *Erskineville Kings* (1999) White A (dir); *Two Hands* (1999) Jordon G (dir); *Little Fish* (2005) Woods R (dir).
- 3 Humphrey McQueen has suggested the embrace of suburbia has also had an effect on the targets of political activism, which have become redirected 'away from the forces of production and onto systems of marketing and consumption. After the proletariat had failed to perform its historic task ... radicals switched to liberating the consumer from the oppressions of everyday life.' 'Alienation became an account of personal loneliness, no longer the outcome of capitalist exploitation. Reformers filled their programmes with items such as reduced class sizes, abortion on demand, craft centres and bicycle paths; the unifying element of such demands was the need to deal with life as most people experienced it.' (1988: 39)
- 4 Lefebvre also associates the realm of the perceived (and hence spatial practice) with form, and therefore the abstract prioritising of spatial practice constitutes a type of intellectual formalism (Lefebvre 1991: 369).
- 5 This is the translation of *les espaces de representation* given by Nicholson-Smith in *The Production of Space* (Lefebvre 1991). A number of other writers prefer the phrase 'spaces of representation' (Elden 2004, Shields 1999, Stewart 1995).
- 6 I am grateful to Desmond Manderson for this point.



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- 7 However Mariana Valverde's study of zoning and land-use in this issue is a notable and welcome exception.

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Taking 'land use' seriously: toward an ontology of municipal law

Mariana Valverde

Introduction: legal tools for local governance

That law often governs space, or governs people through space, is a well-known fact. Although the literature on 'law and space' and law and geography is recent (Blomley et al 2001), municipal and quasi-municipal authorities have for centuries now regulated activities and persons by exercising control over access to and use of spaces — private spaces such as pubs (Valverde 2003) and public or quasi-public spaces such as ports, parks, roadways and sidewalks (Cooper 1998, Hermer & Mosher 2002, Webb & Webb 1906, Frug 1999, Duneier 1999).

Municipal regulations targeting spaces but acting on groups of persons have been scrutinised in recent years, especially in the US and Canada, by those concerned with the rights of dispossessed urban groups. Canadian planning law, in keeping with this international trend, has developed the doctrine that 'people zoning' is impermissible (Hoehn 1996: 175–6, *Re Alcoholism Foundation of Manitoba et al and City of Winnipeg*).¹ Modern zoning is said to differentiate urban space (particularly privately owned urban space) by use, not by type of person. And regulations concerning the use of public space (for example, rules about permits to occupy a sidewalk, close a street temporarily, or hold a festival in a park) also have to be person-neutral on their face.



Taking 'land use' seriously

Critical scholars from both law and urban studies have shown that even in those jurisdictions in which vagrancy laws and their modern successors are constitutionally impermissible, authorities can still easily govern both individuals and types of persons through regulations targeting uses and activities (Waldron 1991, Waldron 2000, Blomley 2004, Hermer & Mosher 2002). Much energy has thus been devoted to showing — both in the scholarly literature and in certain court challenges — that 'uses', 'spaces' and 'activities' are somewhat devious means to the old social-control end of regulating the poor.

From the point of view of experience, it may not matter at all whether one is being kicked out of a park because one is defined as a vagrant or because there is a bylaw of general application that bans sleeping on park benches. However, understanding the workings of law in their specificity is important, both intellectually and politically. Intellectually, it is high time that critical legal scholarship developed an understanding of law that eschews neo-Marxist structural stories in which the only question is whether the rich come out ahead. The rich are not all one group, and understanding conflicts among sectors of the bourgeoisie is crucial; but more importantly, even when the rich do come out ahead, how exactly 'they' manage to come out ahead in a particular legal arena is a matter for the careful empirical documentation and concrete analysis of the 'how' of governance that is so often neglected in structuralist-style analysis of the 'why'.

Politically too, if one is going to launch effective legal and political strategies to counteract some of the exclusionary moves that many contemporary cities have undertaken in recent years, we need to understand that municipal law has certain logics that are not unique but nevertheless characteristic of local governance. Activists and lawyers used to nation-wide struggles around constitutional rights need to understand that local struggles in which the legal 'funnel' for political and social disputes is local law take place on a specific terrain that is quite distinct and much less well known than the arena of federal constitutional rights.



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Blackletter lawyers (and planners) would say that the difference between the local and the ‘big law’ of the constitutional arena is that local government governs property. There is certainly truth in the blackletter story: historically, local government has mainly organised public and regulated private property, relying on property taxes to do so. This has led to constructing local citizenship as a function of property, even if in the current day mere residency is sufficient to grant some notional property rights (for example, in the form of standing for purposes of planning and zoning).

Property is in turn usually defined in terms of access to material resources. Law students know that property includes entities such as easements and air rights, and of course also very abstract economic entities. But generally, municipal law and planning practitioners think about municipal law and policy as revolving, in the last instance, around access to, control over, and ‘enjoyment of’ spaces, buildings, parcels of land, and other largely material entities. This privileging of physically and geographically constituted entities is re-enacted every day in the visualisation practices of planning discussions and zoning hearings — meetings which are always awash in maps, photographs of buildings and streets, architectural drawings, and other visual formats that privilege space and matter rather than people.

My argument here is not, however, that space really matters and that legal scholars should drop what they are doing and read the literature on space. My argument is, instead, that local law and governance is not usefully differentiated from other juridical fields by deploying the things vs persons, nonhuman vs human binary. Actor-network scholars, Bruno Latour in particular (1987, 1993) have opened our eyes to the fruitfulness of an approach that begins by refusing to draw an ontological line separating nature from culture, things from people, objects from subjects. Latour’s work can, I argue, be adapted by legal scholars, in the first instance to help us to deconstruct the old textbook division between the law of persons and the law of things. Needless to say, critical scholarship has long challenged this binary: but, overwhelmingly, critical legal scholars deconstruct the binary only in one direction, namely by





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showing that legal tools designed to govern things, uses, and activities usually end up governing certain groups of persons (for example, those who are homeless). One of the most eminent critical scholars of planning, Peter Hall, typically introduces the history of zoning by mentioning early deployments of zoning bylaws aimed at getting rid of Chinese laundries and Jewish garment workers (Hall 1988, 2002: 58). This one-way deconstruction, however, has the effect of erasing the specificity of municipal legal and policy tools: it makes zoning bylaws seem essentially identical to criminal statutes (for example, the old vagrancy laws, always invoked in critical urban scholarship). The city councils that used zoning to get rid of Chinese laundries were clearly just as racist as the immigration authorities that imposed head taxes, but saying this does not help us to understand the specificity of local governance.

Municipal law certainly governs persons, and even specific groups of persons, and not only dispossessed or marginal groups: but it does so in a different manner than the criminal law or constitutional rights law. Local authorities govern persons as well as pieces of land and buildings, but they generally avoid governing *through* the category of 'person' that is so central to liberal governance and hence to law. Municipal rules and regulations generally govern through categories, such as 'use' and 'activity', that are somewhat removed from personhood partly because they also, and most importantly, simultaneously, govern spaces and things (nonhumans). Governing people, things, and spaces through 'use' is a different kind of governmental operation than the much better known operation of governing through legal categories of personhood and group identity.

The resources of actor-network (ANT) approaches are particularly useful in the study of municipal law, since ANT studies begin by sidelining that central traditional liberal legal category ('person') and treating all 'actors' in a network as presumptively on the same plane. From an ANT perspective, a building, the person owning the building, a drawing of the building, a lawyer making an argument about the building, and a court decision in regard to the building are all 'actors', whose relative weight in a particular network is a matter for documentation



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(Riles 2000, Pottage & Mundy 2003, Valverde 2005). Or to put it differently, from a network point of view, the old neo-Marxist argument to the effect that regulations about uses and spaces are ‘really’ just covert ways of regulating persons loses some of its appeal. Of course persons are part of all legal networks: but so are sidewalks, streetcars, and the numerous pieces of paper used in the adjudication process. ‘Use’ (as in ‘land use’, but not limited to planning law) is a legal technology that constitutes a network that includes inanimate objects, spaces, property relations, persons, trees and plants, and other entities, but without privileging persons.

Governing through ‘uses’

‘Land use’ is of course specific to planning: but ‘use’ is a much more widely disseminated legal concept. At the local level, ‘use’ is an absolutely crucial legal technology, whose effects are best understood if we contrast ‘governing through use’ to ‘governing through persons’. One difference with crucial political effects is that while the governance of persons through law has in recent decades undergone a number of changes increasing due process rights and antidiscrimination protection, uses, unlike persons, are not rights bearers at all. Changes in such areas as planning law thus proceed from causes other than political changes in rights consciousness or rights allocations. For example, it is now common for planners to support mixed-use developments (condos above shops, live-work units, etc), since the strict separation of land uses that gave us the dreary shopless and publess residential streets of the 1950s and 1960s is now unfashionable. But this change, through which ‘uses’ formerly thought incompatible are brought closer together, has nothing to do with any democratic vision of pluralism, people mixing, or empowerment of the dispossessed (uses). Studying municipal law reveals that events and processes that hinge on use governance (e.g. the ability of disabled or homeless people to live in group homes that are zoned differently from conventional family homes) do not today proceed any more democratically than in the past.



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An example from my ongoing research into urban law in action may help here. In the city of Toronto there was recently a bitter fight, lasting for about five years, concerning the bylaw requiring a 250-meter separation distance between shelters for homeless persons. The separation rule was challenged by advocates who used this little detail as the occasion to engage in an all-out political struggle about poverty, homelessness, and social rights in urban space. Ordinarily, anyone wanting to just put up one particular shelter close to another would seek only a suspension of the rule (a zoning variance). Variances are routinely granted through a process that is crucial to the relatively smooth governance of urban order. But suspending such rules can only be done one site at the time, through laborious and expensive public consultation processes that give middle-class homeowners inordinate power to effect denials of zoning variances, even small variances that are very similar to those that are routinely granted for less socially contentious uses.²

In the event, the almost final authority on all local zoning matters, the Ontario Municipal Board, decided to ease the separation distance restrictions imposed on the shelters in order to make it somewhat easier to build or renovate for shelter purposes. This responded to the socially progressive dimension of local Toronto politics — but without quite meeting the demands of the housing advocates, or otherwise radically challenging the vocal elements that cried out in favour of exclusionary measures. And legally, this compromise solution was fully in keeping with the practice of zoning law, since minor adjustments are often demanded (by the OMB or by city council or city planners) more because of their politically pacifying effects than because the adjustments are particularly good in strict planning terms.

Within what ANT would call the network of planning/zoning, it was thus possible to obtain a minor change making life somewhat easier for the city's shelter operators. By contrast, a simultaneous attempt by housing advocates to shift feet and move the struggle onto the terrain of 'persons', through a constitutional challenge arguing that the whole bylaw discriminated against an identifiable group (homeless people)



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did not even get off the ground. The OMB panel stated that they had no jurisdiction over constitutional issues — which is certainly correct, the OMB being set up specifically to adjudicate planning disputes: but they offered the gratuitous comment that if they did have such jurisdiction, they would have found the claim baseless. The bylaw, the OMB found, does not discriminate at all, since ‘there is no distinction based on personal characteristics ... any person may access the facilities if they find themselves homeless’ (OMB 2004: 49).

The attempt to circumvent the relatively self-contained network of planning law by recourse to ‘big law’ thus failed miserably. It is nevertheless important to note that although the result was predictable, given the OMB’s jurisprudence (Chipman 2004), it was not completely a foregone conclusion. Rights claims can sometimes be effectively made within legal networks concerned with use. If a court (rather than an administrative tribunal) had heard the challenge, it is possible that such a court would have found (as the Manitoba Court of Appeal did in the *Alcoholism Foundation* case) that there was a breach of Charter rights, in the law’s effects if not on its face.

However, it is more likely that a court would simply defer to the OMB’s interpretation of the shelter bylaw — given courts’ traditional deference to ‘expert’ tribunals — and thus let stand an interpretation that harmed the interests of homeless persons by defining their refuges as non-housing.

Whatever the legal future of this or similar cases, the point is that arguments about persons and their rights can only be brought in as a wholly external limit on regulations regarding uses. Such external limits are necessarily very exceptional and require much legal and political work. And adjudicative arenas used to haggling about building heights, slight variations in density, and minor exceptions to rules regarding use are probably the worst possible forums to which one could bring constitutional challenges whose currency is persons and their abstract absolute rights. Given the strict limitations on judicial review of municipal and provincial/state decisions, it is very difficult to translate local issues that begin as fights about uses into legal currency valid in the ‘big law’ networks.





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By and large, municipal authorities regulate both people and spaces with legal tools whose logics are incommensurable with the logic of rights — and with the broader logic of 'personhood' that underlies the legal apparatus of rights. This is apparent even in one of the very few decisions that does set an external limit on the use-driven practices of local governance, namely the *Alcoholism Foundation* decision, which demanded that the city of Winnipeg rewrite its group-home zoning bylaws to ensure that Charter rights are not infringed. Even in that case, the judge insisted on keeping the logic of local governance in a separate universe from the world of rights. He stated that federal and provincial governments have all sorts of laws and policies designed to meet the needs of disabled and disadvantaged people for whom group homes and other institutional uses are intended, but added that these policies, despite their location in higher levels of government, are quite irrelevant for local law purposes: 'The purposes of objectives of the provincial legislation [on disability rights] ... are totally different from the purposes and objectives of the City of Winnipeg in attempting to zone land use as it did.' In case the incommensurability of the legal networks was still unclear, he repeated: 'There is absolutely no relation between what the city has been doing and what the province has to do under specific legislation' (703).

How is it that local use-based governance can so peremptorily be said to be separate from and not accountable to the dictates of higher levels of government about disability rights and so forth? It seems to me that the naturalisation of the legal invention of 'land use' in early zoning law (starting in the 1910s) makes it easy for the illiberal (or more accurately, nonliberal) governance of things and persons through 'land use' to go largely unquestioned and even unnoticed, except perhaps by a few practising lawyers. The homeless shelter bylaw mentioned above, for example, was publicised far and wide by activists as an attack on the rights of homeless persons; but little was said in the voluminous record of public debates about something that was legally much more central to the case, namely, the fact that in order to be subjected to quasi-industrial rules about separation and so forth, shelters had to be defined as non-housing — that is, as an institutional rather than residential use.



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Redefining shelters as housing for zoning purposes might have been a much more fruitful and effective legal strategy than raising a constitutional challenge, in part because such a change could be effected outside of the courts, simply through a city council and/or provincial Ministry of Municipal Affairs decision. But while considerable political energy could be mustered, inside city council and outside of it, on behalf of the homeless as persons,³ the more tactically appropriate attempt to redefine shelters as housing received no attention in the city council debates, being found only among the arguments of the lawyers for the housing advocacy groups.

I do not wish to claim that urban/local law is unique in slipping easily from persons to things via uses. The criminal law too is not simply a network of persons: it is fundamentally interested in ensuring security and minimising future disorder, perhaps more than in punishing persons as such. But the point is that the criminal law can only act upon future risks by acting on persons, through their acts. Land-use law seeks to minimise economic and aesthetic disutilities, thus working to produce order in ways that are compatible with the long term aims of the criminal law: but it does not work upon the future by acting on persons. And, contrary to planning law doctrine, neither does land-use law generally act on property as such (except in rare cases, such as expropriation). Rather, land-use law generally acts (as its name indicates) on the 'use' made of the property. This sets up an ontology of governance with distinct features — although admittedly, governing through use is not unique to planning law. Elsewhere in the local realm, a variety of regulations aimed at ensuring order in public space — park regulations, for example — also govern people, property, and space through 'use'.

Use is not a strictly legal term, of course: but nevertheless, when it becomes a key legal technology it has specific meanings and does specific work (just like 'person', also a nonlegal category with a specific legal genealogy). Urban studies scholars and legal historians who have documented the rise of use-based legal tools (such as planning and zoning law) have largely taken the category for granted, as if 'uses' were intrinsic characteristics of buildings and sidewalks and parks like





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mass, colour, and density. There are plenty of disputes among planners and urban studies specialists about how exactly to differentiate between residential and commercial uses; but such disputes presuppose and thus tend to reify the basic category of 'use'. Now, I cannot here undertake a full genealogy of 'use' in law, or even in one area of law: but I can offer some observations that may help to open the blackbox of 'use', with particular attention to 'land use'.

Latour's studies of particular scientific black boxes often take the reader back to the time when a technique or a 'fact' was being discovered and challenged. Similarly, it is useful at this juncture to look back at texts located at the beginning of the project to govern urban space through zoning, a time when 'zoning' and 'use' were new ideas still in need of explanation and justification. One such text is an early Canadian plea for a more modern urban law. The author was Noulan Cauchon, the city of Ottawa's main planner and a leading promoter of town planning across Canada. Stating what by the 1950s and 1960s would no longer need to be stated, Mr Cauchon tells us that planning is 'the scientific and orderly disposition of land and buildings in use and development' (1923: 3). This definition puts zoning fully on the side of nonhumans, but it would be no revelation to Mr Cauchon to add that zoning, which until the 1960s remained the practical core of municipal planning in Canada, does not merely distribute physical things and spaces. Cauchon himself says as much. In keeping with the British literature on planning of the time, planning/zoning is said in this Canadian text to have three purposes and rationalities. These are: 1) health (in the public health sense); 2) 'efficiency'; and 3) 'amenity'. That all of these reach far beyond the mere distribution of things in space was evident to urban planners of the time, who anticipated that human happiness would more or less automatically increase if 'land and buildings' were arranged properly (Perks & Jamieson 1991, Artibise & Shelter 1979, Gerecke 1976).

The first two of Cauchon's rationalities of planning, public health and national efficiency, were the basic rationalities of Canadian post-World War I governance across all levels of government and all governing sites, and they were explicitly inclusive of humans as well as



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nonhumans (as the extensive discussions of human and natural resources prompted by the national Commission of Conservation, Canada's first planning think-tank, show).⁴ In that sense there is nothing specific about planning or indeed about local as opposed to national governance in the two first rationalities mentioned. Thus, special importance attaches to Mr Cauchon's third town-planning objective and target, the only one that is specific to municipal law, namely 'amenity'.⁵

Human and nonhuman: 'amenity'

What did Cauchon mean by 'amenity'?

In Cauchon's long list of the types of businesses that need to be governed through zoning there are many whose inclusion under the zoning banner is justified through 'health' and 'efficiency' — pollution-emitting factories, railways, etc. Health and efficiency are tried and true ways of governing persons and spaces through the category of population, as the vast literature on biopolitical state projects demonstrates. But what is of particular interest in Cauchon's list is that there are some uses that are legally governed through zoning, but without the biopolitical rationales of health and efficiency being involved. One such business use is 'undertaking establishments'. These do not pollute or cause traffic congestion. No biopolitical rationale would justify subjecting these to special separation requirements. Nevertheless, they ought to be regulated as if they were hazardous — because they cause 'distress'. (Hospitals too cause 'distress', as well as traffic, though we are not told if this is because the sight of hospitals reminds passersby of illness and death.) The presence of funeral homes distresses passersby and thus reduces the 'amenity' of the immediate neighbourhood. It is hence clear that amenity is something more than a biopolitical objective; it is also not reducible to an economic rationale, since there is no reason to think that hospitals and funeral parlours lower the value of surrounding homes.

Amenity is a wonderfully multivalent and heterogeneous category. Like many other terms in municipal law (for example, 'blight',





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'improvement' [Valverde 2005]), amenity encompasses physical and economic as well as cultural relations in one fell swoop, by quietly sidelining discussions about causation and about utility. 'Amenity' has a family resemblance to the extremely capacious notion of 'conservation' deployed by the short-lived Canadian Commission of Conservation: the Commission too erased the usual distinctions separating economic prosperity, public health, individual health, patriotism, and aesthetic values. Not surprisingly, given the complexity of the assemblage of purposes and rationalities that lurks under this word, 'amenity' allowed and continues to allow municipalities to govern people — and relations of class, ethnicity, and respectability — without governing *through* persons.

While the 1920s notion of national conservation has long disappeared, 'amenity' continues to allow and justify governance that does not respect conventional ontological distinctions. Today, in Toronto and other North American cities, planner-produced discourse assumes that special sidewalk treatments, 'pedestrian level lighting', and sidewalk trees are concrete ways of rendering 'amenity' visible and effective. There is a strong implication that this also increases the happiness of the people who live or work there, in keeping with the 19th century notion that architectural improvements would act directly upon the souls of urban dwellers. And yet, it would not be accurate to regard 'amenity' simply as a covert way of governing persons. 'Amenity' is connected to but is not quite the same as people's personal happiness.

This is apparent in the ambiguous wording of the Ontario *Planning Act* (1983). The statute states that the purpose of a zoning bylaw is 'to control the use of land to provide for the amenity of the area within the council's jurisdiction *and* for the health, safety, and general welfare of the inhabitants of the municipality'. The 'and' suggests that the amenity of the area is not the same as the health and safety of the people in it. Although amenity is linked to people's welfare — in a rather indeterminate manner — it is nevertheless somewhat disembodied, since it is not identical or even coterminous with human welfare. It is the area that has the amenity, not the persons — although in the process of



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adjudicating amenity, the enjoyment and satisfaction of the persons in it figure very prominently.⁶ In zoning hearings I have attended, ‘amenity’ is routinely said to be calculable merely from looking at plans and drawings that contain no images of persons or any references to actual or hypothetical residents⁷. In this way one slides from bricks and trees to human happiness in a vertiginously speedy manner, without any intermediaries.

Amenity is not a 20th century invention. The word was found in the legal technologies that governed land use before zoning was invented (for example, restrictive covenants and nuisance lawsuits). Like other rationalities of property and civil law, it seems to have been imported into modern zoning law without much discussion. One scholar tells us that ‘the concept of amenity was very powerful in late Victorian times, and seems to have been used in much the same spirit as “quality of life” is today. In its urban planning sense, amenity has been described as meaning “the provision of a good environment for the promotion of a healthy and civilized life”’ (P Smith 1979: 220).

Now, a humanist, modernist scholar, such as Pierre Bourdieu, would object that in the end, in the last instance, it is people (or class fractions) who are being regulated and excluded: he would say that ‘amenity’ is simply a vehicle to convey the cultural preferences of a particular socioeconomic sector so as to govern persons through classes and classes through persons and their habitus. Along similar lines, progressive urban studies writers such as Neil Smith and Mike Davis (N Smith 1996, Davis 1994) spend much time showing that architectural designs and bylaws about the use of space are nothing but vehicles of upper- middle-class hegemony, in keeping with this neo-Marxist approach.

This approach is certainly useful, and has been repeatedly deployed to document the effects on persons and social classes of various urban legal technologies, at the level of sociological effects. And yet, if we are going to understand how urban legal mechanisms today are different from Elizabethan vagrancy laws — if we are going to analyse legal mechanisms in some detail, instead of reducing them to mere effects of





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socioeconomic structures, as is generally done in the critical urban studies literature — it is important to grasp how governing urban problems through lists of activities, utilities, and 'uses' is not quite the same as governing through categories of persons.

One final example will illustrate the incommensurability of use-based and person-based governance. In February 2005, the city of Toronto passed an amendment to the bylaw governing Nathan Phillips square (a large, mostly empty space in front of and around City Hall) to ban sleeping. The hours of heated discussion on the bylaw made it very clear that councillors were not really wanting to govern use. One councillor said that lawyers taking a break from their cases at the nearby Court of Appeal and falling asleep on a bench would not be prosecuted for breaking the bylaw.⁸ The target was quite specific: a group of homeless people, said to consist of 'only about 14 individuals', who according to city officials, persisted in sleeping overnight in the square despite municipal efforts to get them to sleep in the newly opened municipal shelter nearby.⁹ (The square had previously been used as a nighttime refuge by larger numbers of homeless persons, but most of them took advantage of a new nearby shelter when it opened in the fall of 2004).¹⁰

It is tempting to focus analytical attention only on the antisleeping amendment to conclude that we now see a return to old vagrancy laws. Neo-Marxist urban studies (and most existing political activism on behalf of homeless and other marginalised persons) has alerted us to the effects of legal and urban-design technologies on certain groups of persons, and this amendment is almost a perfect case in point. But while this perspective is necessary politically, it is also important to see that providing a functionalist explanation that always talks about excluding or controlling persons of a certain type does not suffice as an analysis, especially as an analysis of the more routine processes of local governance. Direct targeting of persons is nowadays quite unusual. I would argue that the reason why hundreds of people, including myself, gave up the better part of a working day to go and intervene in the council debate was precisely that this plan to coercively govern a specific group of persons is, for Toronto, today, a cruel and unusual use of



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municipal bylaws. To study everyday local legal governance seriously, one cannot focus exclusively on occasional high-profile campaigns, as is generally done by critical scholars who have documented how the homeless were booted out of People's Park in Berkely or how Times Square was gentrified. I argue that one has to study the everyday processes of governance, the taken for granted background against which a large number of citizens (including myself in my participant role) found the new bylaw amendment appalling.

Some of the background is that residents of the city know that homeless persons regularly sleep on Toronto's squares and sidewalks. In the mid-1990s, when a viciously neoconservative provincial government cut the welfare rates drastically, homelessness became a sudden crisis — but in subsequent years the mere presence of panhandlers and people sleeping in parks has become routinised. Generally, visibly indigent people are tolerated (more or less grudgingly) by both officials and the public. Occasional campaigns by right-wing politicians create waves on this surface, but studying these or politically intervening in them does not reveal much about the everyday governance of the marginal.

It is quite telling, I think, that the city has an elaborate protocol instructing their employees how to move to one side belongings pertaining to homeless persons if when they are cleaning the sidewalk the owner is not present. The protocol sets out, in a neutral bureaucratic style, the exact steps to be taken when homeless persons need to reclaim belongings that appear to have been abandoned and that are put into storage by city workers. This routinises the interaction between officials and homeless people in a rather different way than the antisleeping City Hall Square bylaw amendment. Homeless persons might find that their belongings have been seized, but there is a clearly laid out (if bothersome) process to reclaim them. Critical scholars who focus their attention on particular campaigns of social exclusion need to remember that this low-key protocol, which, however reluctantly, admits the homeless into the circle of citizenship, is more typical of the day to day work of bylaw enforcement than the largely symbolic antisleeping amendment just discussed.





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Further to the normalisation of homelessness, a well-established program, Out of the Cold, provides sleeping bags to all who want and need them. These bags, which are often abandoned (especially when it rains) to be later picked up by program volunteers to dry clean them for re-use, act as powerful messages informing daytime passersby of what goes on under cover of darkness in numerous downtown locations. This program too governs homelessness in a manner that does not justify the 'new vagrancy' reading of current urban policy.

Corroborating my analysis of the importance of locating occasional outbursts of exclusionary politics within the context of the more established and more politically ambiguous everyday processes for governing the homeless population is the fact that about six months after the amendment was passed, it appears that no charges under the new bylaw amendment had been laid. The regular coverage of homelessness issues provided in *The Toronto Star* indicates that from February to August, the city carried out a fairly intensive, partly successful campaign to persuade/coerce homeless persons to accept living in cheap rooming houses. The coverage does not mention any bylaw charges being brought against any of the people, some of whom have lived for years under bridges, who in the summer of 2005 were being slowly housed through a combination of compassion and pressure, exerted by the city's newly hired 11 'outreach workers'.¹¹ Homelessness activists also stated that they did not know of any charges under the much-debated antisleeping amendment.

While studying and criticising the antisleeping amendment is certainly worthwhile, more typical of Toronto's everyday processes of governance, I would argue, and possibly illustrative of broader patterns in municipal governance, is the regulatory work provided in the old, unamended Nathan Phillips Square bylaw, which nobody mentioned in the debates about its amendment.

The text of Toronto Bylaw No 1994-0784 reveals a truly Benthamite series of restrictions and prohibitions — few of which seem to have a specific social or political group as their target. These prohibitions remained politically invisible throughout the debate on the antisleeping



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amendment. Perhaps the activists and homeless persons present at City Hall did not know about the existing bylaw; but city councillors undoubtedly did, since the motion before them was an amendment to it. Be that as it may, what is very different about the old bylaw (by comparison with the amendment) is that the majority of its provisions do not target any particular group, that is, they do not govern persons as persons.

Releasing helium balloons is prohibited; so is speaking through a megaphone without a permit; so is being on skates anywhere except on the skating rink. Skateboarding is of course also banned, as is climbing trees (though there are hardly any trees to climb). Selling anything (except newspapers) is prohibited except by special occasion permit; and occasional vendors operating under a permit are subject to lengthy rules about the size, location, and physical character of their stalls. Setting off fireworks is banned, as is throwing anything (including pennies) in the reflecting pool. Riding a bicycle is also prohibited, even though the city provides a temptingly large number of bike parking spots in the square itself.

These are not idle prohibitions. My ongoing empirical research on bylaw enforcement has not yet shed much light on the policing of Nathan Phillips square, but (when arriving to interview a city official in charge of bylaw enforcement, ironically) I was once stopped by a city employee and given a warning as I parked my bike in the place provided. The warning about the bylaw was due to the fact that I had not walked my bike the whole way through the vast expanse of unadorned and treeless concrete that makes up most of the square.

Continuing with the text of the bylaw, we find that it is also forbidden to 'present or take part in any dramatic, musical, artistic or other performance'. Curiously, however, poetry reading is said not to be a performance, which means one can recite poetry in the square, but not sing. A rather politically remarkable fact is that holding a demonstration in Toronto's premier public space requires a permit. And, more relevant to the case at hand, camping is explicitly banned: it is forbidden to 'camp or erect or place a tent or temporary abode of any kind'. (This last





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bit shows that there was little legal point in passing the special antisleeping clause, since — especially in February of 2005, when temperatures were unusually cold, around 20 degrees Celsius below freezing— one cannot merely sleep outdoors, one has to have at least a sleeping bag and some cardboard).

The bylaw as a whole, then, envisions a totally disciplined urban space in which practically anything other than sedate walking is prohibited. The particular space that is city hall square undoubtedly owes something of its austerity to the cultural preferences arising out of Toronto's Protestant past: but today, when half of Toronto's residents have been born outside of Canada, culturalist explanations are less useful than ever. The order of the square (the lack of any non-permitted activity except winter-time skating in the ice rink) is reproduced every day mainly by rules that, unlike the antisleeping amendment, are not obviously targeting a specific group. *Nobody* can hold a demonstration and shout slogans through a microphone without a permit; *no business* can operate in the square; and so on.

So, let us now finally ask, what is this thing called a 'use', this entity that does so much work in the governance of urban space and urban life? One important clue to the ontology of 'use' is that, from the very beginning of zoning law, the adjective most frequently attached to 'use' is 'incompatible' (Fischler 1998, Platt 1991). Let us also note that the doctrine of incompatibility is not exclusive to zoning: the governance of sidewalks and roadways is also characterised by processes in which different uses can only be brought together as an exception, by means of bureaucratic permits that are not easy to obtain. (The very strict permitting of street and subway musicians and the tight restrictions on street vending are examples of this general logic.) While my research on the governance of sidewalks and streets is still at a very preliminary stage, it is not premature to state that the whole history of municipal law is built on a single premise about uses: namely, that different uses of the same urban space are presumptively incompatible.

It may be that the very term 'use' only began to be employed in those situations, such as New York City in the 1910s, in which there



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were heated struggles about who and what ought to be given priority in the arrangement of prime urban spaces, both private and public (Fischler 1998, Hall 1988). It may well be that people did not think of selling fruit on the sidewalk, riding a bike, and singing as ‘uses’ until some citizens began to object to these traditional practices. However it developed, it is clear that the notion of land-use (together with its associated lexicon, which includes ‘amenity’, ‘improvement’ and ‘highest and best use’) soon acquired a certain facticity, an air of solidity.

The connection between ‘use’ and physical space helped in this reification process. To state that factory uses are incompatible with upscale residential and shopping uses is to make an apparently empirical statement, one that is formally homologous with the claim that railways and cars cannot use the same corridors. By talking about incompatible uses one forgets that subways and trains cannot physically travel along streets, while, by contrast, there are no physical barriers to shopping and sleeping being done in the same space; the barriers are normative and legal.

The religion of incompatible land uses that was codified in the 1916 New York City zoning ordinance and borrowed all around North America, including in Toronto, has been modified in recent years. Today we are seeing a retreat from the strict incompatibility thesis of the 1950s–70s, through which residents of countless North American and English cities were deprived of stores and leisure spaces within walking distance. But the post-Jane Jacobs Europhile integration of commercial and residential uses that one sees in fashionable downtown regeneration projects is still tentative and exceptional. First, the mixing seems to go only one way. As Nick Blomley has pointed out in his recent study of property law in action in Vancouver, ‘mixed-use’ tends to be deployed to justify architectural and legal changes facilitating middle- and upper-class households moving into and renovating previously working-class properties (Blomley 2004). Allowing the new self-employed petty bourgeoisie to conduct their (non-blue collar) business from a loft that is classed residential but is located above a shop does modify the ‘incompatible’ uses religion — in one direction; but it by no means





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abolishes it. Shelters for battered women and noisy auto-repair shops will not be able to take advantage of the 'mixed-use' rationality to locate themselves in upper-crust areas.

Secondly, even in its limited one-way form, mixed uses generally require some declaration of exceptionality. Following the American invention of 'Business Improvement Districts', Toronto too developed a special classification for old downtown areas (some formerly industrial and some occupied by discount stores and other 'cheap' uses). Declaring an area to be a Business Improvement Area allows for a number of exceptions to the usual zoning and planning rules (for example, higher densities, easier expropriations, involvement of private sector interests in street design and landscaping as well as in street security, etc).

Hence, mixed-use is not a logic that is being applied consistently and thoroughly around the urban sphere. It is deployed as an exceptional measure, even if more and more downtown districts, in post-industrial formerly blue-collar sections of old cities, are falling under the exceptional category and are being accordingly gentrified. But even if we see the extension of mixed-use planning principles to more and more areas of the city, it is highly doubtful that the uses will be mixed in both directions of the social/economic spectrum.

The reason why I predict that mixing uses will remain one-directional and somewhat exceptional is that, as those fighting for supportive housing in the city of Toronto and elsewhere in North America know, uses have no rights. And in local governance, turning an old home or a disused factory into a shelter is considered a question of uses, not a question of persons. This means that instead of clearly setting out a case about persons (for example, battered women, mentally challenged adults, etc) and their equal right to the city in order to mobilise resources, one has to engage in endless petty fights about uses — parking spots, densities, green spaces and elevations. The production and circulation of these entities needs to be carefully analysed, instead of being dismissed simply as stand-ins for types of persons.

Claims about persons and their rights can occasionally trump and negate some deployments of the power to order space that in the US is



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called ‘the police power’ (for example, in the US strip clubs have been able to contest some zoning regulations on the basis that stripping is a form of speech and thus subject to constitutional protection). But such external limits will necessarily remain exceptional, since they do not affect the bulk of use-based law or challenge its logic.

Arguments seeking to realise democratic inclusionary strategies could perhaps be found that stay within the less humanist, more pragmatic field of ‘uses’. Seeking to redefine group homes as ‘housing’, as suggested in the first example given in the paper, does not satisfy radical lawyers’ yearning to make constitutional history, but it could be more effective in terms of actually getting more supportive housing built — as well as serving, at the academic level, to explore forms of critical legal thought that go beyond the human/nonhuman binary.

Governing urban life through ‘uses’ constitutes a certain terrain and sets out the parameters of the battles that can take place there. We should be able to devise ways to fight on that terrain; I do not see that deploying the liberal fiction of the ‘person’ with ‘rights’ is necessarily the only, or even the best, political move one can make when faced with use regulations that have socially exclusionary effects.

Conclusion: toward a parliament of uses?

In imagining a world in which the binary opposition of things and persons would be critically challenged, Bruno Latour famously asked his readers to imagine re-making ‘the modern constitution’ (that is, the separation of things from people, nature from culture) through the convening of ‘a parliament of things’ (1993: 144–5). I have made a somewhat different argument here, since I have throughout emphasised that ‘uses’ govern things and people simultaneously. I am thus not wanting to emphasise the ‘things’ side of the binary or to repeat that space is important in and for law. Rather, I want to underline the complexity of the task of understanding (and possibly revising) legal mechanisms that have always already deconstructed the things/persons binary.





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At the end of *The Order of Things*, Foucault imagined that perhaps the figure of 'Man', like a drawing made in the seaside sand, was beginning to wash out. It has become apparent, however, that the work of imposing order on the modern world does not necessarily require governing through Man — the literature on space and law is ample proof of that. But neither legal humanism (such as that embodied in radical lawyers' attempt to introduce constitutional rights challenges into legal networks not suited to person-based claims) nor abstractions about space in general (for example, Lefebvre 1991) help much in understanding the working logics of certain very familiar and yet poorly understood forms of legal governance. Bruno Latour's deliberately provocative notion of a parliament of things could perhaps be borrowed in imagining a 'parliament of uses' — and parliaments of other entities that are neither persons nor things, neither cultural nor material, or more accurately both.

Whether using Latour's work or other resources for analysis, it should be possible to experiment with ways of working toward forms of governing (through use, through persons, or through anything else) that have more democratic effects than what we now have, at all political and legal levels. Intellectually, meanwhile, paying serious attention to taken-for-granted terms ('amenity', 'use', etc) and noting how they are deployed in everyday legal governance may prove more useful than any amount of conventional theorising.

Notes

- 1 The ban on 'people zoning' is extremely weak, however. This weakness is illustrated in the key cases concerning one dimension of people zoning, namely, the restriction of certain urban spaces to 'family' (usually defined by blood and marriage). The *Alcoholism Foundation* involved an appeal by several organisations providing supportive housing in group home settings to a Winnipeg zoning bylaw that, like other similar bylaws around the country and in the US, differentiated group homes from family dwellings, imposing requirements on the former — primarily, separation distances — that make it onerous to provide the kind of housing in question. The Manitoba Court of Appeal very reluctantly granted that given Supreme





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Court jurisprudence on discrimination, the Winnipeg bylaw had to be struck down, but the court intimated that it would be easy for municipal lawyers to Charter-proof zoning bylaws accomplishing the same purpose but not so clearly targeting identifiable groups (the disabled or other special-needs persons in supportive group homes). In a similar case, involving a zoning bylaw distinguishing between family and non-family occupiers of second suites (basement apartments), the British Columbia Court of Appeal overturned a lower court decision that had found the municipal discrimination against non-family occupiers to be ultra vires (*Faminow v Corporation of District of North Vancouver*). The lower court decision is a ringing indictment of people zoning, but one that was cut off on appeal.

- 2 This process is common across North America, being generally based on the original New York City zoning bylaw developed during World War I (Hall 1988: 58ff). The New York City Board of Zoning Appeals was the original inspiration for similar bodies across North America, e.g. the Committees of Adjustment of the city of Toronto. Little empirical research exists on zoning appeals/variances processes, but my own research in Toronto suggests that a large part of the city's built form consists of exceptions — for example, buildings and uses that pre-existed the bylaw and buildings (and uses) that obtained legal exceptions. Both of these legally ghostly forms of life are included under the interestingly liminal category of 'legal nonconforming use'.
- 3 This statement is based on a reading of all the relevant City Council debates and the coverage of the protracted dispute about the bylaw in the *Toronto Star*.
- 4 Mixing humans and nonhumans in a way that would later become unfashionable, and is described by historian Paul Rutherford as 'strange' (1971: 215), the Commission of Conservation was concerned both with the conservation of natural resources such as forests and fresh water and the conservation and maximisation of human resources through selective immigration and other means.
- 5 Paul Rabinow's excellent study of modernist colonial town planning in French North Africa demonstrates that, in settings governed directly from a far-away metropolitan centre, town planning can exhibit the same logic as national projects of colonisation and acculturation (1989). In early Canadian cities too one sees certain colonial, national, and imperial logics of governance at work in urban as well as rural settings. The kind of governance





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accomplished through today's zoning bylaws and similar legal tools is thus not coterminous with 'the local' as such. In other words, the differences between local law and governance and 'big law' outlined in this paper have little or nothing to do with scale.

- 6 Davina Cooper has recently alerted sociolegal scholars about the need to further investigate the curious category of 'enjoyment' that is central to nuisance law (2002). Like 'amenity', enjoyment links persons and things quietly and silently, since only persons can enjoy; but in nuisance law as in other areas of municipal governance, persons' enjoyment is not quite the same as the joy of rights, since enjoyment is always mediated by place and is furthermore often conditional on owning the place in question ('enjoyment of one's property' being the operative term). Nuisance law would be a fruitful arena for ANT-style analyses, given the notorious ontological hybridity of typical nuisances, such as loud/offensive noises and pests that are objectionable on both health and aesthetic grounds.
- 7 Over the past year I have observed several hearings of the Ontario Municipal Board and have collected ethnographic information from three of Toronto's four Committees of Adjustment, which grant zoning variances.
- 8 Field notes, city council committee meeting, 5 February 2005.
- 9 I have not been able to confirm whether the opening of this shelter was a direct result of the OMB decision mentioned earlier in the paper, but I suspect that it wasn't, since the property was already owned by the city, and there are no residences anywhere near it. Indeed, it seems as if the OMB decision did not have any
- 10 See Staff Report from Chief Administrative Officer et al, 13 January 2004. The figure of 14 is on page 12.
- 11 While deploying social-work style 'outreach workers' instead of bylaw enforcement officers to deal with homeless persons face to face, and widely publicising this 'carrot' approach as compassionate, the city also deployed a less visible stick: it cut much of the funding it traditionally provided to civil-society groups (such as 'Out in the Cold') that had for years handed out free sandwiches, soup, and toiletry items so as to make it possible for people to continue living on the streets ('Last of the homeless' *Globe and Mail* 23 July 2005: M1).



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Private law, public landscape: troubling the grid

Fleur E Johns

The relation between what we see and what we know is never settled ... Our vision is continually active, continually holding things in a circle around itself, constituting what is present to us as we are ... The eye of the other combines with our own eye to make it fully credible that we are part of the visible world (Berger 1972: 7, 9).

1 Introduction

Let me tell you a story about the relationship between law and landscape. This story has a protagonist (a lawyer) and a setting (landscape). The lawyer comes to the landscape laden with predispositions, viewpoints, culture. Most importantly, the lawyer stands before the landscape after having made two decisive, albeit difficult decisions. The first decision was to become a lawyer; the second, to orient herself, or to be oriented, before a particular landscape. Would it be a wild, uncultivated scene or an industrial centre? Would it be a slum or an affluent suburb? Would it be a business centre or a rural backwater? These decisions, in combination with the supposedly pre-determined properties of the personal, are understood to set the lawyer upon a particular path.

From then on, having selected her landscape, the lawyer's task is to navigate that terrain along her assigned, lawyerly path. The landscape unfolds before her in stages, like a Poussin painting. It is a scene of ribald curves and slippery slopes. For the lawyer, it is scarred only by



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the linear route of the law. Now the law's path turns right, now left (these days, the lawyer steers a course as close to the centre of the path as possible). She wonders occasionally: 'Who built this path?' 'What tectonic shifts, what anonymous human labours shaped this landscape through which I travel?' Distracted, she stumbles, then quickly reminds herself to stay the course.

The path continues. At one point, it falls behind a rise and the lawyer finds herself in a space decreed private. At another point, the path opens into a public square. In each of these spaces, the role of the lawyer is to prune the pathway and gather findings. She must cultivate the opportunities presented by the landscape and respond to its challenges and threats. The path itself — the path of the law — strikes her as relatively narrow. From it, the lawyer gazes longingly at the open planes of the political, the bountiful fields of the economic, the crazed surfaces of the cultural and the serene oases of the natural. It is from these that she draws the inspiration to continue the journey. It is from the landscape that opportunities, questions and resources issue forth. It is the landscape that will decide the allocation of the fruits of her labours, and how bountiful they will be. The landscape tells her who she is and who she should become. The law merely lays out the path: the path between being and becoming.

Now, let me tell a different story about the relationship between law and landscape. Imagine our lawyer protagonist not as a viewer, nor as a pedestrian. Imagine her sodden, embedded, immersed. Picture the lawyer dragging her feet from glutinous mud and struggling to find a foothold — to mark the spot that says 'law'. Think of the building of her path as a sweaty, strenuous, unfinished work on which she labours alongside many. 'This spot,' she says, 'this spot will be sacred and I will call it my own.' 'Here, I will anchor the law.' But then as she places her boot, it touches not field but flesh: she stands on moving ground, the ground of another. 'Here,' she says, 'from this place I can see ahead'; 'now I have a clear line of vision.' But the line she draws is a circle; her progress is a return. 'Ahah,' she says, 'I am standing now at the starting point'; 'this is the place from which we may begin'; 'this is the commonplace'.



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But the commonplace is already scored and cross-hatched. It bears the markings of others who have been before and arrows that point elsewhere.

Prevailing accounts of the relationship between law and its landscapes — physical, social and ideational — tend, I argue, towards the first, more Poussin-esque of these allegorical scenes. The scholarship of ‘legal geography’ has tended to cast law as mediating a perpetual tug-of-war between the private and the public in spatial terms (see, for example, Blomley et al 2001). In some versions of this scholarship, the private is in ascendance; in others, the public is gaining the upper hand. In each case, law is depicted in the foreground, responding to technological, economic, social and political developments cast into the background as ‘social fact’ or otherwise.

According to some late 20th century writings, for instance, the expanding reach of ‘privatopia’ combined with the demise of the social welfare state has led to the gradual historical demise of ‘public man’ and the landscapes in which he flourished (Blakeley & Snyder 1997, McKenzie 1996, Sennett 1977). Today, such accounts maintain, a bountiful public is in retreat as borders tighten, possibilities for protest contract, and large urban assemblages from Berlin to New York are sapped of tax revenue (Larsen 1999). Law is understood to have contributed to this degradation of the public by promoting the naturalness of landscapes averse to social, racial, political and economic miscegenation (Frug 1999: 26–53). Legal efforts to preserve and prioritise the private (pastoral expanses, suburban vistas, isolated tax pools and so forth) have, it is said, hollowed out the state. There is a sense in such accounts that the momentum of a prevailing swing to the private is both driving and exceeding the law.

Elsewhere, however, contemporary scholarship offers a directly contrary account, casting a natural state of privacy, calm and security in a receding mode. The synthetic conditions of a disorderly, technocratic public encroach at ever-increasing speed. Law is either powerless to stop this encroachment, or is deliberately or unwittingly contributing



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to it. Free trade, for instance, imperils private, individualised notions of the neighbourly and the small-scale (Gillespie 2001, Howse & Trebilcock 1997). Walls — virtual and residential — prove permeable, law's labours notwithstanding, and privacy is under siege (Edwards 2003, Bennett & Raab 2003). Again, law is cast at once as respondent, rogue, and redeemer, with its performance in each role proving somehow insufficient. In this case, it is the public or the governmental that is seen to be both impelling the law and overwhelming it.

Socio-legal narratives of both these sorts are inclined to associate the physical integrity of space (whether public square or private cloister) with an elusive, retreating harmony. Both versions of the scholarship paraphrased above import a sense that law stands at a distance from a relatively discrete, non-legal background by which it is both informed and inspired. It is the thesis of this article that law and legal scholarship in common law jurisdictions maintain this sense of distance and integrity in part by adherence to a perspectival grid. The common law, this article will go on to argue, is imbued with a perspectival preoccupation in its reading of physical and social landscapes. That preoccupation — in law as in art — both enables and impedes its vision.

Seeking (momentarily) to scramble this perspectival vision, this article scrutinises its construction and effects through a focus on private law. In so doing, this article seeks to invert a further foreground/background dynamic — namely, that between private law, on one hand, and public policy on the other. The inquiry that follows emphasises the role that private law plays in the sorts of distributions and discriminations that are most frequently attributed to extra-juridical (background) determinants: government policy, corporate purchasing power or consumer choice. Instead, it will be argued here that distributive effects may be attributed to the structural or stylistic features of private law itself. These features are neither individually 'chosen' in any determinative sense, nor beyond legal question. A perspectival orientation facilitates private law's production of a spatial grid to which that law anchors itself, and from which it derives both its rational justification and its reformist goals. Perspective thus shapes the law and influences the direction of legal scholarship and law reform. It does



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so, moreover, in a way that is *itself* cast into the background of legal inquiry. This can be seen in the mundane and apparently settled legal terrain of private property ownership. In particular, it can be seen in the common law on the tort of nuisance.

Through a selective critique of (primarily Anglo-Australian) private nuisance law, this article will probe common lawyers' habitual experience of negotiating the social-physical landscape. As suggested above, that habitual experience involves charting a course by, and laying a mark upon, a pre-existing (albeit ever-changing) background of predisposition, potential and prejudice. In place of this experience, this article seeks to generate a sense of law always still at work in producing its own background: placing and replacing those markers by which the law orients and exonerates itself. More specifically, this article seeks to counter the notion of private property as settled ground: a space always already in the background to law reform debates; pre-negotiated and emptied of regulatory opportunity (on negotiating the non-negotiable, see Derrida 2002: 1–3, 11–40). In analysing the tort law of nuisance for its perspectival orientation, law may be glimpsed in a different relation to landscape to that which the perspectival grid ordinarily dictates.

With these objectives in view, Part 2 of this article will provide a brief explanation of common law principles concerning the tort of private nuisance. It will draw from English and Australian authorities to outline the basic principles of private nuisance, ignoring, for purposes of this article, jurisdictionally specific details and divergences. In view of the mismatched historical medley that comprises the law of nuisance across common law jurisdictions, this will necessarily be an approximate and incomplete account.

Part 3 will then explain this article's claim that the tort of nuisance is informed by a perspectival vision that structures its reading of social and physical landscapes. Drawing upon English, Australian and, to a lesser extent, US, Canadian and New Zealand authorities, illustrations will be given of how the common law of private nuisance enshrines a distinctly perspectival orientation. Once again, this discussion will downplay doctrinal variations across common law jurisdictions.





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Finally, in light of the preceding study, Part 4 will tender the following contention. The perspectival grid is a crucial element to be engaged in seeking to contest the current state of law-landscape relations in the common law, and the blindspots and distributive injustices to which those relations contribute. This article will close with a brief rumination on prospects for opening law's perspectival orientation to negotiation, within the law of private nuisance and elsewhere.

2 The common law of private nuisance: an overview

In order to scrutinise the common law of private nuisance for its perspectival predisposition, it is important first to grasp the basic tenets to which that law subscribes. In so doing, however, it is important to recognise that the complexity of nuisance law across the common law world far surpasses the following description. As one commentator has observed, '[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance"' (Keeton et al 1984: 618).

In brief, a common law action for private nuisance arises from unreasonable interference with the use and enjoyment of land. More precisely, it arises from unreasonable interference with proprietary rights recognised as sufficient to found a cause of action in private nuisance. In other words, for a plaintiff to succeed in an action for private nuisance, the plaintiff must establish that: (a) the plaintiff has a requisite proprietary interest; and (b) the defendant has, by action or inaction, interfered with the plaintiff's use and enjoyment of that proprietary interest, which interference is unreasonable. The defendant may, in defence, either disprove one of the foregoing elements or contend that the nuisance has been rendered lawful by prescription or by statutory authorisation (Trindade & Cane 1999: 640–4, Fleming 1998: 488–92, Deakin et al 2003: 479–84, Heuston & Buckley 1996: 70–6). Let us now briefly consider each of the requisite elements of the tort.



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A Proprietary interest

In the 1997 case of *Hunter v Canary Wharf Ltd; Hunter v London Docklands Corporation* (hereinafter *Hunter*), Lord Goff of the English House of Lords stated that ‘it has for many years been regarded as settled law that a person who has no right in the land cannot sue in private nuisance’ (*Hunter*: 689). Private nuisance is intended to protect the freeholder, the tenant, the licensee with exclusive possession, and/or a party whose reversionary interest is damaged by the nuisance in question (*Hunter*: 692). In English law, exclusive *de facto* possession of affected land may also suffice to establish a right to sue for private nuisance (*Foster v Warblington Urban District Council, Paxhaven Holdings Ltd v Attorney-General, Hunter*: 688). Based on the 1976 authority of *Oldham v Lawson (No 1)*, and the *Restatement (2nd) of the Law of Torts*, respectively, this would appear to be the position in Australian and US law as well.

B Unreasonable interference

As a tort to property, the traditional realm of private nuisance was, in the words of one commentator, ‘the stinking privy, the urban hog-sty, the fouled or diverted stream, [and] the polluting chimney’ (Brenner 1975: 403). Faced with production of the pungent or the poisonous, the law of private nuisance has historically ‘dr[awn] the line around free use and enjoyment of land at that point where another’s use and enjoyment were impaired’ (Brenner 1975: 404). While the standards for adjudging actionable impairment might once have been described as ‘rural, agricultural and conservative’, the range of behaviours that have been held to amount to unreasonable interference with another’s use and enjoyment of land are now as varied as the circumstances of their invocation (Brenner 1975: 404, *Goldman v Hargrave*: 992, *Sedleigh-Denfield v O’Callaghan*: 364).

In English and Australian courts, noise, fumes, odours, vibrations, glare, dust, golf balls have all been found to constitute a nuisance actionable by those in possession of property in close proximity to the property from which they emanate. Interference emanating from one party’s property may pose the risk of physical harm or it may be



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‘productive of sensible, personal discomfort’ consisting of ‘the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves’ (*St Helen’s Smelting Company v Tipping*: 1486). Significantly, however, such interference need not take the form of physical entry onto property. Direct interferences fall under the rubric of trespass to land, rather than the tort of nuisance (Deakin et al 2003: 444–54, Heuston & Buckley 1996: 40–52).

The test that courts apply to an alleged nuisance is one of reasonableness. An interference with another’s use and enjoyment of land will be judged unreasonable (and therefore actionable) where it exceeds the level of tolerance — ‘give and take; live and let live’ — that the law expects of people living in a populous society (*Bamford v Turnley*: 83–4). This standard is not to be set by the most fastidious or sensitive or those prone ‘to dainty modes and habits of living’. Rather, it is to be determined (one oft-cited 1851 authority stated) ‘according to plain and sober and simple notions among the ... people’ (*Walter v Selfe*: 322, adopted in *Don Brass Foundry Pty Ltd v Stead*). Moreover, that which reasonableness is understood to require will depend upon the locality in which this assessment is to be made. Conduct that would be adjudged an actionable nuisance in an affluent, quiet, residential neighbourhood will not necessarily amount to such in a working class, industrial area (*Sturges v Bridgman*: 865, comparing Belgravia and Bermondsey, *Bamford v Turnley*: 79, comparing Grosvenor Square and Smithfield Market). The duration, timing and gravity of the interference will also be relevant to the assessment of an alleged nuisance, as may the purpose or utility of the activity in question (Trindade & Cane 1999: 632–4, Fleming 1998: 464–98, Deakin et al 2003: 465–6, 483, Heuston & Buckley 1996: 55–6).

The ‘zoning function’ of private nuisance law — its ‘function of allocating activities to appropriate areas’ through the characterisation of (un)reasonable behaviour in a manner particular to locality — has been recognised (Brenner 1975: 406). Nevertheless, judicial accounts of nuisance law tend to deflect attention away from its discretionary power to shape, rank and divide contemporary urban and suburban landscapes.



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Nuisance law's classifications of 'reasonable' and 'unreasonable' behaviours are not, it is said, attributable to the vagaries of aesthetic or value judgment, whether on the part of the plaintiffs or that of the judiciary (*McVittie v Bolton Corp*: 283, *Bathurst City Council v Saban (No 2)*: 206, *Coventry City Council v Cartwright*). Nor, the courts have frequently claimed, should these classifications be read as ventures in social engineering. Rather, nuisance law is said both to arise from, and be constrained by, that enduring, unarguable freedom consequent upon the ownership or lawful possession of property:

[T]he English common law allows the rights of a landowner to build as he [sic] pleases to be restricted only in carefully limited cases ... [W]e have a rule of common law which, absent easements, entitles an owner of land to build what he likes on his land. It has stood for many centuries (*Hunter*: 710).

Common law doctrines of private nuisance thus confirm the authority of property holders over the land to which their interest corresponds. Yet the law in this area also confers power upon such interest-holders to shape the landscape *surrounding* their properties by means other than acquisition. Through recourse to nuisance law, such interest-holders enjoy capacity legally to suppress behaviour impinging directly or indirectly upon their normality, thereby possessing authority to shape the landscape *beyond the bounds of their property*. The normality of the owner or other party deemed in control of land is quite literally grounded in the terrain of their proprietary interest, and extended outwards from that ground. The effect of this is to insulate such persons' power and preferences from the many contending claims and perceptions that might be put forward by those who pass through or share their landscape. The property holder's version of the reasonable may not be challenged by anyone other than a neighbouring property holder. In this respect, *perspective* plays a vital constitutive and validating role.

To what 'perspective' does the foregoing claim refer? The reference is to the modern representational scheme of linear perspective, a brief introduction to which now follows.





3 Perspective in private nuisance law

A On perspective

Conventional accounts of perspective in the modern period focus on *perspectiva artificialis* (as opposed to the *perspectiva naturalis* or *communis* of medieval texts) — a perspectival scheme linked to the scientific innovations of the Renaissance insofar as it purported to subject representation to the laws of optics. Such accounts tend also to focus on the innovations of a few named individuals: archetypal heroes of modernity. ‘According to the avatars of history’ wrote Hubert Damisch, ‘no sooner had Leone-Battista Alberti arrived in Florence in 1434 than he undertook to write *Della pittura*, his “art of painting” in three books, the first of which includes, under the heading *rudimenta*, an exposition of what we might call the *princeps* of rational perspective construction and rational *more geometrico*’ (1994: 59). Alongside Alberti stands Filippo di Ser Brunellescho (Brunelleschi) to whom the 1436 Italian edition of *Della pittura* was dedicated (1994: 59). Brunelleschi, Damisch observed, ‘is supposed to have put this perspective into practice, to have put it into action’ (1994: 67). So begins the standard story of the rise of modern perspective.

In Alberti’s *Della pittura*, an ‘excellent method’ was set out for ensuring that ‘objects in a painting . . . appear like real objects’: a method that depended upon such objects ‘stand[ing] to each other in a determined relationship’ (1991: 56). That relationship relied, in turn, upon an anticipated distance between the eye of the spectator and the picture plane. Erwin Panofsky described the “perspectival” view of space’ invented at this time as a ‘transform[ation]’ of ‘[t]he material surface onto which individual figures or objects are drawn’ into a ‘window’ through which a spatial continuum is seen (1991: 27). ‘In a picture constructed this way,’ Panofsky explains, ‘the following laws are valid. First, all perpendiculars or “orthogonals” meet at the so-called central vanishing point, which is determined by the perpendicular drawn from the eye to the picture plane. Second, all parallels, in whatever direction they lie, have a common vanishing point . . . Finally, equal dimensions



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diminish progressively as they recede in space, so that any portion of the picture — assuming that the location of the eye is known — is calculable from the preceding or following portion' (1991: 28).

The effect of these 'laws' of perspective is, as Panofsky noted, to 'create distance between human beings and things ... but then in turn [to] abolish this distance by, in a sense, drawing this world of things, an autonomous world confronting the individual, into the eye ... for these rules refer to the psychological and physical conditions of the visual impression, and the way they take effect is determined by the freely chosen position of a subjective "point of view"' (1991: 67). Damisch elaborated further on the latter of these two effects — the role of perspective in both constituting and referencing a discrete, individualised human subjectivity identified with the 'point of view':

[Perspective's] function seems to correspond perfectly to the function which is that of language, myth, and art, to say nothing of science: a function by no means specular, or passive, but rather constitutive, within the register of representation, of the order and even the meaning of things ... [i]ncluding ... the synthetic function identifiable with the *I*: the "I" which in this capacity must be inscribed, from the beginning, within the "point of view", an idea that necessarily refers us back to that of the "subject" ... (1994: 9–10).

Perspective's installation of the 'subject', Damisch demonstrated, always also entails the organisation of space according to notions of proximity to, and distance from, that subject — the demarcation of a 'here' and a 'there' and the delineation of particular ways of moving between them:

Perspective ... is not a code, but it has this in common with language, that in and by itself it institutes and constitutes itself under the auspices of a point, a factor analogous to the "subject" or "person" in language, always posited in relation to a "here" or "there", accruing all the possibilities for movement from one position to another that this entails (1994: 53).

Damisch, however, disavowed the notion that perspective 'reduces the viewing subject to a kind of cyclops, and obliges the eye to remain at one fixed, indivisible point' (1994: 35). Rather, perspectival orientation





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around the gaze entails capture in, and movement through, a *double* vision: the vision of the one to whose gaze the image is referable and ‘a *complementary* vision, or another vision’ whereby the viewing subject is ‘seen from without as another would see [him/her], installed in the midst of the visible, in the process of considering it from a certain spot’ (Damisch 1994: 46, quoting Merleau-Ponty 1968: 134). Perspective ‘provides a means of staging this capture and of playing it out in a reflective mode’ (Damisch 1994: 46).

In these effects, the influence of perspectival orientation extends well beyond the realm of pictorial representation and visual experience. Perspective works not only, as Alberti’s text would suggest, ‘on painting’ (Cosgrove 1985). Rather, as the ground-breaking work of Hubert Damisch highlighted:

To say that our culture has been and continues to be shaped, informed, and programmed at bedrock level by the perspective paradigm is more than mere wordplay...Perspective has become so completely integrated into our knowledge, at the most implicit or unconscious level, that today we must turn to another kind of knowledge, erudite knowledge, and embark on an anamnestic project designed to recover it from the technological oblivion into which it has been plunged by ideology (Damisch 1994: 52).

Indeed, the ‘programming’ effects of perspective are often, Damisch observed, precisely *not* visible, notwithstanding their rootedness in the visual:

As a paradigm or regulatory structure, perspective is sometimes in operation precisely where one least expects it, where its intervention is least visible...its function extends ... [to] providing ... a network of indexes that constitutes ... the equivalent of an expressive apparatus or sentence structure ... (1994: 25).

This paradigmatic structure is borne out in the jurisprudence of private nuisance at common law.

B The landscape of private nuisance law

In assessing behaviour by reference to the outlook of an aggrieved property holder, nuisance law echoes perspective’s orientation around an individual viewing subject. Nuisance law similarly constructs an



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‘autonomous world’ of things and actions and draws this into a singular observational standpoint. From that standpoint, the world recedes towards a vanishing point in an even progression, such that the distancing of one thing from another within the picture plane is rendered unavoidable. The eye may only bridge that distance via predetermined, navigable paths: by tracing those parallels that organise and fix the perspectival sense of place so that ‘any portion of the picture ... is calculable from the preceding or following portion’ (Panofsky 1991: 28).

One may discern such a perspectival structure in the 1981 English case of *Laws v Florinplace Ltd* (hereinafter *Laws*). The plaintiffs in *Laws*, who were residents of Longmoore Street, Pimlico, in London, sought an interlocutory injunction to restrain the continued operation of a shop selling pornographic magazines, books and videos. That injunction was granted upon a finding that there was at least a ‘triable issue’ that the operation of a sex shop amounted to ‘such an affront to the reasonable susceptibilities of ordinary men and women’ that it constituted ‘an interference with the reasonable domestic enjoyment of [the plaintiffs’] property’ (*Laws*: 666–7). Vinelott J set the scene as follows:

Longmoore Street is a residential street in Pimlico, about a quarter of a mile or a little more from Victoria Station. It bisects a busy road, Wilton Road, which runs south-east from the station. If a visitor continues south-east down Wilton Road after the intersection with Longmoore Street he will reach, after a distance of some fifty to a hundred yards, another main road, Warwick Way, which again crosses and marks the end of Wilton Road. Retracing his footsteps and crossing again the intersection with Longmoore Street he will reach after a longer distance, some three or four hundred yards, another intersection called Gillingham Street. The part of Wilton Road which lies between Gillingham Street and Longmoore Street consists almost wholly of commercial properties of one kind or another, which serve to some extent the casual trade of people coming to and from the station ... But the part of Longmoore Street which lies to the south-west side of Wilton Road is almost wholly residential. The houses are small terrace houses, built a hundred years ago for artisans (*Laws*: 666).

By so framing the area under consideration, Vinelott J went a considerable way towards deciding the outcome of *Laws*, even before





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his evaluation of the parties' substantive arguments got underway. For the character of the area was critical to the determination of what amounted to reasonable enjoyment of property in the vicinity:

Mr Laws, a barrister who lives there and who is the first-named plaintiff, has described this area, that is, the bottom half of Longmoore Street and the part of Wilton Road which lies between Longmoore Street and Warwick Way, as having a marked and attractive village atmosphere. That description is disputed by the defendants, who point to the proximity of Victoria Station, to the commercial nature of the part of Wilton Road which lies between Longmoore Street and Victoria Station, and more particularly to the existence on the north-east side of Wilton Road, near the intersection of Gillingham Street, of a bookshop described as an 'adult bookshop'... and to the existence on the other side of Gillingham Street of a cinema which, it is said, displays films of the kind often described as 'soft pornography' and of a shop described as a 'sex shop' (*Laws*: 667).

By envisaging the area from the perspective of a single pedestrian, beginning at the intersection of Longmoore Street and Wilton Road and walking first south-east and north-west along Wilton Road, and then south-west down Longmoore Street, Vinelott J rendered natural a focus on the bottom half of Longmoore Street, and its distinction from the rest of the area described. Had the imagined spectator been given a bird's eye view, for instance, it might have seemed unreasonable to characterise 'the bottom half of Longmoore Street and the part of Wilton Road which lies between Longmoore Street and Warwick Way', as distinct from the surrounding area. Similarly, had this hypothetical viewer not begun his/her perambulations on the busy thoroughfare of Wilton Road, the above-mentioned area might have not seemed so quiet and village-like in comparison. Vinelott J's positioning of the 'eye' in this case thus established the perspectival 'sentence structure' (per Damisch) through which the landscape under survey was comprehended. Vinelott J's selection of this point of view ensured that the 'small terrace houses' of Longmoore Street came to comprise a 'here' and the commercial properties, adult bookshop, cinema and sex shop of Wilton Road comprised a 'there', with the rights of the respective parties calibrated accordingly.



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By fashioning the landscape in this way, the people who frequented it were likewise divided. They became, respectively, the decent and the indecent, with each of the two constituencies occupying a relatively discrete location within the spatial continuum. Their separation was rendered as natural and proper, in this account, as a perspectival relationship between the near and the far. Accordingly, Vinelott J accepted the following submissions from the plaintiffs:

Counsel for the plaintiffs put his case on two broad grounds. First, he submitted that the existence of a business of this kind, selling hard pornography, and selling it in such a way that the nature of the business would be apparent to those living in or visiting the area, is itself a nuisance, because the instinctive repugnance that would be felt by ordinary decent men and women, and the embarrassment that would be felt by visitors, would in itself constitute a material and unreasonable interference with the comfort and enjoyment of their property. Second, he said that the nature of the business was such that the plaintiffs are justified in fearing that it may become a plague spot, attracting undesirable customers, and with them others, such as prostitutes, who trade on those customers, and in turn, criminals trading on the prostitutes. Further, some of the customers, it is suggested, may be of a kind who might molest young girls with indecent suggestions (*Laws*: 667).

C The law and its backgrounds (part I): economics

Even where courts do not engage so explicitly in setting out the visual panorama of a case, it is possible to discern certain routine operations by which a particular decision in one or other case is made to appear logically defensible, sometimes even unavoidable. These are operations in which perspectival structure is at work. That is, these operations betray an unthinking adherence to a particular 'viewpoint' and a prescribed set of spatial relations flowing from that viewpoint. One such operation involves the distancing of law from the sphere of economics (specifically, the economics of proprietary value). A second entails the distancing of law from the sphere of the aesthetic (the realm of personal idiosyncrasy or 'mere' taste).

The first of these operations is discernible in the requirement that legal constraint under the doctrine of private nuisance be justified by





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reference to ‘injury’ to a proprietary interest. Injury, in this context, is understood as a loss in the value of that property, whether its capital value or its amenity value (*Hunter*: 696). A nuisance will only be actionable where such a decline in property value is shown to arise from the alleged tortfeasor’s unreasonable interference (see, for example, *St Pierre v Ontario*). An oft-cited statement to this effect is that of the Lord Chancellor in *St Helen’s Smelting Company v Tipping*:

If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a *material injury to property*, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible *injury to the value of the property* (emphasis added) (*St Helen’s*: 650).

Framing nuisance in these terms collapses assessment of the parties’ contending claims into the logic of the quantitative: a logic that is distinguished from and, to a significant degree, insulated from legal question. The assessment of value and the finding that value has diminished are understood to be matters of *non-legal* expertise. Typically, expert opinions are taken on these issues from real estate agents and land valuers (see, for example, *Hawkes Bay Protein Ltd v Davidson, Vukelic v Hammersmith and Fulham London Borough Council*). This non-legal sphere of quantitative evaluation falls into the background of the legal dispute and yet remains integral to it. So, in *Hunter*, Lord Lloyd commented:

[T]he essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely, interference with land or the enjoyment of land. In the case of [nuisance by encroachment on a neighbour’s land or nuisance by direct physical injury to a neighbour’s



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land,] the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of [nuisance by interference with a neighbour's quiet enjoyment of his land]. There is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor (*Hunter*: 696).

The demand that the plaintiff show a decline in property value casts into the background of a legal dispute the question of how to characterise and rank the various harms said to have been caused by an alleged nuisance, and the various ways in which supposedly offensive conduct may be experienced by different people. Instead, valuation takes place, at least in part, in a conceptual (or literal) back room to a nuisance claim. The constituent elements of that valuation are presented to the court as 'facts', the strength of which depends more on the perceived veracity and expertise of the non-legal valuers than upon the substance of the claims underpinning them.

Recourse to the quantitative 'background' of property value is, moreover, understood to distance the law from the vagaries of individual personality or prejudice. Speaking for the Ontario Court of Appeal in *Hollick v City of Toronto* (while refusing to certify a class action in nuisance involving 30,000 plaintiffs residing in a 16 square mile area), Carthy JA observed, for instance:

[C]omplaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property ... (*Hollick v City of Toronto*: 267).

The invocation of proprietary value, and the anchorage to that value of a particular legal decision (that is, whether a nuisance is found to have arisen), thus circumscribes an inquiry that might otherwise veer off in a number of directions. Legal inquiry might otherwise include scrutiny of injury-causing behaviour by virtue of which property interests had come to rest in the hands of the property holder(s) in





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question. It might also involve consideration of the competing claims of property-holders and non-property-owning occupants alike, and of the relationships between them. Yet the commodity value of property, as Marx recognised in the 19th century, exerts a talismanic force that forestalls such investigations, ranking the property-holder's comfort and interests above all others'. By its very nature, recourse to the commodity (in this case property) blocks examination or disruption of the social relationships necessary to its production and recognition as a value-bearing thing (Marx 1919: I: 81).

The invisibility of social relations in the assessment of property value is evident in nuisance law's inattention to residents or routine occupants of the property said to have been injured, where those residents or occupants possess no recognised proprietary interest. *Hunter* confirmed, for instance, that private nuisance does not permit suit by 'husbands ... wives, or partners [of the holder of a proprietary interest], and their children, and even other relatives living with them' (*Hunter*: 693). Similarly, in *Hunter*, Lord Goff refused to contemplate extending a right of suit in nuisance to 'the lodger upstairs, or the au pair girl or resident nurse caring for an invalid who makes her home in the house while she works [on the property in question]'. 'The extension of the tort in this way would,' Lord Goff opined, 'transform it from a tort to land into a tort to the person' (*Hunter*: 693).

It is critical to the law of private nuisance that it concerns a wrong done to a proprietary right, which right is understood to exist independently of the sensibilities, status or social circumstances of the aggrieved person who holds it. However, the sensibilities of an aggrieved person *do* form a legitimate basis for a nuisance action when injury thereto may be expressed as diminished enjoyment of a proprietary interest. No matter how much a non-property-holding person may suffer as a result of an interference affecting the property where s/he lives, that person's discomfort will fail to register as the basis for a nuisance action. In contrast, the landowner's 'sensible, personal discomfort' is readily translated into terms of an injury to property, as Lord Hoffman's reasoning in *Hunter* demonstrated:



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In the case of nuisances ‘productive of sensible personal discomfort,’ the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered ‘sensible’ injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation (*Hunter*: 706).

The routine distancing of issues amenable to *legal* deduction from questions of proprietary value helps to render non-negotiable this prioritisation of the sensibilities and sufferings of property holders over those of other people who live with or near them. This distancing relies upon a distinctly perspectival outlook. The common law divides the landscape of a nuisance claim into a series of legal and non-legal planes and casts that division as an autonomous order of nature. In so doing, it determines what is proximate (and open to discussion) and what is remote (and non-negotiable), thereby circumscribing ‘the possibilities for movement from one position to another’ (Damisch 1994: 53).

D The law and its backgrounds (part II): aesthetics

The second operation — in many ways comparable to the first — entails the separation of questions of taste from questions of law in nuisance claims (see generally Coletta 1987 and Smith 2000). Taste is, in this account, the sphere of personality, particularity and instinct. This is a sphere supposedly saturated with subjectivity. By distancing law’s understanding of property’s ‘ordinary’ uses and purposes from a sphere so characterised, those ordinary uses and purposes are stiffened with a sense of inevitability or commonality. In this way, the suppression of activities not decreed ‘ordinary’ is cleansed of partisanship.

This effect was discernible in the Missouri Court of Appeals’ determination, in *Ness v Albert* (hereinafter *Ness*), that a would-be nuisance suit failed to state a cause of action. The plaintiffs in *Ness* alleged that the presence of certain ‘rusted objects’, pieces of concrete, parts of old sinks and stoves, and a partially burned house trailer on the defendant’s property was ‘unsightly’ and ‘thus constitute[d] a nuisance’. Dismissing the suit, the court ruled that nuisance actions



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could not be based solely on aesthetic considerations. By rejecting a nuisance suit so framed, the court in *Ness* reinforced a sense of itself as a decision-making body free of bias:

Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation, and vice versa. What is aesthetically pleasing to one may totally displease another — 'beauty is in the eye of the beholder'. Judicial forays into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty (*Ness*: 2).

The Colorado Court of Appeals sought to adopt a similar posture in *Allison v Smith* (hereinafter *Allison*):

To constitute a nuisance, it is not enough that a thing such as accumulated debris and rubbish be unsightly or that it offend one's aesthetic sense (*Allison*: 794).

That court, however, went on to find that the defendant's accumulation of 'inoperable automobiles, large rigs, a bulldozer, tons of scrap metal, pipe, new and used construction materials, drums of petrochemicals, large amounts of everyday litter and rubbish, and other "obnoxious debris"' on property adjoining the plaintiffs' *did* amount to a private nuisance. It did so by setting the question of unreasonableness apart from the question of 'mere unsightliness'. The court characterised its decision as one not based on 'aesthetic sense', but rather based on a finding that the 'questioned activity [was] [un]reasonable under all the surrounding circumstances' (*Allison*: 794). In so doing, the court relied on the separability of matters of law and reason from matters of aesthetics, associating itself insistently with the former:

[L]egitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard or auto salvage business may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors, particularly when it is located in a residential district (*Allison*: 794).

In *Allison*, the court's ability to condemn particular activity as a nuisance hinged upon its capacity first to identify a singular, ideal



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standpoint from which to view that activity, and second to strip that ideal spectator's position of personalising preferences. The locus which the court attributed to itself for this purpose was that of the property holder(s) against whom the nuisance was alleged to have been committed. Were the property holder in question understood to be viewing the alleged nuisance through the lens of personal aesthetics, the intolerability of the alleged nuisance would have carried no credence with the court (as in *Ness*). Yet where the alleged nuisance was viewed in such a way as to imbue that viewpoint with the universalising properties of reason, its offensiveness was understood to merit the court's censure (as in *Allison*).

It is the regulatory paradigm of perspective that enables this latter form of seeing: that lays claim to a shared reality while emanating from the standpoint of a single viewer. For it is the perspectival grid, with its parallels converging on a single vanishing point, that draws the singular into the common, investing the viewing individual with the omnipotence of the rational or scientific. That which might otherwise appear as a singular vantage point becomes 'reality' by virtue of its adherence to certain mathematical laws. The space of the viewing subject is thereby made to merge seamlessly and methodically with the spatial continuum of the visible world.

A perspectival mode of representation asks that the outlook and interests of the *private property holder* be taken as the outlook and interests of *all* by virtue of the former's inherent 'reasonableness'. Perspective constitutes a tangled melange of public and private from which neither can be extricated cleanly (on the intermingling of public and private within property law, see Hennigan 2004: 197–8). Private property gains, through the operation of perspective, an encompassing, public dimension:

Just as there is no private property in language, there is none in perception: the very idea of a 'perspective' contradicts such a notion (Damisch 1994: 34).

Nuisance law's capacity to proscribe certain behaviours with relative impunity on the basis of their 'unreasonableness' thus depends, in





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part, on that law's positioning itself at a distance from the realms of value quantification and personal fancy. On one hand, the legal assessment of nuisance piggybacks on the dryness, impartiality and relative opacity of property valuation. On the other hand, the legal calculus of nuisance becomes invested with a sense of neutrality and commonality by virtue of its distance from the avowedly subjective domain of taste. By repeated invocation of these distancing relations, courts are inured to protect landed plaintiffs against 'sensible personal discomfort' without being regarded as prejudicial arbiters among conflicting tastes. These relations, in turn, depend upon a divided, repetitive ordering of space that may be traced to the paradigm of perspective. Yet just as law's perspectival inflection makes possible the legitimising strategies described above, so the perspectival dimension of nuisance law submerges the property holder in an endless cycle of social exchanges: exchanges that are bound up in the act of seeing and being seen (Berger 1972: 9). Perspective insulates law, but it also immerses it.

E The law–landscape connection

Through recourse to planar distinctions such as those discussed in the preceding section, law champions and safeguards a particular type of landscape — above all, a divisible landscape. From this landscape, the law then derives reassurance of its own rectitude. For, despite its preoccupation with the separation of law from economics and aesthetics, private nuisance law is heavily invested in the notion that certain landscapes are determinative of positive ethico-political and/or material outcomes. The law of private nuisance works affirmatively, for example, to separate industrial and suburban landscapes (or the division of 'workplace' from 'home'). In *Dennis v Ministry of Defence*, for instance, the fact that the neighbourhood in which the alleged nuisance took place was 'essentially rural' meant that the noise caused by the overflights of military aircraft amounted to a nuisance in such an area. By implication, had the plaintiffs resided in a landscape where military and/or industrial operations featured prominently, they might not have been successful. Nuisance law favours the preservation of single use



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landscapes through the designation of the ‘essential’ character of a neighbourhood. The conferral of this character is almost invariably understood to precede the law’s own characterisation thereof.

The law of private nuisance thus reinforces the naturalness (or reasonableness) of a landscape divided into relatively discrete parcels by reference to ownership, residence, usage and/or occupation. Nuisance law then justifies its own properties by reference to that landscape. Landscape, organised into separable planes or units (locality, street, neighbourhood etc), is understood to lay out the pre-existing terrain that law must strive to entrench. Yet law is, at the same time, envisioning and rendering that landscape according to a particular model. Consider, for example, the emphasis placed on an individual belonging to a single, confined locality, to the exclusion of others from outside that locality, in *St Helen’s Smelting Company v Tipping*:

If a man lives in a *town*, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on *in his immediate locality*, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a *street* where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on *by one person in the neighbourhood of another*, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of *their neighbours*, would not apply to circumstances the immediate result of which is sensible injury to the value of the property (emphasis added) (*St Helen’s*: 650).

Nuisance law thus propagates the expectation that the ‘right’ (divisible) landscapes and the ‘right’ (predictable) laws are determinatively, if imprecisely linked, even as they are understood to stand apart from one another. Laws characterised by consistency,



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uniformity and navigability are often understood to be conducive to the realisation of freedom and prosperity: first, by their deference to the 'certainty' of proprietary interests; second, by their promotion of 'reasonableness' and hence their suppression of societal conflict. So too does the law of nuisance favour a landscape in which space is measurable, divisible and navigable. The one, it seems, engenders the other. Renderings of law and landscape come to emulate one another, even as they are understood to be made of entirely different stuff. As Damisch observed, perspective captures the viewer in a double vision: looking, while watching herself looking. Likewise, the law looks to the landscape for the very properties that it seeks to engender in itself.

This self-fulfilling law-landscape relation persists, rather counter-intuitively, in reformist literature concerned to disrupt socio-economic disparity and racial segregation. Margalynne Armstrong, for example, focuses on the effect of 'irrational ... white perceptions about the effect of black ownership on property values' in her discussion of the entrenchment of spatial segregation in the United States (1998: 1054). In Armstrong's account, the background of residential segregation is comprised of social, psychological and economic elements, from which the law stands apart. Law is called upon to work against and upon this bias-sodden background. Ideally, law must rid itself of the taint of this background irrationality in order for the progressive vision of an integrated spatial continuum to be realised in landscape. Yet law is, in Armstrong's judgment, ultimately unable to penetrate the background before which it works:

The problem of white withdrawal from the market due to property owned by African-Americans and the resulting intransigence of residential segregation reflects fear, ignorance, and bad faith involving social, psychological, and economic factors. The past thirty years show us that law acting alone cannot eliminate segregation. Expanded integration and African-American market equality will require interdisciplinary strategies that include, but go beyond, simply legal solutions (1998: 1063).

In Armstrong's article, as in the work of many progressive legal scholars, '[s]pace is *implicitly* understood to be the inert context *in* which, or the deadened material *over* which, legal disputes take place'



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(Ford 1994: 1857 (emphasis in original)). In both respects, this understanding depends upon the perspectival detachment of foreground from background.

If a law-landscape connection along a perspectival axis is a feature of the very juridical common sense that much reformist literature is concerned to change, then it seems rather surprising that a perspectival orientation is so readily (and silently) accepted in that literature. In accepting the perspectival set-ups that the law poses, one begins one's law reform conversation at the *end* of a negotiation. The reformer who looks to the background of 'context' or the 'interdisciplinary' for answers already accepts that these backgrounds are neatly and necessarily separable from their legal foreground. S/he aspires, perhaps, to stand where the sovereign would stand: in a space outside the messiness of the social, where one knows oneself to be working on the side of the good. However, to tackle bias embedded in the commonplaces of law-landscape, I would argue, one gains much from beginning at one or other place of impurity: points where public/private, law/landscape, authentic/inauthentic, power/freedom, law/non-law and related distinctions break down, corroding the smooth glaze of that which presents itself as non-negotiable. As I have sought to show, the tort of private nuisance may be one such starting point, among many.

4 Final thoughts: prospects for troubling the grid

David Delaney has observed, in relation to legal understandings of 'nature', that '[o]ften, to theorize the legal is to draw boundaries around it, to mark its limits, to distinguish the interior of law from the extra-legal ... To undertake this sort of operation is to create a conceptual or analytical distance between "law, properly speaking," and its mere contexts, or the ground against which law emerges as a figure' (2001: 78). The common law of nuisance, this article has sought to demonstrate, depends on such operations for the production of its own legitimacy.

Nuisance law relies, for its legitimacy, upon the capacity (and propensity) of law to separate itself from the 'ground' of economics and





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aesthetics. It relies too (as much legal scholarship does) on the construction of a ‘private’ domain (of law, property, subjectivity etc) repeatedly set apart from the ‘public’ domain of policy argumentation and resource allocation. The production of these scenes in turn depends upon the adherence, by readers and writers of legal texts, to a perspectival orientation. That orientation permits the naturalisation of ‘conceptual or analytical distance between “law, properly speaking,” and its mere contexts’ as reality. Perspective engenders individualisation and monopolisation of the act of seeing within law and fosters the predominance of an associated subjectivity.

Against this outlook, this article has suggested possibilities for reading private law generally, and nuisance law in particular, as an area of law where significant and politically controversial decisions are taken regarding the constitution of polities, the shaping of landscapes physical and social, and the allocation of power across them. Moreover, the mode of reading enacted in this article — reading the surfaces of nuisance law for pattern and predisposition — resists the layering of law into legal and non-legal or private and public planes, with the latter serving as a determinative underlay. Instead, this article has sought to suggest, the architectural make-up of law (or, per Damisch, its ‘sentence structure’) remains ripe for critical engagement by those concerned about law’s role in concentrating power and resources in relatively few hands. A key element of this make-up is the perspectival grid through which prevailing legal ‘ways of seeing’ are structured (Berger 1972). Law-landscape relations within the common law cannot be comprehended except by reference to this ‘paradigm’ (Damisch 1994). More importantly for those engaged in critical projects of various stripes, law-landscape relations within the common law cannot effectively be disrupted without tackling this perspectival programming.

Rich potential for critical questioning lies within law’s perspectival ‘program’. For, as noted above, embedded within that program is all the messiness of social exchange: The individual viewpoint that perspective works to ensconce within legal understandings of landscape is always unsettled and in the course of reciprocal articulation. The interests and outlook of the private property holder may be entrenched through the



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operation of law's perspectival grid, but that grid also necessitates an engagement with the viewing actions of others. Perspective enthrones the viewing subject only insofar as the viewer knows herself to be seen. Accordingly, far from standing before a background of social context, law *contains* the stuff of the social. Far from detaching itself from a collective background, private law is a publicly negotiated and publicly negotiable artefact. Recalling this may be a first step towards questioning the political imperviousness of contemporary private law and the particular interests that it serves.

More than a decade ago, Damisch proposed an 'anamnestic project designed to recover [perspective] from the technological oblivion into which it has been plunged' (1994: 52). Law too now languishes in a technical limbo, forever the chorus to a 'contextual' (read social or economic or aesthetic) main act. Perhaps, then, there is occasion for an anamnestic project directed at both legal and perspectival technologies: a concerted forgetting of law-landscape in a perspectival mode, so that new set-ups might be tried and new windows opened. Before law's landscapes, '[t]he central question [might] then become how — under what conditions, with what consequences — they are made up' (Delaney 2001: 107).

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The truth in painting: cultural artefacts as proof of native title

Kirsten Anker¹

1 Introduction — 'walking all over their painting'

On the front cover of the *Oxford Companion to Aboriginal Art and Culture* an Aboriginal man in a red loin cloth appears dancing on a brightly coloured canvas. He is dwarfed by the size of the painting, and is doubly lost amid the 'riotous colour', the lines, circles and swirls of his platform, the Ngurrara Canvas II. This is Nyilpirr Spider Snell, an artist from the Kimberley/Great Sandy Desert region of North Western Australia, performing the *Kurtal* — or snake dreaming dance — in Canberra to 'remind those sitting on the High Court of the depth of [his peoples'] claim' (*Native Title Newsletter* 2002: 4).

The painting is a collaboration of around 50 artists, produced when the Walmajarri, Wangkajunga, Mangala and Juwaliny peoples were asked to prepare a map of their traditional area for a Native title claim. They decided to do it this way, each person painting a section which represents their own areas of responsibility on the land and in lore. The result, although not employing cartographic conventions, is described as a map and shows the freshwater holes (*jila*) and other sites in the desert in spiritual and physical relation to each other, as well as representing the relationships between the painters themselves (Chance 2001: 28–40). In giving evidence about the connection of the claimants



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to the land during a plenary session² before the National Native Title Tribunal in 1997, each witness stood on their respective portion of the canvas and recounted the stories associated with it.

But what exactly does a painting prove? One painter described the importance of the Ngurrara Canvas:

I believe that [native title] is about blackfella law. The painting is only for proof. When I go to court to tell my story, I must listen very carefully before I open my mouth. Maybe the *kartiya*³ will say, “We don’t believe you” ... That’s why we made this painting, for evidence. We have painted our story for native title people, as proof. We want them to understand, so that they know about our painting, our country, our *ngurrara*. They are all the same thing (Ngarralja Tommy May, in Chance 2001: 38).

In one respect, the painting is seen as a way to communicate knowledge to non-Aboriginal people and to the courts. Proof of knowledge about country and traditional law is the measure of entitlement under the *Native Title Act 1993* (Cth). But the knowledge of which Ngarralja Tommy May speaks is not something which the painting ‘points to’. This would be the conventional understanding that evidence is something that testifies to the external real world of facts. The painting *is* the country, we are told. ‘They are all the same thing.’ This statement suggests that evidence about traditional knowledge is itself evidence of a different way of knowing. The painting is powerful because in proving a different kind of title to that familiar to the common law, it engages in the very question of what entitlement is. The painting is not just a fact about law, it is law.

Second, the painting is seen to address the need for credibility in making a claim, the need to appear truthful. The relation of truth to evidence in Western law is complicated. While the function of evidence is to elicit the facts, where facts are taken to correspond directly to an external reality, the court usually has before it only some form of statement that the facts claimed are true. Evidence is then what allows the court to increase or decrease the weight of probability in assessing that a claim is true. This might include evidence about the character of a witness in order to infer the likelihood that they are making truthful statements.





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Assessments of credibility are also likely to be influenced by more subtle cultural indicators such as dress and manner (Timony 2000). So what is it about a painting that could show the credibility of a witness? Do paintings have their own truth?

Third, the painting is described as representing a map of the claimants' country.⁴ Maps of the more conventional variety have been central to native title claims, as they have been central to the development of Anglo-Australian land law and to the project of colonisation in general. Boaventura de Sousa Santos has written that both maps and law make claims to authoritatively represent reality (1987). The use of such a painting in evidence may undermine the exclusivity of both western cartography and western law because it suggests that in order to recognise a different kind of title, the common law might also have to consider a different way of conceiving of entitlement and representing the land. The painting may well act as a kind of map in the claimants' case, but it does more than just indicate the geographic parameters of the claim. It makes a normative claim about the basis for entitlement and the manner in which it can be proved that resists reduction to a set of rights and interests over a bounded territory.

Thus I will disassemble the painting's function along three axes, all of which see it targeting a particular orthodoxy in the common law and pushing towards a realisation of the transformative and plural character of evidentiary practices in native title. Part 2 takes up the claim that the Nurrara Canvas is law. Although subordinated to the category of 'fact', the painting must be taken on its own terms in order for it to be meaningful as proof, including a very different person-place relation as the basis for entitlement and the point that, for the claimants, the painting embodies the law. The most obvious challenge here is to the idea of the state as the sole source of law, but other assumed attributes of law — that it consists of public, verifiable and positive statements of principle, for example — are also resisted. In Part 3, I will argue that the painting makes a claim to credibility that confronts conventional legal understandings of truth because it operates aesthetically, rhetorically and therefore a-rationally. Lastly, to read the painting as a map entails a challenge to the European valuation of land, the way it is thought and



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depicted. Where maps have historically colluded with property law in order to communicate a particular mode of entitlement, the canvas insists on disrupting the universality of this vision. In all three instances, there is a strong normative aspect to the canvas which is missed in a conventional reading of it as something purely factual, purely aesthetic or purely cartographic. I will show that it is this much larger challenge which must be met if Australia is, as was claimed for the recognition of native title in *Mabo* (1992), to have rejected *terra nullius*.

The Ngurrara Canvas operates in a number of frames.⁵ It contains designs that originate in body and ground painting associated with traditional ceremonies and law, but it is transposed onto the western format of a flat canvas and in acrylic paint of a much wider palette than was earlier available. It is not a map of the claim area in the conventional sense anticipated by the National Native Title Tribunal personnel, and yet it is comprehensible as such in the context of a growing public awareness of the way Indigenous art can represent traditional relationships to ‘country’. It articulates a claim in a language alien to the rational legal discourse of the court, and yet it can still have rhetorical power — ‘It was, one tribunal member said, the most eloquent and overwhelming evidence that had ever been produced [in the tribunal]. The Aborigines could proceed to court’ (Brooks 2003).

2 Ngurrara as law

A Indigenous law as ‘fact’ in native title

Among other things, the Walmajarri, Wangkajunga, Mangala and Juwaliny groups had to prove they have a connection to the area claimed under traditional laws acknowledged and traditional customs observed by them (*Native Title Act* section 223(1)). In *Mabo v Queensland (No 2)* (hereinafter *Mabo*), Brennan J had said that the content of ‘native title must be ascertained as a matter of fact by reference to those laws and customs’ (*Mabo*: 58). The existence of Indigenous law is a necessary, although insufficient, condition for the recognition of native title (*Fejo v Northern Territory* (hereinafter *Fejo*): [46]). In *Members of the Yorta*





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Yorta Aboriginal Community v Victoria, (hereinafter *Yorta Yorta*) the High Court stressed that claimants would have to demonstrate that they continue to practice traditional laws *as laws* and not, for example, as a mere community narrative of what used to happen (*Yorta Yorta*: 554). Evidence for native title thus consists of claimants' knowledge about traditional laws as well as proof that these laws are still followed.

And yet, the status of the state as the sole source of law in Australia is consistently affirmed in native title jurisprudence. In *Fejo*, the court adhered to a strict positivism in holding that although a grant of freehold title could be subject to pre-existing English customary rights (or the regulatory rules of the jurisdiction), the same would not apply to rights deriving from outside the sovereign system of law, regardless of the continuation of Indigenous connection and law, and even once the land returns to the Crown (*Fejo*: [53]). *Commonwealth v Yarmirr*: Kirby J (at [257]) and *Yorta Yorta* (553) confirmed that in Australia, there is only 'one law.' The puzzle in which legal pluralism is at once required and denied is solved, in the court's logic, by relegating Indigenous law to the domain of fact.

The reference to laws and customs is indicative of the court's *sui generis* characterisation of native title: it is not to be bound to European conceptions of property, it has its own character (*Mabo*: Brennan J at 49–50, Deane and Gaudron JJ at 63, 84). The character able to be determined by laws and customs is limited, though, because native title is strictly a right 'over land and waters', and is always subject to the overriding authority of the common law. Thus in *Western Australia v Ward* (hereinafter *Ward*), recognising native title is thus said to involve the translation of a broad Indigenous spiritual relationship to land into proprietary rights and interests (*Ward*: [14]). Some translations, however, would not be apt. The ambit 'right to speak for country' that often expresses one of the strongest identifications between a person and a place was held not to be equivalent to the strongest right under common law, the right to possession, occupation, use and enjoyment (*Ward*: [88]–[90]). If anything, such a right would have been extinguished when the Crown 'spoke for' the land in issuing mining licenses (*Ward*: [91]).



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An example from *The Lardil Peoples v State of Queensland* (hereinafter *Lardil Peoples*) shows how ‘the facts of Indigenous law’ might be ascertained. Counsel for the claimants, seeking to establish a right of exclusive possession, questions a witness about how a particular ‘rule’ concerning permission to enter certain sea territory has been passed on between generations and if there are any sanctions for breaching it. To a European observer, the qualities of longevity, widespread acceptance and obligation give the practice the ‘necessary’ normative or rule-like character (*Lardil Peoples*: para 76). To identify the law, the practice must be indexed to a rational principle rather than the irrationality of compulsion, the ‘modal must’ of the Dreaming⁶ as Elizabeth Povinelli puts it (2002: 260).

Although many judges have commented on the difficulties in ascertaining ‘the nature and incidents of native title’, the treatment of Indigenous law as fact in native title doctrine supposes that it has an objective existence and is able to be communicated more or less accurately through English. It reproduces the familiar positivist notion of law as a concrete presence, consisting of propositional rules, and independent from all that is not law, but it guards the authority of ‘real law’ for the law of the court. A property right is then a triangulation of a rule, a person, and an area of land. Not only does Indigenous law as fact not threaten the state’s monopoly over sovereignty, but neither does it challenge the *idea* of law as a discrete body of rules or the idea of entitlement as arising from rules regulating the use of land.

B Different evidence and evidence of difference

In contrast, the procedures for proving native title, as they have evolved under the *Native Title Act* and in Federal Court practice, seem to augur transformation — a ‘profound shift’, in the words of Court Registrar Louise Anderson — in the common law. Native title is said to challenge ‘the Court, the parties, and the broader Australian communities to reconsider fundamental questions such as Australia’s history, concepts of ownership, time, spirituality, and even the content of truth itself’ (2003: 124) Through section 82 of the *Native Title Act* and changes to the Federal Court Rules, court procedures have been adapted to take account of cultural concerns of Indigenous claimants that differ



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somewhat from the preoccupations and standard practices of the common law. For instance, Order 78(ii) of the Federal Court Rules suggests that evidence about customary law may be given ‘by way of singing, dancing, story telling or in any other way than in the normal course of giving evidence’. It is often through the difficulties encountered in the process of obtaining, and seeking to understand, evidence that primary judges encounter unavoidable differences in ‘fundamental questions’ that a fuller treatment of native title as the recognition of difference would have them consider.

Four areas of perceived difference tend to arise in native title cases.

- Propositional logic. While the examination of witnesses often uses propositional logic to produce contradictions in witness statements and thereby conclude that only X or Y can be true, anthropologists have reported a lack of concern in some Aboriginal communities with apparent contradictions (see *Lardil Peoples*: [71]). The relative context-dependent nature of statements seems to be the point of contrast here. Other differences between Aboriginal and standard English, speech styles, and modes of questioning are commented on (Neate 2003, Eades 1988).
- Written as opposed to oral knowledge. Although section 82 of the *Native Title Act* permits the court to waive rules of evidence, such as hearsay, so that the oral nature of Indigenous tradition can be accommodated, some argue that there is an inherent bias towards the credibility of the written word (Kerruish & Perrin 1999, Reilly 2000).
- Open as opposed to closed information values. The trial process is premised on the optimum availability of facts and Western cultures value information as a public good. Commonly, the accessibility of knowledge in Aboriginal cultures is highly selective and dependent on age, sex and spiritual affiliation. Details of peoples’ connections to places — the focus of proof in native title — are the very ones most likely to be highly secret. Court practices have adapted to some degree in trying to respect (particularly the gender aspects of) restricted knowledge or ‘secret business’.



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- Abstract or universal knowledge as opposed to highly particularised knowledge grounded in places and rituals. Aboriginal ‘country’ is literally the basis of knowledge and authority and the uneven distribution of access to knowledge corresponds directly to differentiated rights in country. There is a metonymic association between following the law, walking the country, and doing ceremony such as singing, dancing or painting the country. Evidence in native title is often given in ‘on country’ hearings in recognition of the inability of some claimants to speak about country without it being beneath their feet.

These differences (crudely drawn) in thinking and being problematise the project of translation that evidence purports to be. Although the common law has carefully restricted native title to property, once traditional laws and customs become a reference point, the practice of claiming native title soon makes the identification of proprietary rights and interests bring with it the tangled cosmos of ideas of which property is a part. Ways of knowing are directly implicated in what something (a painting, an account of hunting and fishing, a Dreaming story) is evidence of and why.

We can examine more closely how the Ngurrara works as fact in the Walmajarri and Wangkajunga peoples’ claim. Up close the painting is made up of abstract components — concentric circles, dots, arcs and lines — which the claimants identify with physical locations, as well as the occasional figure — a tree or a *kurtal* dancer. That the painters talk about ‘getting the boundaries right’ between sections of the painting, that the other side ‘is not my place’ (Ngarralja Tommy May, in Chance 2001: 35, 38) shows that the claimants have differentiated rights of ‘access’ and ‘ownership’ across those physical locations, matters fairly readily translatable as proprietary rights. And yet, ‘[t]here is no grid-like effect to demarcate separation of territories but a blending of adjacent areas, the flow of the painting imitating the flow of peoples’ movement through the country and of family connections over space’ (Pat Lowe, in Chance 2001: 30).





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Throughout Australia, designs were and are used in a number of situations — on rock walls, on bodies during ceremonies, etched or painted onto stone or wooden *tjurunga*,⁷ on the ground for ceremonial or simply illustratory purposes. To the south east of Ngurrara country, the Walpiri of the Western Desert use sand designs to accompany stories and gossip, so that children learn these markings as an integral part of speech (Munn 1973: 63). Their word *guruwari*⁸ expresses the conflation between places, the Dreaming creation stories and visual representation: it means both the design and the marks left by ancestors on the ground (Munn 1973: 119). The iconography of *guruwari* also embodies the realm of law, providing a lexicon for the creation of obligations and kinship by the ancestor Beings.

For the Yolngu in the north, Howard Morphy describes a conflation between bark designs, Dreaming stories and topographical features — bark paintings recount the journeys of the ancestors, shaping the land as they went. Both designs and landform are ‘continuing manifestations’ of the activities of the ancestors (1991: 218). Consequently, narratives, paintings and related ceremonies about ancestor Beings can be thought to provide a sort of alphabet that allows people to get to know their country, and conversely, to construct and reconstruct the story by reading the country (Schreiner 2001).

Ngurrara painter Pijaju Peter Skipper talks about the painting as being both *wangarr* (shadow or image) and *mangi* (essence, spirit or presence) of the land, both a representation of the absent land and an embodiment of it. The land in turn contains ‘the stories and the bodies of the old people’ (Chance 2001: 33). Each section of the painting simultaneously renders the stories associated with each place. It is these stories to which the entitlement implied by boundaries can be traced, and this demonstration of knowledge about places that, locally, can be taken as proof of rights of ownership (Rose 1994: 2). Once the identification of individuals with particular totem ancestors is added, however, the web between individual people and specific places, designs, songs and stories binds them in a relationship of ‘ownership’ quite unlike the possession of an object held by a subject person, familiar in the West.



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Within Indigenous law, various ceremonies of design creation are often part of a ritual obligation, and even transferring those designs to canvas has been seen as a continuity in that obligation, especially where it has been impossible to visit and physically maintain sites (*Neowarra v State of Western Australia*: [340]–[341], Myers 2002: 284, 289). The development of painting for a Western art market has meant that many communities are used to employing art to communicate with a non-Indigenous public and in relation to the goals of recognition, land rights and economic independence (Myers 2002: 5–6, Morphy 1991: 16–20), as will be discussed below. Using painting in an unconventional manner as proof, in order to gain control over traditional country, can be recuperated within the common duty under Indigenous law to ‘care for country’ as this latter notion shifts to accommodate new circumstances, and so the execution of the painting itself is also a manifestation of people continuing to follow the law.

In the logic of native title, the ‘tradition’ of designs, boundaries and Dreaming stories is the frame of reference which gives a painting value as evidence. Designs originating in sand, rock, bark and body painting embody relationships between ancestors and law, living people and places in the land, which makes them crucially relevant to what is being translated in native title as property rights. In evidence, the painting illustrates the rights (such as those indicated by boundaries), the origin of those rights in a system of law (such as Dreaming stories) and facilitates the oral evidence of the witnesses. The very production of the painting tends to the proof, following *Yorta Yorta*, that these people not only hold the requisite knowledge about their country, but continue to practice it *as* law. The painting succeeds in proving this in large part because, according to the painters’ ways of seeing things, the designs are so intricately bound up in the land that ‘they are the same thing’, that walking on the painting ‘brings [the] country up closer’ (Jukuna, in Chance 2001: 40).

But the significance of the painting relating to proof of title has to be decoded. It is, aside from general characteristics of Aboriginal acrylic painting already familiar in contemporary Australia, opaque to uninitiated non-Indigenous peoples. As for any other translation, the grammar and





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idiom of this code have to be respected, followed, in order to render it legible. Its norms have to be taken seriously. How else does a dot establish a title, than if the law binding that dot to a whole conceptual universe is followed as a principle of interpretation, as a law?

In native title doctrine, Indigenous law is not 'law' in any normatively significant way for the court. But because of the need to translate, to take seriously what Indigenous law 'is', the 'fact' box, like the 'property' box, is a leaky one. For one moment, non-Indigenous triers of fact have to suspend their disbelief and put to one side their knowledge of how the world works and interpret it through other principles. There is one further hurdle of disbelief for the claimants, however: not the difference of the evidence in itself, but its authenticity.

3 Ngurrara as truth

Like Ngarralja Tommy May, other painters are confident of the ability of the Ngurrara Canvas to convince others of the truth of their claim (see also ABC Radio National 1997). For the court or the tribunal, the truth of the claim will come down to the authenticity of what is presented as traditional laws and customs connecting the claimants to the land. How is it possible for the canvas to do this work?

A *The normal course of evidence in the common law*

In the conventional positivist view of law, evidence is the process by which the facts of the case are brought before the judge or jury so that they may establish what happened. Once facts are characterised, the relevant legal principle will then be applied so as to produce the decision of the case. The assumptions of what William Twining calls the 'Rationalist Tradition' of evidence scholarship, implicit in most contemporary work on evidence, are that events and facts have an existence independent of human observation, that true statements correspond with facts, and that present knowledge about past events is theoretically possible, if typically incomplete (Twining 1985: 12–4). Although in practice we can never perfectly establish the truth of a statement of fact, we can filter the process — through the rules of



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admissibility — so that only evidence that tends to increase or decrease the *probability* that a statement of fact is true is allowed to be introduced. This includes details suggestive of whether the witness is being truthful or otherwise, that is, their credibility.

The ‘normal course of evidence’ is taken as a reasoned process of revealing the world through the senses of the witness or the court itself, via eyewitness or expert testimony, documentation or exhibited objects. These either constitute the ‘fact’ in question itself (the witness saw the accused stab the victim) or by inference attest to the occurrence of the fact in question (the witness saw the accused running away from the victim with a bloodied knife in hand). A brief survey of contemporary texts indicates that there are few challenges to this paradigm (Cross & Tapper 1985: 16–37, Ligertwood 1993: 4, Howard 2000: 2). Murphy, for instance, admits that ‘facts’ in court are a matter of what the court can be persuaded to believe rather than what is true, but proceeds as if this process of persuasion is uncontentious or uninteresting (1995: 1–16).

And yet, as evidence is a matter of persuasion, it is never a purely ‘rational’ exercise. Whether facts are true or relevant to the question on trial, or can be inferred from other facts, depends on the experience or intuition of the trier of fact. Persuasion takes place by rhetorical and emotional means as well as by ‘logic’, as practitioners are well aware. But the challenge that these points pose for the Rationalist Tradition is more than just an admission of some extra factors added to a core of facts, or a suspicion that the work of most litigators is in manipulating the trier of fact into arriving at the judgment that will suit their client. None of this challenges the proposition that the truth is ‘out there’. The relevance of outlook and experience, however, goes also to the heart of the concepts of logic, rationality and knowledge itself, as feminist and critical race scholars have argued: our background, values and experience affect not only what we know, but how we know (Alcoff & Potter 1993, Delgado 1995, Harmon 1999, Nicholson 2000).

Critical legal scholars have likewise argued that the process of judgment is neither rational nor determinate, and that both facts and law are highly constructed, dependent on language, reasoning and



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discourse for their representation (Hutchinson & Monahan 1984). Consequently, ‘the legal representation of fact is normative from the start’ and is telling of a particular way of imagining the world (Geertz 1983: 174). The fallacy of the correspondence theory of facts (where statements are considered to correspond directly to aspects of or events in the real world that exist apart from human discourse) is hinted at by the vernacular of practitioners who often speak of the ‘coherence’ of evidence as a narrative as a test for the plausibility of that evidence (Twining 1985: 183, Jackson 1988). How we assess the truthfulness of a story depends on how well it ‘hangs together’, and this relies in turn on cultural experience with styles of narrative. Playing on standard stories also has the effect of pre-empting judgment — if a woman can be cast successfully as a damsel in distress, or a wicked stepmother, we can guess whether the decision will be in her favour or not (see Sarmas 1994).

Other scholars point to the integral role that our senses play in the way we respond to law to the fact, that it is sometimes the aesthetics of legal drama and discourse that makes certain decisions possible. For example, Desmond Manderson argues that it was the visual impact of the scarred body of the plaintiff in *Natanson v Kline*, her heart beating visibly through ribs damaged by radiation in a mastectomy procedure, that led to a new legal principle of informed consent, when those before her had failed in similar claims (2000: 41). The aesthetics of a body, or a painting, or a judicial decision, imply a moral standard. Likewise, they demand a moral judgment.

Perceiving evidence as rhetorical, narrative, aesthetic and normative puts paid to the premises of the Rationalist Tradition. Instead, the hearing of evidence produces a sort of translation of what is taken to be the ‘real world’ — other places and other times — into the terms of law; it renders a world in which law’s principles make sense. In the process it establishes both the separation of law from society and its mastery over society (Mohr 1999). The translation and the constitution of the law/world hierarchy is a play which is dramatised in various ways — the architecture and dress of the court, the presentation of witnesses, exhibits, experts, documents.



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Conventionally, however, for all the symbolic significance of wigs and gowns in evoking the majesty of the law, and the historical origins of the forms of order, these aspects of law are mostly considered to be little more than window dressing, peripheral to the substance of either law or fact (Haldar 1994: 188). But the window's frame, like the frame on a painting, plays a role that is not merely extraneous. It constitutes the object, says what is inside and out, is at once a part of the scene while seeming external to it. It tells us, in both legal and aesthetic terms, what is available for judgment (Derrida 1987: 57).

The frame here is more than just the interpretive context of a 'frame of reference'; it has the sense of selection, delimitation, constitution. The frame as an analytic device is bound up in the philosophical question of 'the limit'. In distinguishing between a thing and what it is not — a painting from the wall, an object of beauty as opposed to its ornamentation, fact from law, law from everything else — there is a question of what happens at the border (the limit) between the thing and the not-thing. A frame (*parergon*) does the job of maintaining this limit, it 'delimits' the subject (work, *ergon*) captured within it. But the status of the *parergon* as neither inside nor outside, and yet maintaining the inside from the outside, makes it a paradox. In order to imagine how the *parergon* operates, Derrida, in *The Truth in Painting*, denotes the frame structurally with the figure of a laced boot (from Van Gogh's painting): it laces the edges together by passing through them in a repeated and reversible movement, from outside to inside, from under to over. A frame thus 'cuts out but also sews back together. By an invisible lace which pierces the canvas ... passes into it then out of it in order to sew it back onto its milieu, its internal and external worlds' (1987: 304).

Consequently, when the courtroom, the gavel, the leatherbound law report say 'what passes by me is the law' they are neither superfluous, nor quarantining the law off from the world, but are rather performing this lacing role. It is by virtue of the law's frame that the outside becomes represented in the *ergon*, that scraps of the world, 'footprints, fingerprints, chance memories captured by a witness' come to





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correspond to ‘the “whole truth and nothing but the truth” of an event’ once brought within the walls of the court (Haldar 1994: 192). In native title cases, some of these frames help constitute the world for the court: a microphone in a bush hearing gives a witness voice, a piece of canvas makes *ngurrara* into a map, a loincloth signifies Aboriginality. The means by which things become what they are. The two senses of frame — *ergon* and frame of reference — are related, for something does not become a ‘thing’ to be interpreted until it has been framed ‘off’ from everything else. Each framing then also implies a frame of reference, a weaving between the thing and its context.

B The painting as supplementary evidence

The positivist paradigm for evidence would allow that paintings, dances, songs, and pitching the court in a desert river bed to visit country, are merely novel ways to introduce facts about Indigenous rights and interests in land into evidence. But how are these ‘facts’ communicated? Without further explanation, a man dancing on a canvas does not immediately say much to a court. An explanation can indicate the significance of the dance, the song, the iconography to the facts at issue—how the claimants are connected to the land and what their rights are over it. But then, as far as the court is concerned, what does the painting add to the explanation?⁹ The presentation of cultural evidence communicates in ways supplementary to the facts proper: by appeal to the senses through colour and rhythm, a sense of space and a smell of dust; and by referents in intercultural knowledge between Indigenous and colonial cultures. Does it *look* like an authentic demonstration of Aboriginal law and culture? Does this man seem to know how to move about the canvas in an Aboriginal way? (Does it tell the story that the court needs to hear?)

For the court, evidence will be judged credible if it gels with expectations of authentic culture (the ‘feel’ and the ‘look’) and if the witnesses display ‘genuine’ knowledge in their testimony. For this, any observer will rely on a repertoire of cultural precedents, among them a likely awareness of paintings as a particularly high-profile site for debates about authenticity and Indigenous culture in recent decades.





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The use of acrylic colours to paint Dreaming designs on boards for sale emerged in Pupunya (in the Central Desert) in the 1970s. With support from the government under the new policy of self-determination, and interest from painters for whom commercial values complimented their own views of the paintings as culturally 'dear', a modest market developed in 'Aboriginal acrylic paintings'. While Indigenous artefacts had earlier held only ethnographic interest for Western audiences (Short 1991: 218, Morphy 1991: 22), they now represent a category of 'fine art' in galleries the world over (Myers 2002: 64).

The appeal of these paintings to a Western public has been multi-faceted. In Australia, a new 'national consciousness' led people to formulate Aboriginal culture as distinctive of a uniquely Australian identity which was, significantly, linked to its land. Internationally, responses to Aboriginal art were themed around an interest in 'the Other' and a nostalgia for place and spirituality, a 'conceptual return to our lost ("primitive") selves' (Myers 2002: 201, 283–6). While acrylic paintings represented an idea of Aboriginal authenticity, however, debates raged around the negative effects of commercialisation and industry on the 'traditional' nature, and therefore the value, of such art. On the other hand, it seems that despite the use of new materials and the influence of advisors in tailoring work for a market with particular visual expectations (Myers 2002: 284, 289), the paintings continue to hold the layered significance of designs that were previously painted on bodies, objects and in the sand, to enact stories from the Dreaming and the geographical places belonging to the painter.

This is what interests the court — that something traditional 'is there' in the painting. But like most work in galleries, acrylic paintings are intercultural objects, produced in a complex world of government policy, the consumer market, art criticism and land claims as well as distinctly Indigenous purposes. Non-Indigenous ideas of 'pure tradition' are in themselves hybrid events, products of the colonial encounter and textually mediated efforts to explain the inexplicable.¹⁰ The Ngurrara Canvas has a specifically contemporary purpose, but is also continuous with an inherited mandate to look after country; it is not a 'title deed'





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and represents something quite different to ‘property’, and yet, if reiterated over time, it can come to be understood in those terms because property and title deed will *themselves* undergo a semiotic shift (Mohr 2002).

So the world of facts in native title does not exist ‘out there’; it is created for the court by the supplementary evidence in the physical and aesthetic being of the painting or other evidence. In the *Lardil Peoples* example, a principle of exclusive possession comes into being when, through the event of oral questioning, someone articulates what they do when asking permission. The manifestation of Ngurrara/country in the canvas brings the claimants’ law into the terms of the law of the court at the same time as it marks a distinction between the two. More than pointing out that the painting convinces of the truth of its object because it matches stereotypes of cultural authenticity, I am arguing that the excluded supplement of the common law ‘proper’, whether a-rationality and aesthetics in the question of proof, or Indigenous law in the question of sovereignty, always makes a return and so effects a transformation on what *is* proper to the law. The general point here is that the recognition of native title is not the application of a label (property) to an external phenomenon (Indigenous law) by an unassailable common law. What is there in evidence is mixed up in the exigencies of proof — all law becomes articulated and made present in certain ways in response to a challenge or a need to explain and justify and so is intrinsically hybrid.

In stating that the ‘facts’ of Indigenous culture and law do not exist in any objective way for the court, I do not mean that giving evidence is a chimera. It is a practice itself, meaningful, for example, in terms of obligations to care for country or to represent Dreaming relations in pictorial form. It is also a practice for *kartiya*, one that constitutes spaces and relationships in particular ways and one that is required to transform law ‘into a living reality, a concrete experience’ (Tait 1999). If, in the usual environment of the court room, symbols and practices work to consolidate the power and authority of western law, then being a visitor on, for example, Walmajarri homeland potentially destabilises





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that frame of reference by immersing the court in another world. If evidence is the law's way of framing the world to make it available for judgment, then the intercultural frames of a native title hearing push towards the possibility of other views on the world and other sorts of judgments. A closer reading of the Ngurrara Canvas as a map of country will provide one example.

4 Ngurrara as Map

Through the approximations I ascribed to Indigenous visual culture above — iconography, representation of topography, lexicon — the common reference to paintings as maps is understandable; they both encode the land. Within the native title frame, paintings can thus be accepted in the role of marking out an area of claim, in the way that a cartographic map would. And yet, unlike a topographical map, it would be useless to an uninitiated person trying to find their way, for the map and the canvas are premised on incongruent ways of reading the land. The question I wish to address here is what this habit of reading has to do with entitlement to property.

A *Cartography and the common law*

In addition to the principles of proof discussed above, property has its own requirements. In the Torrens system of land titles now operating in Australia, proof of title depends on establishing that the person claiming title is the person who is registered as the proprietor of an interest on the register of the state or territory-wide Land Titles Office (or equivalent).¹¹ This system is the apotheosis of a long process of the 'dephysicalisation' (Vandeveldt 1980: 329) of real property in the common law, where title to land was gradually, and now almost completely, removed from material events on the land.¹²

In spite of this development, the common law presupposes a resource of memory. In medieval and preliterate times, where the performance of rituals such as turning turf or exchanging objects marked the conveyance of land to a new owner, the objects worked as a guarantee of title 'only because they were fixed as reference points within a





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medieval art of recollection, which recorded cultural events by associating them metaphorically or metonymically with things and their images' (Pottage 1994: 361). So the functional locus of title was in the local knowledge about boundaries and transfers; the ritual of transfer merely underlined the accumulated practice of neighbours and past owners as to who held what rights and where.

The advent of cartography eventually facilitated the removal of property from local knowledge onto a more abstract domain, first of the paper title, and more recently, of the register. In a more rapidly changing social, political and economic context, individual memories could no longer give certainty. Increased communication led to a perception of local spaces as parts of a whole, matched by the increased availability of maps which placed land onto a homogenising, linear grid. Industrialisation led to a growth in urban areas and rapid changes in topography that confused and outstripped local memory, at the same time as creating the need for, and perception of, land as a commodity. Proof of title in the common law context is thus dominated by a logic of exchange and abstraction. Every time we use the title system, we bring that logic into being as a (naturalised) way of perceiving land.

Native title evidence is introduced into this frame of reference. Memory and practice as a resource in proving title is at once deeply familiar and pointedly forgotten in modern property. It is easy to accept that a painting stands in for memory in the same way as a title deed (or the register) does for common law property, while overlooking the performative, constitutive role that earlier rituals actually played and that the technology of title continues to play, and so missing the subtleties of what native title is performing and bringing into being.

The critical context for this performance, in Australia, is the way the same disciplines of cartography and property that in England facilitated industrialisation worked in concert to offer up a vision of a land available for acquisition. Since its inception in the European imagination,¹³ *Terra Australis* was represented cartographically as a blank space within the initially vague outlines of its coast (Ryan 1996: 115–7). The impression of collusion between this and the legal doctrine of *terra nullius* — a





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legal blank space — is hard to avoid. Once physical colonisation of Australia began, representations of its landscape in the sketches and journals of early explorers followed a similar trope. The monotonous, undifferentiated mass of land in the interior resisted being read, for example for signs of water, in the way that ‘normal’ landscape could be read.¹⁴ Landscape also *became* monotonous because of the imperative to move through space in exploration—the apparent absence of geographical ‘milestones’ frustrated an explorer’s desire to sense progress and direction (Carter 1988: 247).

New maps inscribed colonial qualities over Indigenous (unreadable) ones: the blankness was marked by features of European creation — fences, houses, roads. Locations are specified through coordinates of latitude and longitude that take Greenwich, London — the heart of the British Empire — as their point of reference (Reilly 2003: 3). Indigenous placenames were laid over with names bestowed by explorers who created a landscape in the act of naming. Names reference the imperial act of possession or the experience of exploration itself — Victoria, Queensland, Cape Tribulation, Lake Disappointment.

In an attempt to manage the vastness and unfamiliarity of the land, both written accounts and early landscape painting made use of the comforting European ideals of the ‘picturesque,’ an aesthetic in which the land appears as a scene arranged for the viewer — vivid green foliage, ornamental avenues of trees and the like — and, moreover, as naturally awaiting the arrival of sheep and cattle (Appleton 1975: 25–39, Sturt & Mitchell in Ryan 1996: 74–6). It is a short step from rightfully enjoying the view to rightfully enjoying ownership. Kooris,¹⁵ when present, were corralled by the ‘picturesque’ as part of the scenery — they belonged to the known rather than existing as knowers (or owners) themselves and so did not disturb the fantasy of *terra nullius*.

Although native title is a form of land ownership that in some sense operates outside the grid of registration, it is in other ways incorporated into the same non-Indigenous view of land through the processes of representation used in native title claims. Maps, as Alexander Reilly explains, are everywhere in native title, and ‘[t]he ability to represent





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relationships to land and waters cartographically is central to the process' (2003: 3). Maps are used to specify the external boundaries of the claim area and the extent of other land tenures,¹⁶ and to indicate the various aspects of the claimants' connection to the country through symbols that represent Dreaming tracks, and other sites of significance to them, alongside the symbols of European settlement — roads, fences and homesteads. Such maps embody both the possibility of co-existence, and the limitations of the recognition of Indigenous relationships to country because in being reduced to a singular, unambiguous discourse, Indigenous spaces are subjected to a deeper process of colonisation (Reilly 2003).

The significance of maps as representations to questions of proof is that they belong to an aesthetic that semiotically communicates entitlement. The act of representing space positions people with respect to the world. Perspectivalism 'helps constitute an apparent divide between the "sovereign eye" of the observer and the space of the "external world"' (Blomley 1998: 575) that makes domination and surveillance possible and natural (Cosgrove 1984: 25). In cartography, even the implicit sense of observation is erased. The flatness of projection is a view from no-where and the naturalness of this particular vision is perfected. The cartographic aesthetic thus achieves the necessary conditions for ownership: a subject 'eye/I' that can only relate to the objectified land through possession, and a grid of infinitely exchangeable portions. It also excludes other perspectives by creating the illusion that these qualities inhere in the land rather than existing as properties of vision (Bender 1999: 32).

The Nurrara Canvas, on the other hand, has a spatial organisation in which there are no portions, only places known and named. If dot paintings can sometimes resemble aerial photographs, they are far more significant for positioning people in, in relation to, and because of, the landscape. Such land could never be a possession; it is more like family. The relationship is one of care and stewardship.

The Nurrara Canvas is coined as a map because that is the term to which the claimants responded. The analogy also permits the uninitiated



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to understand the painting as a representation of the relative position of places in the land. But the painting embodies an alternative aesthetic that contests all three aspects of the legality of entitlement: objectification, commodification and exclusion. As a map, the painting is not simply assimilated to the Cartesian worldview, but participates in shifting the terms in which maps are understood. It introduces a multiplicity to the monopoly over vision, a perspective in which people are not absent from the map, and a relationship with land that forms an alternative mode of entitlement.

To the court, the Ngurrara Canvas both represents and demonstrates, through performance, the existence of property rights via matters of entitlement under traditional law. But what the painting represents and performs is something larger than what is forensically captured as the frame of traditional law: western titles are also performative, and in this intercultural arena, the evidentiary process hosts a shifting conversation about what land (and with it identity and entitlement) can possibly mean, and performs the fact of that plurality. Although not superseding the technical requirement in section 62(2)(b) of the *Native Title Act* that a cadastral map of the claim area be provided—and so never ‘officially’ a map — Ngurrara as map nonetheless puts into relief the fact that land titles are a complex of habits of vision, practices with respect to the world and the methods of representation that link the two.

B Physical Country

If *Ngurrara* is a map, this map *is* also the country, filled with significant places, connected by stories. Giving evidence on the painting is the next best thing to standing on the land (Chance 2001: 40). Where physical country is understood to be fully integrated both into an Indigenous notion of law and one of identity, it makes sense that, as Kathryn Trees has explained in relation to the hearings for the Miriuwung–Gajerrong claim, witnesses do not merely feel more comfortable giving evidence on their home country than in the foreign territory of a courtroom (although that is one way of expressing it); their ability and authority to speak about certain places may literally depend on their being physical present (2002).





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The practice of permitting hearings ‘on country’ would seem to go further than merely increasing ‘access to the facts’ because it contemplates the normative impact of being on country to the witnesses. Chief Justice Black of the Federal Court writes that:

The new practice is a recognition that, for many claimants, their relationship to country is not able to be explained in the abstract, and that it is necessary to be on country to gain a true appreciation and understanding of that relationship and the claimants’ evidence about it. It is also an acknowledgment that, under traditional law, some evidence can only be given on country, and that there will be many cases in which it would be quite wrong to expect claimants to talk about their relationship to country by reference to maps prepared by non-indigenous people (Black 2002: 18).

Under the *Native Title Act*, taking account of the cultural concerns of claimants and witnesses is part of the balancing process of procedural fairness (*Native Title Act* section 82). But is there more at stake? If giving evidence on country is a source of authority for Aboriginal people, is there a conversely unsettling process going on here for the court? How does it affect the processes of law ‘for judges to sit in the desert under trees or in tents for 4–6 weeks at a time to hear evidence, with limited facilities and very few formalities’ (Black 2002: 18)?

The physical site of the court and its surroundings are conventionally seen as extraneous to the operation of law. As we saw, however, this window dressing communicates a great deal about the law, and even makes judgment itself possible. Even in a desert setting the idiom of order familiar in courtroom architecture (Haldar 1994) is apparent: during the Miriuwung–Gajerrong hearing, a picnic table was transformed into a judges’ bench with a red cloth; maps and stacks of legal papers reinforced the value of the written word; the judge and the lawyers sat on raised chairs and heard from witnesses while they, too were sitting in chairs rather than on the ground; microphones designated who the court would listen to; the whole arrangement enhanced the position of the judge—the performance was for him, who sat in objective distance from it all (Reilly 1996: 203–5). Sometimes such degrees of formality are even requested — as when the Karajarri community invited the court to





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robe — to reflect the significance of the proceedings for the claimants (Anderson 2003: 135).

There are clues as to how an experience of physical country might affect judgment. Reilly writes that the court looked uncomfortable in its new setting on the riverbed of Miriuwung–Gajerrong country (1996: 205). In *De Rose v State of South Australia* (hereinafter *De Rose Hill*), O’Loughlin J mentions six of the 13 sites visited during the hearing. Unusually for a native title judgment, he gives some brief descriptions of physical aspects of the sites. For instance, the site at Intalka was said to be ‘a rocky gorge of spectacular beauty, spoilt by the presence of three large rusted water tanks’ (*De Rose Hill*: [384]). Some of the significance of the places to the claimants was described — where the ancestor Beings had traveled through, places of danger and death — and the association of ancestor Beings with physical features of the land was a recurring part of the hearing (*De Rose Hill*: [387]).

We can only speculate as to the effect on the trial judge of travelling round to these various sites with elderly Yankunytjatjara and Pitjantjatjara people, at times obviously impressed by the landscape and the stories associated with it (for example *De Rose Hill*: [410]). Perhaps there are some clues to his surprising findings that the claimants had lost their spiritual connection to the place (*De Rose Hill*: [910]–[915]), however, from the fact that the claim area comprised a cattle station. Alongside emu eggs transposed into boulders and *Tjukurpa*¹⁷ tracks there were fences, water bores and cattle. This is contested land, and the presence of European artefacts in the landscape represents a *fait accompli* in the competition between two groups of people.

Just as the legal doctrine of *terra nullius* was accompanied by cartographic and artistic representations that all spoke to a particular way of seeing the land and the Kooris, Murris, Wiradjuris and others who lived there, a reversal of the doctrine relies on an ability to see the land as peopled, as belonging to someone, as known to someone. It is possible to consider that hearings ‘on country’ merely enable a more comprehensive presentation of the facts required to prove native title. This is a perspective that poses few challenges to the positivist



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conception of law and evidence. However, I would argue that a hearing on country enables the change of view required to fully reverse *terra nullius* in all its constituent parts by physically locating the court in what was previously a blank space, and populating it — with ancestors, stories, law and people themselves. In contrast to the positivist conception, this argument proposes a law which, like the specific instance of *terra nullius*, is part of a larger complex of seeing, representing and being in the world.

5 Conclusion

When the High Court spoke of native title as an ‘intersection between two normative systems’ (*Yorta Yorta*: 550) it was as a device to explain the recognition by the common law of rights arising in traditional Indigenous law: the intersection happened once, at the time sovereignty was claimed. Because there can only be one law and one sovereign, recognition relates to property rights alone. But the reference in the definition of native title to the internal perspective of claimant groups — what *Walmajarri* law say — means that in the process of proof, what *Walmajarri* law says about property rights soon unravels into larger and more fundamental questions. Partly because of the inherent requirements of proving customary entitlement as a fact in court, and partly because the Federal Court has been directed to take Aboriginal and Torres Strait Islander cultural concerns into account, some kind of ‘profound shift’ is visible in the necessity to take seriously the daily realities of the claimants’ lives and the way they think: there are unfamiliar rules about who can speak about what and where they can speak; some people aren’t supposed to look at other people; this rock is an emu egg; strangers have to be ‘watered’ before they enter this place; this painting is the country.

The need for elements of Indigenous law to be taken as principles of interpretation in proof means that the intersection of the ‘two normative systems’ is not a dead letter, but a live quotidian interaction. The dynamics of this can be understood in part by considering how forms of evidence particular to native title, and especially paintings such as



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the Ngurrara Canvas, communicate their significance by operating within different cultural frameworks. A painting that draws on traditional designs from the Kimberleys works on levels pertinent to the painters in terms of embodying Dreaming stories and their connections to places and ancestral Beings. It is one way of fulfilling a traditional obligation to 'care for country' and it in fact performs that relationship to country. For the court, this manner of proof is inevitably read against common law notions of proof, title and the modes of imagination and representation, such as cartography, that support them. Reiteration over time of Indigenous modes of expressing connection to country through Dreaming stories and designs can begin to stand in for these western phenomena — maps, title deeds — within both contexts. In response, the phenomena themselves begin to undergo shifts.

But the intersection is more than simply the traditional law and custom frame caught within the common law frame. Such a painting is not a 'purely' Indigenous object, produced for internal purposes. Already there is a recent and high-profile history of Aboriginal painting for a Western market that involves desires for cultural pride and economic independence on behalf of the painters, as well as changing Western aesthetic criteria, ideas of landscape and, for non-Indigenous Australians in particular, a search for a distinctive national identity. The Ngurrara Canvas was painted for an additional specific purpose, the native title claim, but its power as a communicative tool relies on this history of Aboriginal mainstream art and the ability of a non-Indigenous audience to perceive the painting as meaningful. Through its address to the senses, the Ngurrara Canvas may also compel others — without further rational explanation — to recognise in the common law what is a compulsion under law for the claimants.

Lastly, the use of the painting as a physical platform for delivering evidence on country introduces a final frame that draws all the others together. To stand on a painting that represents parts of the country in order to talk about those places and its laws embodies the connection in Walmajarri and Wangkajunga ontology between land, people, stories and designs and so brings home a radically different knowledge about land to that of the court. But its spatiality allows it to invoke the concept





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of maps, while challenging the way of seeing and understanding land that western cartography represents. Standing on a painting that is a map of country from another way of seeing thus confronts the physical and the representational aspects of *terra nullius* — we are here on this country and this is the way it looks to us.

This intersection through the processes of giving evidence is not, despite my emphasis on dialogue, a fluid semiotic free-for-all. Meaning (or knowledge) and power are bound together, and in native title, it is the *kartiya* who have the power to disseminate some interpretations, to quash others, and to back those interpretations with the force of the state. After all, the Ngurrara Canvas does not fulfil the requirements of s62 for a map of the claim area. Others before me have despaired that what is proper to Indigenous peoples, whether in art or in native title, is inevitably erased by the colonial leviathan which at best holds an inventive monologue with itself. Such a view would mean that even when, like the Ngurrara claimants, agency is asserted through cultural means, the terms on which they are received are not of their making — if not property, title, or proof, then dance, painting and ‘Aboriginal or Torres Straight Islander’ trap them in a diorama from which there is no escape. While it may return land to their control or engender pride in aspects of culture, the native title process is stressful, often requires the breach of secrecy laws, and always demands that claimants represent themselves through foreign languages, ideas and technologies.

I do not claim that in using the Ngurrara Canvas as evidence some kind of ‘true’ recognition of the painting’s meaning has taken place, but rather that the processes of interpretation and meaning making are more complex, plural and shifting than the conventional model of proof would allow. In a ‘clash’ of laws, judges may wield the force of law, but the source of law as legal meaning remains a deeply social, and inescapably plural, process (see Cover 1983). For law more generally the implications are that some of its neat divisions have to be rethought, in particular, the singular location of law in the state, the separation of fact and law, the rationality of proof, and the idea of property as distinct from a broad ontology of place.





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As Fred Myers argues in relation to Aboriginal art, by the very fact that it provokes exposure to a paradox, Aboriginal art has influenced the parameters of art criticism and discourse. The same prospect exists in native title: the involvement of Indigenous claimants in native title processes is not only supplying answers to the questions posed by the common law, but changing the nature — the how and the what — of the questions, themselves.

Notes

- 1 Research Fellow, McGill University and PhD candidate, University of Sydney. I am indebted to several colleagues at McGill — particularly Rod Macdonald, Mark Antaki and Desmond Manderson — whose input helped refine my ideas in this piece; to discussions following presentations at the University of Sydney, as part of the International Roundtable for the Semiotics of Law held at McGill University, and at the forum *Gouvernance et Diversité* in Montreal; and to the LTC anonymous reviewers whose comments were astute, detailed and generous.
- 2 Claimants have to pass an initial registration test with the Tribunal, demonstrating that there is sufficient factual basis for their claim: *Native Title Act 1993* (Cth) s190B(5). As of 1 July 2005 the claim is still in mediation: National Native Title Tribunal File No WC96/32.
- 3 White people.
- 4 Aboriginal painting from other regions have also been described as geographic maps: for example Pintupi Western Desert acrylic dot paintings (Myers 2002: 34) and Yolngu bark painting in Arnhem Land (Morphy 1998: 24)
- 5 My intellectual debt here is to Howard Morphy's image of the frame in relation to Yolngu art (1991: 21–32), and Richard Mohr's analysis of change and continuity in law with frames as a semiotic device (2002).
- 6 An Aboriginal English term for a central conception in some Aboriginal cultures which is sometimes described as the source of law or custom, the time when the land, animals, people, stories and law were created by spiritual ancestor Beings, but also a continuing web connecting all these things. See W E H Stanner's classic essay (1998).
- 7 Sacred object, in Aranda language around Alice Springs (Pannel 1994).
- 8 A type of men's ceremony and corresponding designs.



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- 9 I am questioning the position of Western evidence here, not the position of the Nurrara claimants, who have clearly expressed the view that this was their preferred method of giving testimony, and the way they feel best able to express themselves.
- 10 A sobering analysis of one of the earliest ethnographic studies by Spencer and Gillen is given by Elizabeth Povinelli (2002: 71–109).
- 11 As long as no exceptions to the indefeasibility of title apply, for example, *Real Property Act* 1900 (NSW) s42.
- 12 Some rare exceptions include the doctrine of adverse possession, and the provision of easements by prescription.
- 13 Pythagoras devised a concept of a southern landmass counterbalancing the northern one in the 5th century BC, and a *Terra Australis* appeared on the medieval *mappae mundi* (Eisler 1995: 8–11).
- 14 A similar experience was had by European settlers of the Canadian prairies, who were at a loss to know how to paint in the ‘absence’ of scenery (Rees 1982).
- 15 As early landscape painting was mainly from areas in the South East, the people depicted were Kooris.
- 16 Required by *Native Title Act* 1993 s62.
- 17 Dreaming, or ancestral Beings.

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