record and document ownership of the Spinifex area. Two paintings were produced initially, one painted by the men and one by the women (Cane, 2002: 16–17). These are described as 'native title paintings'. In 1998, the Spinifex people entered into a framework agreement with the Western Australian Government which was ratified by parliament. The paintings were formally included in the preamble of the agreement (Cane, 2002: 16). For the Spinifex people, the paintings are part of mapping territory.

This chapter examines mapping and surveying as technologies of jurisdiction.[3] The main concern here is with the way in which a jurisdiction is inaugurated through the mapping of physical space. The practice of mapping makes possible the existence of the legal concept of territory. Maps and territory are mutually supporting. The map is not the territory but it does, to paraphrase Chase, represent a particular spatial embeddedness of authority and jurisdiction (Chase, 1998: 59). As a technology of jurisdiction, mapping allows space to be reconceptualised as place, allows the assertion of jurisdiction over far-flung horizons and – along with its counterpart technology, surveying – allows the legal space of jurisdiction to be mapped on to the physical space of the land and sea. As a concern of jurisdiction, territory mediates between sovereignty and the physical earth. Once mapped, space becomes associated or identified with a sovereign and becomes a territory. Thus mapping is a jurisdictional device, a practice through which jurisdictions are embodied as territories and through which (as a result) people, places and events in that territory become juridified. One particular example of that juridification is the way in which the relationship of Indigenous Australians to their country becomes transformed to the legal construction of native title.

This chapter will proceed in the following way: the first section very briefly considers the shift from jurisdiction based on status to territorial jurisdiction. This is followed by a description of the history and process of graticulation through which early cartographers were able to impose a grid across the known and unknown world, imposing a mathematical regularity across the globe. The third part of this chapter examines how the process of graticulation supported the assertion by early explorers of sovereign jurisdiction over the new world, looking particularly at the assertion of British jurisdiction over the North American and Australian continents. The following section considers the relationship of the map to the physical earth and sea. On one level, that relationship is abstract, mathematical and incommensurate. The abstract nature of the map means that it will never map precisely to the earth. Thus territory can never match the physical. On another level, therefore, law must be simultaneously regrounded through the inscription of law in the landscape by the use of physical markers. A particular example of the juridification which results from territorial jurisdiction is then presented, together with an argument

3 For the purposes of this chapter, I am adopting Rush's definition of jurisdiction. As Rush (1997: 150) states: jurisdiction is literally to speak the law. Jurisdiction is a site of enunciation: 'It refers us first and foremost to the power and authority to speak in the name of the law and only subsequently to the fact that law is stated – and stated to be someone or something.'

that the embodiment of jurisdictions through Western, Cartesian mapping practices facilitates the assertion of common law jurisdiction over native title and renders indigenous understandings of country incommensurable with the legal doctrine of native title.

From status to territory

The predominant model of jurisdiction today is based on territory. However, this has not always been the case. In medieval England, jurisdiction was effected through attachment to a number of modes, the most common of which was status. Status is a concept familiar from Roman law: the filius families, the married woman or the soldier. Similarly, in the medieval common law, certain ranks, groups or classes occupied a special legal position of their own – for example, the ecclesiastic, the lunatic, the married woman, the villein, the Jew, the person attainted, the infant, the leper and most interestingly the monk, who was considered to be legally dead (Pollock and Maitland, 1968: 416). At this time, the status of these groups cut across the developing rules of the common law.

The lunatic, for example, held a special position in medieval law. Jurisdiction over those of unsound mind originally vested in the lunatic's Lord but was later transferred to the Crown. As this jurisdiction was a valuable right, it was vested in the Exchequer. Later, however, as it became a duty – and one from which no profit could be made – the jurisdiction passed to the Chancellor, who appointed a committee to oversee the property of the lunatic (Holdsworth, 1922–1972: 474). A second example is that of the Jew. The Jew was under the wardship of the King and all that he had belonged to the King. Thus, if the interests of the Crown were at stake, he was under his protection; if not, he was dealt with as a gentile (Pollock and Maitland, 1968: 469). Interests of the Crown generally meant the business of money-lending. In the twelfth century, a department of the Royal Exchequer, the Exchequer of the Jews, was organised for the supervision of this business. According to Pollock and Maitland, it was 'both a financial bureau and a judicial tribunal' (Pollock and Maitland, 1968: 469). When property was involved, the Exchequer acted as a judicial body determining disputes between gentile and Jew in both criminal and civil causes. Civil matters purely between Jews were left to the custom of the Jews and their own tribunals.

Jurisdiction was territorial in some contexts. While some local divisions, such as the shire and the hundred, as well as the manor and the borough, clearly operated on a territorial basis, they did not have exclusive jurisdiction in that territory. Even in these cases, however, territorial jurisdiction was often secondary to status. It was a person's status as villein or freeman which primarily determined jurisdiction, rather than the strict notion of a manor as a territorial entity. As Ford (1999: 881) points out, even those divisions which operated on a territorial basis had few of the qualities we associate with territorial jurisdiction today. Most notably, they had no definite territorial boundaries.

The concept of territorial jurisdiction is a relatively recent phenomenon. The 'modern', Westphalian order of states arose in the context of the erosion of

the institutional centrality of religion and the colonisation of the new world. The simultaneous 're-spatialisation' of Europe and expansion by first the Spanish and Portuguese, then the Dutch and English, into the new world led in part to the new sovereign territorial state. 'State' became synonymous with bounded territories and specifiable populations. Sovereignty involved the assertion of independence: sole rights to jurisdiction over a particular people and territory.

The rise of the concept of territorial sovereignty is not in itself the reason for the loss of status as a primary method of organisation. In many cases, that was simply a by-product of the growth of the common law and legal centralisation, as well as the disappearance of certain persons who occupied a particular status as the result of social, religious and economic changes (Holdsworth, 1922–1972: 3). Nevertheless, by the time of the colonisation of the new world, jurisdiction based on territory was becoming the dominant form of jurisdiction and is now a normalised construct which obscures earlier and alternative modes of organising jurisdiction.

In order to support territorial jurisdiction, there must be a precise delimitation of territorial boundaries. Ford calls this the 'bright line' rule (Holdsworth, 1922–1972: 853). While the precise location of a boundary may be arbitrary, in jurisdictional terms it functions as an uncrossable barrier (Ford, 1999: 850). One entity's jurisdiction ends precisely at the boundary, where that of another begins. One set of governing laws end and another takes over. Without such a bright line, we are, according to the courts, left with a jurisdictional 'No Man's Land',[4] a neutral place to which 'bad characters' may resort,[5] knowing that jurisdictional uncertainty will render them safe from the interference of the authorities.[6]

The technology of mapping made possible the shift from jurisdiction based primarily on status to the modern, familiar, territorial jurisdiction by making it possible to define territory. The result of defining territory was that it was possible to uniformly 'impose the same institutional and administrative arrangements and laws over [that] territory', a project of the later Enlightenment (Hobsbawm, 1990: 80). Thus one of the effects of territorial jurisdiction is that it eliminates differences based on concepts such as status. All those who are within the territory become subject to that jurisdiction. By virtue of being within the territory, all people, places and events become juridical objects. Even where the remnants of an earlier mode of jurisdiction can be seen – the minor, for example, still has a special status at law – that status is overlaid by territorial jurisdiction. It is the courts of the state within which the minor is located that one must apply to for relief.

The graticulation of space

In early modern Europe, to the extent that jurisdiction was territorial in nature, the reference point for dealings with such jurisdictions – as with land – was local memory and customs. Law was embedded in local life, and in the particularities

4 *State of South Australia v State of Victoria* (1914) 18 CLR 115 at 139 (PC).
5 *State of South Australia v State of Victoria* (1914) 18 CLR 115 at 123 (PC).
6 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 682 (HC).

of local knowledge and circumstance. Boundaries and communities were amorphous, lacking in physical and geographic distinction. What distinctions existed were maintained by customary practices rather than by geographic 'bright lines'.

One echo of this time exists in the perambulation – the practice of walking the physical markers of the property or jurisdiction. An example is the practice of 'beating the bounds':

> The parson and parish old-timers would lead the rest of their neighbours around the boundaries of the parish. This village parade went over every stile, past every marker, along every hedgerow, providing the community with a 'mental map of the parish' that could be drawn upon in cases of property dispute.
>
> (Bushaway, 1982: 84)[7]

Similarly, the boundaries of manors were defined by markers. Local topological and human-made features – stone walls, levees, hedges, boundary stones – marked the limits of ownership and/or jurisdiction. Remnants of such practices still survive and many US state statutes still refer to boundary surveys as perambulations.[8]

In the absence of 'rational' and 'objective' qualities of spatial order, what mapping there was reflected the physicalised nature of communities' relationships with land and jurisdiction. The tradition of medieval mapping typically emphasises the sensuous rather than the rational and objective (Harvey, 1990: 243). In other words, 'the medieval artist believed that he could render what he saw before his eyes convincingly by representing what it felt like to walk about, experiencing structures, almost tactilely, from many different sides, rather than from a single vantage point' (Edgerton, 1979: 9).

Medieval Europe saw only 'odd pockets of map-making [and] the occasional individual who drew maps'. Society 'simply did not think in cartographic terms when confronted with the need to record or communicate topographic information, whether it concerned half a field or half a continent' (Harvey, 1980: 155–56). Those 'odd pockets' that did exist consisted largely of portolan maps, zonal maps and the medieval *mappae mundi*.[9] There was also some recognition of the benefits of an improved system for locating places, including by reference to coordinate systems. For example, in his thirteenth century *Opus maius*, Bacon had already proposed the use of coordinates of latitude and longitude to map the Earth (Woodward, 1991: 83). However, as Woodward notes, 'neither the data nor

7 To check no one was encroaching on their land, the congregation would walk once a year from one boundary 'mark' to the next, shouting 'Mark, Mark, Mark' at each and beating it with sticks, or a stripped willow branch known as a wand.

8 See, for example, Title 15 (*Cities and Towns*) – Wyoming State Statutes – Chapter 1, Article. 4.

9 Portolan maps or charts were Mediterranean Sea charts. Zonal maps divided the Earth into five climactic zones. Like the *mappae mundi*, they were circular, and often maps combined elements of the two.

the demand were ready for the concept' (1991: 84). No one had yet been able to project such a reticulated surface on to a flat chart (Edgerton, 1979: 98–100).

In 1400, Ptolemy's *Geographia* arrived in Florence from the Byzantine East, apparently brought by scholars who were attempting to obtain texts for the purposes of learning Greek.[10] Its arrival in Europe – and particularly in Florence – at a time of intellectual flowering 'spawned an unprecedented excitement about the *Geographia*' (Edgerton, 1979: 114). Its spread was increased by the translation of the work into Latin in the first decade of the fifteenth century, and its emergence in print around 1475.

Rather than the maps and empirical knowledge of the world contained in them, it was the methods of mapping the world that made the *Geographia* so important. The *Geographia* included three alternative cartographic methods. While all three methods were intended to allow the mapping on a plane surface of the longitudes and latitudes of the globe, it was the third method, contained in Book Seven, which was to revolutionise map-making. Ptolemy explained that his scheme enabled the mapping of places, preserving the proportion of individual locations (chorography) in relation to the whole (geography):

> The end of chorography is to deal separately with a part of the whole, as if one were to paint only the eye or ear by itself. The task of geography is to survey the whole in its just proportion, as one would the entire head. For in an entire painting we must first put in the larger features and afterwards those detailed features which portraits and pictures may require, giving them proportion in relation to one another so that their correct distance apart can be seen by examining them, to note whether they form the whole or part of the picture.
>
> (quoted in Edgerton, 1979: 111)

By using a grid system of longitude and latitude:

> We are able therefore to know the exact position of any particular place; and the position of the various countries, how they are integrated in regard to one another, how situated in regards to the whole inhabitable world.
>
> (quoted in Edgerton, 1979: 111)

The advantage of the Ptolemaic system of cartography was that the grid system reduced the world's surface to geometrical and mathematical uniformity. Further, at a time when an increasing amount of information was becoming known about the outside world, it made clear that the *oikoumene* (the known world) occupied only part of the whole sphere of the Earth (Edgerton, 1979: 113, 115). Ptolemy's projections did not show the entire globe (only 180°), but the map frame slowly

10 An interesting account of the arrival of the *Geographia* in Florence can be found in Edgerton (1979). Note that other authors place the date for the arrival of *Geographia* earlier: see Turnbull, (1996: 14).

expanded to encompass the globe. By 1514, Ptolemy's projection had been extended to cover the entire world – known and unknown.

By locating the *oikoumene* on only one part of a grid of latitude and longitude, the *Geographia* not only changed the way maps were structured but also the perception of space itself (Brotton, 1997: 32). The dominant form of map until this time had been the *mappae mundi*, a form of T-O map, in which purported to show the entire world, divided into three continents: Asia, Europe and Africa. These were often seen as representing the world 'as divided among the three sons of Noah – Shem, Ham and Japheth – and thus to illustrate the three great races of the world – the semitic, hamitic and japhetic' (Woodward, 1991: 83). These maps 'emphasised the spiritual rather than the physical world'; they were a projection of Christian truths on to a geographical framework (Woodward, 1991: 83). The Psalter *Mappae Mundi*, for example, shows Christ standing above the world, with outstretched arms,[11] while Christ sits in judgement above the Hereford *Mappae Mundi* and the map revolves around Jerusalem which is at the exact centre of the world (see further Harvey, 1996). The maps therefore show a world structurally dependent on Christ and his earthly institution, the Church (Ryan, 1997: 104), reflecting the dominance of the Church in medieval life.

By contrast, Ptolemy's *Geographia* made it clear that the known world, the *oikoumene*, occupied only one part of the globe. The graticulation system changed the map fundamentally: not only did it replace the structure and technique of the T-O map with a system of coordinates, confining the *oikoumene* to a part of the globe but also in so doing it undermined the Christian symbolism on which the T-O map was in part dependent (Brotton, 1997: 32). As Brotton states:

> Ptolemy's impact on the world of geography was to revolutionize a certain perception of space itself, which was no longer charged with religious significance but was instead a continuous, open terrestrial space across which the monarchs and merchants who had invested in copies of his *Geographia* could envisage themselves conquering and trading regardless of religious prescription.
>
> (1997: 32)

The graticulation of the globe meant that all known places could be located, and distances and directions between them established. Furthermore, new routes to known destinations could be hypothesised. In the sixteenth century, there was a proliferation of maps, due to their obvious uses in trade and commerce. Maps became highly valued for the access they promised to territories and commodities (Brotton, 1997: 85).

Graticulation not only produced geometrical, abstract space, but also empty, homogenous space. The result of graticulation was a 'movement away from local

11 The Psalter map is reproduced in Whitfield (1994: 19).

topological concepts toward those of a finite, spatially referenced spherical earth, a *tabula rasa* on which the achievements of exploration could be cumulatively inscribed' (Woodward, 1991: 85). The outlines of the southern continent, for example, were progressively mapped on to the grids of longitude and latitude. Through this, geographers created a blank southern continent – a textual space on a map, on to which could be projected a construction of the continent as either empty and uninhabited (Ryan, 1997: 101) or as populated by fantastic creatures and people. The construction of the southern continent as a *tabula rasa* had important consequences. The colonial moment of widespread appropriation, effected by the physical arrival and taking of jurisdiction over the continent, was preceded by a symbolic assertion of jurisdiction through mapping. Mapping rendered the new territory knowable, open to appropriation, even prior to arrival.

Mapping territory

It was not simply mapping, but the form of that mapping which supported jurisdiction. Graticulation meant that unknown spaces could be given coordinates. The vast parts of the globe beyond the *oikoumene* could be assigned locations by latitude and longitude. Despite never having been seen by Europeans, the new world could be mapped: the unknown became knowable and, more importantly, claimable. The place of territorial jurisdiction could be created out of the space of the unknown.

Dividing the globe

The linking of law to the emerging concept of national territory through mapping and geography was given impetus by Columbus's voyage and the 'discovery' of the 'new world'. One of the results of Columbus's voyage was a reinvigoration of previous Castilian and Portuguese disputes concerning the demarcation of their relative spheres of authority in what Schmitt (1996: 30) has termed the 'free space' of the emerging new world. This free space, open to European appropriation through land seizures, 'made necessary certain divisions and distributions' (Schmitt, 1996: 31). It required a delineation of spheres of authority – of the territories of various European princes.

Since the early mid-1300s, Castile and Portugal had competed for trade with, and possession of, newly discovered lands – the Canary Islands, Guinea, Morocco. Alfonso of Portugal sought aid from the Pope in order to bolster his claims. By his 1452 Bull *Dum diversas*, 'Nicholas V granted King Alfonso general and indefinite powers to search out and conquer all pagans, enslave them and appropriate their lands and goods' (Davenport, 1917: 12).[12] Three years later, the Bull *Romanus Pontifex* settled the dispute between the two in

12 The following short account draws on this work.

favour of Portugal by confirming *Dum diversas*, specifying where it applied and granting it:

> The acquisitions already made, and what hereafter shall happen to be acquired [which] do belong and pertain, to the aforesaid king and to his successors and to the infante, and that right of conquest which in the course of these letters we declare to be extended from the capes of Bojador and of Não, as far as through all Guinea, and beyond towards that southern shore.[13]

Importantly, these belonged to the King and 'not to any others' (Davenport, 1917: 24).

After Columbus's voyage, Pope Alexander VI assigned Castile the exclusive right to acquire territory or trade in, or even to approach, the lands lying west of the meridian situated 100 leagues west of any of the Azores or Cape Verde Islands.[14] The line was confirmed and moved westward by the Treaty of Tordesillas in 1494.[15] The Treaty described the demarcation as follows:

> A boundary or straight line [shall] be determined and drawn north and sought, from pole to pole, on the said ocean sea, from the Arctic to the Antarctic pole. This boundary or line shall be drawn, as aforesaid, at a distance of three hundred and seventy leagues west of the Cape Verde Islands, being calculated by degrees, or by any other manner as may be considered the best.
>
> (Davenport, 1917: 95)

Davenport notes that the Spanish and Portuguese 'evidently considered that the line established by the Treaty of Tordesillas passed around the earth' (Davenport, 1917: 2). Problematically, although the idea of the meridian had become commonplace, the ability to match the ideational to the physical surface of the globe lagged behind. Nevertheless, despite the continued problems involved in locating the line of demarcation, or agreeing on the distance represented by a degree, the treaty constituted an attempt to divide the globe in two – to demarcate and underpin spheres of authority by reference to the new technology of mapping. Importantly, this evidences a shift in the means of establishing political–territorial limits. Rather than the physical landmarks that defined the limits of medieval territorial units, the intangible, mathematical line of latitude demarcated the boundaries between one sovereign authority and another.

The practice of delineating jurisdiction by reference to 'objective' map coordinates became a feature of new acquisitions. For the Portuguese and Spanish, the two leading maritime nations of the fifteenth and early sixteenth

13 The Bull *Romanus Pontifex*, 8 January 1455, as reprinted and translated in Davenport (1917: 23–24). The Bull was confirmed in *Inter Caetera*, 13 March 1456, by Calixtus III.

14 Papal Bull *Inter Caetera*, 3 May 1493, cited in Davenport (1917: 56).

15 Treaty of Tordesillas, 7 June 1494, ratified by Spain on 2 July 1494, ratified by Portugal on 5 September 1494. Reprinted in Davenport (1917: 84).

centuries which were exploring at a time when territories in the new world were not even yet discovered, mapping, navigation and astronomy were the key technologies which facilitated jurisdiction and appropriation.

As Schmitt notes, the lines themselves only acted as an internal division between different sets of European powers of zones of authority in which land appropriation could take place (Schmitt, 1996: 35). Despite their often-contested nature, such zones functioned internally as a justification and demarcation of sovereign jurisdiction. While such divisions did not constitute a jurisdictional 'carving up' of the globe (e.g. Spain and Portugal's attempts to divide the new world between themselves were ignored by other European powers), internally to each power it constituted a grand exercise of sovereign jurisdiction, to set in motion the impulse of appropriation.

In the specific case of the English, there was no grand division of the globe. Rather, by the time English commercial activity had fuelled the impulse for appropriation, attention in the new world of the Americas had shifted to the carving up of the land mass of the continent: the creation of bounded places from space.

Creating new territories: mapping British Colonies

The internal medium through which jurisdiction was asserted by the English (later British) Crown in the new world of America was the Royal Charter, a legal/administrative document which produced a new colony as English territory 'by creating jurisdictions in bounded space' (Tomlins, 2001: 316). Royal Charters defined the newly created territories by a mixture of the new techniques of mapping and the 'old' technology of physical landmarks. There was never a complete shift between the localised technology of the perambulation and the abstract technology of mapping. Rather, the two came to be mutually supportive in defining the new territories.

In the first charter of the Virginia Company (1606), James I:

> Vouchsafe[d] unto [the company] our licence to make habitation, plantation and to deduce a colony of sundry of our people into that part of America commonly called Virginia, and other parts and territories in America either appertaining unto us or which are not now actually possessed by any Christian prince or people, situate, lying and being all along the sea coasts between four and thirty degrees of northerly latitude from the equinoctial line and five and forty degrees of the same latitude and in the main land between the same four and thirty and five and forty degrees, and the islands thereunto adjacent or within one hundred miles of the coast thereof.[16]

The second and third charters of the Virginia Colony, in which the jurisdiction of the colony was extended, described the territorial jurisdiction according

16 For the Virginia Charter, see www.yale.edu/lawweb/avalon./states/va01.htm. For a similar example, see also the Charter of the Massachusetts Bay Company, 4 March 1629, reproduced in Jensen (1969: 72).

to more conventional reference points: (recently named) landmarks – 'Cape Comfort' – and physical features – 'the sea coast'.[17]

The Charter of Pennsylvania (1681) combines the two technologies. It also demonstrates the specificity with which territorial jurisdictions could be defined: the precision of the bounded spaces which they created. Under the Charter, Charles II granted:

> Unto the said William Penn, his heirs and assigns, all that tract or part of land in America, with all the islands therein contained, as the same is bounded on the east by the Delaware River, from twelve miles' distance northwards of New Castle Town unto the three and fiftieth degree of northern latitude, if the said river doth extend so far northwards; but if the said river shall not extend so far northward, then by the said river so far as it doth extend; and from the head of the said river, unto the said three and fortieth degree. The said land to extend westwards five degrees in longitude, to be computed from the said eastern bounds; and the said lands to be bounded on the north by the beginning of the three and fortieth degree of northern latitude, and on the south by a circle drawn at twelve miles distance from New Castle northward and westward unto the beginning of the fortieth degree of northern latitude, and then by a straight line westward to the limit of longitude above-mentioned.[18]

In the Charter of Pennsylvania, Penn is granted full power over an area of land, the topography of which is unknown. Two alternative methods of determining the northern boundary of the territory are given – depending on how far the Delaware River 'doth extend', something unknown to Europeans at the time. The abstract divisions of meridians of longitude and latitude allowed the British Crown to assert territorial jurisdiction over a territory whose size and boundaries had not yet been fully established and whose interior was almost completely unknown to it.[19]

Similarly, Governor Phillip's instructions with respect to New South Wales confirmed the boundaries or limits of his jurisdiction – not only by subject-matter but also by geographical scope. His jurisdiction was confined to 'our territory called New South Wales'[20] which was defined as:

> Extending from the northern cape or extremity of the coast called Cape York, in the latitude of 10°37' south, to the southern extremity of the said territory of New South Wales or South Cape, in the latitude of 43°49' south, and of all

17 See the Third Charter of the Virginia Company, 12 March 1612, www.yale.edu/lawweb/avalon/states/va01.htm

18 Charter of Pennsylvania, 4 March 1681, reproduced in Jensen (1969: 93–94).

19 Much of the mapping of the coastline which had occurred had been by the Dutch, French and Portuguese.

20 Governor Phillip's First Commission, King George III to Arthur Phillip, 12 October 1786, (Watson, 1914: 1). The subject-matter of Phillip's jurisdiction is outlined in his Second Commission and Third Commission, dated respectively 2 April 1887 and 25 April 1887. These are reproduced in Watson (1914: 2, 9).

> the country inland to the westward as far as the one hundred and thirty fifth degree of longitude, reckoning from the meridian of Greenwich, including all the islands adjacent in the Pacific Ocean, within the latitude of the aforesaid of 10°37' south and 43°39' south. [21]

The limits of Phillip's territorial jurisdiction were reiterated in his Second and Third Commissions. Although Phillip and the First Fleet had not yet departed for New South Wales, Britain was claiming territorial jurisdiction over half a continent. At the time of Phillip's commission, the entire coastline of the territory of New South Wales was still unclear. In particular, the coastline of the Gulf of Carpentaria was incomplete, as was the Great Australian Bight (Lines, 1992: 16).

Under international law, symbolic acts of possession, such as raising the flag, were insufficient to confer sovereignty. Rather, a mere inchoate title was acquired which required actual possession or occupation in order to confer territorial sovereignty. The position under international law was recognised by the British Government (Smith, 1932–1935: 1). Despite this, the Commission appointing Captain Phillip as Governor conferred upon his jurisdiction to the eastern half of the continent, an area considerably larger than that claimed by Cook, including parts of the coastline and islands not yet seen by Europeans. Similarly, the 1787 Charter of Justice, by which courts of civil and of criminal jurisdiction were established, also appears to have given jurisdiction to these bodies over a wider area than that so far occupied.[22] Thus jurisdiction was asserted although sovereignty had not yet been acquired. As the settlers pushed out from Sydney Cove towards the Blue Mountains and beyond, sovereignty followed in their wake.

Once appropriated, the systematic measurement and surveying of the new territory would become an essential aspect of European colonisation and the consolidation of European control. The administrative measuring and ordering of the territory underpinned the initial exercise of jurisdiction over the new land. Most commonly, in English colonies, this was achieved through cadastral surveying.

In early modern Europe, space was not precisely defined as it is today by modern surveying. Rather, measurements were fluid and approximate (Ford, 1999: 881). Measurement of land was understood in terms of everyday life. As Darby notes, units were often measured by reference to a day's journey, or a morning's ploughing and surveying (insofar as practices could be given that name), and there was marked confusion between units of measurement – for example, customary or statutory acres (Darby, 1933: 530). However, new

21 Notably, the westernmost boundary of the colony was 135°E latitude, which equated to the line of demarcation declared between Spain and Portugal in the Treaty of Tordesillas. Lines comments on this coincidence, noting that 'the reasons for the British Government's choice of the 135 meridian of east latitude as the western boundary of Governor Phillip's jurisdiction are not evident', and are 'the subject of much speculation'. He does not, however, advance any hypothesis as to a possible relationship between the two demarcation lines: Lines (1992: 11–12).

22 See *Charter of Justice*, 2 April 1787 (UK).

techniques in cadastral surveying, made possible in part by the rediscovery of Euclidean geometry, allowed the land mass of the kingdom of Great Britain to be demarcated and ordered with increasing accuracy (see generally Darby, 1933). Cadastral surveying arose in the context of land valuations. In the sixteenth and seventeenth centuries, however, its use moved from the private context to being predominantly used in state-sponsored surveys. By the second half of the nineteenth century, it was an axiomatic adjunct to effective government control of land (Kain and Baigent, 1992: xvii). As with mapping, cadastral surveying projects a regular, ordered grid upon the blank landscape of the new territory. Slowly, and unevenly, surveys filled the blank, unpopulated interior of the new colony of New South Wales, allowing for the extension of imperial control and jurisdiction, and creating a multitude of jurisdictional spaces, public and private.

Abstracting territory and grounding law

Techniques of mapping facilitate the abstraction of territory from the physical earth and allow the concept of territory to act as a mediator between sovereignty/jurisdiction and the physical. At the same time, however, law is also regrounded through the inscription of law in the landscape by the use of physical markers.

The problems of definitively pegging the abstract of latitude and longitude to the physical arose with respect to the boundaries between the colonies, later states, of South Australia and Victoria. The boundary between New South Wales (later Victoria) and South Australia was by the *Act* 4 & 5 Wm IV c 95 and Letters Patent issued under it, defined to be the 141st meridian of East Longitude. According to the Letters Patent:

> We do hereby fix the Boundaries of the said Province [of South Australia] in manner following (that is to say). On the North the twenty sixth Degree of South Latitude On the South the Southern Ocean – On the West the one hundred and thirty second Degree of East Longitude – And on the East the one hundred and forty first Degree of East Longitude including therein all and every the Bays and Gulfs thereof together with the Island called Kangaroo Island and all and every the Islands adjacent to the said last mentioned Island or to that part of the main Land of the said Province.[23]

In addition, s 1 of that *Act* provided that on the partitioning of the territory of South Australia from that of New South Wales, the laws of New South Wales would not, as might be expected, apply in the new province. Rather, the new province was to be treated 'in law (as it was in fact) as new territory acquired by settlement, with the consequence that the settlers would take with them the Common and Statute Law of England so far as applicable'.[24]

23 Letters Patent reproduced in *State of South Australia v State of Victoria* (1914) 18 CLR 115 at 118–20.

24 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 677.

Thus the border would demarcate the different legal regimes applicable in each jurisdictional entity.

The Letters Patent were issued on 19 February 1836. However, the border remained undefined for some time, not least because of the acknowledged difficulty of ascertaining the location of the 141st meridian of East Longitude in relation to the physical Earth for the purposes of marking the boundary. By 1846, the boundary problem had created a zone of lawlessness, in which murder had been committed and revenues could not be collected.[25] Different surveyors placed the 141st meridian in different physical locations. In the end, 'a mean was struck between the calculations' of the two surveyors.[26] A third surveyor, on the basis of these two earlier attempts, finally produced a survey result acceptable to the Governors of both South Australia and New South Wales. In March 1849, both Governors finally proclaimed the boundary and physical markers were made along the line. From that time until 1911, the line marked in that process was the de facto boundary between South Australia and Victoria, despite the realisation soon after the boundary was marked that it was approximately 2 miles to the west of the 141st meridian. In 1911, South Australia brought an action for recovery of what it alleged was 2 miles of its territory.

Both the High Court and the Privy Council recognised the impossibility at the time of both the fixing of the boundaries and commencement of the action of determining the exact location of the 141st meridian. Yet, for the purposes of jurisdiction, some definite bright line was needed. The 'rights and liberties of the inhabitants of the country' were at stake.[27] If the border were to be the 141st meridian, in the strictest sense, then the relationship of the border to the physical Earth would forever remain indeterminate. If this were so, then the consequence would be:

> … that neither at the date of the Order in Council nor at any subsequent time was it possible to fix with accuracy a line on the surface of the earth representing the meridian; he also submitted that the degree of accuracy with which this could be done had increased with the progress of knowledge and would probably increase still further in the future, and that therefore the boundary, however carefully fixed, could never be said to be the legal boundary or to warrant the claim of either colony to exercise jurisdiction up to it in view of the possibility that a redetermination of greater accuracy might shift its position.[28]

In contrast to the Privy Council's statement, however, it could be contended that there is a legal boundary, the 141st meridian, but that that legal boundary could never directly map to the physical.

25 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 683.
26 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 686.
27 *State of South Australia v State of Victoria* (1914) 18 CLR 115 at 140.
28 *State of South Australia v State of Victoria* (1914) 18 CLR 115 at 136–37.

In contemporary times, surveying and mapping in Queensland are undertaken within the framework of the Geodetic Datum of Australia 1994 (GDA94). GDA94 is the coordinate reference system which provides a correlation between surveys, maps, charts and the physical of the Earth's surface.[29] Prior to GDA94 coming into use in 2000, the reference system used was GDA84. One of the results of the new standard is that:

> Coordinates related to the current Australian Geodetic Datum (AGD84) will differ from those related to the proposed Geocentric Datum of Australia (GDA94) by about 205 metres.[30]

In consequence, maps and charts which pre-date July 1998 are issued with a 'warning note' as to their inaccuracy.[31] Just as with the Spanish/Portuguese *rayas*, and the problems of defining the relationship between the 135° East meridian and the physical Earth, as well as the delineation of the South Australian–Victorian border, the implementation of new standards for geodetic data also points to the relativity of the relationship between maps and the physical: Australian' Geodetic Datum 1994 (AGD94) connects maps and charts to different physical points than AGD84 – they are 205 metres apart.

Underneath this layer of abstraction, however, lies an older technology – delineation by the physical: the boundary marker, the perambulation. In definition of territorial entities, the new technologies of mapping and survey are layered on top of the older sediments of local memory and the physical. There has never been a clear shift from one resource of delineation to another. The localised of the boundary markers and familiar physical features of the landscape survive as basic tools in modern surveying, albeit in a different and new form. As the High Court observed in *State of South Australia and Victoria*, some kind of physical demarcation is needed for a boundary:

> The word 'boundary' imports, from the very nature and purpose of the thing described, a line of demarcation capable of being marked on the ground as the visible and permanent delimitation of separate independent adjoining jurisdictions.[32]

Or, according to the Privy Council in the same case: 'To define a boundary for such purposes it is necessary that the boundary line should be described or ascertainable on the actual surface of the earth.'[33] Such visible delimitation was

29 See Department of Natural Resources and Mines, Queensland Government, www.nrm.qld.gov.au/property/surveying/geocentric_datum.html

30 Department of Natural Resources and Mines, Queensland Government, www.nrm.qld.gov.au/property/surveying/geocentric_datum.html

31 Department of Natural Resources and Mines, Queensland Government, www.nrm.qld.gov.au/property/surveying/geocentric_datum.html

32 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 712.

33 *State of South Australia v State of Victoria* (1914) 18 CLR 115 at 140.

to 'be marked upon the ground by a double row of blazing upon the adjacent trees, and by mounds of earth at intervals of one mile where no trees exist'.[34]

The original marking of the intercolonial boundary between Queensland and New South Wales occurred in 1865. The boundary was marked with human-made and physical features: rocks, trees marked with symbols (≠ and Δ) and with steel pins, 1 inch in diameter and 2 feet long. Cairns and posts were also used (*Redefining*, 2001: 4–5). In 1879, the part of the boundary formed by the 29 parallel of East Meridian was resurveyed and marked by 'well squared posts at every mile, concrete obelisks at the extremities of the initial five mile chords, east and West and two brick obelisks at Hungerford, and permanent marks at all important points' (from an account by William Campbell 1895 quoted in *Redefining*, 2001: 6). A one-ton post was placed on the West Bank of the Barwon River. It marked the end of the survey and 'was marked "QL" on the north side, "NSW J Cameron GS" on the South Side and "≠Lat 29" on the west side' (*Redefining*, 2001: 7). Despite the acknowledged lack of precision in the location of the 29th meridian of Latitude East, according to both the Queensland and New South Wales Governments, 'the border as originally marked . . . defines the true position of the Queensland–New South Wales border' (*Redefining*, 2001: 14).

The marking is the physical act 'required to locate [the] position [of the meridian] with reference to the earth'.[35] But it also harks back to the perambulation, the marking of trees, the insertion of posts – to an earlier time, to an earlier way of knowing and dividing the Earth, when territory was more directly grounded in the physical and law was local. The marking grounds the law in the earth, attaching the legal and ideational of territory to the Earth's surface. Thus law, through the jurisdictional places and spaces of the colonisers, becomes inscribed in the landscape, visible in trees and fences, cairns and posts. In 1993, the Queensland and New South Wales Governments remarked the original boundary posts on the border. In the intervening century, almost 90 per cent of the original mileposts had disappeared. The governments searched for physical evidence of the markers, and mathematically modelled the probable location of the remainder. Recovery marks were placed for the mileposts that were found. The states reinscribed the jurisdictional limits of the state in the physical and reinstituted the bright line on which territorial jurisdiction depends.

Jurisdiction is facilitated and supported by the technologies of surveying and mapping. These technologies mediate a relationship between the law and the physical earth through the concept of territory. Territory has no absolute relationship to the physical earth because it relies in part on technologies which have no absolute relationship to the Earth. Mapping, surveying and charting are themselves mediated. They rely on coordinate reference systems – longitude and latitude in all their complexity – to mediate their relationship to the physical. Such reference systems are never ultimately pegged to the physical, but constantly redefined with increasing scientific precision by the use, for example,

34 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 689.
35 *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 723.

of satellite imaging and mapping. However, law has never escaped the physical. It is still grounded in the physical – through its markers and stones, inscribed and reinscribed in the landscape.

Mapping native title

The Pila Nguru, or Spinifex people, live in the Tjuntjuntjara, the Great Victoria Desert in Western Australia. The Spinifex people remained largely untouched by the arrival of Europeans until the 1950s when their country was the site of British nuclear testing, requiring the removal of many of them to camps hundreds of kilometres away. They slowly returned to their lands in the 1980s. Some of the Pila Nguru did not leave their country in the 1950s and remained uncontacted until 1986.

Western Australia was formally claimed by the British in 1829. In that year, Fremantle raised the flag at the mouth of the Swan River and took possession of the area, founding the colony of Western Australia, and claiming 'all that part of New Holland which is not included within the territory of New South Wales'. The English, aware that under international law possession was required to confirm title, were concerned to settle in the area to bolster their claim as the French, in particular, had also 'discovered' the west of New Holland. Despite the settlements in Western Australia being confined to a small section in the south west, it was taken that this was enough to confirm possession of the territory.

While the boundaries of the territory and its internal topography remained unknown, long before the arrival of the colonists the continent had been placed on maps and its shape and character hypothesised. Prior to taking physical possession, geographers created an outline of Australia as a blank, inhabited only by fanciful creatures, on to which could be projected a construction of the continent as empty and uninhabited, awaiting a new order. The continent could be brought within imperial jurisdiction by the imposition of a new textual regime. The construction of the continent as a *tabula rasa* set the preconditions for the later legal construction of *terra nullius*, which justified the assertion of jurisdiction, both sovereign and common law, on the grounds of the uninhabited state of the continent, and the subsequent transformation from empty land to sovereign territory (Dorsett and McVeigh, 2002: 300).

As a consequence of the acquisition of territorial sovereignty over the west of New Holland, the common law was introduced to the colony. In *Mabo (No. 2)*, Brennan J considered the introduction of the common law into New South Wales. In the context of that colony, he noted that, as there was considered to be no law in the new colony, the common law was imported not merely as the personal law of the colonists but as the law of the land. Brennan J put the matter thus:

> The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country. The hypothesis being that there was no local law

> already in existence in the territory . . . the law of England became the law of the territory (and not merely the personal law of the colonists) . . . The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.[36]

The majority in *Mabo (No. 2)* proceeded on this understanding, despite confirming that the colony had not been uninhabited.[37] Thus, in Western Australia – as in New South Wales – the common law became not only the law of the land, but of the entire territory. The result is that, as the common law is the law of the land, it binds not only the colonists but also the Indigenous inhabitants. The consequence of the acquisition of territorial sovereignty was the uniform application of common law jurisdiction across that territory. All those who are within the territory become subject to that jurisdiction. By virtue of being within the newly acquired territory, the Spinifex people, and their relationship to country, are liable to become juridical objects. On making their claim for native title, their relationship to country becomes juridified as native title. As part of making a claim, it is necessary to outline precisely the boundaries of country. In the bureaucratised system which regulates applications for a determination of native title, this requirement is fulfilled by mapping country through the provision of geospatial data, and in so doing by the imposition on to traditional country of Western, Cartesian ways of understanding.

Section 62 of the *Native Title Act 1993* (Cth) prescribes that, in order to register a claimant application for a determination of native title, certain information must be provided. The information required includes a map of the claim area and a detailed written description outlining the boundaries of the area covered by the claim area. As a result of this, the issue of mapping native title claim areas has become a complex one, requiring access to sophisticated geospatial data.

The Geospatial Analysis & Mapping Branch of the National Native Title Tribunal produces geospatial technical guidelines for the preparation of maps to be used in claims. According to the guidelines, an adequate map will 'contain a geographic or grid reference system, together with the map zone (where applicable) and reference datum, such as GDA94, AGD66'. It will also 'depict and label (if scale permits) areas or features mentioned in the written description; clearly depict areas excluded (if applicable and possible); where other detail is used as a spatial reference (e.g., cadastral parcels), include the currency date pertaining to that information [and] include a locality map' (National Native Title Tribunal, 2001).[38]

36 *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1 at 36.

37 *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1 at 43 per Brennan J, at 78 per Deane and Gaudron JJ, at 182 per Toohey J.

38 The map is appended to the claim application as Sched B. The claim is lodged on Form 1 as prescribed by the Native Title (Federal Court) Regulations 1998, reg. 5(1)(a).

The guidelines provide that the accompanying written description of the claim area may define the external boundaries in a number of ways:

> . . . by way of reference to physical features such as watercourses and roads, together with the location on such . . . by reference to administrative boundaries (for example, local government areas), other native title claimant applications or areas publicly notified (for example, land acquisition notices) . . . by metes and bounds description or a series of coordinate points or combination of each. If coordinates are used, the map zone (where applicable) and reference datum must be identified.
>
> (National Native Title Tribunal, 2001)[39]

For a native title claim, the requirements of the *Act* may amount not only to a map and a written description of the claim area but also pages and pages of detailed geographic coordinates: points of longitude and latitude in accordance with GDA84 or GDA94. These coordinates are required to pinpoint the exact boundaries of the claim area. For the claimants, however, the precision of Western mapping denies the complex nature of interrelations between families, clans and other groups. Western mapping practices reinforce the idea of the 'tribe' as a homogenous entity with clearly bounded borders and culture. Yet, for some claimants, the boundaries of their land may be incapable of such precise delineation – they are porous and negotiated. For the Spinifex people, for example, there is no 'bright line' of territory or territorial jurisdiction. Rather, there is a complex set of interconnected personal and communal associations which 'form the basis upon which [they] recognise this country as theirs as distinct from that of their neighbours' (Cane, 2002: 54). According to Cane:

> That recognition is enumerated through a constellation of sites related to an individual's birth, parents, grandparents, brothers and sisters and Tjukurrpa, which together give shape to a geographic area associated with their community.
>
> (2002: 54)

Rather than bright lines, boundaries are:

> To a degree, arbitrary, drawn as a measure of cultural convenience around the area within which a given group has known associations and primary responsibility: 'in the desert proper boundaries lose their significance and the focus is unequivocally on sites and the tracks (dreaming) that link them together'.
>
> (2002: 56, quoting from Peterson and Long, 1986)

For some groups, territorial boundaries may be firm, while for others territorial boundaries are flexible and dynamic – to Western eyes, ambiguous. Yet for both

39 The written description of the claim area is appended to the claim application as Sched C.

Indigenous and non-Indigenous, visual representation is a way of demonstrating territory. Just as mapping demonstrates the bright lines of territorial jurisdictions, visual representations – paintings, maps if you will – represent for indigenous groups their ownership and jurisdiction.

Conclusion

Mapping has been described as the 'midwife' of the nation state (Ford, 1999: 870) and of territorial sovereignty. Along with the technology of surveying, mapping defined the globe as blank space into which imperial and common law jurisdiction could be projected, and in so doing obscured indigenous jurisdictions and ways of seeing and understanding country. The native title paintings of the Pila Nguru are representations of their country, beliefs and kinship systems, and demonstrate profound connection to the land. They provide an older way of understanding spatial order, reflecting the physicalised nature of communities' relationships with, and jurisdiction over, country. Ironically, as a technology of jurisdiction, mapping has never entirely replaced earlier pre-Cartesian ways of representing local environments. Territory still requires attachment to the Earth through markers and cairns. Despite this, the two ways of seeing seem incommensurate. While relationships to country can be – and are – represented on Western maps, something seems lost in the translation. As legal practice, the process of mapping for a native title claim juridifies the relation to country and recreates it as 'native title'. At the same time, the process of mapping for the claim reinstitutes sovereign and common law jurisdiction by reimposing the ordered grid of the Western map on the landscape.

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Legislation

Native Title Act 1993 (Cth)

9 Placing jurisdiction

*Leslie J Moran**

Introduction

'Jurisdiction', the *Oxford English Dictionary* reveals, is a complex knot of meanings. It refers to institutional, organisational and functional aspects of law and its (judicial) administration, and more specifically to their 'power'. 'Jurisdiction' is also described as a term that refers to the 'extent', 'range' and 'territory' of those judicial and administrative institutions and operations of power (*Oxford English Dictionary*, 1991: 904). 'Extent', 'range' and 'territory' denote and connote the institutional, organisational and functional aspects of law (its power, authority, rule, monopoly of violence) by way of its limits, its boundaries and its bounded operation. As such, 'jurisdiction' is a term that characterises law and legality as spatial and geographical phenomena. There is a growing body of work that analyses the interface between the spatial and the legal. Some work has drawn attention to the juridical significance of key spatial terms such as 'frontier', 'map', 'territory' and 'nation', while other work has examined the spatial dimension of legal terms, such as 'sovereignty' and 'property' (Blomley, 1994; Cooper, 1998; Goodrich, 1990, 1992; Holder and Harrison, 2002; Johnston, 1990; Nedelsky, 1991; Sarat, Douglas and Umphery, 2003). Both approaches point to the intimate connection between the legal and the spatial. This chapter offers a critical reflection on jurisdiction as a geo-jurisprudential term.

I begin with a word of warning about the use of spatial terms, and more specifically about terms which denote and connote 'edge' and 'limit' such as 'jurisdiction'. Smith and Katz (1993) emphasise the need to carefully examine the relationship between space and language. In particular, they warn of the way spatial terms connote fixity and stability, thereby erasing the contingency of space and the political struggle by which different spaces and spatial

* I would like to thank the Law School at Griffith University for its financial assistance, making my participation in the seminar on jurisdiction at Griffith University possible. Thanks also to Bruce Carolan and the College of Law, Stetson University, Florida who were responsible for organising a visiting fellowship in March–April 2004. The final stages of research and writing were undertaken during the course of this fellowship.

categories come into being and function. For example, 'boundary' is a term that not only refers to an edge, a limit as a line that divides, separates and distributes, but also one that has clarity, is impermeable, stable and fixed. Smith and Katz point to the ways in which all these connotations about the nature of the boundary are problematic. They threaten to erase the contingency, mobility and plurality of experiences (and thereby locations) of edges and limits. Boundaries are neither always (nor only) located and experienced literally as spatially remote in relation to a literal centre. They also may be experienced at the physical core and the heart of a place as well as in a multitude of other more or less physically remote locations. This multiplicity of locations of the experience of a bounded space highlights the way 'limit', 'edge', 'boundary' and 'jurisdiction' operate at the level of metaphor, by way of connotation. Bammer (1992) notes that, as metaphors, these terms have an 'indeterminate referential quality', being capable of constituting experiences of a specific location and place in many different contexts and settings. Any encounter with the spatial dimensions of jurisdiction needs to proceed with these points firmly in mind.

Ingram, Bouthillette and Retter (1997: 7) suggest that one of the effects of this depoliticisation is that, while spatial themes proliferate, the different spaces remain under-documented, analysed and theorised. In response to these dangers, Berlant and Freeman (1993) argue that spatial themes demand detailed consideration. Inspired by these concerns, this chapter explores the borders and boundaries of the institutional, organisational and functional aspects of law and its (judicial) administration in a very specific political and spatial context, in relation to homophobic violence and claims for citizenship being fabricated in demands for and in practices of safety and security in Manchester's 'Gay Village' in the north-west of England.

This particular political context draws another dimension of spatial/legal politics into the frame: the significance of bodies in general and sexual bodies in particular. Elizabeth Grosz (1995) offers a useful insight into the importance of the space–body interface. Spatial categories as metaphor and metonym, she suggests, play a key role in making the sense (the intelligibility) and the non-sense (the unintelligibility) of the corporeal, the body. As de Certeau (1984) notes, the idea of the boundary plays a particularly important role. The body is articulated and defined, he suggests, by way of delimitation (1984: 139). Bodies are imagined as bounded and limited entities. For example, the skin connotes the boundary *par excellence* – between inside and outside, between one person and another (Ahmed and Stacey, 2001). In turn, Grosz notes, the body works as a metaphor and metonym of space. The body as limit and boundary is place personified. The body as place may be both positive and negative, imagined both as the place of good order and its apotheosis. The (male)[1]

1 For work that explores the interface between sexuality and gender by way of lesbian sexuality, see Jagose (1994); Wittig (1992); Mason (2001).

sexualised body has long been one context in which the body as the spatial metaphor of good/bad order has been produced (see, for example, Boswell, 1980). The case studies explored in this chapter examine two proximate contexts in which the sexual body is a space–body interface through which political struggles that make up the institutional, organisational and functional boundaries of law's force take place.

Spatial themes have been a long-standing dimension of a body politic concerned with same-sex desires and identities. Sexual and cultural geography and work informed by urban studies (Adler and Brennan, 1992; Bell and Valentine, 1995; Castells, 1983; Castells and Murphy, 1982; Valentine, 1993a,b,c, 1996) and architectural studies (Betsky, 1997; Sanders, 1996) have begun to document and analyse the rich diversity of spatial categories through which the sense and non-sense of sexualised intimacy and sexual belonging may be made. This work suggests that a diverse spatial language is at play in the generation of the contours of social exclusion and social belonging in general, and the body politics of sexual belonging in particular: place, site, environment, the urban, suburban and rural, queerscapes, locality, liminality, utopia and heterotopia, ghetto, region, neighbourhood, building and home.

The most pervasive spatio-corporeal theme is the distinction between 'the public' and 'the private'. In many respects, the dominance of this particular spatial dichotomy in the context of genital intimacy (between men) is unsurprising. Eve Sedgwick (1990) has pointed to the cultural importance of these spatial terms. The public–private binary, she has argued, does phenomenal cultural work in Western liberal democratic societies. This is realised through an extensive metonomic chain of associations condensed within the public–private binary – for example, as a relation of the impersonal–personal, inauthentic–authentic, danger–safety and insecurity–security, to name but a few. Such is the range of meanings produced through the public–private distinction that it threatens, she warns, to make it difficult to not only differentiate it from, but also imagine, alternative spatial categories. It is therefore not surprising that, in the context of same-sex intimacy, the public and the private have been dominant spatial themes closely connected with matters of the reach of law and its limits, its jurisdiction. From the nineteenth century, they have been a prominent feature of attempts to fabricate and govern the space–body interface according to the particular requirements of law's limits (Lauristen and Thornstad, 1974; Moran, 1996).[2]

However, the public–private distinction does not exhaust spatio-corporeal themes within this body politics. Perhaps most familiar are the spatial–political categories of 'community', 'nation' and 'state' (Altman, 1982; Cooper, 1994; Kinsman, 1987; Moran, 1991). Deployed in various legal contexts, such as demands for civil and human rights (Stychin, 1998, 2003; Waaldijk and Clapham, 1993; Wintermute, 1995), and more recently formulated in terms of sexual

2 Lesbian scholars have challenged the importance of the public–private relation: see Majury (1994); Mason (1995, 1997).

citizenship (Bell, 1995; Binnie and Bell, 2000; Evans, 1993; Phelan, 2001; Stychin, 2003), different geographical categories have been deployed in the figuration of the space–body interface, such as 'the international', 'the supranational' and 'the global' – thereby imagining alternative (and competing) locations of belonging. These particular space–body relations are never far away from the spatial themes that seek to imagine a different limit, creating new juridical locations of belonging (Ford, 1999).

A powerful image in which the spatial, the corporeal and the legal are woven together is the phrase the 'body of law'; another is 'the sovereign' and 'sovereignty'.[3] In 'the sovereign' and 'sovereignty', law may be embodied and thus personified in the corporeality of the reigning monarch, or in a more abstracted image of Leviathan, or in a republican image of a body politic as 'the people'. Common to all is resort to the image of the human body in the representation of law and the good order that law stands for. In the bounded body of the sovereign, law and the legal order are totalised and rendered coherent in the ideal corporeality of that (king's/queen's) body (Kantorowicz, 1957). At the same time, that body works as a visualisation of law as a limited and a located practice and power. The sovereign's body as a corporeal metaphor of law and order (of good order) also gives form to the ideal body of the individual made subject/citizen, both subjected to and the model subject of good order (Cheah and Grosz, 1996). So how does homophobic violence fit into this scheme of things?

The idea and practices of safety and security that constitute the body politic are central to political initiatives focusing on homophobic violence. They seek to draw attention to the pervasive operation and impact of homophobic violence, and make demands that the state intervene to punish this form of violence and bring it to an end. As Shane Phelan (2001) notes, within the Western liberal democratic model, the state plays a key role in the provision of safety and security (cf Moran and Skeggs, 2004). Through its monopoly of legitimate violence, the state is the ultimate provider and guarantor of safety and security. In turn, safety and security are a fundamental dimension of the relationship between the state and the citizen. It is a particularly important context and location through which a politics of belonging (which Fraser, 1995 has characterised as a politics of recognition) is forged.

This particular relationship between the state and the individual has long been informed by heterosexist assumptions. Homophobic violence, rather than being a sign and a practice of a disorder that has no place within the state, threatening both individual, and state safety and security, has long been a characteristic of good order and state safety and security policies and practices. Same-sex genital acts have, in this context, been characterised as disordered and disorderly, as acts out of place. Homophobic violence has been actively pursued though state institutions and, even when not a formal part of these institutions, has been

3 Richard Ford (1999) suggests that the spatial aspect of sovereignty is of recent origin and is particularly associated with geo-political changes in Europe.

characterised as a legitimate (state-sanctioned) private activity, as exemplified in the continuing viability of the 'homosexual panic defence' (Howe, 1997, 1998; Tomsen, 1994, 1998).

Thus safety and security, as the heart of citizenship, have long been informed by heterosexist assumptions. Rosga (2001) argues that demands that the state in general, and its agents of criminal justice in particular, now imagine homophobic violence as a form of disorder, as a threat to community safety and security, represent a political project that seeks to turn the state against itself. This, I would suggest, involves a jurisdictional reconfiguration – a transformation of the nature and form of the boundaries of law. The political struggles that produce and change the boundaries of law are the focus of the following analysis.

Political and spatial contexts

I want to examine the terms of the state's jurisdiction over internal safety and security in two different contexts that are both temporally and spatially proximate. The first is a set of criminal proceedings which have come to be known as the case of the 'Bolton Seven'. The second is gay and lesbian perceptions and practices of safety and security in the 'European gay Mecca' of Manchester's Gay Village.[4]

The case of the 'Bolton Seven' involved criminal proceedings against Norman Williams, Jonathan Moore, David Godfrey, Terry Connell, Gary Abdie, Mark Love and an 'unnamed minor'.[5] All were friends, friends of friends or lovers. The incidents occurred in Bolton, a medium-sized town in the north-west of England. Bolton lies a mere 16 kilometres north of Manchester's Gay Village, which has been described as 'a European gay Mecca' (Healthy Gay Manchester, 1998). It is arguably the largest, most concentrated and thereby the most public commercial gay space in the United Kingdom.

The proceedings against the 'Bolton Seven' arose out of investigations conducted by officers of the Greater Manchester Police Service. Two 'home-made videos' recorded on a camcorder owned by Connell were found during the course of a police search of the home of Williams. The videos were central to the proceedings providing key evidence of the wrongful acts. All of the defendants were charged and found guilty of the offence of gross indecency involving consensual acts of mutual masturbation and oral sex. Three were charged and found guilty of buggery, which involved consensual anal penile penetration. All these acts were performed 'behind closed doors', in the homes of two of the accused. It was

4 The analysis of Manchester's Gay Village draws upon data produced in the course of an empirical research project funded by the Economic and Social Research Council entitled 'Violence, Sexuality, Space', ESRC research award No. L 133 25 1031. That project was undertaken by the author with Beverley Skeggs and research assistants Paul Tyrer, Karen Corteen and Lewis Turner. The research used a multi-method approach: surveys, structured interviews and focus groups: see Moran and Skeggs (2004).

5 It is estimated that half a million pounds was spent on the investigation and prosecution.

accepted that the videos had been made for home, not commercial, use. Five of the accused aged between seventeen and a half and 25 (at the time of the acts) were sentenced by the trial court judge to undertake community service and subject to probation orders.[6] The two older men, one aged 33 and the other 55, were sentenced to terms of imprisonment, of two years and nine months, respectively, suspended for two years. These two defendants were also required to register with the local police as 'sex offenders' under Part 1 of the *Sex Offenders Act 1997*.[7] Spatial themes had a high profile in the proceedings and in the controversy surrounding them.

While geographically proximate to the incidents and proceedings in Bolton, Manchester's Gay Village appears to offer a very different political, spatial and legal landscape. The Gay Village is arguably the largest, most concentrated, visible (public) gay identified location in the United Kingdom. It is also the location one of Britain's first police liaison initiatives bringing the police together with lesbians and gay men. More recently, it has been the site of the United Kingdom's first homophobic hate crime initiative. Both the incidents in Bolton, and the police and community initiatives in the 'gay Mecca' of Manchester's Gay Village have a temporal and geographical proximity, being contemporaneous and little more than 16 kilometres apart. Both have jurisdictional proximities, being subject to the same laws and being administered by the same police service, the Greater Manchester Police. At the same time, the sexual citizenship of the men criminalised for consensual sex with men 'behind closed doors' seems very remote from all that is suggested and celebrated in the sexual citizenship being fabricated though gay and lesbian engagements with the police in the same police service that is committed to taking homophobic violence seriously (cf Stanko and Curry, 1997). The proximity and distance between these two proximate events and locations was captured in a report in a gay monthly journal, *Gay Times*, which announced that:

> Greater Manchester Police gay liaison work, thought of as the most advanced and progressive in the country, has suffered a serious set-back following the force's dogged prosecution of the Bolton Seven.
>
> (Tatchel, 1998: 43)

The analysis that follows seeks to examine the complex and problematic relationship between space, bodies and law, that connects and separates the legal landscapes of these two events and locations within the body politic.

The Queen's Peace

Let us begin with the analysis of the case of the 'Bolton Seven'. The most controversial spatial dimension of the proceedings related to a jurisdictional issue: the

6 On appeal, the community service component of the sentences was quashed for each defendant. Moore's sentence was reduced from two years to twelve months' probation. Abdie's sentence, originally 150 hours' community service, was reduced to a one-year conditional discharge.

7 For the following five years, they have a duty to inform the police of any change of name or address.

reach and limit of criminal law and its administration. Defence challenges to the operation and severity of the criminal law deployed spatial distinctions between the public and the private to explain the limits of criminal law, and thereby to intimate the extent of its legitimate reach. The proceedings explored different and contentious meanings of 'private', from the meaning prescribed in the *1967 Sexual Offences Act* and what might be described as more popular meanings. These spatial dimensions of law are also intimately concerned with bodies: the corporeal. The space–body connection is forged in law by reference to the actions named and forbidden by the criminal law: gross indecency and buggery.

Sections 12 and 13 of the *Sexual Offences Act 1956* describe the prohibitions (buggery and gross indecency) that informed the jurisdiction of the law at that time.[8] Section 12(1) provides: 'It is an offence for a person to commit buggery with another person' and s 13 that:

> It is an offence for a man to commit an act of gross indecency with another man whether in public or private, or to be party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man.

In these two sections, the limit of law is represented in two different ways. In s 13, the theme of jurisdiction appears by way of an explicit spatial reference, 'whether in public or private'. Here a boundary is named in order to erase it. In s 12(1), the limit of the reach of the criminal law appears by way of the absence of any reference to a limit. Common to both is the apparent limitless reach of the criminal law in relation to these forbidden acts. Here the bodies in question are always within reach of the law and its institutions of administration and enforcement.

The archaic collective term for criminal wrongs is 'pleas of the Crown', their political and spatial form being known as the Queen's/King's Peace. While the two offences outlined above represent the borders of Queen's Peace in different ways (respectively explicitly and implicitly), they achieve the same spatial effect. The Queen's Peace is unlimited, and at the same time limited – but only by the greater limits of sovereignty itself.[9] This Queen's Peace is a delimitation constituted by way of a series of binary oppositions: of order against disorder; of rule in contrast to the unruly; of law against violence. Through the prohibitions, the body is read and written according to the requirements of the Queen's Peace. It is

8 Major changes to the law of sexual offences is to be found in the *Sexual Offences Act 2003*. That Act (see Sched 7) repeals these sections. Non-consensual buggery now falls within the definition of rape (s 1) and a new offence of 'assault by penetration' (s 2). The offence of gross indecency has been abolished (Sched 7). A new offence of 'sexual activity in a public lavatory' (s 71) continues to criminalise consensual sexual activities, though the offence is limited to sexual acts performed in a particular place.

9 While this formally suggests the absence of boundaries within the criminal jurisdiction, it does not necessarily preclude the possibility of other simultaneous jurisdictions (juridical spaces), such as ecclesiastical or feudal jurisdictions that have in the past been the other to the Queen's Peace. Ford (1999) also draws attention to the possibility of contemporary local jurisdictions.

made the disorderly body that calls for order. It is the unruly body and the body of escalating violence that threatens the body of law as order, rule, reason. The limit of the Queen's Peace, its beginning and end, is disorder that is always proximate and always elsewhere. By way of acts of buggery and gross indecency, the sexual body is made always already a body outside the law, as outlaw, that is to be subjected to the law. As a technique of locating and governing this body, the Queen's Peace knows no internal limits other than disorder which calls this technique into being. This sexual body is one that is always before the law, always visible to the law. It is within this scheme of things that domestic and intimate space of the home of the accused is within the Queen's Peace and subject to it, not apart from or beyond its reach or its limit. In this scheme of things, all other possible boundaries are made porous, contingent, ultimately incorporated within the limit of the Queen's Peace.

But the Queen's Peace has been subject to certain spatial qualifications in this context. These were first introduced in the *Sexual Offences Act 1967*,[10] which amended ss 12 and 13 of the *1956 Act*. The *1967 Act* qualified the reach of the Queen's Peace by way of a distinction between the public and the private. It is to this public–private divide that I now want to turn.

'In private'

Under the terms of the *1967 Act*, 'in private' is a limit to the reach of the general criminal law. It erects a boundary that has many dimensions. It locates the limit of the Queen's Peace by reference to bodies, to their sex (under that *Act*, only the male body could attain the status of 'in private')[11] and by reference to particular intimate gestures (confined to anal penetration of one man by the penis of another and a range of forms of genital contact and genital display with another man). It is also a boundary found only in relation to a very specific civil society – a society of two – locating those bodies as beyond the law by way of a sentimental domesticity. As with other privileged civil societies, its subjects are required to have particular capacities (of age[12] and mental ability) and to have performed an 'act of consent'. Judicial commentary on this particular process of boundary formation – for example, in the case of *R v Reakes*[13] draws attention to other

10 These provisions have their origin in law reform initiatives inaugurated by the Wolfenden Committee and found in that committee's report (1957). The *Sexual Offences Act 2003* repeals the provisions of the *1967 Act* (see Sched 7). It now appears that, rather than the terms of the *1967 Act* providing an exception to the reach of the Queen's Peace, the private as a limit of criminal law has become a generalised limit in the context of consensual genital relations in private.

11 This resulted in an interesting state of affairs. Buggery between a man and a woman could not be defined as 'in private' and was thereby criminal under the *Sexual Offences Act* at all times, with or without consent. This situation was reformed in the *Criminal Justice and Public Order Act 1994*.

12 Age had a particular importance in the 'Bolton Seven' case, as one of the accused was under 18 (the then age of consent) at the time of the acts. He was seventeen and a half. I have analysed age as a boundary in the context of the reform of the 'age of consent' in detail: see Moran (1997); Waites (1999).

13 *R v Reakes* (1974) *Crim LR* 613.

contingencies: the time of night, the function of the place, lighting and the likelihood of a third person coming upon the scene. Further unarticulated factors are characterised by the pregnant phrase 'surrounding circumstances'.[14]

The sentencing remarks made in the 'Bolton Seven' case by the trial court judge, His Honour Judge Michael Lever QC, provide an opportunity to examine a particular instance in the formation of the boundary, 'in private' in a particular case. Ultimately, in this context, the 1967 qualification, 'in private', was never available to secure the innocence of the 'Bolton Seven'. As the trial court judge explained, the acts 'were committed in full view of several people, and recorded by another on a camcorder'.[15] The presence of 'several people' and the camcorder operator clearly violated the statutory definition of 'in private' found in the *1967 Act*: no more than two people. The judge's reflections on the boundary between the private and the public demonstrate that this boundary is rich in meaning.

The judge, examining various different dimensions to the meaning of the phrase 'in private', explained:[16] 'The word private carries its natural meaning that the act has taken place in the presence of the two participants and nobody else.' At another point in his sentencing remarks, he commented:

> In my judgement, the vast law-abiding majority of homosexuals, like the vast law-abiding majority of heterosexuals, are private people who consider that their sex lives are their own private affair . . . They have not the slightest desire to be members of a so called community, or pressure group.

Of particular interest here is the way the judge gives the law's spatial category, 'in private', the gloss of 'natural meaning'. Here the boundary marker 'in private', marking the limit of the criminal jurisdiction, is constituted as a division between nature and nurture, nature and culture (cf Ford, 1999). As 'nature', the politics of space both within the legal category and within the trial are grounded, made authentic and made apolitical. In this context, the apolitical dimension of the private (no more than two subjects) is made over against another civil grouping, a 'so called community or pressure group', its political nature being indicated by reference to its investment in what the judge explained is 'sometimes described as Gay Rights'. Any blurring of the division between private and public is also a blurring of the distinctions connoted by reference to that divide.

14 This does not exhaust the criteria that inform the boundary of 'in private'. Others are to be found in the text of the *1967 Act*. On the jurisdictional aspect of some of these limits: see Dempsey (1998).

15 The camcorder provides a context in which the fragility of the boundary between the public and the private is revealed. This recording technology allowed representations of the acts in private to appear in public.

16 Transcript of the Sentencing Remarks of His Honour Judge Michael Lever QC. The judgement of the Court of Appeal (Criminal Division) suggests that this is not correct. One of the accused, Godfrey, pleaded guilty to an 'offence of buggery in which he was penetrated': Transcript of *R v Turner, Godfrey, Abdie and Love*, Case No. 98/1429/X2 at 1. All quotations in this paper are taken from this transcript unless otherwise specified in the following footnotes.

The judge notes that a blurring of this division has damaging consequences. These seem to be twofold: it damages individuals as private subjects, causing them 'grave embarrassment, distress and humiliation'; and it damages the law and the legal process. In the latter context, the damage takes the form of the corrupting effect of politics upon the law. One sign of the damaging effects of this boundary violation is identified by the judge in terms of its impact upon individual defendants, who experience 'far greater anxiety'. Those identified by the judge as raising political issues in the criminal trial, Williams and Connell, were said to have experienced greater anxiety in relation to the proceedings. While the trial judge was willing to recognise that the law may have some connection with the political, by way of its relation to 'democracy' and its particular institutions, 'elected representatives', this interrelationship had to be rigorously circumscribed, confined and located elsewhere to the law. The elsewhere of politics is explained by reference to the court's only concern: the rule of law. The court, the judge explained, 'is a court of law, not of morals'. To bring the political into the private violates the division between law and politics, and thereby violates nature which is divided from culture.

The naturalisation of 'in private' also has another resonance: the private–public divide echoes the boundary of hetero and homo. The implications of these separate but connected divisions are mapped in the case by way of both contrast and analogy between the hetero and the homo. Homos may be 'like' heteros – that is, a civil society of no more than two. As a private relation of two persons, this is civil society as 'nature' personified. It is good order made apolitical. It is in this context that the hetero (and homo) are described by the judge as a 'law-abiding majority'.

Hetero and homo as both clear division and interconnection meander through the judicial commentary. One context in which it is deployed is in the production of a distinction *between* defendants. On the one hand, Williams and Connell are characterised as 'mature men and practising homosexuals', which for the judge denotes more dangerous offenders to be more severely punished. The remaining five defendants are characterised as 'the rest', said by the judge to be more victims than offenders. Williams and Connell give shape and form to the clear division between hetero and homo.

'The rest' is also a category that connects these apparent opposites. First, 'the rest' is a term that names sexual disorder, but one that is subject to relocation. This term of disorder is figured in a number of ways: 'deprived backgrounds', 'broken families', 'ill-educated' and in being 'immature', 'unsophisticated', 'not very intelligent', 'unemployed' and so on. This list provides a rich catalogue of registers of disorder which might valorise and explain their disorderly actions, putting them clearly on the side of the 'bad' rather than the 'good'. Here genital acts are made signs of minor incivilities described as 'crude antics', the acts of 'smutty-minded schoolboys tipsily experimenting with sex', 'nothing to do with affection, let alone love'. Being acts performed with persons of the same sex, these various registers of the distinction between disorder and order are aligned with the 'homo' rather than the hetero; however, at the end of the proceedings, this

distribution is subject to a certain transformation. The judge notes that 'at least three of the five . . . are now involved in apparently serious relationships with young women, at least to the extent that [they] are actually living with them'. Here the judge points to the fluidity and porosity of the boundary between hetero and homo, and the interpenetration of one with the other. While this shift most surely threatened to disturb the fixity and stability of the sexual dichotomy (of homo and hetero), it also offers to relocate these sexual bodies, making possible a movement from homo to hetero, from bad to 'good' order. In this move, the 'good homo' seems to disappear from the frame of possibilities of signifying orderly society. Within this scheme of things, the 'homo' threatens to be always disordered, always out of place and subject to erasure under the realisation of the Queen's Peace as a space of heterosexual legal order. The case of the 'Bolton Seven' seems to offer a bleak picture of the Queen's Peace as a possible spatial politics of genital intimacy between men as good order.

The Gay Village: in or beyond the Queen's Peace?

As a juridical spatial order limited only by the boundaries of sovereignty jurisdiction, the Queen's Peace is not limited to or by a concern with the particular sentimental domestic locations that occupied the attention of the Bolton Crown Court. It is a spatial politics of law co-extensive with the second location of this study, the 'European gay Mecca', Manchester's Gay Village. As in the case of the 'Bolton Seven', 'in private' has no significance as a limit upon the reach of the power of law characterised as the Queen's Peace in the Village. Nor are the acts that might invoke the forceful imposition of the Queen's Peace limited to buggery or gross indecency. The Queen's Peace might be made manifest by way of a rich diversity of wrongful acts. For example, in the case of *Masterson v Holden*[17] two men standing together on London's main shopping thoroughfare, Oxford Street, rubbing each other's bodies – described in the case as the buttocks and genital area – were found guilty of a breach of the peace. Nor are the spaces of bars and clubs (civil societies), where entry is contingent upon agreement and subject to capacity, beyond this Queen's Peace. In the late 1970s, police raided gay bars and clubs in the then nascent Gay Village.[18] In that instance, the disorder that threatened the Queen's Peace was the spectacle of men dancing with each other, which was said to be in violation of a prohibition of licentious dancing. In relation to the Queen's Peace, the boundaries of civil society are like the limits of domestic space – penetrated by the reach of a power, the limit of which lies elsewhere.

The operation of the Queen's Peace is to be found in the human actions at work in the fabrication of the places that make up this 'European gay Mecca'. A historical study of that space shows that bars and clubs frequented by men who

17 *Masterson and Another v Holden* [1986] 3 All ER 39.

18 These raids were conducted at the time James Anderton was the local police chief constable. He had gained a certain notoriety for the expression of his right-wing fundamentalist views.

desire genital contact with other men have existed in the area for decades (Quilley, 1997; Whittle, 1994). In the past, these bars had to fabricate a certain invisibility in order to satisfy the spatial and aesthetic requirements of the Queen's Peace. They were located in a then run-down and partly abandoned area close to the city centre (a liminal zone) (Moran, 1996; Moran and McGhee, 1998; Shields, 1991), hidden in back streets, underground in basements and cellars, behind always closed, anonymous doors, unmarked (at least) to a heteronormative gaze (Brown, 2000).

Over against this is the Village as a location of resistance to the Queen's Peace. This resistance has taken various forms: demonstrations against the police raids; the establishment of organisations exposing, challenging and negotiating the heteronormativity of the Queen's Peace through HIV/AIDS activism; and initiatives specifically focusing on policing, crime control and criminal law. Healthy Gay Manchester and a Village-based Manchester lesbian and gay police liaison group have produced victim surveys[19] and developed homophobic hate crime initiatives. The documentation of violence against lesbians and gay men – previously absent from official police data – recording lesbian and gay fears of the police and capturing their experiences of homophobia in encounters with the police has been an important activity. Dialogues with the police to change police practice have been another important initiative.

Resistance has also taken the form of aesthetic practices that have changed the physical fabric of the Village. 'New' bars of the Gay Village have a different aesthetic, one now dominated by the requirements of visibility and display. Manto (the first of this new wave of places) has a 10-metre glass frontage that looks on to the Gay Village's main artery, Canal Street. Outside tables and chairs are another common feature. The 'Gay' of 'the Village' is now overtly marked. The 'C' and the 'S' on the Canal Street signs are continually erased, transforming it into 'anal treet'. Street banners, wall posters and high-profile public events – in particular the annual lesbian and gay festival, Mardi Gras – have further contributed to the public gay signification of the locality.

The Queen's other peace: Manchester's Gay Village

These changes, I suggested, mark challenges and changes to a particular idea of the Queen's Peace that have been taking place over an extended period in a particular place: the constitution of a gay public space as a space of good order. Many of the challenges and initiatives seek to have an impact which goes wider than the Village, the jurisdiction of the local police service is Greater Manchester which covers both Manchester and Bolton. The arrest and subsequent conviction of the 'Bolton Seven' therefore suggests that many of the changes focusing on policing and criminalisation had (at that time) at best a very parochial

19 The Manchester Lesbian and Gay policing initiative produced the first UK lesbian victim survey: see Brett (1999).

effect (cf Corteen *et al*., 2000). This is not to suggest that the Village has not challenged and changed the Queen's Peace, but to point to the importance of its spatial limitations. It is to the detail of the spatial politics constituting that particular location that I now turn.

I want to focus here on the political and spatial context of that change: boundaries. The theme of boundaries was a preoccupation that emerged early in the generation of research data on homophobic violence initially amongst key business and community activists in the Village, but also in focus groups with gay men and lesbians who use the Village. Changes in the use of the Village, and its popularity as an entertainment space, generated much discussion of a 'straight invasion' of the Village. This perception of boundary violation was the immediate context in which boundary talk provided the forum in which discussions and reflections on the nature of a sexualised (gay) public space of good order, a location of safety and security, took place. The remainder of the chapter focuses upon various aspects of this boundary talk: the form of these boundaries, their location and their valorisation.

The Gay Village 1: techniques of boundary formation

Research data from the Village suggests that techniques of boundary formation are various. Boundaries may be formally signified by way of official boundary-keepers, such as doormen located at the threshold of a premises, or informally – for example, by a drag queen who drove round the Village declaiming its boundaries. Other mechanisms of boundary formation and maintenance include a demand for a formal confession at the border: 'I'm queer', followed by a declaration, 'I agree to abide by the [bar's] Rules and only fetch in my gay friends' or are marked by a certificate of passage, a 'passport' such as a 'VIP card' or a keyring. Successive Mardi Gras events have used a 'pledge band' which gives those wearing the band access to nominated bars, clubs and other premises in the Village. Purchasers were told that the band would ensure safety and security. 'John', the manager of a bar in the Village, illustrates another set of boundary marking practices. He explained that the central characteristic of the bar, captured in the slogan 'don't discriminate, integrate', was to be found emblazoned on each menu card. It also informed the design of the bar and was expressed in its music policy. Marking the boundaries of the place in their different ways, all these practices signify the nature of the place. Other research participants commented upon the way that a boundary is inscribed in and marks the body. Examples given relate to ways of dancing, ways of looking, modes and topics of speech and attitude. The bodies of those who use the entertainment space become a locus and sign of the boundaries of that space and the meanings attributed to that space. As spatial and corporeal markers, these boundaries inscribe different domains of a sexualised good order; a bar club or street. These boundary markers/makers also function as mechanisms of surveillance and governance with various degrees of formality and informality (cf Moran and McGhee, 1998).

As each of these boundary practices constitutes the location and governance of good order in formation, so (potential) boundary violations locate disorder and danger. Borders mark sites of potential boundary failure. Gatekeepers fail to patrol and maintain boundaries. Boundaries prove to be unstable, 'a billboard outside said "Integration not Segregation" which I think is a fantastic idea but unfortunately . . . it has become too top heavy the other way'. Rather than being something that is fixed in space and time, boundaries are not taken seriously, 'a lot of bars are gay but on a very trivial sense'; they are described as 'token', and a 'camouflage' for 'straight businesses'. Bodies are often read as out of place. As one of the gay male focus group participants explained:

> . . . a small but very obnoxious group of straight people, unreasonably pissed [were] affecting the whole character of the bar . . . . they were dancing . . . and it was done in a particular way that I don't expect in a gay bar . . . but the aggression that goes with heterosexual people . . . was self-evident.

Here heterosexual bodies are reduced to a sign of a threatening disorder and perceived as evidence of a boundary violation (located as beings out of place). More specifically, minor incivilities – one of the most common being 'looking' – evidence pending disorder which takes the form of 'sheer lack of respect'.

The Gay Village 2: locating boundaries

An opening mapping exercise with the research focus groups demonstrated that any idea that the limit of the Village is a fixed or stable bounded entity is problematic. While individual maps of safety and danger shared many similarities, each one differed. Comments by 'Terry', a gay men's officer with the local city council, problematise any simple notion of the solidity of boundaries. He explained that, while on the one hand they are clear, at the same time they are 'a bit fuzzy'. Another respondent, 'Lynn', a local activist and voluntary worker, offered an insight into the 'fuzzy' nature of these boundaries. She explained that the boundary is also to be found 'in the middle you know, in between, not even just like down by the side . . . It tends to be all over'. 'Lynn' challenges the connotations of fixity, stability and permanence associated with boundaries. Her insight draws attention to the way in which the boundary might not have a privileged location. The boundary as outer edge is mobile and multiple. It is at the edge but also at the heart of the space. Its location is produced in its installation and investment. It is known at the moment of its production. This suggests that the boundary is both elsewhere and everywhere. In terms of the boundary of the Queen's Peace of the Village as a different limit of a different good order of safety and security, its limit and its location are perhaps best understood in terms of the moment of its production and the recognition of its violation rather than as a specific, stable or fixed location.

The Gay Village 3: boundaries of meaning

Finally, I want to briefly examine some of the values that inform and invest these boundaries of good order. Norman, one of the research participants, explained:

> I've bought gay clubs and I open gay clubs and I'm keeping them gay clubs, as gay as I can keep them. And nobody's gonna shove me any other way. I want gay . . . no straights. I think you should shoot . . . them all [straights], they do your head in.

Another, Rose, commented:

> . . . because too many straight people are . . . in the Village at the weekend . . . for the [gay] men who traditionally go out, it obviously seems to affect them because their own private space is being invaded in their eyes.

I want to focus on a particular theme found in these extracts: ideas of property.[20] As Blomley has noted: 'To talk of property in legal and political terms is to talk of order . . . ' (1997: 286). Property talk is one intelligibility through which the sense (and non-sense) of boundaries, and thereby formations and locations of this order, can be explored. Jennifer Nedelsky's (1991) work on American constitutionalism draws attention to the cultural and political importance of property and boundaries, and examines some of the meanings that are being generated about these areas in Western liberal democratic contexts.

Norman's observations contain some key characteristics associated with the idea of property. Exclusive possession informs his comments that he will not allow anyone to interfere with his decision to buy, open and run a gay bar, 'nobody's gonna shove me any other way . . . I think you should shoot them all'. Use informs his determination to 'run them gay . . . [keep] them gay'. Alienation is another characteristic to be found in Norman's observation. He makes reference to it by way of his observation 'I've bought gay clubs . . . ', which implies a capacity to dispose of gay clubs.

The juxtaposition of 'gay' and 'club' draws our attention to another aspect of 'property': propriety. As propriety, the property relation is concerned with the particular characteristic or quality of a thing which might be described as its nature or its essence (the proper, the respectable) (Davies, 1994, 1998, 1999; Naffine, 1998). Propriety is also concerned with the realisation and control of the qualities and attributes of the thing. Norman deploys propriety in his use of the particular nomination 'gay club' and in his determination to maintain that characteristic. Propriety works to give the substantive meaning of the boundary, but it also names the nature of the 'good order' that the boundary circumscribes.

20 Other values made in and through boundaries in this location are explored in Moran and Skeggs (2003).

For Norman, the boundary has particular characteristics: it is associated with exclusion – 'no straights'.

Through these ideas of property, the boundary takes the form of a claim (or right), which is not only a claim to secure, preserve and alienate but also a claim to secure, preserve and alienate the very nature of the thing. Here the property relation takes the form of an entitlement. Entitlement is both a reference to 'title', the claim to property (possession, use, alienation), and a reference to propriety: 'title' as superscription or designation that names the nature of the thing – in this instance, 'gay'.

While it might be trite to note the importance of the attributes of property for Norman, a gay man who over the past 20 years has owned and operated businesses (a taxi company, clubs and bars) in 'the Village', it would be premature to reduce ideas of property to the context of legal ownership of private property. This would miss the wider symbolic significance of the particular mentality of property that may not only be connected to property as legal ownership but also separate from it. It is in this context that the second extract, from 'Rose', has particular significance.

'Rose' makes reference to the Village – albeit in the voice of gay men rather than in her own voice as a lesbian – as 'our private space'. This draws our attention to the use of property as metaphor. By way of metaphors, the themes associated with property as an individual and a private form of spatial appropriation, ownership and belonging are used to make sense of other spatial relations that are communal and collective (be they civil society or the state) rather than individual (cf Nedelsky, 1991).

Margaret Radin's work (1993) on the distinction between property as the personal and the fungible is also important here. In the personal–fungible distinction, Radin explores symbolic meanings of property that are produced in the context of property as legal relations. For Radin, personal property is property 'bound up with a person'. It is contrasted with 'fungible property', described as property 'held purely instrumentally'(1993: 37). Radin explains this 'instrumentality' as 'holding an object that is perfectly replaceable with other goods of equal market value' (1993: 37). But Jeanne Schroeder (1998) raises a note of caution and adds an important point of correction to this scheme. It is wrong, she warns, to reduce property to a relation of subject to object (the thing or place). Property is a relation between subjects. This is true of both Radin's categories of property.

The empirical data suggests that the personal–fungible distinction has significance in various contexts. For example, in Norman's opening observation, in the first instance the property relation appears as a relation of the subject (Norman) to the object (a gay club) where the object might be perfectly replaceable by another object of equal value. However, Norman evidences a different type of investment in the property, giving the property a different symbolic significance. This is evidenced in his insistence on a very particular propriety, 'gay'. Furthermore, it is this propriety that conjoins identity, both individual and collective, to themes of property – use, exclusive possession, title, claim.

As personal property, the bar is a nodal point in a set of interrelations with other subjects, constituted in terms of those included and those excluded. The communal and community dimensions of the personal of property are perhaps more apparent in the metaphors of property and propriety used by Rose in her description of the community of the Gay Village as the 'private space' of gay men. Further evidence in support of this conclusion is to be found in wider discussions about different bars in the Gay Village. The personal–fungible distinction informs descriptions of the distinction between gay bars (personal) with lesbian and gay owners and bars owned by 'big firms' (fungible). Through metaphors of property, gay bars as personal property in contrast to straight bars as fungible property draws attention to the symbolic importance of property relations in contrast to thinking of property purely in terms of economic (Knopp, 1994) or more abstract symbolic relations (cf Forest, 1995). At the same time, it suggests that this distinction is unstable. Both in the case of Norman, as the owner of the gay club, and wider discussions about the 'big firm bars' as a vehicle for heterosexual invasion, the economic and symbolic are intimately connected. For example, the lesbian and gay Mardi Gras exposed the fragility of the distinction between a 'community event' and an event reduced to a profit-making enterprise benefiting breweries and bar owners. The fungible–personal relation as an either/or situation needs to be treated with caution. Particular attention needs to be paid to who is making the claims and the particular claims that are made. In our data, the personal–fungible is perhaps best understood in terms of struggle, tactic and strategy (de Certeau, 1984).

This analysis of borders and boundaries in the experience of making the Village a locus of a gay public space of safety and security highlights the impact of ideas of property, propriety and entitlement in relation to the constitution of an alternative Queen's Peace. This is not to suggest that this exhausts the spatial themes through which that peace might be reimagined in that location, nor is it to suggest that they are only to be found in that spatial context. The analysis here has drawn attention to their possible role in a specific spatial/juridical context in the formation of claims of citizenship (Turner, 2000). Finally, we ought not to forget a warning note raised by Naffine and Davies (2001: 39). While the rhetoric of property has had – and continues to have – significant political purchase, having immense strategic value, it may also retard social change.

Conclusions: the limits of a new jurisdiction

This chapter offers an analysis of two different and in many ways opposed but connected manifestations of the Queen's Peace. In their temporal, spatial and substantive proximity and distance, they demonstrate the ways in which the spatial politics of the Queen's Peace as a single bounded space needs to be treated with caution. As a jurisdiction, the Queen's Peace is necessarily limited and bounded; it is always already a particular place, always already parochial. It is important to take that parochialism seriously in order to understand the particular spatial politics that inform it. In this chapter, the contrast between

the 'Bolton Seven' and the Gay Village draws attention to the need to be sensitive to the complexity of the parochial. Santos (1989) has noted that within each jurisdiction different juridical imaginaries may be both superimposed and interpenetrated (cf Ford, 1999). This suggests that the locatedness of law needs to be understood as a singularity, a multiplicity and as the space (in)between different spaces. The contrast between Bolton and the Gay Village draws attention to the multiple, mobile and contested nature of what might in the first instance appear to be a singular Queen's peace.

This chapter does not offer the Village (as a micro or sub-jurisdiction) as the final solution to the horrors of the Queen's Peace, as exemplified in the case of the 'Bolton Seven'. The juxtaposition of the case of the 'Bolton Seven' and the Gay Village offers an example of some of the problems of the ghetto or safe haven as a jurisdictional solution. Homophobic violence as a threat to good order is far from being confined to public space or entertainment spaces. Recent research (*Understanding and Responding to Hate Crime*, nd; Moran, Paterson and Docherty, 2004) suggests that the home, neighbourhood and workplace are the main locations of homophobic violence. The safe haven of the Village is relatively remote from these locations. Furthermore, to offer the Village as a solution would also be to assume and demand that the Village be a spatial unity. The juxtaposition of the 'Bolton Seven' case and the 'good order' of the Village does not seem to be, as Rosga (2001) suggests, an instance in which the state is being turned against itself. I would suggest that, through the lens of jurisdiction, while on the one hand the illusion of the unified, totalising body of the sovereign is exposed, the unity of that body as the limit of law and its administration is always at any one point of time fractured and fragmented. At the same time, the two case studies explore the various contexts and ways in which that unity of the law of the sovereignty comes into being and is marked on the bodies of the subjects that the process locates.

Finally, while the Village does offer a haven, a safer space, a different order, in relation to the potential exposure to the violence and exclusions demanded by the legal order as demonstrated in the case of the 'Bolton Seven', as my colleagues and I have argued elsewhere, the geography and politics of the order of the Gay Village also appears to be a geography and politics of exclusion (Moran and Skeggs, 2003; Moran *et al*., 2001). The Village is a complex space of both protection from hetero-violence for lesbians and gay men and also a space of exclusions for lesbians and gay men. These exclusions produce a 'good order' of the Village based upon violent hierarchies of class, race and ability. However, it may in the final instance remain important to recognise the strategic significance of the Village as the possibility for a different Queen's Peace.

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10 A jurisdiction of body and desire

Exploring the boundaries of bodily control in prostitution law

Lee Godden

> The very contours of 'the body' are established through markings that seek to establish specific codes of cultural coherence. Any discourse that establishes the boundaries of the body serves the purpose of instating and naturalizing certain taboos regarding the appropriate limits, postures and modes of exchange that define what it is that constitutes bodies.
>
> (Butler, 1999: 166)

Introduction

The *Prostitution Act 1999* in Queensland was the latest in a series of Australian laws that decriminalised various forms of prostitution and brought prostitution in brothels within statutory control (Neave, 1994: 67). At the time, the new laws were proclaimed to strike a balance between providing a regulated environment in which safe, controlled prostitution could operate, and maintaining the moral and social interests of the community. This legal reform represented a significant social change in a relatively conservative Australian community where religious groups adhering to 'traditional Christian values' still hold considerable political influence. Moves to decriminalise prostitution in many Australian jurisdictions also run counter to recent policy trends which invoke a return to 'family and community'. In negotiating the balance between the sacred and the profanely 'material', the Queensland laws provide a means to legitimate the activity of prostitution while setting the putative boundaries of 'family and community', as clearly distinct from those bodies that may corrupt such ideals.

Central to any exercise in the setting of 'boundaries' in law is the concept of 'jurisdiction'. Accordingly, this chapter analyses the manner in which law assumes power over prostitution and its associated 'bodies' by reference to changing conceptions of jurisdiction. The more neutral term 'bodies', rather than 'subjects' or 'individuals', is used to emphasise the process by which law, through an assertion of jurisdiction, acts on or through bodies to 'identify' and ascribe legal status to the subject/individual. Consequently, jurisdiction is given a confined interpretation in this context as the ambit of the legal power to act upon or control 'bodies' as a capacity to prescribe 'proper' boundaries in relation to that legal status. Thus jurisdiction is not simply the assertion of bare control over

bodies in a territorial compass but also comprehends the manner and form by which law insinuates itself as the indispensable means of control by establishing a necessary nexus between body and 'law'.

Yet the concept of jurisdiction is not static, as its formulation is dependent upon the prevailing conception of 'law' with which it is associated. Changing historical understandings of the relationship between law, power and jurisdiction add further complexity. The first conception, in simplified terms, comprehends a model of law in juridical form. The second is associated with a move to administrative forms of governance. These two models of 'law' have been prominent in the control of prostitution – first, the criminal law associated with a juridical form of law, and second, regulatory or normative control by the administrative and bureaucratic state. Feminist reactions to prostitution control have varied from denouncing the exploitation of women as social victims with no effective choice (Pateman, 1988) to recognising the autonomy of women to undertake the relatively well-paid employment offered by prostitution (Perkins, 1994). Within Australian society, the two models have fluctuated in importance as the pre-eminent mode of controlling the 'bodies' engaged in prostitution. Each mode exhibits a particular configuration of jurisdiction as part of that control.

Within Australian society, conservative religious and political groups have often identified moral laxity with any moves to decriminalise prostitution.[1] Symbolically, prostitution and sin have been associated – even if this link has not always been reflected in more formal policies. In the context of conservative Christian values, prostitution regulation has been characteristically associated with the need for the imposition of criminal law prohibitions. Such sanctions, this view suggests, work upon a body that is 'subject to law'. Jurisdiction becomes the mode for an imposition of boundaries upon the body. Implicitly, this analysis also accepts that a body already 'exists' with a pre-given status as a prostitute – a body that cannot come within law's jurisdiction except as a naturally sinful body that has transgressed moral values prior to law's assertion of a power to punish, and thereby control, such bodies.

With the advent of a more normative framework for law, it is argued here that, through an assertion of regulatory control over prostitution, law simultaneously 'creates' and constrains the bodies that it recognises as being engaged in prostitution. As a form of access to bodies and their sexuality, the regulatory technologies of prostitution laws construct a particular sexed body that is identified primarily in terms of its potential to transgress 'boundaries'. Accordingly, the identification of such a 'body' concurrently establishes the necessity of a jurisdiction for, and of, those technologies of control. In establishing the contours of such a body, its boundaries, the laws marks out their extent (see MacNeil, 1998

1 For example, a prominent aspect of the Queensland National Party policy platform in the state government election campaign following the 'legalisation' of prostitution was the restoration of the criminal status of brothels. The campaign was based around a theme of the decay of moral values introduced by Labor government reforms and the need to return to 'law and order'.

for a discussion of the construction of the body in rights discourse) by setting appropriate limits, postures and modes of exchange. Such limits, postures and modes of exchange are articulated by reference to the norms of family and community, and thereby mark a purported consolidation – but also an erasure of identity (Butler, 1992: 354) for the prostitute, the body known to law primarily as one to be excluded from entering such family and community 'spaces'.

Punishment of the sins of the flesh

Discourses of desire and flesh as sins to be recanted were central concerns of Christian confessional practices in many Western societies, most prominently (but not exclusively) in the pre-capitalist era (Weeks, 1990). These practices and discourses became associated with more formalised 'law' via a model of repressive sovereign power (Foucault, 1988: 23). This association indicates the centrality of sexuality to many religious discourses – and to law. In particular historical periods in Western society, those women not in 'acceptable' heterosexual relationships have been regarded as an embodiment of sin, associated with the devil. Such women have been persecuted by various means, including legal trials and punishments which sought to establish their status as witches (Roper, 1994: Chapter 8). Similarly, the bodies of prostitutes – to the extent that they exist outside familial bounds – also suggest a perceived breach of moral and social order. Accordingly, their legal control has often been accompanied by criminal sanctions and their rigid enforcement, although – perversely – prostitution has just as often been informally tolerated and only indirectly and sporadically prosecuted (see Hunt, 1999: 35–37 for seventeenth- and eighteenth-century English prosecution statistics).

In Western society, bodily control exercised through criminal sanctions is consistent with the formulation of power in terms of 'Law'. Power is exercised in a negative manner: 'Confronted by a power that is law, the subject who is constituted as subject – who is "subjected" is one who obeys' (Foucault, 1988: 85). This theory is a familiar one from positivist analyses, which echo the earlier Kantian position on law and sovereign authority. Sovereign authority in most Western legal systems is no longer explicitly personified but, it is claimed, it still invokes an inner compulsion so that we persist in the habit of obedience (Dworkin, 1983: 527). In simplified terms, this 'model' of power and law is a linear one of domination and reciprocal obedience, prefaced upon a capacity in the sovereign to do 'violence' (Sarat and Kearns, 1992: Introduction). Moreover, this model of subjugation – historically associated with Law in Western societies – has specific ramifications for an understanding of jurisdiction.

Jurisdiction thus inheres in the sovereign–subject relationship as it has its origins in the sovereign's personal power of death or punishment over those persons 'subject' to law (Cover, 1983: 1–5). In a very immediate and direct sense, then, jurisdiction subtends a relationship between sovereign and subject as a scope of power and authority. The ambit of jurisdiction is extensive with an area defined by exclusivity of control, and a corresponding domain of obedience in the

sense that the bodies of 'subjects' remain subject to law.[2] As the bodies remain subject, they remain open to punishment as a form of bodily coercion. Since the Middle Ages, this view of jurisdiction which complements the sovereign-juridico model of law and power (Foucault, 1988: 85) has been prevalent in Western society. Arguably, though, the neatness of fit between the concept of personal and territorial jurisdiction and law/power begins to shift with historical movements in the nature of power away from a single sovereign source.

Criminal law as jurisdiction over a sinful body

Nonetheless, an emphasis upon a personal jurisdiction over the subject body remains clearly evident in criminal law. The association has a long historical lineage. The sovereign power of punishment by death [as a taking of life] was the obverse face to the position that the sovereign was the source of life. Western Christian beliefs posit God as the ultimate creator of life (Foucault, 1988: 138). The sovereign as God's representative on Earth thus assumed a power of life, but more significantly a power to take life. In this manner, the notion that violent punishment falls within the preserve of the sovereign forms the ontological grounds of juridical law and marks off its jurisdiction (Sarat and Kearns, 1992: 9). Thus the instrumentality of the law embodies the moral force of the sovereign state via a criminal law that metes punishment and/or death on the body of the corrupt wrongdoer. Boundaries are defined in the negative terms of prohibition (Foucault, 1977: 10–12, 14–20).

If prostitution laws are conceived primarily as a negative prohibition, then consequently the 'body' of the prostitute comes within law's jurisdiction in order to punish it for its transgressions. An association of moral order and punishment as 'desert' reflects a Kantian conception of law, which in turn draws on Christian religious themes. This view presupposes a rational actor who takes responsibility for breaches of moral order (Kant, 2002). Kant's deontological position assumes that, as rational creatures, it is possible for people to discern right from wrong, such choices not being dependent on contingent social standards but on universal values (the right). Punishment, according to Kantian formulations, is predicated upon a retributive notion of individual responsibility (Kant, 1996 [1797]: 332). Applying such an account, law establishes its criminal jurisdiction over a prostitute's body to punish an individual who has willingly contravened moral standards. In effect, it assumes punishment as the necessary consequence to the corresponding jurisdiction to control the bodies. The application of criminal sanctions thus works at a symbolic level to assert a general power to impose violence upon bodies which transgress.

2 Nietzsche argues that the foundation of social order and sovereign power is based on an ability to extract recompense at the ultimate level of the body. Thus the memory of law is inscribed on bodies as one of pain. 'Civilisation comes about only by branding the law on bodies through a mnemonics of pain, a memory fashioned out of the suffering and pain of the body.' For a discussion, see Cheah and Grosz (1996: 13).

Thus the jurisdiction of control exercised by the criminal law acts directly on the prostitute's body to set bounds through physical coercion as a deserved punishment. Pursuant to a negative form of power, such bodies have been physically restrained and subjected to various forms of bodily constraint. However, the hidden partiality of this model of prostitution control is clear. Jurisdiction is asserted only over one-half of the bodies engaged in the exchange relationship of prostitution – that of the incumbent 'body' rather than the user of that body (Sullivan, 1995). As prostitutes are predominately women and young people, and the users of those bodies are predominately older men, the asymmetry of power that operates through this model of jurisdiction that 'attaches' sanction to a sinful body is readily apparent.

The criminal law also constitutes an instrument of 'civic death' in that it provides criminal sanctions for those activities of the body that are deemed 'outside' community and law (Moran and Sharpe, 2002). To be subject to the jurisdiction of law in this sense is to be placed outside 'community' as one is 'outside' law.[3] At various periods, the prostitute was deemed to be 'outside' family and community (see Garland, 2001 for a discussion of the links between criminal law and social order). Thus the body was subject to the exclusionary force of the criminal law,[4] especially where prostitution was associated with disease and contagion (Allen, 1990: 249). The model of prostitution control based on civic exclusion developed most intensely where laws were framed around extended familial relationships (Neave, 1994: 68–69). The body of a prostitute could find no existential relationship within a network of legitimated bonding that followed the 'differentiation into order and caste' that designated societies of 'blood alliances' (Foucault, 1988: 147). Even when not directly outcast, prostitutes, together with the mendicant and wanderer, were dealt with pursuant to statutes such as *Vagrancy Acts* which proclaimed the distance of such bodies from the fixed, productive stability of law and family (see, for example, Mahood, 1990: 50, 51).

Prostitution has long been the focus of public moral campaigns and policing agendas within Australia (Allen, 1990: Chapter 1). Traditionally, the criminal law and its selective enforcement have provided the most overt form of legal control. Yet the dimensions of control have varied. At particular times, prostitution within Australia has been 'prohibited and prevalent, secret and expensive, industrially regulated by policing and prosecution outcomes, professionalized and normalized' (Allen, 1990: 215). More recently, the prohibitions against prostitution set by criminal law and sanction have been far less stringently enforced in many Australian jurisdictions. Further, the bonds of family and community have extenuated over time. Yet, even when prostitution is

3 The explanatory memoranda accompanying the passage of the Queensland prostitution law reforms clearly recognised that prostitutes were not afforded the same access to law and protection as the rest of the community: Prostitution Bill 1999, Explanatory Notes, pp 2–3.

4 Historically, when linked to the suffragette movement there was a strong association with a sexual purity agenda in 'first phase' feminist thought that sought to abolish prostitution. See, for example, Hunt (1999: 122–33).

decriminalised and controlled by reference to regulatory practices, 'family' and 'community' are still proclaimed as 'boundaries' which must be protected from the incursion of unlawful desires and the potentially corruptive bodies of prostitutes.[5] Thus, although much less prominent than in former eras, the criminal law continues to be employed by the Australian 'state' to constrain the bodies of prostitutes through the assertion of a jurisdiction of coercion and exclusion.[6]

By contrast, the recent legislative change to decriminalise prostitution putatively brings prostitution within the 'civic space' of law as a normalised activity. Prostitution and the bodies that perform such practices no longer attract the prohibition and sanction of the criminal law.

Jurisdiction as a power of life

The transformation in the interplay between the criminal law, prostitution regulation and 'bodily control' reflect broader changes in the conception of the relationship between those with the power to impose 'jurisdiction' and those upon whom that jurisdiction is imposed. From the eighteenth century onward, 'it is no longer a matter of bringing death into play but of distributing the living in the domain of value and utility' (Foucault, 1988: 157). No longer is law framed primarily as a negative, personalised threat of violence. Violence and law as negation are increasing displaced by an assertion of power as a control over life. However, the association of law and violence continue in an uneasy tandem in modern regulatory formulations as a more indirect form of coercion.

Thus, 'to say that law's violence is legitimate is, in the modern age . . . is to claim that law's violence is controlled through the legal articulation of values, norms and procedures and purposes external to violence itself' (Sarat and Kearns, 1992: 5). It is the move beyond negation to a sense of law and jurisdiction as an articulation of 'values, norms, procedures and purposes' – largely, though not exclusively, external to violence – that is the concern of the next section. Such 'values, norms, procedures and purposes' are articulated in terms of a sexuality conceived primarily as a commercialisation of prostitution, a process that distributes bodies 'in the domain of value and utility'.

This purported rationalisation of prostitution as a promotion of 'life', sustaining value and utility, draws on two more pervasive trends. First, the promotion of life manifests as a control over 'populations', and second, there is an overriding concern with 'body' as the point of access to life: 'Broadly speaking at the juncture of the "body" and the "population" sex became a crucial target of a power organised around the management of life rather than the menace of death' (Foucault, 1988: 147).

5 In 2002, Victoria sought to introduce legislation which allowed so-called 'zones of tolerance' where street solicitation for prostitution would be 'tolerated'. The proposed legislation was abandoned by the government due to strong resistance by local residents and small-business operators in the St Kilda district.

6 In Queensland, for example, despite the legalisation of small-sized brothels, individual soliciting for prostitution outside these contained spaces remains illegal.

> Power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself; it was the taking charge of life, more than that, it gave power its access to the body.
>
> (Foucault, 1988: 142–43)

The extent to which modern societies have overcome the menace of death is arguable (Butler, 1992). Any transition to a singular promotion of 'life' through access to the body remains partial. In prostitution control, the technologies employed in the management of life exist in the same regulatory 'space' as attempts to counter the menace of death. Indeed, the menace of death in the form of AIDS is an ever-present impetus for tighter regulatory controls that ultimately seek to preserve life (see *Prostitution Act 1999* (Qld), s 91). Nonetheless, even if incomplete, the ascendancy of bio-power marks a transition away from the sovereign model of law. It marks a change towards 'a conception of power which replaces the privilege of law with the viewpoint of the objective, the privilege of prohibition with the viewpoint of tactical efficacy, the privilege of sovereignty with the analysis of a multiple and mobile field of force relations, wherein far-reaching, but never stable effects of domination are produced' (Foucault, 1980: 102). Indeed, the model of law begins to operate 'more and more as a norm'. Ultimately, a 'normalising society, is the historical outcome of a technology centred on life' (Foucault, 1980: 144).

If sex has become a target for the management of life in a normalising society, this objective has not translated to a simple facilitation of all forms of sexuality. The treatment of prostitution remains highly ambivalent within Australian society. Nonetheless, prostitution has been gradually normalised by reference to the changing dimensions of family, economy and gender roles (Allen, 1990: 215). Such normalisation, though, is not reducible to a simple assimilation with dominant 'family values'. To deal with such ambivalence, a technology of inclusion but containment is promoted. For example, only discrete types of prostitution, such as brothel sex work, have been legalised.

To facilitate such simultaneous inclusion but containment, the regulatory technologies for proliferating, innovating, annexing, creating, penetrating and managing bodies are clearly apparent in the legislative reforms to the *Prostitution Act 1999*. Moreover, consonant with the prediction that this normalising power would be most visible in the 'whole continual and clamorous legislative activity' (Foucault, 1980: 144), we find that this normalising framework extends not just to the substantive prostitution legislation, but to the minutiae of delegated legislation: to building codes, to planning codes and to regulations prescribing various matters under the *Prostitution Act* itself. These technologies exist in tandem with a range of other legal instruments, operating primarily through the planning laws, which are aimed at prostitution control at the broader level of a 'population'.