

# Bringing the outside(r) in: law's appropriation of subversive identities

SARAH KEENAN<sup>1</sup>

*SOAS, University of London*

## *Abstract*

*This article explores some of the ways in which law appropriates subversive identities. Drawing on work from geographical, feminist and critical race approaches to property, I put forward an understanding of property as a relation of belonging 'held up' by space. Building on this understanding, I argue that identity can operate as property in the same way that land and material objects can, and that law appropriates subversive identities by bringing them into its hegemonic space of recognition and regulation. Law's appropriations have a range of effects on both the individual subjects directly involved in legal proceedings and the broader spaces in and through which those subjects forge their identities. Specifically this article explores the appropriation of gay and lesbian identities in the context of immigration law, and of aboriginal identities in the context of Australia's Northern Territory National Emergency Response Act 2007 (Cth) (NTNERA).*

This article proposes that law appropriates subversive identities by bringing 'outsiders' into hegemonic spaces of belonging. It focuses on the appropriation of lesbian identities in the contexts of British refugee law and on aboriginal identities in the context of Australia's NTNERA respectively. The process of appropriation involves subversive identities, which are defined in part through their positioning outside or on the margins of law, being brought into spaces of legal recognition and regulation, with a wide range of effects. This article draws on geographical, feminist and critical race approaches to property to focus on the *spatial* effects of such appropriations. The first part of the article explores the conceptual links between property, identity and spatiality to put forward an understanding of property as a spatially contingent relation of belonging, and of appropriation as a spatial process. The latter part of the article builds on this understanding of property and appropriation through empirical studies. Through these explorations of the conceptual and the empirical, the article argues that law's appropriations of subversive identities reshape conceptual, social and physical spaces of belonging. Because space is dynamic, this reshaping is not necessarily fixed or permanent; outsiders continue to build and maintain their own spaces outside the law.

---

1 Lecturer in Law. With thanks to all at the Centre for Law, Gender and Sexuality at the University of Kent, but particularly Davina Cooper and Toni Williams, for their support during the earlier periods of research for this article, and to Amanda Perry-Kessaris and Mel Evans for insightful comments on an earlier draft. All errors are mine alone.

## Property, identity and belonging in space

To appropriate is to take someone else's property and make it your own. Despite an extensive body of philosophical and legal literature on its meaning, property is still difficult to define. The adjectival meaning of appropriate – 'suitable or proper' – is not an etymological coincidence. As I have discussed elsewhere,<sup>2</sup> the understanding of property as a suitable or proper part or extension of the subject has a long history in Western philosophy, most prominently through the work of John Locke and Georg Hegel. For Locke, property is an inherent, essential part of the subject (the body's labour) and a constructed extension of it (the land upon which the body labours).<sup>3</sup> For Hegel, subjectivity can only be achieved through the process of appropriation; the subject must acquire property in the process of becoming fully human. Whereas Locke's subject enters the world already possessing property in his own labour, Hegel's subject must achieve property through his relations with the external world.<sup>4</sup> Locke and Hegel have in common their definition of property as something that is an essential part or extension of the proper subject (as well as an assumption that neither women nor non-white races can be proper subjects).

Debates over what counts as property continue to be prominent across a range of political contexts because property is still widely understood and enforced as a particularly formidable right. Although many legal theorists have pointed out the social constructedness of property<sup>5</sup> – persuasively arguing that it comprises 'no more than socially constituted fact'<sup>6</sup> – most nonetheless still understand property as operating to give the subject something fixed, permanent and incapable of being legally interfered with by others. Although Gray's argument that property is 'an illusion' is an insightful and persuasive one, property is nonetheless an illusion with very material effects. Most significantly, property gives the subject the power to exclude.<sup>7</sup> Such exclusion has material effects ranging from urban homelessness to indigenous dispossession. Citing these effects and discussing the ultimate power of forced eviction that private property rights entail, Nicholas Blomley argues that property produces geographies of violence.<sup>8</sup> While Locke theorised property in terms of a person's relationship with a thing (land), modern property theorists have made a point of highlighting that 'dominium [private power] over things is also imperium [political power] over our fellow human beings'.<sup>9</sup> Property entails significant social power – it is not just an extension of the subject, but also a relationship between subjects.

Building on and taking further these understandings of property as a socially powerful right of exclusion, Cheryl Harris, in her influential 1993 piece, argues that whiteness is property. Writing in the United States context but drawing on histories and arguments applicable to other Anglo-European states, Harris outlines how property rights are rooted in racial domination to the extent that whiteness is a form of property.<sup>10</sup> Slavery and

2 S Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 *Social and Legal Studies* 423.

3 M Cohen and C B Macpherson, 'Property and Sovereignty' in C B Macpherson (ed), *Property: Mainstream and Critical Perspectives* (University of Toronto Press 1978).

4 G W F Hegel, *Elements of the Philosophy of Right* (CUP 1991).

5 K Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252.

6 K Gray, 'The Legal Order of the Queue' (paper presented at Techniques of Ownership: Artifacts, Inscriptions, Practices, London School of Economics, 20 July 2007).

7 J E Penner, *The Idea of Property in Law* (Clarendon Press 1997); Cohen and Macpherson (n 3).

8 N Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid' (2003) 93 *Annals of the Association of American Geographers* 121.

9 Cohen and Macpherson (n 3).

10 C I Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707.

colonial conquest – practices implemented by force and enshrined in law – established whiteness as a prerequisite to the exercise of enforceable property rights.<sup>11</sup> (This is not to say that all white people owned property, but that whiteness was one prerequisite to being able to own property.) From the mid-1600s onwards, whiteness was established in the US as a protected legal category which gave white subjects a wide range of social benefits, and from which non-white subjects were excluded. And, while slavery and conquest are no longer legal practices,<sup>12</sup> by essentially maintaining the status quo of a socio-economic system entrenched in racial inequality, law continues to recognise the settled expectations of white people that have been built on the benefits and privileges of white supremacy.<sup>13</sup> Harris sees whiteness as a property right which is exercised whenever a white person takes advantage of the privileges accorded to white people simply by virtue of their whiteness.<sup>14</sup> These privileges are vast and complex.<sup>15</sup> Harris suggests affirmative action as a means to undermine the property interest in whiteness because this would aim to effectively diminish the exclusiveness of white privilege.<sup>16</sup> According to this argument, property is both an essential part of the subject (one's race) and an important relationship between subjects (whiteness gives tangible privileges over non-whites).

Other feminist legal theorists have also explored the idea that particular identity characteristics can function as property. Drawing on Harris's work and on feminist understandings of the relational nature of identity, Margaret Davies troubles the distinction between 'having' and 'being' in regards to masculinity.<sup>17</sup> Because having and being are so culturally interwoven, Davies argues, 'any question of "being" must bring with it – at some level – a question of "having"'.<sup>18</sup> Failure to notice the interdependence of these ideas, she argues, may 'lead to the re-stereotyping or re-freezing of the identities which are otherwise subject to transgression'.<sup>19</sup> Making the case for a queer theory of property, Davies is arguing for a conceptual linkage between identity (often understood as fixed and essential) and ownership (often understood as transferable and impermanent). Such linkage might allow for a de-essentialised understanding of both property and identity, and thus for a subversion of the rigid 'sameness and otherness' which essentialised understandings engender. As will be discussed further below, Davina Cooper has questioned the distinction between ownership and membership in her work on property.

What these feminist and critical race scholars have in common is their argument that, as well as offering increased *access to* property, belonging to particular social groups can also *itself constitute* property. This argument is in many ways consistent with the Lockean and Hegelian understanding of property as *an essential part* of the proper subject. But whereas these classical philosophical formulations begin with an assumed separation between the subject and that outside it and understand property as a relation between them, the critical theorists discussed above challenge (either implicitly or explicitly) that assumed separation.

---

11 Harris (n 10) 1718–24.

12 That is, slavery and conquest are no longer legal in their traditional forms. Many would argue that conquest continues in other forms today, particularly in 'postcolonial' settler states, and that certain contemporary racialised labour practices amount to slavery.

13 Harris (n 10) 1731.

14 Ibid 1734.

15 P McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (Wellesly College Working Paper No 189 1989).

16 Harris (n 10) 1785.

17 M Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1998) 8 *Social and Legal Studies* 327.

18 Ibid 343.

19 Ibid.

If having is inextricably linked to being, if whiteness and other identity characteristics are property, then the subject is always already connected to that which is outside it. These understandings of property thus require a shift in focus away from the subject and onto the broader spaces, relations and networks that constitute property. This shift in focus does not imply that the subject becomes irrelevant or disappears from view, but rather that it becomes part of a fuller picture of factors to be considered.

One such factor is belonging, which is in many ways the inverse of exclusion – the subject can exclude the world from her object because that object belongs to her. As well as property ownership, belonging can signify membership of a community, a relationship to place, and/or a behaviour or identity that ‘fits’, or is ‘at home’.<sup>20</sup> Nira Yuval-Davis describes belonging as being about emotional attachment, about feeling safe and/or ‘at home’.<sup>21</sup> Emily Grabham writes that belonging ‘refers to the location of an object or person in its “proper place” (“the book belongs on the shelf over there” or “you belong in the UK”)’.<sup>22</sup> Belonging thus connotes a sense of propriety, of the proper. To belong is to fit smoothly, or without trouble, into either a conceptual category or a material position. It is necessarily a relational term; an object/subject/practice/part that belongs cannot exist in a vacuum, it must belong to or with something else.

Cooper used belonging as a way to understand the overlap between property as ownership and property as membership in her study of property practices at Summerhill School, an alternative school where children choose whether or not to attend class and where rule-making and dispute resolution involve the school body as a whole (both teachers and children).<sup>23</sup> Cooper found that property practices at Summerhill were constituted by a legally pluralist regime of institutional recognition,<sup>24</sup> with understandings and performances of property being shaped by official state practices, a range of formal and informal school acts. Cooper describes property practices at Summerhill as involving a number of intersecting dimensions, of which belonging is the most important.<sup>25</sup> Cooper considers belonging in two ways: firstly, the relationship whereby an object, space, or rights over it belong to a subject (‘subject–object’); and, secondly, the constitutive relationship of part to whole whereby attributes, qualities or characteristics belong to a thing or a subject (‘part–whole’).<sup>26</sup> Both types of belonging implicate social relations and networks that extend beyond the immediate subject and object of property; property is instead understood as ‘a set of networked relations in which the subject is embedded’.<sup>27</sup>

#### ‘Holding-up’ and different kinds of property

Cooper’s analysis of property is spatial in that it focuses on the networks in which the subject is embedded rather than primarily on the subject herself. Networks are necessarily spatial; as particular arrangements of intersecting forces or things that necessarily extend beyond the subject, different networks (whether they be social, conceptual or physical)

20 D Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press 1998).

21 N Yuval-Davis, K Kannabiran and U M Vieten ‘Introduction’ in N Yuval-Davis, K Kannabiran and U M Vieten (eds), *The Situated Politics of Belonging* (Sage Publications 2006).

22 E Grabham, “‘Flagging’ the Skin: Corporeal Nationalism and the Properties of Belonging’ (2009) 15 *Body and Society* 63.

23 D Cooper, ‘Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property’ (2007) 32 *Law and Social Inquiry* 625.

24 *Ibid.*

25 *Ibid* 628.

26 *Ibid* 629.

27 *Ibid* 636.

constitute the reference systems through which we locate ourselves in the world. Geographer Doreen Massey argues that instead of thinking of places as areas with boundaries around, it is more useful and accurate to imagine them as articulated moments in *networks* of social relations and understandings<sup>28</sup> (my emphasis). In order to constitute property, I have argued elsewhere that the set of networked relations to which Cooper refers must not only include one of belonging between either subject and object or part and whole, but also be structured in such a way that that relation of belonging is conceptually, socially and physically supported or 'held up'.<sup>29</sup> That is, the set of networked relations that Cooper describes must form a space that holds up the relation of belonging.

As has been argued by Massey and other geographers, all spaces are produced by a multiplicity of different, dynamic forces – space is physical, social, conceptual and, importantly, active. Put simply, relations of belonging are held up when the wider social processes, structures and networks that constitute space give force to those relations. By this I mean that they are recognised, accepted and supported in ways that have a range of effects and consequences. For example, heterosexual relations tend to be held up by space in a multitude of ways that homosexual relations are not (through institutional means such as marriage and parenting rights, through social validation such as accepting, supporting and celebrating couples who hold hands or kiss in public, through positive media representation, through the availability of appropriate sex education and safe sex materials, etc.). This holding up by space of a relation of belonging is more than the act of state recognition, which is associated with liberal identity politics, and which has been specifically critiqued for its predetermination of the bounds of the propertied subject, particularly in colonial contexts.<sup>30</sup> While recognition, as Brenna Bhandar argues, 'fails to escape the violence inherent in colonial spatial and temporal orders',<sup>31</sup> the concept of holding-up is directly concerned with these orders.

The understanding of belonging as between part and whole (the second in which Cooper considers belonging) is something of a departure from traditional and legal understandings of property, but resonates strongly with Harris's analysis of whiteness as property. Using the analysis of part-whole belonging, whiteness can be understood as property because the property holder is embedded in certain social relations and networks of belonging. A white person can enjoy the privileges of whiteness because he or she belongs to the various social relations and networks that constitute whiteness. As sociologists such as Ruth Frankenberg have shown, those relations and networks are complex and far-reaching. Whiteness, like all identity categories, is socially constructed through historically specific fusions of political, economic and other forces.<sup>32</sup> Whiteness in turn 'constructs daily practices and worldviews in complex relations with material life'.<sup>33</sup> That is, whiteness is productive of subjectivities. So while whiteness can be understood as belonging to the white subject as Harris argues (whiteness as property in the sense of subject-object belonging), the white subject also belongs to the complex relations and networks that form whiteness (whiteness as property in the sense of part-whole belonging). This analysis suggests that, in order to understand the varied social powers of property,

28 D Massey 'Power-geometry and a Progressive Sense of Place' in B Curtis, T Putnam, G Robertson, L Tickner and J Bird (eds), *Mapping the Futures: Local Cultures, Global Change* (Routledge 1993).

29 Keenan (n 2).

30 B Bhandar, 'Plasticity and Post-Colonial Recognition: "Owning, Knowing and Being"' (2011) 22 *Law and Critique* 227.

31 *Ibid* 228.

32 R Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (Routledge 1993).

33 *Ibid*.

both subject–object and part–whole belonging must be considered. In policy terms, this analysis means that, if the normative goal is to challenge the way whiteness (or another identity category) operates as a structure of exploitation and oppression, then it is the relations and networks that form whiteness which must be changed rather than the individual subjects who belong to those relations and networks.

#### Law's appropriations of subversive identities

What does this understanding of property mean for law? On one level, understanding property as a relationship of belonging held up by space demonstrates that property is not defined by law alone. Cooper's study showed that property at Summerhill was constituted through a range of social norms, rules and relations rather than through law alone. On another level, understanding property as a relationship of belonging held up by space also reveals the spatiality of the state co-optation of identity politics, which I will argue below can be usefully understood as law's appropriations of subversive identities. Both insights offer a way of understanding the political effects of law that is different from the insights of socio-legal work that takes individual legal subjects – or the similarly grouped subjects of liberal identity politics – as the focus of its analysis. Widening the lens of analysis out from the subject and onto the spaces of belonging in which the subject exists (and, as will be argued below, through which the subject is constituted) brings into view physical, social and conceptual effects of law that tend to be overlooked in socio-legal approaches and in other analyses that focus on the subject (or on groups of subjects). Bringing this understanding of property to law shows how politics of co-optation are not just about the co-optation of individual subjects or groups, but also about shifting the space in which those subjects or groups were able to emerge as a potentially subversive force.

There is now an expansive critical literature on the ways in which the state and other institutions have co-opted different kinds of identity politics. Identity politics is a broad term that encompasses a range of causes based on the shared experiences of injustice of members of particular social groups.<sup>34</sup> Identity politics were essential to the civil rights movement in the United States, to the attainment of equal legal rights for women, and to many other hugely significant social changes over the past century. In recent decades, however, there has been increasing criticism of identity politics and a decided theoretical shift away from them.<sup>35</sup> One of the main critiques is that identity categories, such as 'woman', 'black' and 'gay', are social constructs that do not have natural or universal meanings. To take the first example, Simone de Beauvoir's now classic assertion that 'one is not born, but rather becomes, a woman'<sup>36</sup> has been definitively confirmed by successive generations of feminist writers who have debunked ideas that women can be defined through their genitalia, appearance or sexual preference, and explored the multiple ways in which women (and men) learn to perform their genders.<sup>37</sup> It is thus unclear who is inside and outside any particular category, and those who do fall inside the categories will not necessarily have a strong base of shared experience.<sup>38</sup> There has also been critique of the scale of change that identity politics is capable of producing. The elements of identity politics that have gained most traction in mainstream political praxis are liberal campaigns

34 C Heyes 'Identity Politics' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Plato 2009).

35 M Lloyd, *Beyond Identity Politics: Feminism, Power and Politics* (Sage Publications 2005); J Anner, *Beyond Identity Politics: Emerging Social Justice Movements in Communities of Color* (South End Press 1996).

36 S de Beauvoir, *The Second Sex* (Alfred A Knopf 2010) 267.

37 See, for example, J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990); B Hooks, *Ain't I a Woman? Black Women and Feminism* (Pluto Press 1990).

38 E Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990); Butler (n 37); Hooks (n 37).

that have as their goal the improvement of conditions and the extension of rights for that particular identity category, rather than the broader goal of shifting the very systems that produce identity categories and their differential conditions. As Wendy Brown argues:

politicised identities generated out of liberal, disciplinary societies, insofar as they are premised on exclusion from a universal ideal, require that ideal as well as their exclusion from it, for their own perpetuity as identities.<sup>39</sup>

That is, liberal identity politics aims at inclusion within a system rather than at systemic change.

Related to, and in some cases as part of this critique of identity politics, is a specific critique of law's co-optation of such politics. There have, for example, been critiques of race politics in the US in the post-civil-rights era, pointing to the de-radicalisation of the Black movement and arguing that the achievement of formal legal equality gives the illusion of substantive equality. The reality of substantive inequality along the lines of race persists and is covered up and thus to an extent protected by law.<sup>40</sup> The recognition of indigenous land rights in the courts of settler colonial states such as Australia and Canada has also been critiqued for its ultimate re-inscription of colonial power over indigenous difference and resistance.<sup>41</sup> The passage of hate crime laws to 'protect' women, sexual and racial minorities has come under considerable critique for its reliance on and bolstering of the deeply racist and sexist prison industrial complex.<sup>42</sup> And even relatively conservative feminist voices have pointed out that 'gender mainstreaming' in international law has allowed claims to equality to be tamed and de-radicalised.<sup>43</sup> By including and ostensibly protecting particular articulated interests of a range of marginalised identity groups, law improves the situations of only the most privileged of such groups while ignoring the most oppressed and preserving the overarching systems that produce such oppression and marginalisation.

#### Thinking spatially: co-optation as appropriation

From a spatial perspective, law's co-optation of identity politics can be understood as occurring in part due to an implicit construction of space as static, closed and singular. This implicit understanding is prevalent in Western philosophy<sup>44</sup> and is shared by law and by the elements of identity politics that come to be co-opted. Legal geographers have consistently critiqued law for its assumption that space is the static, neutral backdrop to legal action.<sup>45</sup> Similarly, liberal identity politics (which tend to be the elements of identity politics that are co-opted by law) have been critiqued for being 'single axis',<sup>46</sup> disconnected from grassroots struggles and lacking in genuine intersectionality (that is, lacking in an understanding of the

39 W Brown, 'Wounded Attachments' (1993) 21 *Political Theory* 390.

40 R C Smith, *We Have No Leaders: African Americans in the Post-civil Rights Era* (State University of New York Press 1996).

41 I Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253; S Motha, 'Mabo: Encountering the Epistemic Limit of the Recognition of Difference' (1998) 7 *Griffith Law Review* 79; F L Korsmo, 'Claiming Memory in British Columbia: Aboriginal Rights and the State' (1996) 20 *American Indian Culture and Research Journal* 71.

42 D Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press 2011); A Smith, 'Unmasking the State: Racial/Gender Terror and Hate Crimes' (2007) 26 *Australian Feminist Law Journal* 47–57.

43 H Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1.

44 D Massey, *For Space* (Sage Publications 2006).

45 N K Blomley and J C Bakan, 'Spacing Out: Towards a Critical Geography of Law' (1992) 30 *Osgoode Hall Law Journal* 661.

46 K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139.

complex ways in which different systems of oppression, such as class, race and gender, intersect to form the conditions of people's lives).<sup>47</sup>

One effect of this construction of space as static, closed and singular is that time is envisaged as an interconnected, homogeneous configuration of movement from one moment to the next – time as a singular universal trajectory of becoming, which operates over smooth, static, ideologically closed space.<sup>48</sup> These understandings of time and space in turn support a view of history and 'development' as an inevitable march towards a common goal. As Massey puts it, 'coexisting heterogeneity is rendered as (reduced to) place in the historical queue', and difference is neatly packed into bounded spaces and dismissed to the past, which is implicitly understood as singular – as *our* past.<sup>49</sup> Thus migrants from 'developing' countries are seen as arriving not only from the peripheries, but also from the past.<sup>50</sup> This understanding of space and time similarly supports an understanding of development and globalisation as an inevitable temporal sequence – poor nation states and those in early stages of capitalism are understood as 'catching up' rather than as being involved in current practices and relations of increasing inequality and oppression.<sup>51</sup> Single-axis identity politics also tend to construct identity groups as needing to catch up with the majority, that is, to be included in a political and legal space that is 'advanced' and 'modern'.<sup>52</sup>

Relegating spatial difference to temporal sequence means constructing as inevitable both the present and the future for those who are 'behind' in the queue, because the singular, linear temporal trajectory is already determined. Similarly, relegating identity difference to a need for inclusion into a pre-existing political space means constructing as inevitable the dominance of that pre-existing space. Understanding space as active and multiplicitous rather than static and singular enables an analysis of law's co-optation of subversive identities that escapes the inevitability of the dominance of law's space. Such co-optations are not just about bringing individual subjects or groups inside a dominant space, but also about shifting the space in which such individuals and groups are embedded. These co-optations are thus not just a matter of bringing *outsiders* in, but about reshaping and reducing *the outside*. Such reshaping and reduction affects what relations of belonging will be held up in the future. These processes are not simply co-optations of groups and individuals but appropriations of subversive identities and corresponding reshapings of the spaces that once held them up. Yet, because space is active and multiplicitous, such appropriations are never fixed or complete; reshaping is an ongoing process, as is resistance to law's appropriations. I will now discuss two instances of law's appropriation of subversive identities through the shaping of spaces of belonging.

47 U Erel, J Haritaworn, E Gutierrez Rodriguez and Christian Klesse, 'On the Depoliticisation of Intersectionality Talk: Conceptualising Multiple Oppressions in Critical Sexuality Studies' in A Kuntsman and E Miyake (eds), *Out of Place: Interrogating Silences in Queerness/Racality* (Raw Nerve Books 2008).

48 Massey (n 44).

49 Ibid 69.

50 E Darian-Smith, 'Rabies Rides the Fast Train: Transnational Interactions in Post-colonial Times' in D Delaney, R T Ford and N Blomley (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell Publishing 2001).

51 Massey (n 44) 82.

52 See I Grewal, *Transnational America: Feminisms, Diasporas, Neoliberalisms* (Duke University Press 2005); S Long, 'Unbearable Witness: How Western Activists (Mis)recognize Sexuality in Iran' (2009) 15 Contemporary Politics 119.

## Refugee law's appropriation of 'the subversive queer woman'

The picture that Western governments, media and liberal non-governmental organisations generally paint of refugee law – particularly in relation to claims made on the basis of sexuality persecution – is one of racialised gays and lesbians fleeing vaguely defined but implicitly demonised 'repressive regimes' to find sanctuary in tolerant, liberal Western states that open their borders as a charitable act of 'human rights protection'.<sup>53</sup> Such representations exist in part because of the very structure of refugee law, which demands a unitary, discrete subject who can travel outside her home country, file a claim for asylum and prove that it would be highly dangerous to go back. The Convention Relating to the Status of Refugees 1951<sup>54</sup> was drawn up in the post-Second World War era as part of a suite of new international legal instruments based on liberal notions of human rights and equality.<sup>55</sup> State signatories to the Convention are obliged to provide protection for individual subjects who have successfully fled their home state and are unable or unwilling to return due to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (Article 1 as amended by the 1967 Protocol). It is now an accepted tenet of refugee law in particular states including Australia, Britain and Canada that sexual orientation and gender identity can constitute a 'particular social group' within the meaning of the Convention<sup>56</sup> and that, accordingly, individuals who leave their home countries because they have a well-founded fear of sexuality-based persecution should not be forced to return there.<sup>57</sup>

While there has been research published on the legal position of queer asylum seekers and the particular difficulties they face in the refugee determination process,<sup>58</sup> and on the

---

53 B Keenan, 'Milestone Victory for Gay Refugees' *The Guardian* (London, 7 July 2010) <[www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/supreme-court-gay-refugees-right-to-asylum](http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/supreme-court-gay-refugees-right-to-asylum)> accessed 5 December 2011; N Miles, *No Going Back: Lesbian and Gay People and the Asylum System* (Stonewall 2010).

54 189 UNTS 150 (entered into force 22 April 1954).

55 J Fitzpatrick, 'Revitalizing the Refugee Convention' (1996) 9 *Harvard Human Rights Journal* 229, 231.

56 Article 1A (2) of the Convention defines a refugee as any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it'; Article 33(1) states: 'No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

57 In the Australian context this was first judicially confirmed in *Applicant A v MIEA* (1997) 190 CLR 225; in the Canadian context in *Ward v Attorney-General (Canada)* (1993) 2 SCR 689; in the United Kingdom in *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal, ex p Shah, R v Immigration Appeal Tribunal, ex p Shah* [1999] UKHL 20, [1999] 2 AC 629; and the United Nations High Commissioner for Refugees has had the policy that 'persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognised as refugees' since 1996; see K L Walker, 'Sexuality and Refugee Status in Australia' (2000) 12(2) *International Journal of Refugee Law* 175.

58 For example, Walker (n 57); C F Stychin, "'A Stranger to its Laws": Sovereign Bodies, Global Sexualities, and Transnational Citizens' (2000) 27(4) *Journal of Law and Society* 601; D McGhee, 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vacui' (2000) 6(1) *Body and Society* 29; J Millbank, 'Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation' (2002–2003) 1(3) *Seattle Journal of Social Justice* 725; J Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003' (2005) 14(1) *Social and Legal Studies* 115.

problems facing women claiming refugee status,<sup>59</sup> this research has remained largely within the framework of single-axis identity and recognition rather than positing a broader critique of the system itself. Despite the abolition of the discretion requirement, refugee law continues to require the performance of a very particular sexuality for asylum to be granted. As will be discussed in this section, that sexuality is overwhelmingly based on Western commercial understandings of gay men. Building on the conceptual discussion above, this section shows how refugee law can be understood as appropriating the potentially subversive property of the queer woman asylum seeker. The asylum seeker's property in this context is her identity, her part-whole belonging. She is persecuted in her home state because of her queer sexuality and non-normative gender performance. In travelling to the receiving state, she has the potential to produce subversive property there – by asserting that her queer sexuality and non-normative gender performance should be held up in the receiving state. However, the asylum seeker must perform her identity in a very particular way. The same properties that made her subversive, disruptive, even inflammatory in her home state must be shown to be properties that make her a worthy citizen in the receiving state. In demanding proof of a particular lesbian identity legible to a Western court, the receiving state requires the asylum seeker to shift the way she performs her identity, while positioning itself as a haven of salvation and generosity. Many refugee lobby groups also adopt these saviour discourses, bolstering neocolonial ideas about sending and receiving states.<sup>60</sup> Through this legal process the receiving state appropriates the asylum seeker's potentially subversive property and uses it as means by which to further develop its own space of belonging.

For an applicant to prove her sexuality, she must give details such as when she first thought she was a lesbian, all of the intimate relationships and feelings she has had with and for other women, how she managed to hide those feelings and relationships and what happened to her as a consequence if she did not manage to do so, along with anything else that the decision maker hearing the case thinks is relevant to authenticating her lesbian identity. Although queer asylum seekers still assert agency in the courtroom, acting tactically in the face of overwhelming legal formalism,<sup>61</sup> refugee law ultimately requires 'real lesbians' to either be participants in the pink economy and publicly perform their sexuality like gay men, or alternatively to be caring maternal women whose sexuality is an almost invisible part of their identity.<sup>62</sup> For example, a Mongolian woman seeking asylum in Australia on the basis of sexuality persecution was asked by the Refugee Review Tribunal to give names and addresses of 'gay locations' in both Mongolia and Australia, and to disclose whether she had yet acquired a local woman lover in Sydney.<sup>63</sup> The tribunal then asserted that conditions for gays and lesbians in Mongolia had been improving in recent years, citing as authority the *Spartacus Guide*, a commercial travel guide aimed at Western gay men

59 For example, J Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1(4) *International Journal of Refugee Law* 518; A B Johnsson, 'The International Protection of Women Refugees: A Summary of Principal Problems and Issues' (1989) 1(2) *International Journal of Refugee Law* 221.

60 P Tatchell, 'Gay Asylum Reform Proposals' (Gays Without Borders 2008) <<http://gayswithoutborders.wordpress.com/peter-tatchell-gay-asylum-reform-proposals/>> accessed 20 September 2011; 'Prossy Kakooza Must Stay!' (Facebook) <[www.facebook.com/group.php?gid=15442634010](http://www.facebook.com/group.php?gid=15442634010)> accessed 10 September 2011.

61 T A M Johnson, 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings' (2011) 20 *Social and Legal Studies* 57.

62 S Keenan, 'Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject' in Sharron Fitzgerald (ed), *Regulating the International Movement of Women: From Protection to Control* (Routledge 2011).

63 *N04/48953* [2005] RRTA 363.

planning holidays abroad. In a Canadian case, a Russian woman seeking asylum tried to use receipts from the Toronto gay village to prove her lesbian sexuality.<sup>64</sup> The Immigration and Refugee Board took issue with the fact that only some of the receipts were for transactions paid by debit and or credit card, and that only some 'had an air-miles card number on them'. The board found that her inability to show with certainty that the payments were made directly by her meant that she did not make any of the payments herself, and that, 'on a balance of probabilities', she was not really a lesbian.

These cases demonstrate that women claiming asylum on the basis of sexuality persecution must prove that they fit into a particular Western lesbian identity category that is constructed as universal. In terms of part-whole belonging, refugee law produces a lesbianism 'whole' of which applicants must prove they are a part. In so doing it also (re)produces a space of belonging that holds up one particular way of being a queer woman. Apart from the obvious problems with assuming that asylum seekers will be financially able to make 'gay purchases', practically able to name 'gay locations', and culturally able to make social connections as soon as they arrive, the requirement that these women perform their sexuality in this commercial, public way also ignores the reality that the asylum-seeking subject has by definition come from a space where her queer sexuality was not held up, indeed, where it was unsafe for her to publicly show her sexuality. Refugee law's requirement of the performance of this particular lesbian sexuality not only accounts, to some extent, for the relative invisibility of women (compared to men) making claims for asylum on the basis of sexuality,<sup>65</sup> but also dictates and thereby reproduces a mode of being lesbian that fits with state interests in consumerist economics and easily definable and visible minority communities. Overt queer sexuality, the very aspect of identity that made the subject subversive and put her at risk in her home state, is made into a normative property defined by courts using commercial, masculine standards. Such cases also demonstrate the overlap between property as part-whole and subject-object belonging, for, to have her (part-whole) lesbian identity held up, the applicant must own particular objects and move in or 'master' social and physical space in a particular way (subject-object belonging). In requiring the asylum seeker to behave and consume in particular ways, refugee law shifts the asylum seeker's queer sexuality from being a property that unsettled and was potentially subversive of the (sending) state to one that bolsters the broad agenda of the (receiving) state.

By requiring queer women asylum seekers to perform this particular version of lesbian identity, refugee law takes what was the subversive property of the asylum seeker and reorients it such that it becomes part of the property of the receiving state. While the asylum seeker's sexuality unsettled the space from which she came – unsettled that space to the point where she could not safely remain there – refugee law requires her to perform her sexuality in a way that reinforces the hegemonic space of belonging of the receiving state. While this performance fits with and strengthens the growing space of 'homonationalist' belonging,<sup>66</sup> the asylum seeker can be left isolated within refugee communities.<sup>67</sup> The space of belonging produced by court decisions on asylum claims made by women on the basis of sexuality persecution is one in which the nation state is solidly shaped with clearly delineated physical boundaries. Refugee law proceeds on the basis that a subject either belongs or does not, and that belonging is determined by law alone. Indeed, the lesbian

64 *X(Re)* (25 March 2008).

65 This has been noted elsewhere: J Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 *Georgetown Immigration Law Journal*

66 J K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007).

67 A de Jong, *Lesbian, Gay, Bisexual and Transgender (LGBT) Refugees and Asylum Seekers* (The Information Centre about Asylum and Refugees in the UK September 2003).

subject produced by refugee law functions in a similar way to the figure of the woman in some human rights discourses, as has been critiqued by Inderpal Grewal and others<sup>68</sup> – as objects of charity capable of being saved from their own state's repressive regimes and converted to sexual citizenship, which can be done through consumerism. Refugee law appropriates the subversive property of the lesbian asylum seeker and produces a space that holds up particular racialised, gendered and sexualised identities.

One circumstance that is never taken into consideration by receiving courts and tribunals is the effect that their decision about the particular applicant before them will have on the space she leaves behind. Of course, the very structure of refugee law prevents this type of consideration from being taken into account – the Refugee Convention is concerned with individual 'human beings' enjoying 'fundamental rights and freedoms', and with 'the problem of refugees' not becoming 'a cause of tension between states'.<sup>69</sup> It is not concerned with the complex forces and power structures that have caused the sending state to be a dangerous place for queer women, or with the future of those 'outside' spaces. Yet, the operation of refugee law has broad spatial effects – by enabling the permanent departure of dissident queer subjects on the condition that those subjects present their home states as uniformly and impossibly homophobic, refugee law leaves undisturbed and even bolstered, the gendered and heteronormative networks of belonging that make that space unlivable for queer women. The important work of local groups' resistance to homophobia and sexism must necessarily be deemed inadequate by the courts of the receiving state in order to construct the sending state as a uniformly and impossibly unlivable space for queer women. Yet, in reality, such groups continue to work to produce spaces that do hold up queer relations of belonging, with such spaces often being strategically out of the view and reach of law, and outside the understanding of Western 'experts'.<sup>70</sup> Although a positive refugee decision makes a significant and welcome difference in the lives of the individual applicant, it leaves unquestioned the spaces of belonging that cause queer women to move in the first place. Refugee law appropriates the subversive property of the lesbian asylum seeker and produces spaces that hold up particular racialised, gendered and sexualised identities.

#### Property law's appropriation of 'the subversive aboriginal person'

Moving now from a socio-legal area generally framed in terms of international migration and mobility to one generally framed in terms of domestic relations and stasis, this section examines law's appropriation of subversive identities in the context of indigenous land rights. It is already fairly well established that the law of settler colonial states facilitates legitimises and relies upon the appropriation of indigenous land and mineral resources.<sup>71</sup> Patrick Wolfe and others argue that settler colonialism has as its goal the elimination of the native, and this argument certainly holds weight when considered in light of the ongoing policies of punishment, control and removal of indigenous people that are prevalent in settler colonial states.<sup>72</sup> With the advent of the non-profit industrial complex and its focus

68 Grewal (n 52).

69 Preamble.

70 See, for example, the diverse work in S Ekin and H Abbas, *Queer African Reader* (Fahamu Books and Pambazuka Press 2012).

71 I Watson, 'Illusionists and Hunters: Being Aboriginal in this Occupied Space' (2005) 22 Australian Feminist Law Journal 15; A Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3 borderlands eJournal; C Notzke, *Aboriginal Peoples and Natural Resources in Canada* (Captus University Publications 1994).

72 P Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387.

An human rights,<sup>73</sup> along with UN concern for the treatment of indigenous peoples,<sup>74</sup> state laws aimed at the actual physical or cultural genocide of indigenous peoples are untenable. However, focusing on the Australian government's recent legislation enabling the compulsory acquisition of leases of aboriginal land in the Northern Territory, I argue in this section that law instead functions to appropriate subversive aboriginal identities. This process includes the appropriation of aboriginal culture, but extends further. Aboriginal identities are appropriated through the reshaping of aboriginal spaces of belonging. What is at stake in these leases is more than the land over which the leases are sought – it is also the social and cultural characteristics of the communities that live on the land. The resistance to the leases and the insistent claim of aboriginal communities that 'we are not moving' goes beyond an insistence on staying in the same physical place and extends to an insistence that that place remains a space of aboriginal belonging.

The Northern Territory 'intervention' is the name used to describe the set of policies introduced by the Australian Commonwealth government in August 2007. The intervention was primarily enabled by the NTNERA. The Act followed a report by the Northern Territory government entitled *Little Children are Sacred*, which contained allegations of widespread child sex abuse in remote aboriginal communities in the territory.<sup>75</sup> The Northern Territory is commonly regarded as the 'most aboriginal' area of Australia because it has the highest aboriginal proportion of its population of any Australian jurisdiction (over 30 per cent compared to the next highest 3.8 per cent),<sup>76</sup> the highest number of native title land claims,<sup>77</sup> and is the site of the first and most significant aboriginal land rights legislation in Australia (around 45 per cent of the area of the Northern Territory is now aboriginal – owned under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (Land Rights Act), which is higher than in any other jurisdiction).<sup>78</sup> Unlike the rest of Australia, the remote aboriginal communities of the Northern Territory are areas where white Australians may feel out of place.

The Northern Territory is one of two mainland Australian territories, the other being the small area around the federal capital of Canberra, and, although the territories are now self-governing, they are still subject to having their laws overridden by the Commonwealth government – a level of intrusion from which the Australian states are immune. This Commonwealth power to override territory laws is enabled by s 122 of the Australian Constitution. Drawing on this power, the Commonwealth government announced on 21 June 2007 that the levels of child sex abuse in the Northern Territory's aboriginal communities had become a national emergency to which the Northern Territory government had failed to adequately respond. As such, the Commonwealth government was to immediately pass emergency response legislation.

73 A Smith, 'Introduction: The Revolution Will not be Funded' in *Incite! Women of Colour Against Violence* (ed), *The Revolution Will not be Funded: Beyond the Non-Profit Industrial Complex* (South End Press 2007).

74 J Anaya, *Observations on the Northern Territory Emergency Response in Australia* (United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People 2010).

75 P Anderson and R Wild, *Little Children are Sacred: Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government 2007).

76 *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (Australian Human Rights Commission 2008) <[www.hreoc.gov.au/social\\_justice/statistics/index.html#Heading34](http://www.hreoc.gov.au/social_justice/statistics/index.html#Heading34)> accessed 15 February 2010.

77 'Northern Territory' (National Native Title Tribunal 2010) <[www.nntt.gov.au/Native-Title-In-Australia/Pages/Northern-Territory.aspx](http://www.nntt.gov.au/Native-Title-In-Australia/Pages/Northern-Territory.aspx)> accessed 15 February 2010.

78 B A West and F T Murphy, *A Brief History of Australia* (Infobase Publishing 2010) 85.

The NTNERA introduced a range of highly paternalistic measures to large areas of the Northern Territory. These measures apply to 'prescribed areas' of the Northern Territory, which are defined in the Act as all aboriginal land,<sup>79</sup> as well as any other area declared by the relevant minister, with the exact co-ordinates for the prescribed areas listed in a schedule to the Act.<sup>80</sup> All prescribed areas are those of aboriginal communities.<sup>81</sup> The NTNERA measures applicable in the prescribed areas include: a total ban on the possession and consumption of alcohol;<sup>82</sup> compulsory income management for all welfare recipients;<sup>83</sup> compulsory installation of anti-pornography filters on all public computers as well as obligatory record-keeping of all computer users;<sup>84</sup> cutting back of the permit system for entry onto aboriginal land;<sup>85</sup> federal government takeover of local services and community stores as well as a ministerial power to suspend all elected councillors;<sup>86</sup> a ban on Northern Territory courts from taking customary law into account when dealing with bail applications and sentencing;<sup>87</sup> and compulsory rent-free five-year leases of aboriginal land to the federal government.<sup>88</sup> The NTNERA made itself exempt from Australia's Racial Discrimination Act 1975 (Cth).<sup>89</sup>

In terms of aboriginal resistance to the intervention, the compulsory leases were the focus of anti-intervention campaigns, at least in the legal arena. Notably, traditional owner Reggie Wurridjal brought a High Court challenge against the Commonwealth government, claiming that the lease of the Maningrida land on which he lived amounted to an unjust compulsory acquisition of property, contrary to s 51(xxxi) of the Constitution. Along with other aboriginal elders, Wurridjal was recognised under the Land Rights Act as a traditional owner of the land in question. Like all land under the Act, the fee simple title is held by an Aboriginal Land Trust for the benefit of the relevant aboriginal people. The township of Maningrida was established as an instrument of government policy in 1957.<sup>90</sup> While many aboriginal people have moved to the township of Maningrida itself, many also continue to live in outstations on the region, of which there are over 30.<sup>91</sup> The Bawinanga Aboriginal Corporation operates a large and successful aboriginal employment scheme whereby those living on the Maningrida outstations are paid to maintain them.<sup>92</sup> Due to the relatively short history of white settlement and the relatively well-resourced support of outstation living, aboriginal residents' relationship with land in the Maningrida region is stronger than in other parts of Australia and is also robustly defended in the face of encroaching white governance. In a long and complex decision, the High Court found that the compulsory lease of the Maningrida area did *not* effect any acquisition of property from Wurridjal

79 That is, land held on trust under the Land Rights Act.

80 NTNERA, s 4.

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

82 NTNERA, s 12.

83 *Ibid* s 126.

84 *Ibid* pt 3.

85 Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007, (Cth) sch 4.

86 NTNERA, pt 5, division 4; pt 7.

87 *Ibid* ss 90, 91.

88 *Ibid* pt 4, division 1.

89 *Ibid* s 132.

90 J C Altman, *Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights* (CAEPR Australian National University Working Paper No 46 2008) 1.

91 *Ibid*.

92 'History' (Bawinanga Aboriginal Corporation, Darwin 2007) <[www.bawinanga.com.au/meetbac/history.htm](http://www.bawinanga.com.au/meetbac/history.htm)> accessed 1 March 2011.

himself, and that, although the leases did acquire property from the Land Trust, that acquisition was on just terms.<sup>93</sup>

From a property law perspective, the leases were unusual in many respects but notably in that, although they granted the Commonwealth 'exclusive possession and quiet enjoyment of the land while the lease is in force',<sup>94</sup> the Commonwealth never sought to enforce this right. Government officials made a point of publicly insisting that the leases did not amount to a land grab.<sup>95</sup> Indeed, then Prime Minister John Howard said, in reaction to land grab allegations, that 'we're offering a guarantee that we're not taking anything from anybody. We're trying to give things back.'<sup>96</sup> The question then is what was the government taking, or at least trying to take, through these compulsory leases. The government asserted that the leases 'help to expand opportunities for business investment such as farming, tourism and retail businesses and home ownership' and 'offer opportunity for economic development and better housing and infrastructure' for the benefit of the existing aboriginal communities.<sup>97</sup> In terms of better housing and infrastructure, part of the government's argument for why it needed leases of the land was that having long leases meant that it would not have to go through bureaucratic approval processes in order to make repairs on houses and impose maintenance conditions on individual renters.<sup>98</sup> The minister stated that the leases would also allow the government to promote private home-ownership in aboriginal communities rather than the communal title under which almost all aboriginal land is currently held.<sup>99</sup>

Anti-intervention campaigners pointed out that, contrary to the Commonwealth's stated objectives, housing for aboriginal people in the prescribed areas did not improve under the intervention leases, and any economic development has been negligible.<sup>100</sup> However, while activists were understandably sceptical that the government control of housing enabled by the leases would come to mean 'higher rents, more restrictive tenancy conditions and easier eviction',<sup>101</sup> there was no clear evidence that the Commonwealth used its leases to directly push residents out of their homes.<sup>102</sup> The Commonwealth government's rationale for the five-year leases shifted over time and was generally ambiguous.<sup>103</sup> Paddy Gibson argues that the leases were an attack on the gains won in the aboriginal land rights struggle, namely

---

93 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2.

94 NTNERA, s 35(1).

95 'QC Rejects NT Land Grab Fears' (*ABC News*, Sydney 17 July 2007) <[www.abc.net.au/news/2007-07-11/qc-rejects-nt-land-grab-fears/96634](http://www.abc.net.au/news/2007-07-11/qc-rejects-nt-land-grab-fears/96634)> accessed 3 December 2011.

96 P Karvelas and S Parnell, 'Communal Land up for Grabs', *The Australian* (Sydney 30 June 2007) <[www.theaustralian.com.au/news/nation/communal-land-up-for-grabs/story-e6frg6nf-1111113856963](http://www.theaustralian.com.au/news/nation/communal-land-up-for-grabs/story-e6frg6nf-1111113856963)> accessed 24 August 2011.

97 J Macklin, 'Stronger Futures in the Northern Territory' (Australian Government Discussion Paper June 2011) 13 and 22.

98 Karvelas and Parnell (n 96).

99 *Ibid.* The Commonwealth government continues to have a policy of encouraging private home-ownership in aboriginal communities, although how that ownership is linked to government leases is less clear in more recent reports: Macklin (n 97).

100 'Rollback the Intervention' (Intervention Rollback Action Group, Alice Springs 2009) <http://rollbacktheintervention.wordpress.com/> accessed 18 August 2012; 'Intervention Delivering "Empty Shipping Containers, No Houses"' (*ABC News*, Sydney 7 September 2008) <[www.abc.net.au/news/2008-07-09/intervention-delivering-empty-shipping-containers/2498780](http://www.abc.net.au/news/2008-07-09/intervention-delivering-empty-shipping-containers/2498780)> accessed 23 August 2011.

101 P Gibson, *Return to the Ration Days* (Jumbunna Discussion Paper 2009).

102 Existing rights and interests in the land are preserved by s 34 of the NTNERA, but s 37 allows the minister to terminate preserved rights.

103 S Brennan, '*Wurridjal v The Commonwealth*: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 *Melbourne University Law Review* 957, 963.

'aboriginal control over their own lives'.<sup>104</sup> However, that control had already been taken on a far more direct and dramatic level with other provisions in the intervention such as the total ban on alcohol and compulsory income management. The fact that the leases seemed from the start to be mainly symbolic (because the government made clear its lack of intention to take up its right to exclusive possession) and yet have been the most contested aspect of the intervention suggests that the government was still 'taking' something; that there was a materiality to the 'symbolic' property being acquired.

The property being acquired or 'taken' through the compulsory leases was aboriginal, not just in terms of the type of legal title the land was held under, the identity of the claimants or the majority racial group living on the land, but also in terms of the broader, contested space of belonging of post-contact Australia. What was being appropriated through the intervention leases was not so much the right to exclusive possession of the land in the prescribed areas, as it was the holding up of aboriginal identities in those spaces.

A group of aboriginal activists called the Prescribed Area Peoples' Alliance released a statement following a meeting in June 2009 stating, that the intervention measures 'are pushing us into a corner. That will mean they will take away everything we belong to . . . If people are forced to leave off homelands they will lose everything, their identity.'<sup>105</sup> This reference to aboriginal identity, and to 'everything we belong to' (emphasis added) demonstrates the part-whole belonging that is at stake here – although the lease in question in *Wurridjal v The Commonwealth* clearly involved a change in which subject the object belonged to, what was more important to the aboriginal people affected by the leases was the threatened change in the whole (culture) of which they were a part. The space of belonging produced by property in the leases affects both the control of the land and the subjectivities of those who live on it. The appropriation of aboriginal identity through the reshaping of spaces of aboriginal belonging was at stake.

The term 'homelands' is instructive, as is the spatial reference to being 'pushed into a corner'. Although various definitions exist, the key characteristics of homelands are that they are aboriginal-initiated, permanent communities that are distant from non-aboriginal settlements both cartographically and culturally.<sup>106</sup> Beyond its geographical meaning, the idea of homelands captures something of the spatial understanding of property, the subject-object and part-whole belonging, the importance of land and the importance of home and the connection between them. Homelands are spaces of aboriginal belonging where being aboriginal is held up. Because they are not just a set of physical places but rather a space of aboriginal belonging, the homelands can be depleted both physically and culturally – by being forced to move from one location to another and also by having their distinctive characteristics maligned or dissolved. At the same time though, the homelands are a space that cannot be annihilated by compulsory leases or bulldozers alone. Like all spaces, the homelands are not frozen in time, but will shift and adapt from moment to moment, and across physical locations.

The homelands are a kind of subversive property in that the relation of belonging between aboriginal people and their land and culture – a relation that is out of place according to dominant Australian understandings of what and who belong where – is held up in the homelands. In response to the intervention, one remote Northern Territory aboriginal community held on to its subversive property by physically moving and taking its

<sup>104</sup> Gibson (n 101).

<sup>105</sup> 'Prescribed Area Peoples Alliance Statement' (One Voice Gathering, Darwin 18–19 June 2009) <<http://rollbacktheintervention.wordpress.com/statements/>> accessed 22 March 2010.

<sup>106</sup> C A Blanchard, *Return to Country: The Aboriginal Homelands Movement in Australia* (Australian Government Publishing Service 1987) 7.

space with it. This is the community of Ampilatwatja, located some 300km north-east of Alice Springs. Ampilatwatja is a community of the Alyawarr people and land.<sup>107</sup> In June 2009 the people of the Ampilatwatja community, supported by several Australian trade unions, walked off their town site in protest against the intervention, and started building new accommodation and infrastructure on a site 3km away, just outside the boundaries of the intervention's 'prescribed areas'.<sup>108</sup> Despite its physical move, the Ampilatwatja community retained its space of belonging, which is no doubt altered from what it was at the last site but is still a space where aboriginal bodies and cultural practices belong. Spokespeople from the walk-off site have emphasised their rejection of the government's regime, their spiritual connection to the land and intention to live under their own customs and laws forever.<sup>109</sup> Walk-off spokespeople have, for example, stated to the government that 'we're never ever going to go back to that community to live under your controls and measures';<sup>110</sup> and that their action of walking outside the borders of the prescribed areas:

leads us not to Canberra but to Country, not to further assimilation through dependency but to a continuing way of life, not to western law but to our own, not to hand fed scraps and the confines and indignities of the ration mentality and manufactured 'real economies' but to self reliance, learning by doing and direct responsibility for self, Family and the coming generations.<sup>111</sup>

The Ampilatwatja people's location and declaration that they will not be moving unsettled the Commonwealth government<sup>112</sup> and created ripples of media attention.<sup>113</sup> There is a claim to property, not just in the sense that the land which they have moved to belongs to them, but also in the sense that as a community they are part of an aboriginal culture distinct from the dominant non-aboriginal cultures of wider Australia. It is a claim that their space of belonging should prevail, that their relation of belonging to their land and culture should be held up. Whereas the *Wurridjal v The Commonwealth* case challenged the government's power to take property in aboriginal land, the walk-off literally moved away from the law and took the community's aboriginal space of belonging with it.

#### Conclusion: law's appropriations and the spatiality of identity

The socio-legal issues of sexuality-based asylum claims and of compulsory leases of aboriginal land in Australia have in common a contestation over property – both involved attempts to assert that particular relations of belonging should be held up in particular

107 'Ampilatwatja' (Barkly Shire Council) <[www.barkly.nt.gov.au/our-communities/ampilatwatja/](http://www.barkly.nt.gov.au/our-communities/ampilatwatja/)> accessed 12 December 2011.

108 'About' (Intervention Walkoff's Blog, Alice Springs 23 July 2009) <<http://interventionwalkoff.wordpress.com/about>> accessed 23 March 2010; J Dheerasekara, 'Back to Country: Alyawarr Resistance' (Alice Springs 2009) <<http://vimeo.com/12577970>> accessed 12 December 2011.

109 'Ampilatwatja Walkoff – Aboriginal Australia Today' (The Juice Media 25 October 2009) <[www.youtube.com/watch?v=8nJKEL9asqQ&feature=related](http://www.youtube.com/watch?v=8nJKEL9asqQ&feature=related)> accessed 12 December 2011.

110 R Downs, 'NT Aboriginal Leaders Condemn Intervention, Housing Program Failure' (Sydney 7 October 2009) <<http://interventionwalkoff.wordpress.com/media-releases/>> accessed 12 December 2011.

111 J Hartley, 'Message from John Hartley' (Northern Territory 2010) <<http://interventionwalkoff.wordpress.com/statements/>> accessed 12 December 2011.

112 The minister has not released an official statement on the walk-off but is clearly aware of its presence. This video shows public servants from the Commonwealth government driving out to the walk-off site in order to inspect it, looking somewhat shocked at what was taking place and being asked to leave by the residents. 'Intervention Agents Evicted' (ForNowVision, Alice Springs 17 February 2010) <[www.youtube.com/watch?v=AB27NSgJEpY&feature=player\\_embedded](http://www.youtube.com/watch?v=AB27NSgJEpY&feature=player_embedded)> accessed 31 August 2011.

113 L Murdoch, 'A Community with its Own Intervention' *Sydney Morning Herald* (Sydney 13 February 2010) <[www.smh.com.au/national/a-community-with-its-own-intervention-20100212-nxmp.html?skin=text-only](http://www.smh.com.au/national/a-community-with-its-own-intervention-20100212-nxmp.html?skin=text-only)> accessed 19 December 2012.

spaces. In regards to the leases, that contestation was over whether aboriginal or Anglo-Australian spaces of belonging would be dominant in the remote communities of the Northern Territory. In regards to the cases of women claiming asylum on the basis of sexuality persecution, that contestation was over what kinds of sexualities will be *held up* and afforded a space within the receiving state. Whereas the Australian cases involved assertions of subversive (aboriginal) property and the refugee cases involved the reorientation of what was a subversive (queer) property, both sets of cases demonstrate the significant, pervasive social power of property – its production as well as requirement of particular spaces of belonging. These studies show the complexity of the relationship between property, identity, belonging and space. Law appropriates subversive identities by reshaping the spaces that hold up those identities. The spatial understanding of property as belonging put forward in this article can be used to illuminate the ways in which law appropriates subversive identities, which operate as property on both subject–object and part–whole levels. However, while law appropriates, resistance continues on the outside, through the building and maintenance of spaces that hold up subversive relations of belonging.