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ARCHITECTING ABORIGINAL ACCESS TO JUSTICE: THE COURTS AS DOORS TO THE LAW

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The courthouse is the geographic site at which the abstract Leviathan of Australia's settler legal system is made visible. It is also the portal through which citizens may access this legal system in order to vindicate or protect their rights within it. Given the modern concern of the Anglo-Australian legal superstructure with 'access to justice', it is of paramount importance that courthouses are welcoming and accessible, both physically and psychologically. This article employs an amalgam of architectural and legal scholarship to assess how successfully Australian courthouses are fulfilling their brief of opening the door of the Law to one particular segment of society, Aboriginal people. Discussion covers both the aesthetics and functionality of these buildings, particularly their forecourts, facades, entrances, holding cells and, of course, the court rooms proper. It is contended that by designing courthouses that are sensitive to the needs of Aboriginal people — courts designed in the mode of 'Aboriginal architecture' — some of the legal wrongs of colonialism might be incrementally righted.

> [T]he story that a building tells through its design may be as important to the community it serves as its function. By shaping our thoughts about ourselves and our institutions, it will directly affect our efforts to work productively together.[1]

> It is unlikely that architecture alone will solve issues of social disadvantage, cultural loss, alienation or inappropriate and dysfunctional justice systems. But, at its best, architecture may be viewed as a symptom of a successful culture. With this view,

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1 Stephen G Breyer, 'Foreword' in Steven Flanders (ed), *Celebrating the Courthouse: A Guide for Architects, Their Clients, and the Public* (W W Norton & Co, 2006) 9, 9.

> architecture might in fact provide us with a tangible hold on the greater — though more elusive — reality of a just and prosperous culture … But can the cure begin with the symptom? Perhaps it can begin nowhere else.[2]

I INTRODUCTION

If it is true that public buildings 'reflect the beliefs, priorities and aspirations of a people',[3] what do Australia's public buildings say about Australians? More specifically, what do Australia's courthouses say about the beliefs, priorities and aspirations of the Australian people? The courthouse is the geographic site at which the abstract Leviathan of Australia's settler legal system is made visible. It is also the portal through which citizens may access this legal system in order to vindicate or protect their rights within it. Given the modern concern of the Anglo-Australian legal superstructure with access to justice, it is of paramount importance that courthouses are welcoming and accessible, both physically and psychologically.[4] This article employs an amalgam of architectural and legal scholarship to assess how successfully Australian courthouses are fulfilling their brief of opening the door of the Law to one particular segment of society, Aboriginal people.[5] Acknowledging that the staggering rates of Aboriginal contact with the non-Aboriginal legal system are in part the product of intergenerational trauma and disadvantage wrought by

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2 Philip James Kirke, *The Shelter of Law: Designing with Communities for a Culture of Natural Justice* (Friend Books, 2009) 47.

3 Lewis F Powell Jr, 'Foreword' in John O Peters and Margaret T Peters, *Virginia's Historic Courthouses* (University Press of Virginia, 1995) ix, ix.

4 Robert McDougall, 'Designing the Courtroom of the Future' (Paper presented at the International Conference on Court Excellence, Singapore, 27-29 January 2016) 14, 17-18; Law Reform Commission of Western Australia, *Court Perspectives: Architecture, Psychology and Law Reform in Western Australia* (Law Reform Commission of Western Australia, 1999) 1-3.

5 The word 'Aboriginal' is used in this article in its adjectival sense, to connote connection to the first peoples of Australia including those of the Torres Strait Islands.

colonialism,[6] the question to be asked is what, if anything, can court design do about it? It is contended that by designing courthouses that are sensitive to the needs of Aboriginal people — courts designed in the mode of 'Aboriginal architecture' — some of the legal wrongs of colonialism might be incrementally righted.

In order to establish the theoretical basis on which this article will proceed, three conceptual matters are dealt with at the outset: the (post)colonial premise on which this article rests; the idea of built space as socially produced; and a working definition of 'Aboriginal architecture'. First, this article proceeds on an assumption of the inescapability, at least for the present time, of the application of settler law to Aboriginal people. With that assumption in mind, this article asks how settler law might be imposed upon Aboriginal people in the least oppressive way. In relation to the second, this article is premised on the idea that the built environment impacts upon the behaviour of its inhabitants, moulding the way people think and act. This is not a novel concept, but neither is it uncontroversial. For that reason some brief justification for, and adumbration of, such a theory of built space will be proffered.

The third theoretical concept to be afforded detailed attention below is 'Aboriginal architecture'. A working definition of 'Aboriginal architecture' will be articulated and a case made for its importance to Australian courthouse design. In summary, this article understands 'Aboriginal architecture' as a mode of architectural practice that emphasises a collaborative design process involving meaningful engagement with local Aboriginal people. Notwithstanding this process-oriented, rather than aesthetic, definition of Aboriginal architecture, some distinct design motifs can be identified as commonly occurring in buildings created in this consultative manner. One particular theme which appears often in

[6] In *R v Welsh* (Unreported, Supreme Court of New South Wales, Hidden J, 14 November 1997) it was remarked: 'Only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture'.

courthouses designed in the Aboriginal architecture mode is the interpenetration of indoor and outdoor space. This aspect of Aboriginal architecture has been labelled, by one architect, 'inside-out architecture'.[7] In the courthouses considered in this article, inside-out architecture is expressed in the creation of hybrid indoor-outdoor spaces; the privileging of natural light, views and ventilation; and the prominence afforded to recognisable, autochthonous building materials like wood and stone.

Before concluding, this article will sound a note of caution regarding the danger of paying formal tribute to Aboriginal epistemologies absent any substantive engagement with the wishes of the people themselves. In summary, this article brings together historical and contemporary scholarship on courthouse design so as to advocate for a culturally sensitive approach to the design and fabrication of Australian courthouses in areas with a high proportion of Aboriginal court users.

II THE (POST)COLONIAL PREMISE ON WHICH THIS ARTICLE RESTS

It is necessary to begin by limning the scope of this article's contentions, and the legal field within which its modest critique purports to operate. It is not novel, and hopefully no longer even controversial, to acknowledge that there are, broadly speaking, two legal systems claiming jurisdiction over the continent that is commonly called Australia. On the one hand there is the relatively recently introduced colonial legal system; on the other, a pre-existing and continuing Aboriginal customary jurisprudence, settler understanding of which is modest but growing.[8] The extent to which

[7] Philip Kirke, 'Kalgoorlie Courts Project' (2009) 98(5) *Architecture Australia* 71, 73.

[8] See, eg, *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* [2016] FCA 776.

the latter can continue to flourish independently of the former,[9] or can be interwoven with the former,[10] are pressing questions. But they are largely beyond the scope of this article.

Whilst acknowledging the force of, and encouraging the continued pursuit of, arguments in favour of Aboriginal sovereignty and/or increased recognition of Aboriginal law within the settler legal system, this article pursues a more limited claim. Namely, that there are changes to be made within the currently dominant paradigm of the Anglo-Australian legal system that would benefit Aboriginal persons caught up in this system. Given the startling number of Aboriginal persons presently coming into contact with Australia's settler legal system, particularly in the criminal context,[11] methods of rendering these engagements more productive and meaningful, and less oppressive in the neo-colonial sense,[12] should not be discounted as insignificant.[13]

III A THEORY OF BUILT SPACE AS SOCIALLY PRODUCED

This article starts from the position that the built environment affects the way people act within it. Most obviously this effect is physical,

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9 Christine Black, 'Maturing Australia Through Australian Aboriginal Narrative Law' (2013) 110 *South Atlantic Quarterly* 347.

10 See generally Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94 Discussion Paper (2005); Darren Peter Parker, 'An Aboriginal Jurisprudential Examination of Constitutional Recognition' (2013) 22 *Griffith Law Review* 344.

11 See generally Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013); Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Federation Press, 2nd ed, 2016).

12 Chris Cunneen et al, *Penal Cultural and Hyperincarceration: The Revival of the Prison* (Routledge, 2016) 144-6.

13 See Kirke, *The Shelter of Law*, above n 2, 49-50.

in that a person's immediate surroundings govern how he or she moves through space; an example of this being the way doors and corridors dictate where and how one may enter and move through buildings.[14] The built environment also has a psychological impact on its inhabitants, whose mental or emotional states can be influenced by factors such as the intensity and quality of light; temperature and humidity; the nature of any airflow or ventilation; what and how far one can see; and what one can smell, hear and touch.[15]

Such a theory of built space as socially produced is not new, it can be seen fully formed in the writings of the late twentieth century French theorist Henri Lefebvre, and in a more unrefined state in the work of his contemporary compatriot, Michel de Certeau.[16] Lefebvre was interested in the built environment of the city, and particularly in the social forces that dictate the spatial ordering of the urban environment. In his seminal work, *The Production of Space*, Lefebvre wrote: '(Social) space is a (social) product'.[17] What Lefebvre meant by this typically apocryphal remark is that public spaces are arranged according to the values of dominant social forces and ideologies,[18] which arrangement in turn governs how the space will be experienced by its inhabitants.

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[14] Michel de Certeau, *The Practice of Everyday Life* (Steven Rendall trans, University of California Press, 1984) 96 [trans of: *L'invention du quotidian. Vol. 1, Arts de faire* (first published 1980)].

[15] See generally Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (Routledge, 2011).

[16] Henri Lefebvre, *The Production of Space* (Donald Nicholson-Smith trans, Blackwell, 1991) [trans of: *La production de l'espace* (first published 1974)]; de Certeau, above n 14. See also Dennis Cosgrove, *Social Formation and Symbolic Landscape* (Croom Helm, 1984); Donald Meinig (ed), *The Interpretation of Ordinary Landscapes: Geographical Essays* (Oxford University Press, 1979).

[17] Lefebvre, above n 16, 26.

[18] Lefebvre was most concerned with the dominant force of capitalism whereas this paper attends to the dominance of particular Anglo-centric architectural ideas.

This article is not the appropriate forum to debate the exact outline of such a theory of built space.[19] It is sufficient for present purposes to proceed on the basis of such a theory at its most essential, namely: that social forces produce built spaces, which in turn mould the people using those spaces. Or, in the words of Winston Churchill, 'we shape our buildings, and afterwards, our buildings shape us'.[20] Accepting, for the purposes of this article, the truth of such a statement, one can begin to appreciate the power and responsibility vested in those who design and architect buildings, particularly public buildings. This is a power and responsibility that should not go unscrutinised. It is imperative that the public attend to *what buildings do*, and what they might do better.

IV ABORIGINAL ARCHITECTURE: TOWARD A PROCESS-ORIENTED DEFINITION

There is a nascent body of literature and architectural work within and around the field of what might be called 'Aboriginal architecture'. The term is an admittedly imperfect one employed by Aboriginal Australian architect Jefa Greenaway, amongst others, as shorthand for a mode of architecture practiced *by*, *for* or *with* Aboriginal people. Greenaway writes:

> I see 'Aboriginal architecture' as simply any form of architecture that is initiated by, for or with Aboriginal (or Torres Strait Islander) people. In short, it is work that has been *duly authorised* by Community and ensures that a tangible connection to that community is at the core of the project.[21]

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[19] For another perspective, see David Tait, 'Boundaries and Barriers: The Social Production of Space in Magistrates' Courts and Guardianship Tribunals' (1999) 1 *Journal of Social Change and Critical Inquiry*.

[20] United Kingdom, *Parliamentary Debates*, House of Commons, 28 October 1943, vol 393, col 403 (Prime Minister Churchill). Churchill was advocating for the rebuilding of the House of Commons following its bombing in 1941.

[21] Jefa Greenaway, *Reflections on Indigenous Placemaking* (2015) ArchitectureAu <http://architectureau.com/articles/reflections-on-indigenous-placemaking/> (emphasis added).

Paul Memmott, author of an authoritative monograph on the subject, employs slightly different terms — 'post-classical Aboriginal ethno-architecture', [22] '[c]ollaborative Aboriginal architecture' [23] or 'bi-cultural architecture' [24] — but with similar connotations. He writes:

> Collaborative Aboriginal architecture can be defined as architecture in which an Aboriginal client retains conceptual, stylistic and management control of the project but forms a collaborative partnership with other professionals and skilled personnel … to implement such a project.[25]

Again in a similar vein, Alison Page, founder of the National Aboriginal Design Agency, writes:

> Indigenous architecture is not a style but a culturally appropriate process based on communication, trust, and community development … From the moment a building idea is conceived to the moment it is realised, communication, in whatever form, and community involvement will determine the Aboriginality of the architecture.[26]

All of these attempts at definition are, importantly, not anchored to any particular aesthetic. Nor do they limit the scope of the concept to buildings designed by architects who identify as Aboriginal (Australia only boasting 13 such architects at last count).[27] Instead, Aboriginal architecture is distinguished by a design process that prioritises Aboriginal ways of thinking and being in the creative phase and, consequently, the final product.

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22 Paul Memmott, *Gunyah, Goondie and Wurley: The Aboriginal Architecture of Australia* (University of Queensland Press, 2007) 286.

23 Ibid 303.

24 Ibid.

25 Ibid.

26 Alison Joy Page, 'Living Spaces: Gurung Gunya: A New Dwelling' in Margo Neale and Sylvia Kleinert (eds), *The Oxford Companion to Aboriginal Art and Culture* (Oxford UP, 2000) 423.

27 Greenaway, above n 21.

Authorisation in this context connotes the imprimatur of community approval for a building, the creation of which has involved Aboriginal people of that community. Rueben Berg, architect and Director of Indigenous Architecture and Design Victoria, agrees, but phrases the issue differently, saying: '[t]he key question is how can we do this appropriately and respectfully, in a way that still gives a sense of *ownership and control* to the Aboriginal community'.[28] Berg's use of the language of ownership is instructive, and aligns with the turn in the public policy debate to a focus on Aboriginal empowerment and self-government.[29] Philip James Kirke, an architect whose projects will be discussed later in this article, has similarly said that 'it comes down to an issue of ownership'.[30]

Authorisation, or a sense of ownership, of architectural projects is most commonly sought to be achieved through extensive and meaningful community consultation. Consultation is a common element of design briefs and is by no means unique to the sphere of Aboriginal architecture, but it assumes a special, and historically freighted, significance in this context. Consultation not only leads to more culturally appropriate and user-friendly buildings, it also guards against the danger of non-Aboriginal architects, designers, builders and project managers simply re-enacting the colonialist power dynamic whereby settler values are imposed on Aboriginal people in the paternalistic belief that 'we know what is best for you'. As Greenaway explains: '[collaborative design] provides the best opportunity to get the necessary buy-in and to facilitate a shared

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[28] 'Building Indigenous Awareness: Q + A with Rueben Berg', *Australian Design Review* (16 April 2015) <http://www.australiandesignreview.com/architecture/55192-building-indigenous-awareness-qa-with-rueben-berg> (emphasis added).

[29] See, eg, Noel Pearson, *Radical Hope: Education and Equality in Australia* (Black Inc, 2011); Günter Minnerup and Pia Solberg, *First World, First Nations: Internal Colonialism and Indigenous Self-determination in Northern Europe and Australia* (Sussex Academic Press, 2011); Christine Fletcher (ed), *Aboriginal Self-determination in Australia* (Aboriginal Studies Press, 1994). Cf Gary Johns, *Aboriginal Self-determination: The Whiteman's Dream* (Connor Court, 2011).

[30] Kirke, *The Shelter of Law*, above n 2, 54.

journey, whereby solutions cease to be imposed but are rather developed together'.[31] The process, then, is as important as the outcome in the field of Aboriginal architecture, indeed the one dictates the other.

The courthouse at Port Augusta, South Australia, stands as an example of how successful this collaborative process can be. The building was designed after extensive local consultation.[32] The resulting structure incorporates a seamless blend of elements from Anglo-centric courthouse design and Aboriginal culture. The approach to the main court entries is based on an image of Arkurra, a snake figure from the traditional Dreaming of the area.[33] The variegated exterior is coloured in the same hues as those of the nearby Flinders' Ranges ochre, which is still used as body paint in local Aboriginal ceremonies.[34] The interior prioritises views to the outside and the culturally significant Flinders Ranges, Minburie Ranges and Spencer Gulf.[35] For these features, and others, the project received a Commendation for Collaborative Design from the Royal Australian Institute of Architects.[36]

The recently completed courthouse in Kununurra, Western Australia, provides another good example. That building was designed with the assistance of an Aboriginal Reference Group. The Group's suggestions contributed to elements of the building's design, the surrounding landscape architecture and the almost twenty pieces of public art adorning the interior walls.[37]

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31 Greenaway, above n 21.

32 Elizabeth Grant, 'Port Augusta Courts' (2009) 98(5) *Architecture Australia* 86, 86.

33 Ibid 90.

34 Ibid 86.

35 Ibid.

36 Ibid. The project also received an Australian Civic Trust Award of Merit in the Materials and Natural Landscaping categories.

37 Elizabeth Grant and Thalia Anthony, 'Kununurra Courthouse' *Australian Design Review* (27 May 2015) <http://www.australiandesignreview.com/architecture/56766-kununurra-courthouse>.

In understanding Aboriginal architecture as a design process, rather than an aesthetic, those working in this field stress that consultation is not simply a matter of form, it must be meaningful. Page explains why it is undesirable that consultation occurs as a discrete act undertaken after the design phase; rather, Page suggests, consultation is most meaningful when it occurs synchronously with design so that the knowledge gained from consultation can be incorporated effectively into the plans.[38] Kirke goes further, he contends that consultation should precede design such that the seed of the design germinates in early community consultations. Kirke, preferring the phraseology of 'collaboration' to consultation, writes:

> The most successful projects only come out of full collaboration. In our experience, collaboration means that the very earliest definition of a project should take place with the community, not presented essentially defined with circumscribed areas for input.[39]

In the case of remote communities, Kirke explains how this may require the architects to travel to the community and sit down with community members to discuss their desires for the building and continue this consultative conversation subsequently as the plans take shape.[40] Undoubtedly, this level of consultation is an onerous obligation. One can anticipate objections that such efforts at consensus building would stymie the creativity of the architects themselves. In fact, the experience of architects who have adopted this process tends to the contrary. The development of relationships between architects and Aboriginal communities often appears to lead to rewarding experiences for the architects involved, and buildings adapted to the particular needs of their users.[41]

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38 Page, above n 26, 423.

39 Kirke, *The Shelter of Law*, above n 2, 64.

40 Philip James Kirke, 'A Place of the Law: An Architectural Perspective on Indigenous Courts' (Paper presented at Australian Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4-7 September 2007) 17, 36.

41 Ibid 43; Greenaway, above n 21; Kirke, 'Kalgoorlie Courts Project', above n 7, 73.

Having reached a workable definition of Aboriginal architecture it naturally falls now to consider the relevance of this mode of architectural creation to the design of Australian courthouses.

V THE IMPORTANCE OF ABORIGINAL ARCHITECTURE TO AUSTRALIAN COURTHOUSES

The courthouse is the most conspicuous physical expression of the Law, the otherwise invisible hand that orders everyday life by imposing a complex web of obligations and rights. Thus, the physical appearance of the courthouse is of huge representative significance, it is the tip of the iceberg that modestly but confidently hints at the immense but invisible weight beneath it.[42] Of this, the courthouse's symbolic role, it has been written: '[it is] an icon of the commitment to justice, a symbol of law and order'.[43] Symbolism aside, the courthouse is also important in a practical sense. As the most obvious site of the public's interface with the Law, the courthouse must facilitate public legal engagement by being as accessible as possible.

In Australian history these functions of the courthouse, the symbolic and the practical, have not always operated to the benefit of Aboriginal people. For much of Australia's post-settlement history Aboriginal people were excluded from meaningful mention in the Constitution;[44] they were excluded from the franchise;[45] their

[42] Allan Greenberg, 'Selecting a Courtroom Design' (1975-1976) 59 *Judicature* 422, 423-5; Allan Greenberg, 'Raising "Temples of Justice"' (1975-1976) 59 *Judicature* 484, 484-7.

[43] Graham Brawn, 'The Changing Face of Justice: The Architecture of the Australian Courthouse' (2009) 98(5) *Architecture Australia* 39, 42.

[44] Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Relations in Australia* (Oxford University Press, 2009) 257-65.

[45] Ibid 26-7.

occupation of land was of little or no legal significance;[46] the criminal law was weighted against them;[47] they were denied equal wages for equal work;[48] and they suffered myriad other systematic legal disadvantages.[49] The significance of the foregoing is that the courthouse was historically neither a port of entry to the Law for Aboriginal persons nor representative of an admirable legal system. Rather, the town courthouse was an unwelcome reminder of the Law's indifference, and outright hostility, to Aboriginal rights.[50]

It is hard to overstate the need for particular cultural sensitivity in designing today's courthouses when one views the task against this legacy of the Australian courthouse as an emblem of colonisation, *terra nullius* and systemic blindness to Aboriginal legal rights. To the extent that Australia wants to apologise for, undo, redress and reverse the wrongs of the past, the courthouse offers an architectural and psychological terrain for modest attempts at decolonisation.[51] For Dr Kate Auty, who presided as a Magistrate over Aboriginal sentencing courts in Victoria and Western Australia, giving Aboriginal actors the authority to change the physical configuration of existing courtrooms facilitated a reverse occupation of these justice spaces.[52] Echoing that sentiment, it has been said that such courts might provide 'a space which, through the creative use of

[46] See, eg, *Cooper v Stuart* (1889) 14 AC 286 at 291-2. See also Kent McNeil, 'Racial Discrimination and the Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181.

[47] Behrendt, Cunneen and Libesman, above n 44, 24-5, 113-36.

[48] Ibid 35-9.

[49] See generally John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997); Bain Attwood and Andrew Markus (eds), *The Struggle for Aboriginal Rights: A Documentary History* (Allen & Unwin, 1999).

[50] Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) 146.

[51] See Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms* (Yale University Press, 2011) 372.

[52] Kate Auty, 'Room with a View — Courtrooms and Culture' (2009) 98(5) *Architecture Australia* 49, 50.

symbolism, mediates between memory and tradition and anticipation of a future of hope'.[53]

Nevertheless, it must be accepted that there are limits to what can be achieved by architecture alone, some physical changes never rise above the symbolic (a difficulty which is returned to at the end of this article). Kirke has eloquently expressed both the limits and possibilities of culturally sensitive court architecture in the passage that provided the second epigraph to this article, and deserves rehearsing here in its entirety:

> It is unlikely that architecture alone will solve issues of social disadvantage, cultural loss, alienation or inappropriate and dysfunctional justice systems. But, at its best, architecture may be viewed as a symptom of a successful culture. With this view, architecture might in fact provide us with a tangible hold on the greater — though more elusive — reality of a just and prosperous culture. If we can only imagine the broad shape of what a successful contemporary culture might be, then the physical vision of the places that might nurture and celebrate such a culture might begin to suggest themselves, as an integral, if perhaps minor part of the important whole. In bringing into manifestation just one such symptom of a living healthy whole, we might begin to catalyze the underlying, more profound realities that give a culture its heart and life. But can the cure begin with the symptom? Perhaps it can begin nowhere else.[54]

To illuminate Kirke's comments it is worth adverting to an example of how the configuration of the courtroom can, in turn, sculpt the contours of the Law itself, effecting an incremental decolonisation of the Law's principles, tenets and priorities.

A bottom-up transmogrification of the usually procrustean Anglo-Australian legal structure can be seen in the sphere of criminal sentencing in the Nunga Court in South Australia. The Nunga Court

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[53] Diane Jones, 'Historic Courts' (2009) 98(5) *Architecture Australia* 58, 59. In this passage Jones is paraphrasing Tait.

[54] Kirke, *The Shelter of Law*, above n 2, 47.

is a specialised stream of the Magistrates' Court that deals solely with Aboriginal offenders. In Nunga Court proceedings the Magistrate will not sit at the elevated judicial bench,[55] rather he or she will join legal counsel, the offender, the offender's family members and two or three Aboriginal Elders, at the bar table.[56] The table may be circular[57] or elliptical, and the public seating is often similarly arranged in a semi-circle.[58] These arrangements are adopted to foster a less formal atmosphere.[59] In such an environment all persons involved are more likely to volunteer information and the Magistrate will, thus, be better informed and better placed to sentence the offender appropriately.

The Nunga Court began and continues to operate without a specific legislative framework,[60] the same is the case in Western Australia and Queensland, whereas all other jurisdictions boasting Aboriginal sentencing courts have explicit enabling legislation.[61]

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55 Auty has characterised the elevated judicial bench as part of the traditional courtroom's 'iconography of control and domination': Auty, above n 52, 51. See also John N Hazard, 'Furniture Arrangement as a Symbol of Judicial Roles' (1962) 19 *ETC: A Review of General Semantics* 181, 181.

56 Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (Federation Press, 2016) 18.

57 The idea for the circular bar table may have originated from the Commonwealth Law Courts in Darwin in the mid 1990s (see Stephen Parker, above n 50, 110) or from the Aboriginal circle sentencing courts emerging in Canada in the early 1990s (see *R v Moses* (1992) 71 CCC (3d) 347 (Yukon Territorial Court)).

58 Bennett, above n 56, 18. The circular design of the Aboriginal court in the Roma Mitchell Commonwealth Law Courts building in Adelaide, designed by HASSELL, is intended 'to resemble the indigenous process of meeting in a circle on natural ground and [to] acknowledge the traditional meeting place of the Kaurna people of the Adelaide plains': Imogen Beynon, *Structuring Justice: The Third Justice Environments Conference Court Architecture Exhibition* (University of Western Sydney, Court of the Future Network and Australian Institute of Judicial Administration, 2010) 49.

59 Bennett, above n 56, 7.

60 Cf the 'Aboriginal Sentencing Conference', which *has* been legislated for: *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

61 *Magistrates Court Act 1989* (Vic) ss 4D-4G; *Children, Youth and Families Act 2005* (Vic) ss 517-520; *County Court Act 1958* (Vic) ss 4A-4G; *Criminal Procedure Regulation 2010* (NSW) pt 6; *Magistrates Court Act 1930* (ACT) ss

Nevertheless, the legality of the innovative arrangements adopted in the Nunga court was affirmed by the Supreme Court of South Australia in the 2002 case *R v Carter*, where it was said:

> In considering this appeal, I bear in mind that the Nunga Court was established to allow for a more creative approach to be taken in sentencing with specific regard to Aboriginal defendants. I recognise that the court has been successful in providing a more sensitive environment for Aboriginal defendants within the criminal justice system. The approach clearly must be encouraged and supported.[62]

By designing spaces that are open to Aboriginal ways of thinking and being, these courts create the potential for those alternative epistemologies to infect (positively) Anglo-Australian jurisprudence. Changes to the physical configuration of the court can thus be seen to be capable of amplifying Aboriginal voices in Australia's legal discourse and effecting a bottom-up, subtle reconfiguration of the Anglo-Australian legal structure.

A more practical argument for the relevance of Aboriginal architecture to the design of contemporary Australian courthouses can be founded on the basal proposition that, in many parts of Australia, Aboriginal people make up the majority, or at least a significant portion, of court users. (The term 'court users' encompasses all members of the public attending court, including litigants in civil matters, defendants and victims in criminal proceedings, jurors, witnesses and interested community and family members.) This is true of many regional courts in Western Australia, South Australia, the Northern Territory and the more remote reaches of the States on the eastern seaboard. Courthouses in these places are often the central public building of the town. Such courts will usually service a large surrounding area, making 'court day' a busy

219N, 309; 'Community Court Darwin Guidelines' (27 May 2005, since repealed).

62 *R v Carter* (2002) 81 SASR 330, 335 [16].

fixture on the monthly calendar. This has lead to some writers describing regional Magistrates' courts as 'foundational places'.[63]

Architects briefed with designing courthouses in such locations need to consider the responsibility of the State to Aboriginal court users, especially where such Aboriginal people are suffering entrenched social disadvantage. Kirke, the chief architect of a culturally sensitive court development in Kalgoorlie, Western Australia, outlined his understanding of this responsibility, writing:

> Social scientists and criminologists continue to debate the reasons for these disproportionate rates of over-representation [of Aboriginal people in prison]. However, most agree that at least part of the reason is that Aboriginal Australia has suffered, and continues to suffer, a high degree of cultural loss, with attendant disintegration of social structures, stability and identity. Further, enduring and wide-ranging cultural disconnections with mainstream Australian society contribute to both social and economic marginalization. Given these facts, it is not too much of a stretch to suggest that part of the solution lies in an acknowledgement of — and engagement with — Aboriginal culture.[64]

The question then becomes *how* courthouses in such places might be designed so as to synthesise Aboriginal architecture with traditional court functions? The next part of this article, drawing from a number of examples, describes one significant motif often occurring in courts designed by, for and with Aboriginal people: the interpenetration of indoor and outdoor space. Given that this appears to be a priority of many Aboriginal communities from different corners of the continent, the article examines a number of concrete expressions of this design theme.

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[63] Bridget Harris, Lucinda Jordan and Lydia Phillips, 'Courting Justice Beyond the Cityscape: Access to Justice and the Rural, Regional and Remote Magistrates' Courts' (2014) 23 *Journal of Judicial Administration* 158, 160.

[64] Kirke, 'Kalgoorlie Courts Project', above n 7, 71.

VI 'INSIDE-OUT' COURT DESIGN

Having advocated, in the earlier stages of this article, for a process-oriented definition of Aboriginal architecture it might seem inconsistent now to discuss a common aesthetic and functional theme characterising courts designed in this mode. In truth, there is no inconsistency. The commonalities one sees in courthouses designed using the process of Aboriginal architecture are a product of the same consultative design phase; it is unsurprising that such consultations, even those taking place in opposite corners of the country, yield buildings that prioritise the same design tropes. Whilst it is not suggested that these design features will be valued by all Aboriginal communities, it is nevertheless instructive to note what, to date, appears to be a trend.

In a survey of courthouses designed using this process, one theme stands out above any other and that is the interpenetration of indoor and outdoor space. Kirke uses the phrase 'inside-out architecture'[65] to encapsulate this form of architectural thinking. He writes:

> At its heart, the design has inverted usual architectural thinking by making the outdoor spaces the central organizing principle of the whole project. In making these outdoor spaces work appropriately and comfortably for traditionally orientated Aboriginal people … the built elements have derived their form and qualities.[66]

This approach is based on research showing that most people are more relaxed and focused in naturally lit spaces with a direct relationship to the outdoors.[67] (One might imagine this to be

[65] Ibid 73.
[66] Ibid.
[67] See, eg, John Hockings, 'Brisbane Supreme and District Court' (2009) 98(5) *Architecture Australia* 65, 67. See generally L Edwards and P Torcellini, 'A Literature Review of the Effects of Natural Light on Building Occupants' (Technical Report, National Renewable Energy Laboratory, July 2002).

particularly true of Aboriginal people from remote communities who have spent most of their life in the outdoors.)[68]

In the recent past, court design only went so far as to allow natural light into the courtroom,[69] the fear being that it would be too distracting or impermissibly voyeuristic to allow noise, air, smells and views from outside into the courtroom. The architect of the Brisbane Supreme and District Court felt bound by this tradition in his design of that precinct:

> We knew from our research and from the expressed desire of judges that courtrooms with an external aspect and with natural light give better trial outcomes. People are more relaxed and are able to concentrate for longer periods of time in healthy, day-lit spaces with a direct relationship to the outside world. … [But] [i]t is simply not acceptable to have a courtroom where direct sunlight enters the court, where people outside can see into the court, or where external sound can enter the court. The inside-outside relationship is really a one-way relationship.[70]

This is no longer the consensus position, as commissioning bodies and architects begin to acknowledge the 'need for *actual* and *perceptual* access to the outdoors and fresh air'.[71] Innovative courtrooms are now being built in ways that erase traditional spatial hierarchies by physically melding indoor and outdoor spaces, preferring natural light, affording views of the surrounding landscape and allowing the sounds and smells of the outdoors into the courtroom itself. Some manifestations of this new movement of

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[68] Paul Memmott and Karl Eckermann, 'Cultural Issues in the Architectural Design of Indigenous Custodial Facilities' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13-15 October 1999) 9-10; Memmott, *Gunyah, Goondie and Wurley*, above n 22, 295-301; Paul Memmott, 'Remote Prototypes' (2001) 90(3) *Architecture Australia* 60, 60-5; Timothy O'Rourke, 'Sharing Plans for Aboriginal Housing' (2016) 105(5) *Architecture Australia* 37, 38.

[69] For a history of the architecture of the 'traditional court' see Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914* (Ashgate, 2003) chs 2, 4, 5.

[70] Hockings, above n 67, 67.

[71] Brawn, above n 43, 40 (emphasis added).

inside-out architecture in court design are discussed below. Due to the relative dearth of courthouses designed in the mode of Aboriginal architecture, reference is also made to buildings without a specific focus on Aboriginal users but which nonetheless exhibit similar design priorities.

A *Hybrid Indoor-Outdoor Spaces*

The above-mentioned Kalgoorlie courthouse is perhaps the most advanced of all Australian courthouses in its melding of inside and outside space. In the new building, each court has an attached outdoor courtyard of native plants offering visual respite from the proceedings inside. Just as importantly, the holding cells for offenders in custody provide access to this same landscaped courtyard. This major design feature was included in response to requests from the local Aboriginal legal service.[72] The design anticipated that court proceedings might take place in the courtyard itself, and the adjoining wall of the courtroom is articulated to allow it to be folded up, so as to transform the court into a hybrid indoor-outdoor hearing space.[73] Even more radical is the Kununurra Court complex's outdoor court space. Essentially a paved area with a quadrilateral shade structure that is open to the elements on all four sides, the space represents perhaps the most complete sloughing off of the historical baggage of preconceived ideas about what a court ought to look like.[74]

B *Natural Light*

Another priority shared by the small set of courthouses in the Aboriginal architecture field is the utilisation of natural light. Natural light, or 'sun ingress', was not always privileged in

[72] Kirke, 'Kalgoorlie Courts Project', above n 7, 75.
[73] Ibid 74.
[74] Grant, above n 32, 90.

courthouse design.[75] Traditional Anglo-centric courthouse architecture employed muted lighting from multiple sources to evoke a solemn chiaroscuro effect redolent of candlelit churches. Thankfully that position changed and, with a growing appreciation of the benefits of natural light for concentration and wellbeing, windows and skylights often now feature in courtroom design. In a happy coincidence of practical and symbolic function, natural light is today also regarded as a desirable element in court architecture for the reason that it represents truth and transparency in the legal system.[76] In Ipswich, Queensland, a town with a high rate of Aboriginal contact with the police, the local police watch house, designed by ABM Cox Rayner, has natural skylights.[77] The courthouse at Port Augusta, referred to above for its receipt of a Collaborative Design award for the architects' consultation with the local Aboriginal community, includes large expanses of glazing which spread a diffuse natural light over the interior.[78]

C *Views*

Another shared feature of courthouses designed for Aboriginal court users is the pre-eminence afforded to views of the surrounding landscape. Historically, outlooks from the courtroom were prohibited, being thought to distract and detract from the intensity of the proceedings within. Now windows into and out of courtrooms are seen as important sources of visual relief and essential to making

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[75] See, eg, Don Hardenbergh, Robert Tobin Sr and Chang-Ming Yeh, *The Courthouse: A Planning and Design Guide for Court Facilities* (National Centre for State Courts, 1991) 47-9.

[76] Former Chief Justice of the Federal Court of Australia, Michael Black, has said '[l]ight is symbolic of truth': Michael Black, 'Representations of Justice: A Photographic Essay in Two Parts' (1999) 1 *Journal of Social Change and Critical Inquiry*.

[77] Beynon, above n 58, 25.

[78] Grant, above n 32, 86, 90. It is interesting to note in passing the stark contrast between this privileging of natural light in the interests of Aboriginal court users and Kirke's proposal that artificial lighting might be employed to simulate the glow of a campfire and thus invoke an atmosphere of solemnity: Kirke, 'A Place of the Law', above n 40, 34.

courts perceptually and psychologically accessible.[79] The importance of 'country' to many Aboriginal people means that views of the outdoors take on a special significance in the design of courthouses that will be used primarily by Aboriginal people. A number of writers and architects have noted the importance of establishing sightlines from inside such courts to the landscape and flora outside.[80] Kirke has written: 'The ultimate reference — the land itself — [should] be visible wherever possible, the silent and ever-present context of all the events of the court and of community'.[81] The Kununurra Court complex was designed with the Aboriginal connection to country in mind, with the result that the whole building and windows within it are orientated to afford views of the dramatic sandstone and conglomerate mountains in the distance.[82]

D *Ventilation: Sounds and Smells*

Perhaps most innovative are the buildings beginning to permit sounds and smells from the outdoors into the previously insulated sanctum of the courtroom. The Neighbourhood Justice Precinct in Collingwood, Melbourne, not only allows for views into the courtroom but permits some outside noise to filter in.[83] The Lyons designed Parramatta Trial Courts Building in Sydney utilises natural ventilation, as does the Billard Leece Partnership's upgrade to the Supreme Court of Victoria building and FMSA's Moorabin Justice Centre, also in Victoria.[84] Whilst the buildings just discussed were not designed exclusively for Aboriginal court users, they exihibit the same concern to interweave indoor and outdoor spaces. These buildings might be seen as offering an innovative medium for

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79 The Pine Rivers Courthouse, in Queensland, designed by Guymer Bailey Architects, provides an exemplary transparent court frontage: Beynon, above n 58, 40-3.

80 See, eg, Grant and Anthony, above n 37.

81 Kirke, *The Shelter of Law*, above n 2, 68.

82 Grant and Anthony, above n 37.

83 Peter Johns, 'Neighbourhood Justice Centre' (2009) 98(5) *Architecture Australia* 93, 97.

84 Beynon, above n 58, 32-3, 37, 61.

connecting indoor courtrooms to the outdoor environment, an innovation which may well be picked up by Aboriginal architecture in the future if it has not been already.

E *Materials*

Another way in which connection with the natural environment is being achieved in courthouse design is by the conspicuous use of local natural materials, particularly stone and wood. This is perhaps most dramatically achieved in a court outside of Australia, New Zealand's Supreme Court in Wellington. Designed by architects Warren and Mahoney, the building is riddled with references to flora which hold significance to the Maori population.[85] The courtroom itself is almost spherical in shape and is lined by an incredible tessellation of 2294 silver beech panels, the result evoking the cone of the Kauri tree.[86] Similarly, a number of Australian courts with a high portion of local Aboriginal court users have commissioned bar tables made from local timber,[87] and architects of the Roma Mitchell Commonwealth Law Courts and a paradigm of Aboriginal architecture, the Port Augusta courthouse, visibly prioritise local stone and wood in their design.[88] In a different functional context, the recently completed Aboriginal Medical Service in Casino, New South Wales, is largely constituted of brick made from the earth of the local Bundjalung Country.[89]

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85 Beynon, above n 58, 8.

86 Ibid 54-5.

87 The Koori Court in LaTrobe Valley, Victoria, and the Nadju Court in Norseman, Western Australia, are two examples. See Auty, above n 52, 50.

88 Beynon, above n 58, 51.

89 Claudia Taborda, 'Casino Aboriginal Medical Service' (2016) 105(5) *Architecture Australia* 22, 28.

VII A NOTE OF CAUTION — SYMBOLS WITHOUT SUBSTANCE

The courts discussed above, particularly those in Port Augusta, Kununurra and Kalgoorlie, through their consultative creative process and resulting inside-out designs, are paradigms of the Aboriginal architecture Australia should be striving to offer all communities with similar needs. These are, however, exceptions, not the norm. Most courts do not have the funding for extensive architectural redevelopment, and culturally sensitive design elements are limited to minor cosmetic changes to the existing structures.

Auty presided over many such courts. Notwithstanding her budgetary limitations, she found that the simple inclusion of Aboriginal and Torres Strait Islander flags and artworks operated to 'radically and delicately destabilize' the symbolism of the State.[90] Whilst that might have been the case in Auty's courtrooms, where she pioneered an inclusive and culturally sensitive approach to sentencing, symbols will not always ensure culturally sensitive justice delivery.

Such semiotic references will only enact a meaningful change to the environment where they arise from consultation with Aboriginal people. Without such consultation one sees '[t]he temptation for white fellas to overlay idiosyncratic romantic personal visions of aboriginality, without necessarily developing such visions in intimate partnership with Aboriginal clients'.[91] To date this charge does not appear to have been levelled at any of the courthouses this article has identified as designed by, for and with Aboriginal people; but this ought not to be a cause for complacency. It is worth noting the controversy surrounding one non-legal building, ostensibly designed after consultation with the Aboriginal community, for the

[90] Auty, above n 52, 51.
[91] Kirke, 'A Place of the Law', above n 40, 38.

cautionary lesson it offers white fella architects of courthouses for Aboriginal people.

The Portrait Tower, designed by ARM Architecture and built by Grocon, is a luxury apartment tower emblazoned with a relief of William Barak, perhaps Victoria's most famous nineteenth-century Aboriginal. The symbolism is well intentioned and well executed; Barak's face, which slips in and out of resolution depending on one's perspective, is oriented towards the Shrine of Remembrance in a pointed political reminder of the frontier wars that largely go un-memorialised in mainstream history books.[92] A staunch critic of the building, prominent Aboriginal architect Kevin O'Brien, noted that as a starting point this was a promising idea but that the building itself did not progress beyond symbolism. He argued that it fails to positively engage in any way with the Aboriginal people of Melbourne and is unlikely to house a single Aboriginal tenant.[93] Similarly, David Hansen, writing in the *Griffith Review*, commented:

> The sad truth is that this building is not a monument to William Barak. It is not in fact a Portrait. And it is not, strictly speaking, a commemoration of any kind. No, this is Brand Reconciliation ... in which the particular and painful truths of settler history are glossed over in favour of a warm and fuzzy notion of communal inheritance.[94]

It is against this danger of empty symbolism that courthouse architects must guard.[95] In light of controversies like the Portrait Tower, Greenaway describes the new standard by which culturally sensitive design must be measured:

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92 Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (University of New South Wales Press, 1981); Henry Reynolds, *Forgotten War* (NewSouth Books, 2013).

93 ABC Radio National, 'A Monument to Architectural Cynicism?', *Awaye!*, 4 April 2015 (Kevin O'Brien) <http://www.abc.net.au/radionational/programs/awaye/a-monument-to-architectural-cynicism/6365942 >.

94 David Hansen, 'Headstone: A Portrait of the Aboriginal Leader as a Kitsch Icon' (2012) 36 *Griffith Review* 170, 177-8.

95 For a nuanced, historical assessment of symbolism in Aboriginal architecture see Memmott, *Gunyah, Goondie and Wurley*, above n 22, 232-57.

> Gone are the days of hanging a boomerang on the wall and saying, 'That's Aboriginal' … By weaving reference points throughout, meaning becomes deep seated, an integral part of the design language, a solution that moves beyond clichéd, stereotypical or potentially patronising references.[96]

VIII CONCLUSION

In the face of the alarming overrepresentation of Aboriginal people in Australian prisons, policy makers need to be doing everything possible to facilitate meaningful, constructive and positive interactions between Aboriginal people and the courts. This article has suggested that the development of courthouses incorporating Aboriginal architecture is one way towards achieving such meaningful engagement. It is to be readily conceded that architecture cannot ameliorate the myriad and complex issues of Aboriginal overrepresentation in the criminal justice system. But, as the projects at Port Augusta, Kalgoorlie and Kununurra show, courthouses designed in the mode of Aboriginal architecture project a powerful message to the Aboriginal community and Aboriginal court users that their input is valued and their voices will be heard. The message contained in these buildings is not a temporary or contingent platitude, it is a statement that future generations will be able to decipher by reading the traces of the buildings they inherit. Public buildings are lasting inscriptions of social values, and they leave encoded messages by which the societies that build them are judged in the future. Thus, when commissioning bodies turn to consider the design of future courthouses in Australia, they would do well to look to the flourishing field of Aboriginal architecture.

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[96] Greenaway, above n 21.