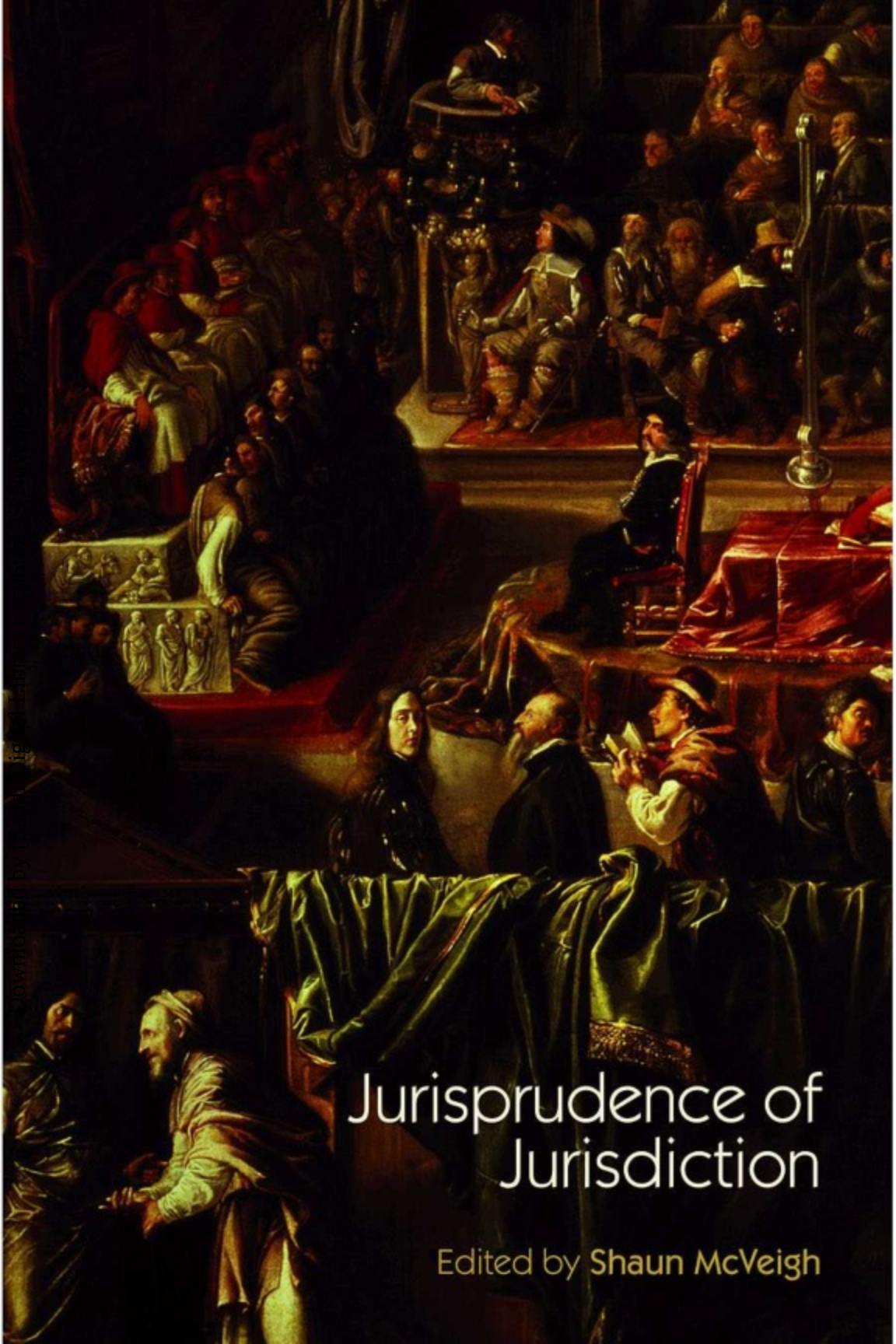
Jurisprudence of Jurisdiction
Edited by Shaun McVeigh

Jurisprudence of Jurisdiction

For much of the history of the western legal order, the question of jurisdiction – the question of the power and authority of law – has been the first question of law. This book investigates the difference that jurisdiction continues to make to the ordering of normative existence. It also follows the speculation that without an account of jurisdiction, jurisprudence would be left speechless, with no power to address the conditions of attachment to legal and political order.

The starting point of this book lies with the claim that a sharper focus can be given to normative legal ordering through questions of jurisdiction than can be through those of moral responsibility or social action. This is so because jurisdiction articulates both the potentiality of law and the conditions of its exercise. It provides the idiom of response to the fact that there is law and to the fact that law institutes, judges and addresses a form of life. From this viewpoint the contributors to this book examine the institution of human rights, the new global and national orders of sovereign power and of trade and information, the judgement and government of death and desire, and the address of colonial and postcolonial legal idioms. In doing this the contributors also provide for the elaboration of questions of jurisdiction as part of the resources and repertoires of jurisprudence.

This book provides a point of entry to an emergent genre of writing within doctrinal, historical and critical jurisprudence that has returned to questions of jurisdiction to think again about juridical order and change. In so doing, it also points to questions that must be asked for there to be any interdisciplinary study that addresses law.

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Preface

The contributors to this collection of essays were given a brief that was broad: it was to refresh the jurisprudence of jurisdiction. They were prompted to respond to the question 'What might be understood in jurisprudence by way of a return to questions of jurisdiction?' Behind this question lies the speculative claim that, without an account of jurisdiction, jurisprudence would be left speechless, left without the power to address the conditions of attachment to legal and political order. What was invited in this book was not so much a critique of the form of law, but an investigation of the modes or manners of coming into law and of being with law. Implicit in this is a refocusing of attention away from the litigious concerns of tribunals and fora towards an engagement with the inauguration, existence and practices of law.

Questions of jurisdiction have been central to Western legal and institutional thought, yet how to find a place within jurisprudence and the philosophy of law to pose such questions has not been obvious. At its broadest, the question of jurisdiction engages both with the fact that there is law and with the power and authority to speak in the name of the law. The encapsulation of jurisdiction involves consideration of the enunciation (or potentiality) of law, its technological and material modes of operation and its idiomatic expression. These concerns provide the frame of reference for the investigations into the jurisprudence of jurisdiction made in this book.

The approaches taken to jurisdiction in this book have not generally been limited to attempts either to justify existing accounts of jurisdiction or to reconcile the exercise of jurisdiction with state policy or party interests (important though these concerns are). Instead, two broad lines of investigation are pursued. In one direction, the contributions formulate and reconstruct jurisdiction as part of rival metaphysics of law; in another they perform as essays, or investigations, into the resources and repertoires of the jurisprudences of jurisdiction. In relation to the former, the essays consider afresh the ways in which philosophies of law and jurisprudence respond to questions of jurisdiction. They also serve as a reminder of the continuing importance of jurisdictional thought to both metaphysics and ethics. In relation to the latter, these contributions consider jurisdiction as exercise of a technology of law. As a question of technology, three themes are addressed: first, institutional relations between jurisdiction, state,

sovereignty and territory; second, the governmental relations between jurisdiction, judgement and the technologies of law; and third, the idiomatic representation of jurisdiction to law. Taking up these topics, the contributors to this book examine the institution of human rights and the new global and national orders of sovereign power, the judgement and government of death and desire, and the address of colonial and post-colonial legal idioms.

The return to questions of jurisdiction forms part of an emergent genre of scholarship within doctrinal, historical and critical jurisprudence. Its address is primarily juridical, but it also raises questions for all disciplines enmeshed in questions of authority and authorisation as these concerns retain their juridical affiliations. Much of the impetus of the work in *Jurisprudence of Jurisdiction* is critical: the concerns of the contributors circulate around questions of belonging to law, of working within the idiom of law and what (if anything) can continue to be said about attachments of law and its orderings of time, space and place. Beyond this, a collection of essays on jurisdiction is as eclectic as the domains of the critical legal study of law.

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Part I

Introduction

1 Questions of jurisdiction

Shaunnagh Dorsett and Shaun McVeigh

Introduction

Questions of jurisdiction have been central to Western legal traditions, yet finding a place within jurisprudence and the philosophy of law to pose such questions has not been obvious. By contrast, the practice of the law is preoccupied with questions of jurisdiction and the arrangements of the authority to judge in matters of law. Despite this, the work of practitioners lacks anything but the 'thinnest' of descriptive accounts of what it means to engage with questions of jurisdiction. It is as if legal thought cannot, or can no longer, articulate the terms of its own existence. To introduce *Jurisprudence of Jurisdiction*, this chapter returns to some of the central topics of jurisdiction in order to investigate the modes or manner of coming into law and of being with law.

At its broadest, the question of jurisdiction engages with the fact that there is law, and with the power and authority to speak in the name of the law. It encompasses the authorisation and ordering of law as such as well as determinations of authority within a legal regime. Emile Benveniste has drawn out the inaugural character of the etymology of jurisdiction. The Latin *juris-dictio* links the Latin noun *ius* with the verb *dictio*. *Ius* is usually translated as 'law', and refers to the adjectival situation of conforming to law (*iustus*). Linked to the verb *dicere* – the saying or speech of law – *ius* becomes performative (and adverbial) (1973: 391). Within the institutional domain of the Roman courts, *ius* and *dicere* are linked to the office of the *iu-dex*, he who states the law, and *juris-dictio*, the saying or speaking of the law (*Digest* 2.1.1) (Benveniste, 1973: 392). In jurisdiction, then, might be found questions of the inauguration of law – its value and validity – and its articulation. It is with these concerns, and with the representation of the orders of law that are engendered through jurisdiction, that the contributions to *Jurisprudence of Jurisdiction* seek to engage.

The conceptual role that questions of jurisdiction play in legal thought has not received much attention in contemporary legal theory. At the risk of caricature, within the philosophy of law questions of jurisdiction fall for consideration somewhere between the concerns of philosophies of action and event, and those of moral responsibility. If located as a question of action and event, jurisdiction makes a brief appearance in relation to questions of sovereignty and of space but

gives way to the evaluation of law in general or vacates law altogether for the fields of international relations and political geography. Perhaps this reflects a preference, predominant since the nineteenth century, for explanations of law framed in terms of social and not legal existence, state centred or otherwise (Kriegal, 2001). As a part of a discourse of moral authority, jurisdiction takes its place as an embodiment of value, or as a partial step towards value. Such approaches risk losing the questions of 'why law?' or 'why this law?' and with them the question of the authority and form of law. To address such questions ties jurisprudence back to the diction or speech of law and returns the process of jurisdiction both to a structure (or metaphysics) of law and to a history of the institutions that carry the meaning of legal life.

For some, tying questions of jurisdiction back into metaphysics and to the difficulties of staging a relation to law gives too much to a long tradition of thinking about law which has little hold on contemporary reality. Our present, whether viewed as modern, ultra-modern or postmodern, can no longer be considered capable of being structured or represented in fully legal or ethical form (Murphy, 1997). What is needed is a form of investigation that pays attention to the ways in which the authorisation of law is linked to its purposes or desire (Goodrich, 1996). For others, failure to pay attention to the difficulties of escaping from the metaphysics of law ensures only its repetition (Gadamer, 1979: 494; Rose, 1984: 3; Derrida, 1989). However, to think that it is possible simply to have done with questions of jurisdiction would be to forego the possibility of questioning the concepts of limit and structure in law as well as the links between speech and law and voice and authority. It is with these questions of jurisdiction, and not with those of morality and action, that first questions of law can be posed. This formulation of a metaphysics of law, together with the inaugural gestures of law itself, forms the first theme of this book.

There is also an insistent materiality to questions of jurisdiction that can initially be approached in terms of an institutional practice or pragmatics. At the centre of these practices are the various devices, techniques and technologies that make the enunciation and life of the law possible, and the investigation of these forms the second major theme of the book. It would be no great exaggeration to say that the institutional histories of Western law have been written in terms of jurisdiction. Questions of jurisdiction were central to the accounts of the protocols of government of imperial Rome just as much as they were to the accounts of the medieval ordering of the spiritual and temporal relations of church and state and to the rise of the modern nation-state. The history of the common law is also – and often is simply only – a history of jurisdiction. Holdsworth, for example, devoted much of his 16-volume *History of English Law* (Holdsworth, 1922–1972) to detailed accounts of particular and plural jurisdictions: those of common law, stannary, forestry, ecclesiastical law and so on. Likewise, the history of common law legal ordering of British colonisation, as with other imperial projects, was in many ways one of jurisdiction. It is through jurisdiction that the authority of the common and imperial laws have been asserted, and it is through questions of jurisdiction that the legal settlement of the

colonies has been effected. Contemporary writings on international and universal jurisdictions are recent additions to this genre.

What is striking in the writing of the histories of jurisdiction is not so much the lack of substantive criticism but the lack of a language of analysis of jurisdiction. It is possible to develop ethical arguments about the moral value of universal jurisdiction or of the practical negotiations of the rival criteria of jurisdiction in the draft *Hague Convention on Jurisdiction and Judgments*, but there is as yet only a very limited discourse of jurisdiction itself (Macedo, 2005). Within legal doctrine, questions of jurisdiction are frequently merged with those of authority and its delimitation or, as in the case of private international law, figured in terms of justification (Whincop and Keyes, 2001). One consequence of this is that the technologies of law that establish authority are understood as descriptions of bare action or fact – technical commentary on the determination of forum and the recognition and enforcement of judgements. In all this, the character of jurisdiction as an instrument is frequently occluded. What is lost is the staging and representation of law as a work of figuration. A claim that the technologies of law do more than describe legal actions should raise no controversy within legal thought. Viewed as process, jurisdiction encompasses the tasks of the authorisation of law, the production of legal meaning and the marking of what is capable of belonging to law. If nothing else, the work of categorisation of persons, things, places and events; the procedures of summons, hearing, decision and sentence; and the forensic concerns of argument and proof serve as devices of attachment to law.

The analysis of the artefactual character of law has more recently been found in the domains of anthropology, sociology and cultural studies. In this book, these concerns are returned to law and addressed through jurisdiction. This allows for the consideration of the state, for example, as an assemblage of devices and techniques not only for the delimitation of relations of authority and the exercise of power, but also for their representation. In this book, rather than assuming a natural link between sovereignty, territory and land, the links between sovereignty, state and territory are studied in terms of techniques of authorisation and grounding. As a technology, jurisdictional practice institutes a relation to life, place and event through processes of codification or marking. It is through jurisdiction that a life before the law is instituted, a place is subjected to rule and occupation, and an event is articulated as juridical. In all this, of course, the long polemics of jurisprudence have disputed the representation and manner of being subject to a jurisdiction.

The concern with the diction, speech or idiomatic representation of law forms the third major theme of this book. The elaboration of how instruments give voice to law has been one of the tasks of jurisprudence. At issue are not so much the administrative aspects of government, but the broadly semiotic aspects of jurisdiction (Goodrich and Hachamovitch, 1991). The idiom of jurisdiction can be understood in terms of the interpretation and judgement of institutional meaning. However, to analyse the communication of law as jurisdictional enunciation, it is also necessary to consider what is passed on in the pragmatic performance of jurisdiction.

The contributions

The chapters presented in this book broadly follow the three lines of aspects of jurisdiction already outlined. In one direction, they formulate and reconstruct the metaphysics of jurisdiction and in so doing examine the inaugural gestures of jurisdiction. In another, they perform more or less as investigations into the resources and repertoires of the jurisprudences of jurisdiction and the technologies of government. In so doing, they investigate the attachments of jurisdiction. Finally, they direct attention to the idiom of jurisdiction and the representation of the symbolic or semiotic ordering of law.

Situations of jurisdiction

The metaphysics of jurisdiction addresses the speech of law and what allows the law to emerge or cohere as law. It seeks to formulate and respond to questions such as: 'How does jurisdiction (and so law) arise in its original form?' and 'What utterance inaugurates a jurisdiction and establishes a power to legislate in its act of speech?' Questions of jurisdiction address the relation between metaphysical and juridical thought and between the legal and the social domains. In this book, the two opening chapters are used to provide a point of entry into contemporary formulations of the relations between the metaphysical and juridical thought of law.

For Costas Douzinas and Maria Drakopoulou, questions of jurisdiction do not simply have answers in the history of law and practice, but rather form a part of the 'interior' sovereignty of law (Douzinas) or are statements that inaugurate law (Drakopoulou). Both authors, of course, make strong claims for the importance of jurisdiction to the conceptual formation of the political and legal domains. In the 'Metaphysics of Jurisdiction', Costas Douzinas engages the relationship between universal jurisdiction and the conflict of jurisdictions and sovereignty. For Maria Drakopoulou, in 'Of the Founding of Law's Jurisdiction and the Politics of Sexual Difference: The Case of Roman Law', the question is more morphological: 'what is engendered and given shape through jurisdiction?' Both draw questions of jurisdiction into the formation of the modern subject. For Douzinas, paying attention to the metaphysics of jurisdiction allows for the development of a critical, acoustic, subject. For Drakopoulou, the concern is more to reveal the synchronic morphology (the shape) of law's being, rationality and power – and the way sexual difference 'provides the conditions of possibility of the "visibility" of law's power'. The immediate objects of Douzinas' polemic are the claims to transcend sovereignty made in the name of universal jurisdiction. Against this, Douzinas posits conflicts of sovereignty as the presupposition of jurisdiction. The opening of political and legal thought is the coming together, or becoming common, of a community, which 'appears by expressing itself in a sovereign way by giving itself the law'. This initial gesture Douzinas names as *bare* sovereignty – the circumscription, or naming, of being in common. Insofar as there is a question of community at issue, there can be no escape from the

metaphysics of sovereignty – and its accompanying institutionalisation. The sovereign giving of the law also invokes a law-maker and the enforcement of law or the recognition of the natural order of things. Within this scheme, jurisdiction marks the point of inauguration at which the community gives the law to itself, the most singular utterance offering up the most general law. Jurisdiction, then, is the speaking of the sovereign law of the community (*juris dicere*). If this is so, then the question of jurisdiction also grants a privileged point of location for thinking about political philosophy and philosophical politics (and law) as it is both the site and point of determination of political and legal decision.

Where Douzinas produces a chorography of the metaphysics of the sovereign subject of jurisdiction, Maria Drakopoulou can be said to produce a morphology of the metaphysics of the engenderment of jurisdiction. Where Douzinas draws on the linguistics of Benveniste to draw a distinction between enunciation and subject, Drakopoulou marks a similar distinction in terms of the statement and the narrative of sexual difference. Jurisdiction, for Drakopoulou, is not a structure but a 'function of existence' (Foucault, 1972: 86): it takes place. Her chapter in effect produces a semantics – and perhaps an ontology – of the enunciation of Western jurisdiction. In relating two accounts of sexual difference that shape the narrative of Roman law, the stories of Lucretia and Verginia examine the way in which the morphological power of jurisdiction is realised. Drakopoulou relates the story of the extortion of sex from Lucretia, the subsequent trial of Sextus for crimes relating to illicit sexual acts, and also relates her suicide to the founding of the new law of Rome. The radical transformation of time and space that inaugurated a new law was established by marking the feminine as sexual difference and as a referent outside of law. The other story of Rome that Drakopoulou relates is that of Verginia. Her story of sexual assault, honour, chastity and death is told as part of the relationship of the excluded legal relationship of the feminine to law.

The accounts of jurisdiction offered by Drakopoulou and Douzinas sit alongside, and can be counterposed to, two earlier broadly phenomenological accounts of jurisdiction by Goodrich and Cover. Together they flesh out the contemporary critical framing of jurisdiction. In the work of Peter Goodrich, jurisdiction is linked to the articulation or nomination of desire. It becomes a site of enunciation where affective desires become attached to law as person, place or event. Whereas Douzinas concentrates on the authorisation of jurisdiction, and Drakopoulou its shape, it is the ways in which law institutes life that are the central concern of Goodrich's pragmatics of jurisdiction. While jurisdiction is frequently described in terms of the posited laws of state law, Goodrich investigates those jurisdictions, or aspects of jurisdiction, that reveal the instituted common laws of desire. In *Law in the Courts of Love*, for example, Goodrich disinters a (possibly apocryphal) jurisdiction of the laws of love, in which the poetics of courtship and the conduct of love were subject to adjudication. Where the Christian tradition instituted a jurisdiction that encouraged a love of the divine and judged in the name of *lex caritas*, these courts

of love followed the laws of erotic love (Goodrich, 1996: 217). The proceedings of the Courts of Love date back to the twelfth and thirteenth centuries and were related in the Troubadour traditions. For Goodrich, they emblematise an errant jurisdiction that pitches love and death into relation. They are not subject to church law but to a feminine jurisdiction where affect and desire are given due weight in an art of living. Where Goodrich finds a feminine jurisdiction in the interstices of law and a feminine politics within the law, Drakopoulou figures the feminine as outside the law. Accordingly, for Drakopoulou, the desires of law cannot recover a feminine voice within the genealogical ordering of law.

While somewhat different in idiom, Robert Cover's accounts of jurisdiction, bring out a fourth theme of a metaphysics of jurisdiction, the way that jurisdiction is bound to violence and justice. Robert Cover develops an account of jurisdiction that is more closely concerned to calculate or measure with the violence of law. To do this Cover elaborates something like a natural law of jurisdiction (Cover, 1995a,b,c).

What makes Cover's elaboration of jurisdiction distinct is the emphasis he places on linking his account of a jurisdiction of natural law committed to a justice 'yet to come' to an institutional account of the practical reasoning of the judge that restages a role-bound jurisdiction of violence. In this configuration the claim of jurisdiction is never simply a claim of present authority but invokes with it a commitment of a justice to come. The claim to judge and to actualise law and justice is never separate from the institutional force necessary to transform the contingent action into a meaningful event. This formulation also returns questions of jurisdiction to their point of ordering – their time and place (McVeigh, Rush and Young, 2001). This is so both for state law and for other normative orders (Roberts, 2005). Douzinas' chapter draws attention not just to the violence in law, but to the violence *of* law, a violence that can never simply be subordinated to the theological concerns of sovereignty and the aesthetic and ethical concerns of judgement. Drakopoulou's chapter displaces the fiction of the sovereign subject into the shape of law and finds violence in the separate and engendered form of violence that instantiates the law. At the risk of over-generalisation, it could be said that it has been the return to the problem of the time and place of law that has preoccupied critical legal theory in the last 10 years.

States of jurisdiction

The chapters in the third part of the book are relatively easy to situate. Two features have dominated modern Western formulations of jurisdiction: the significance of the state and its sovereignty; and the means through which the attachments of jurisdiction proceed. Conceptually and institutionally, they have been formulated in terms of a set of relations between jurisdiction, nation-state, sovereignty and territory.

Without pressing the issue too hard, at present, formulations of questions of jurisdiction dominate contemporary political and civil disputes. Questions of

executive power, and the civil and military authority to try those held in Camp X-Ray, Guantanamo Bay, have returned issues of freedom and security to those of jurisdiction. Less publicly, and in many ways more farcically, the remnants of British colonial jurisdiction are being reassessed on Pitcairn Island, just as the legacy of the colonial jurisdictions is being effaced in the rest of the post-colonial domains [*R v 7 Named Accused* [2004] PNCA 1]. In a slightly different context, the new international orders of the commercial domain have pitched the complexities of the organisation of jurisdictions in private international law against the claims of a new *lex mercatoria* for global economies, universal jurisdictions of human rights and transmission systems of information such as the internet. What allows this array of jurisdictional questions to be connected is a concern with overstepping the territorial jurisdictions of nation-states. What inhibits thought about what this might mean is a relative lack of attention to the juridical and jurisdictional character of state sovereignty and its alternatives, and in particular to the homology of law and territory which still dominates contemporary accounts of the state.

If the contributions to the first part of the book seek to give conceptual order to questions of jurisdiction at the level of metaphysics, in this part the contributors engage with the particular jurisdictional formations of the modern sovereign nation-state. Where positivist jurisprudence has customarily represented jurisdiction in terms of a monologic of sovereign state power, the contributions to this book investigate both the natural law of jurisdictions and the plurality of state and non-state jurisdictions. While in some respects the influence of pluralism in the social and cultural study of law has pointed to the way in which legal practices are diverse in both production and reception of law, paying attention to questions of jurisdiction allows for these observations to continue to be phrased in terms of juridical ordering.

The overwhelming contemporary importance attached to the sovereign territorial jurisdictions of the nation-state should not obscure the variety of ways in which jurisdictional attachments can be, and have been, formed, as well as the different ways in which territory itself has been articulated. In medieval Europe, for example, territory was a term that referred to the district surrounding a city over which it had jurisdiction or exclusive authority. Roman and pre-modern sovereignty was conceptualised in terms of *imperium* and was connected to personal political denomination and office rather than land. In England, the feudal relation between Crown and subject was bound into a recognised system of rights and obligations (Ullman, 1975). While territorial jurisdiction was not unknown in medieval England, the most notable territorial jurisdictions were franchises. Franchises were grants of authority from the Crown to the territorial lord, who might be either lay or ecclesiastical. All these are some way from contemporary presuppositions of the fact of sovereignty and territory.

The modern sovereign territorial state as a particular form of jurisdictional organisation with a specific conceptual and institutional ordering owes much to the European political settlement consequent on the wars of confessional religion in seventeenth-century Europe. The Treaty of Westphalia in 1648 is credited with

're-spatialising' Europe in terms of bounded sovereign territories and specifiable populations (Schmitt, 1996). Its jurisprudence was the product of a self-conscious work, now recently revived, first of German political jurisprudence, then of English and French jurists in the seventeenth century (Hunter, 2001; Hunter and Saunders, 2003). Sovereignty, too, in the common law tradition might be viewed as a series of jurisdictional disputes. This is so from the early modern disputes over ecclesiastical, Royal and common law jurisdiction played out, for example, in the case of Prohibitions del Roy [(1607) 12 Co Rep 63], as well as the administrative battles for control of the government of the state in the nineteenth century and the present day reordering of the juridical orders of human rights.

The chapters in this part all address and complicate contemporary articulations of jurisdiction and sovereignty. Stewart Motha addresses the constitution of jurisdiction and the presence of the sovereign subject through the figure of the abandoned detainee at Guantanamo Bay. John Strawson and Nan Seuffert address the inheritance of colonial jurisdiction practices through analyses of contemporary 'experiments' in state formation: the absent state of Palestine and the 'bi-cultural' state of New Zealand. Finally, Mary Keyes addresses what is of interest to the state, as well as what interests the state has, in controlling jurisdiction and adjudication.

In 'Guantanamo Bay, "Abandoned Being" and the Constitution of Jurisdiction', the object of Stewart Motha's critical concern is those accounts of sovereignty and the rule of law that attempt to secure political community through a monistic account of sovereign and subject. Taking his cue from the work of Jean-Luc Nancy (2003), Motha argues that, far from being a unique exception to law, the 'abandoned' status of the detainees at Camp X-Ray, Guantanamo Bay, is central to the structure of sovereignty in general and to the neo-imperial American state in particular. Starting with the observation that the detainees at Camp X-Ray are not fully excluded from law, but are held in place by a law that excludes them from access to law, Motha draws out the way in which the condition of the life of the detainee unmediated by civil law is a product of a jurisdictional arrangement of the withdrawal of law. What is revealed in the 'abandonment' of the detainee is not a loss of law, but a structure that borders sovereign law and upholds both law and its withdrawal. For Motha, what is revealed is not so much a state of exception but a part of the working of the economy of sovereignty. The process of abandonment is one of reinscribing the limits of law by means of an inclusive exclusion. In this account, 'abandoned being' is neither inside nor outside the legal or political order of law, but is a possibility through which jurisdictional order proceeds and is constituted.

John Strawson considers absence of another kind in his chapter, 'Conjuring Palestine: The Jurisdiction of Dispossession'. Here what is at issue, in the context of Palestine, is the status of a jurisdiction that might appear to be expressing the authority of a self-determining sovereign state but is, for the time being, without state or territory. While Palestine possesses many of the trappings of statehood – walled borders, political representation, a national authority and so forth – what drives the formation of Palestine is not the logic of the possession of space and place but its dispossession. The institutional logic for this dispossession can be

found, Strawson argues, in the continued use of the jurisdictional arrangements of the British colonial mandates over Palestine and Israel. Strawson elaborates that continuity in the meticulous legalism of subordination which characterises the contemporary politics of settlement.

Like Motha at Camp X-Ray, Strawson finds in Palestine a state of abandonment. Where Motha considers this abandonment as a question of being and of being a subject, Strawson elaborates it as a question of power and discourse. Nan Seuffert's chapter, 'Jurisdiction and Nation Building: Tall Tales in Nineteenth Century Aotearoa/New Zealand', is a companion piece to Strawson's account of Palestine. Like Strawson, Seuffert points to the way in which contemporary practices of dispossession in Aotearoa/New Zealand continue the jurisdictional practices that facilitated the dispossession of Maori in the nineteenth century. Seuffert draws out the ways in which the jurisdictional subordination of Maori law, and the displacement of Maori political and social structures, was also connected to a discourse of the ethnic nation and state. The state of New Zealand was constructed in the second half of the nineteenth century in conformity with the fantasy of an ethnically 'British' settlement. What Nan Seuffert's account drives home is how much of the aspiration of a 'bi-cultural' Aotearoa/New Zealand depends on structures of jurisdiction previously deployed to do precisely the opposite.

Where the earlier chapters in this part presume a central relation between state, jurisdiction and territory, in the final chapter, 'The Suppression of State Interests in International Litigation', Mary Keyes examines how state interests are represented in jurisdictional issues between private parties. Keyes shows that the criteria for determination of jurisdiction, such as the presumptions of territorial connection or compensation for personal injuries, are the product of a pragmatic formalism and the attempt to suspend or suppress overt reference to international political relations. In this way, jurisdictional arrangements are managed and a process of adjudication is practised that avoids direct involvement with questions of state policy or international relations. This, of course, does not stop a decision being made as to the choice of competing legal systems – and judgements being made that have effects on state interests.

In a way that resonates with the analyses provided by Strawson and Seuffert, Keyes shows the ways in which formal jurisdictional arrangements give shape to the understanding of the state. This should be no surprise given the history of jurisdictional practice. What may be a surprise, however, is the willingness of doctrinal scholars, practitioners and critics to overlook the difference jurisdiction makes to thinking about the state. One task of a critical jurisprudence would be to produce accounts of sovereignty and doctrine that no longer presuppose territory as fact – subject only to adjudicatory and administrative organisation. This is the concern of the third part of this book.

Technologies of jurisdiction

Jurisdiction, particularly in common law thought, is known through its acts and is elaborated through usage and practice. An exercise of a jurisdiction is always an

exercise of a technology, or an assemblage of devices, that authorises law and in a general sense institutes a life – or at least a life before the law. In common law thought, this technical and material aspect might be characterised in terms of a technology or set of techniques that capture or attach its objects to law. One aspect of this has already been investigated in the elaboration of relations between sovereignty, territory and the state. It is the questioning of the relations between these three terms that allows for a more nuanced account of jurisdiction as an instrument of law. This is the concern of the third part of the book.

In this part, attention is turned to some of the devices of judgement, categorisation, government and administration that have dominated the processes of the attachment of persons, things, events and effects to the body of law. Consideration is given here to the ways in which space is instituted and demarcated through measurement (Shaunnagh Dorsett); place is organised through administration (Les Moran) desire is marshalled and distributed by planning regimes (Lee Godden); and the death of legal persons is delimited through status and role (Shaun McVeigh). In part, these contributions to the book are concerned with producing 'thick' descriptions of the techniques of jurisdiction, but they also help to redefine the ways in which the juridical can be thought in relation to technology.

One of the more striking revivals of jurisprudence has been the spatial turn taken in the elaboration of the links between law and political, cultural and social geography. In her chapter, 'Mapping Territories', Shaunnagh Dorsett explores cartography as an aspect of the inauguration of jurisdiction. As a technology of jurisdiction, a map enables space to become a jurisdiction, marked as the territory of a sovereign. It is this technology, Dorsett argues, that proved decisive in displacing the earlier jurisdictional arrangement based on status and dominion, as it provided for the possibility of a definitive delimitation of space. Where once a legal space might have been delimited by the amount of work done by an ox under plough, or the distance capable of being walked in a day, space could now be determined in relation to an abstract grid. In a more complex manner, cartography provided a device for the development of modern understanding of regulation since it allowed for the demarcation of boundaries to be determined by technical means and not local memory or custom. It rendered space abstract and knowable without particular knowledge of place or custom. As Dorsett notes, this technology provided a functional reference for the European and British colonial drive to gain possession of the world. Finally, a territorial jurisdiction based on mapping produces a particular way of understanding place and its relation to the ground or land. For the purposes of Western laws, all such relations must be capable of representation in terms of a grid.

Lee Godden and Les Moran investigate the space of jurisdiction through the contemporary orderings of bodies and desire. Where Dorsett considers geography, chorography and cartography as technologies of jurisdiction, Godden, in 'Jurisdiction of Body and Desire: Exploring the Boundaries of Bodily Control in Prostitution Law', positions jurisdiction between bodies and law, and Moran, in 'Placing Jurisdiction', figures jurisdiction in terms of a spatial

ordering of bodies. For Godden, while the regulation of prostitution establishes the nexus – largely in terms of boundaries – between the body and law, how jurisdiction is understood and practised depends on a conception and practice of law. For Moran, the jurisdictional control of sexual bodies is set in the context of the creation of a queer domain of the 'Gay Village' in Manchester, England, and the maintenance of the homophobic political-legal order of the Queen's Peace.

In Australia, the regulation of prostitution has varied from the criminal regulation of a pre-existing sinful body that has transgressed moral values to the administrative regulation of prostitution that constrains, constructs and manages a 'form of life' of prostitution. Drawing on the work of Michel Foucault and Judith Butler, Godden shows how prostitution and planning laws in Queensland, Australia, shape prostitution in terms of place and a negative identity based on exclusion from both family and community. Jurisdiction in this account operates through the performance both of prostitution and of the regulatory technology that creates legal meaning both as a question of gendered sexual practice and as question of population control. Questions of jurisdiction emerge here to unify around the prostitute body a broad range of regulatory concerns relating to building use, planning, design, social hygiene, moral policing and so forth. However, in so doing, the prostitute body takes up a legal status (or a *de facto* legal status) that sets 'bounds for the prostitute's body and sexual activity by "identifying" the concurrent necessity for such bounding'.

In 'Placing Jurisdiction', Moran problematises the relation between space, language, the body and the law. In his analysis of the jurisdiction over male desire and homophobic violence, Moran voices these concerns in terms of a traditional civil jurisprudence: the safety and security of the Queen's Peace. In contrasting a police prosecution of seven men for sexual offences including sodomy in Bolton, Lancashire, with the construction of the 'Gay Village' in Manchester 15 miles away, Moran draws out the ways in which the jurisdictional arrangement of public and private space, natural and unnatural bodily activities, safe and unsafe sexual, social and commercial practices are brought into being and contested.

At the centre of Moran's analysis is the insistence that bodily–spatial arrangements should be thought of in political–legal terms. If the prosecution of seven men for consensual sexual activity provides a depressing reminder of the homophobic ordering of 'private' space, the spatial and bodily ordering of the 'Gay Village' provides a new and limited ordering of public space and bodies. However, as Moran's interviews highlight, both engage a politics of space and place. In Moran's account, the space of the 'Gay Village' does not offer the possibility of a jurisdictional solution to homophobic violence, since it organises only one aspect of public space. What it does reveal, however, are the different ways in which the sovereign body of the law is articulated through questions of jurisdiction.

In 'Subjects of Jurisdiction: The Dying', McVeigh returns the emergent jurisdiction over assisted suicide and euthanasia to the functional tasks of a dogmatic order and considers how a jurisdiction over the terminally ill might

institute them as legal persons and bring them to their death. Many accounts of assisted suicide and euthanasia make appeals to a natural moral personality in order to judge legal regulation, whether it be in terms of the autonomous or sacred person of integrity. However, they have difficulty in accounting for the jurisdictional structures and techniques of regulation. As such, they leave untouched the means by which the state might express its interest in the terminally ill, or in assisting suicide or euthanasia. This chapter examines how these interests have been delimited by the status of legal personality and the available roles that give juridical shape to a dignified manner of dying for the terminally ill. More generally, the chapter explores a theme that runs throughout this book: the competition in legal thought between anti-legal regimes that are framed in terms of an escape from law in the name of a higher law (freedom, integrity or the sacred) and those political–legal orders that remain within a technically constructed (dogmatic) legal order.

To note that jurisprudence is transmitted through and must engage with the technologies of jurisdiction is to do no more than point out that coming to judgement in law – which is the task of jurisprudence – is neither just a matter of interpretation nor just a matter of consequential enforcement. What is at issue are the techniques of the inscription and institution of forms of life. The chapters in this part of the book can broadly be said to have investigated the attachment of bodies, things and events to the body of law. They also open up questions of jurisdiction to judgement and to the diction of jurisdiction (Rush, 1997).

Dictions of jurisdiction

The fifth part of the book takes up the idiomatic ordering, or diction, of jurisdiction. In this book, the elaboration of the inaugural character of jurisdiction and its topical and technical arrangement has been presented as double bound: it is distributed amongst the parts of law; and it is the point from which each of the legal parts are related and put into circulation. The voice of law – as well as the attendant thematics of enunciation, presence, authority and truth – owes as much to the inheritance of scholastic theology and canon law traditions as it does to formulations within contemporary legal thought (Helmholtz, 2004; Legendre, 1997). Equally, the status or standing of the technical understanding of jurisdiction can be traced both through the institutional inheritance of Roman law and the concerns of authorised government. How these two aspects might be articulated has been the subject on a long polemic between legal and anti-legal understandings of law (Schutz, 2005). While modern legal theory has often inaugurated its jurisprudence with the assertion or questioning of the sovereignty of the modern state, questions of jurisdiction become more readily visible as a concern of jurisprudence when they are not treated as homologous to sovereignty. This at least has been one of the persistent themes of the contributions to this book.

In this part, *Jurisprudence of Jurisdiction* reprises two moments of the meeting of laws at the frontiers of east and west in America and in India. In 'Embracing Jurisdiction: John Ford's *The Man Who Shot Liberty Valance*', Bill Grantham takes up the themes of idiom, authority and jurisdiction and examines them in terms of the 'forms of life' and consciousness represented in a John Ford Western. *Liberty Valance*, points out Grantham, was concerned with the clash of jurisdictions between the 'old' and 'new' laws of the West. On the one hand, there was the law of frontier based on the jurisdiction of personal authority (and the small arms and the self-interest of the property barons) and on the other hand, there was the new territorial jurisdiction of the state based on the rule of law (and federal arms, fundamental principles and the settled state).

The jurisdiction of the old law was founded on personal authority, that of the new law on principle. *Liberty Valence* re-tells the passing of one law to another. In this, *Liberty Valence* is unusual in the way that it self-consciously enacts its frontier story as one of rival jurisdictions and takes its interior drama of conscience as being that of the 'crisis of living with and without jurisdiction'. Stoddard, who narrates the story and is credited with establishing the new law by killing the dishonourable Liberty Valance in a shoot-out, discovers that he is not the man who shot Liberty Valance. The true killer was Doniphon who, as the last (honourable) representative of the old law of personal jurisdiction, died in the process. In doing this, Doniphon ushered in the new jurisdiction based on the rule of law. The crisis, of course, is that Stoddard – who is the hero of the film, the possessor of both the prize girl and the political life – does not have the personal authority to inaugurate the law. This is, as the jurisprudence of Robert Cover displays, the crisis of all thought of law that falls to be enforced. A valance, after all, is a drape used to hang over, cover or mask an underlying structure. Valence, a word that can be heard in the same way, is a measure of strength, capacity or attraction.

Against the tenor of some of the more structural accounts of the jurisprudence of jurisdiction presented in this book, Grantham captures the way in which the idiom of jurisdiction continues to reproduce a 'form of life' as a question of character, action and judgement – phrased in terms of the practical, physical knowledge of the procedures, conduct and manners of law. For Grantham, John Ford's filmmaking – or at least his account of it – proceeds through an empiricism of historical fact. No doubt it was an empiricism much influenced by American prudence and the sense that the factual narratives of the American West were epic and existed in some sense outside of time. Ford's was a kind of empirical Platonism to be found in the work of Ralph Waldo Emerson and in different form in the common law (Cavell, 1995; Deleuze and Guattari, 1994). In *Liberty Valance*, suggests Grantham, Ford mourns the passing of the old law of the West, not because this law was better (clearly, for Ford, it was not) but because the new jurisdiction of territorial law can offer no completion or redemption without the authority of a personal jurisdiction which no longer has a place.

In contrast, in his chapter, 'Jurisdiction and the Colonisation of Sublime Enjoyment', Piyel Haldar traces the idiomatic use of the sublime in the elaboration of the imperial aspirations of the British Crown and its common law in India.

The sublime directs attention not to the material presence of human laws, but to that which is beyond the domain of the human. As a motive to thought and action, it can open up the world to infinite pleasure and to awe or terror; subject to sublimation and appropriation, it can serve as the idiom of control and the extension of a territorial jurisdiction; and, as the invisible order of the law beyond law, it connects archaic jurisdictions to contemporary ones in order to invoke a universal jurisdiction. Perhaps in order to emphasise the affective character of the sublime, Haldar's investigation of India's colonisation proceeds at the level of biography and investigates the work and life of William Jones, seventeenth-century judge, Orientalist and colonial administrator in India.

For Haldar, the attempt to colonise what the mind cannot grasp in the sublime provides the shape of authority and desire in much eighteenth-century common law and contemporary legal thought. As a philologist, William Jones was a translator of the Laws of Manu; as a judge in Calcutta, he put those translations to use in the courts as a digest of indigenous law; and as a jurist–philologist, he speculated on the possible common origins of the English common law and the Laws of Manu. Readers of the work of Edward Said will no longer be surprised to find that the Romantic's' impulse to investigate Hindu and Muslim laws and literature was also put to imperial purposes. However, Haldar also examines the way that Orientalist romanticism has given a specific shape to the jurisprudence of jurisdiction. Jones' investment in the sublime as philologist can be registered in terms of pleasure. As a judge, such pleasure was sublimated and put to use to create an Indian subject of law governed now through the jurisdiction of English laws of Manu. As jurist seeking to justify the universal jurisdiction of the English common law and government through native law, the sublime was used to postulate a common origin of ancient laws. Finally, and perhaps inevitably, Jones was tempted to identify himself with the position of sublime legislator, joining the figures of Manu, Solon and Tribonian as both a passive recipient of a sublime law and a powerful conduit or mediator between the law and its subjects. With this, of course, colonial law obtains full force – although, for Jones and the common law, the sublime still remains an ungraspable idiom.

Concluding comments

The return to questions of jurisdiction forms part of an emergent genre of scholarship within doctrinal, historical and critical jurisprudence. In the *Jurisprudence of Jurisdiction* questions of jurisdiction and the institution, judgement and address of law have been directed to those of belonging to law, of working within the idiom of law, and what – if anything – can continue to be said in the name of the law. These might be taken as threshold concerns of exercising a jurisdiction.

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Part II

Situations

2 The metaphysics of jurisdiction

Costas Douzinas

In 1993, Belgium gave itself the jurisdiction to indict and arrest anywhere in the world and to try anyone suspected of having committed war crimes and crimes against humanity whenever and wherever these crimes may have been committed. Under this universal jurisdiction, the Belgian authorities issued an arrest warrant, in 2000, against Congo's Foreign Minister, Abdulaye Ndobasi. The Congo took Belgium to the International Court of Justice in the Hague, claiming that the warrant violated the Minister's immunity under international customary law. In February 2002, the Congo won and the court ordered Belgium to cancel the warrant.[1] The court accepted that Foreign Ministers cannot be brought before the criminal courts of a foreign state while in office, irrespective of the seriousness of the allegations, as they are protected by the immunity of sovereignty. However, three Western judges added that the court should have ruled that crimes against humanity can engage universal jurisdiction, even if it was not applicable in the current case, and a fourth argued that Belgium had the power to issue the warrant. As the three put it, while there may be no general rule specifically authorising the right to exercise universal jurisdiction, the absence of a prohibitive rule and the growing international consensus on the need to punish crimes regarded as most heinous by the international community indicate that the warrant for the arrest of Mr Ndobasi did not violate international law.

The question of universal jurisdiction is one of the most contested problems in the new times we live in after the collapse of communism. It is associated with the decline of the principle of sovereignty upon which international law was established in the post-Westphalian period. Ours is a period of proliferating jurisdictions, each positioning itself against the horizon of the universal. But every claim to universal jurisdiction soon becomes particular in relation to a wider claim (that of the International Court of Justice), and that again will be dwarfed by the greater universality of the International Criminal Court which will again be contested by the American exception with its implicit claim to an even wider de facto universality. The process of universalisation has a tendency to be reproduced

1 *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*), International Court of Justice, Judgment of 14 February 2002. Case report at http://212.153.43.18/icjwww/ipresscom/ipress2002/ipresscom2002-04bis_cobe_20020214.htm

ad infinitum as each universal becomes a particular against a new jurisdiction that claims even greater catholicity. But universal jurisdiction proclaimed by various particulars leads inexorably to a clash of jurisdictions: its proper field is the conflict of laws. This conflict appears to be external – a contest between different institutions and normative systems, each with its own priorities, procedures and scope of intervention. This essay argues, however, that the conflict of jurisdictions and the dialectic of universal, particular and singular is not just a contingency of contemporary jurisdiction, but a presupposition of jurisdiction *tout court* intimately linked with the metaphysics of sovereignty. Let us turn to this metaphysics.

A space, terrain or collection of people becomes community when this space gathers itself in common. By gathering in common, the terrain becomes territory, the collection, collectivity or community, the space of relationships, society. A community comes forth as *polis*, empire or state by circumscribing itself in its interiority and demarcating its proper from an outside. A community's outside may be seen as open space (the New World to old Europe), as uncircumscribed relations (the barbarians beyond the borders) or as another foreign community (Sparta to Athens or France to England). In all instances, this coming together or becoming common appears by expressing itself in a sovereign way by giving itself the law. In this minimal sense, sovereignty is the name of the appearance of a community, the expression of a decision to be in common. Sovereignty launches itself when it sets the origin and the ends of community, when a community gives itself to itself formally in self-jurisdiction. Community as coming together must gather itself by asserting the power of sovereignty as the outward expression and inner arrangement of its very facticity. While this assertion often presupposes the existence of commonality in the form of a mythical past, it is the declaration itself that brings it into existence. We can call this logical presupposition and historical expression of community, of any community, *bare sovereignty*.

For a community to be in common in its sovereignty, relationships amongst its members must be circumscribed – in other words, regulated. The maxim *ubi societas ibi jus* expresses the recognition that a collection becomes people in community when this or that law declares itself as the common law, and transforms relations from open and uncircumscribed to closed, encircled and ordered. But a law can become the common law and define community if someone, an ultimate instance decision-maker or decision decides with finality and sets the physical and spiritual borders of the common. The setting of the common law as the expression and organisation of community may take place through a long process of recognising a certain natural order of things, the *dike* of the world, or through the enunciation of a new law and constitution through an act of taking hold of the space and the people. But in all instances, a community gathers itself as common or sovereign in jurisdiction in *juris dicere*, the speaking of law.

Let me start with the etymology of the term. Jurisdiction speaks the law: it is juris diction – the diction of law, law's speech and word. As a double genitive, jurisdiction, law's speech, has two aspects, which are inescapably intertwined. It refers both to the diction that speaks the law – law's inauguration through words – and law's speech – what the inaugurated law says. And if the Romans

believe that the law speaks, for the Greeks, the word for jurisdiction is *dikaiodosia, diken didonai*, the giving of *dike*, of order and of the law. Jurisdiction is the gift of law (but who gives this gift?) and law's gift (but what does the law donate?). Who speaks and gives the law (*dicere juris*), and what does the law give (*juris dictio*)? If we were to accept Ulpian's contested opinion in the Digest that the word for law *jus* derives from *justitia*, that is, justice, jurisdiction would be the diction of justice, that is, justice's talk.

The law speaks and the law gives; the law gives its talk and this law-talk is associated with justice. The common metaphysical structure that regulates jurisdiction follows a schema according to which the most particular, the singular – a speech or utterance – offers the most general, law. The universal as ratio, concept or law conjoins the most fleeting, the saying of a word or the happening of an event. But which speech establishes its power to legislate in its act of speaking? Which utterance brings about this formidable result while uttering mere words? How does jurisdiction arise in its original form? These ultimate questions of jurisprudence point to the proper boundary between law and politics, the political grounding of law and the legal foundation of the polity – in other words, to the heart of a political philosophy and of philosophical politics.

According to the French philosopher Jean-Luc Nancy, what is at stake in the articulation of the singular and the universal is the linking of the juridical and the political that brings law to existence, allows law's emergence as law (Nancy, 2003: 152–71). We are faced with the question of the nature of the decision or speech that makes law effective. This decision is an act of law. But, unlike law-making acts, which give effect to the generality of law, this act is singular and therefore belongs to the field of law's application. And unlike particular acts of law application, this is an act in which the law recognises itself as such, acts out its original right as law reflexively and, in doing so, institutes itself. The speech that gives law is a legislation or judgement. The nature of law-giving is most apparent in constitution-making, the inaugural act of the power to legislate. In all legislation, but particularly in constitution-making, the political as decision, act or judgement attaches itself to law as the precondition of law's coming into being. But for the law to come into existence, it must declare itself to be the law of a specific community and attach to a particular polity. The juridical too links itself to the political, to the *polis* as its constituting provision. We have a double linking of a judgement that singularly institutes the law, of a unique act that pronounces legitimacy in general: it is a particular judgement about the generality of law and a general judgement about the particularity of a polity and its sovereignty. Jurisdiction contains the motif of a declaration that gives now and prospectively reproduces the power of law as always linked with a polity and a politics.

In jurisdiction, legal speech both constitutes and states the law; it introduces the constitution (an act of utter singularity, indeed the very definition of the unique and unrepeatable event) and presents its principles and norms (a return to the universality of law and the uniformity of its application). Two axes are implicated here and are rolled into one: the universal and the particular as well as the performative and the constative. Their cohabitation helps confuse the four

poles of the two dyads. To glimpse the structure of jurisdiction, we need to separate their respective positions.

Let me recall here a crucial semiotic distinction between two different speaking positions – that of the subject of enunciation and that of the subject of the statement. In literature, the subject of enunciation is the author of a novel, while the novel's fictional narrator is the subject of the statement, the one who tells the story. The lack of distinction between the two positions, the confusion of the distinct subjects of the diction, permeates jurisdiction and is at its most apparent in constitution-making. The French Declaration of the Rights of Man and Citizen, starts by claiming to derive from God and to speak on behalf of all humanity and its eternal and inalienable rights. It states: 'All men are born free and equal' but then proceeds to give the newly inaugurated rights to the only people it can legislate for – French citizens. The recently enacted South African Constitution begins: 'We the people of South Africa recognise the injustices of our past, honour those who suffered and adopt this constitution'. Now the subject of enunciation is the constitutional assembly – it is the body which creates the new institutions, structures and rights – but its statement is attributed to a totally different subject: God, humanity or the people. In both instances, the subject of enunciation – the constitutional legislator or the new sovereign – is utterly unique. It is the agent and result of revolution, the historical expression of triumphant political will – in other words, a singularity. The revolution and its agent form the essence, one could say, of eventness, of the utter unpredictability of a history-making event. And yet this representative of the event speaks the law, both creative and unique, as all creativity has to be, by referring it back to another speaker, a putative higher authority – God or the People – of which it presents itself as a particular instance. The particular and the universal are rolled together, as are the different subjects of enunciation and statement. One obvious explanation is that referral backwards or upwards to the universal acts as an ideological trope aiming to justify or legitimise the utter uniqueness of the action and diction. And yet, like many obvious explanations, I believe that it is not sufficient.

The confusion, the rolling together through the rhetorical figure of *metalepsis* (the part stands in for the whole), is implicit in the nature of all jurisdiction and not only in constitution-making after revolutionary upheavals. Enunciation is the general precondition for the existence of all discourse. Since Rome at least, the diction of *jus*, its public utterance, is the necessary prerequisite and constraint of all law. This constraint is not limited to law; enunciation is the general precondition of all discourse since, without its communication to at least one other person, discourse would remain a private matter. Discourse, in general, requires a speaking subject. Jurisdiction, following this constraint, demands:

> the existential positing of a *judex*, of an unique individual who says the right, and who is unique not because he takes this power to himself . . . nor because people have decided to give it to him [but because] only a single individual can speak.
>
> (Nancy, 1993: 132)

If the law must speak in order to exist, the law needs a mouth and voice. We, the law's addressees, must hear law's word and accept law's gift. But if the law needs a mouth, the mouth attaches to a face and a body. The law to speak must be one; only a unique individual can speak law. And it is because the law must have a mouth and a body that the great legislators – Moses, Solo, Lycurgus, Plato, Zarathustra – enter the stage. One could generalise: this is the entrance door for the great representatives of sovereignty, God, King, the People. Juris-diction is individual because it is indivisible. The legislator or *judex*, the sovereign himself, is a function of law's speech, of the speaking requirement of law.

The most extreme philosophical defence of the principle of monarchic sovereignty is advanced by Hegel (1967) in his *Philosophy of Right*. Hegel argues that the content and aim of the state is the union of all. The ethical state realises the principle of union as such. For Hegel, politics transcends collective life and other social relations established for the benefit of the partners; similarly, the citizen transcends the private individual of civil society. Sovereignty exists in the form of a subjectivity without foundation, a personality which enjoys complete self-determination. It is this transcendence, both metaphysical and empirical, that is incarnated in the monarch. He is 'the summit and base of everything' in the state (1967: 278), the truth of its truth, the truth of 'union as such' (1967: 279). The oneness and uniqueness of the monarch, the monistic *arche*, both presents the truth of the union of all in the state and embodies its empirical instantiation. The monarch is the superior individual of the state. He is the whole of the state, someone whose personal unity accomplishes the union of the state. The monarch is the state itself as individuality, an individuality which encloses both the utterly unique biological person of the ruler and the whole of the relations of the state. The monarch as a real person is the truth of the union, its very existence. The unity of the state is personal and the sovereign person is unitary. Indeed, the state has legal personality and exists only if it is identified with a single person: 'The personality of the State is real only if it is a single person' (1967: 278). The monarch incarnates the principle of sovereignty and affirms the essence of union by converting it into the unity of a real person.

But what creates the need for such a unique and universal person? What gives the monarch his two bodies and turns him into the secular simulacrum of Christ? It is the demand that the right be posited. '*Right is by its essence an actual positing* … The actuality of right is its *sensible declaration* to the intelligence, and the exercise of its legitimate power' (Nancy, 1993: 119, italics in original). Hegel derives the need and nature of the singular, individual personification of sovereignty precisely from the requirement that law speaks. The position of law is jurisdiction. The right of the people, which is nothing other than the expression of the Spirit in the ethical state, must take empirical existence, speak through its positing in jurisdiction: 'The juris-*diction* of the monarch, on this account, is only the naming of right, of union as right' (Hegel, 1967: 131, italics in original). Right is the presupposition of the union of the people but to become real it must be pronounced. The monarch, the *monos archon* or unique sole ruler, comes into

existence in order to voice this right. The long and tortuous metaphysical argument ends up with the same conclusion. The monarch is a function of jurisdiction, the historical mouthpiece of the Spirit as the announcer of the right of people. The sovereign person comes to existence because the Spirit as right must be actualised in the world. The 'signature, the name, and the mouth of the monarch who says "I will" constitute and are the decision that, even if it adds nothing to the content of the people's right, transforms the saying of the law and of the councils into the doing of subjectivity' (Hegel, 1967: 131).

Hegel believes in the union between the right(s) of people and the type of law a polity introduces through its sovereign (Douzinas, 2002). 'Concrete right is the absolute necessity of spirit' (Hegel, 1967: 28). Today we have to accept that rights are the effect and not the cause of law. If this is so, the figuration of king and right or of legislator and people takes a different inflection. It is the particular which speaks, the Constitutional Assembly, the legislator or the judge but their utterance is figured in the name of a silent partner for whom they speak – God, King, the People or law. The saying of law, juris-diction, is what brings together the universal and the particular and articulates their relation. Here we reach the original and basic structure of what one could call the theologico-political form of sovereignty. All legislators repeat the gesture of Moses in Sinai. Moses speaks and gives the law as a mouthpiece or a ventriloquist's dummy; in reality, it is God who speaks and dictates his words to Moses. According to theologico-political philosophy, the sovereign is he who declares the exception and metes out the excess and incalculability (Schmitt, 1985). The function of jurisdiction is to bring the sovereign to life and give him voice and then, by confusing the person who speaks and the subject who states, to conceal sovereignty by confounding its creative, performative aspect with the declaration of the law and by excepting or excluding the sovereign's power of exemption.[2] Even more importantly, the configuration of individual and universal creates a body politic which mirrors the individuality of the *juris-dictator* (he who speaks the law), a unified body which, while plural and therefore silent, wills the law singularly and speaks through its foil and representative, the sovereign, legislator or judge.

We can now understand a second crucial element of jurisdiction. As originary power or foil for sovereignty, it must both establish (perform) and confirm (state) the law. Both producer and witness, jurisdiction incorporates the contingent 'I' of the political agent (monarch, revolutionary or reformer) into the community of a deeply rooted or under construction 'We'. Nietzsche said that morality is the absolutisation and eternalisation of temporary relations of power. Could we not argue, similarly, that the diction of law and its constraint that it be spoken by an individual presents the social as individual – in other words undivided – as the mirror image of law's speaker? The distance between he who performs (the legislator) and he who states (the people or law) is where the One and All

2 For the difficulties of lawyers and political philosophers with the state of exception, see Agamben (2003).

are rolled together. But this confounding can also be unravelled. The particular claim to state a universal law is always an uncertain claim; uncertainty is its precondition. If the speaker – literally the *dictator* – was certain, jurisdiction would be asserted without anything else, without justifications and confusions, without confused reasons, like the robber who demands your money to spare your life. The need to justify, to offer reasons in order to *dicere juris*, shows insecurity – the fear that the claim can fail. It is because the claim of law can fail, because the gap between particular and universal or between performance and statement can be seen for what it is – as two separate moments that are not necessarily or automatically connected – that both violence and critique launch themselves in law.

Violence is the closing down or forgetting of the gap, critique the care for the distance, the cultivation of its memory and possibility. The closing down is violence *stricto sensu*, when the 'I' is forced to become part of the 'We', of a community or a communion where we find our essence through the identification with the spirit, the tradition or the history of the whole. All such violent identification can be called mythological. It asserts a common being in which the law speaks to its subjects as One and All or as All in One. In our liberal and democratic societies, forgetting the gap is the more common form: judicial interpretation and judgement are organised in a way that conceals the original performance of the law in favour of its reasoned and coherent statement. And yet this forgetting is at its most fragile when the jurisdiction of a court or judge is challenged. Both the Nuremberg and the Yugoslav war crimes tribunals resorted to the sheer fact of their establishment by the victorious or the powerful to get around the challenge to their jurisdiction. When jurisdiction is itself called into question, the original difference between creating and stating the law returns like the repressed. But the rare and exceptional challenges to jurisdiction, which make it take shelter in the political and violent act of its inauguration, should not fool us. Every trial explicitly or implicitly addresses the power of the court to judge. Jurisdictional acquiescence or challenge is the horizon against which all trials are conducted. It is in this sense that we should understand Benjamin's statement that there is something rotten in law (Benjamin, 1978). What is rotten in every legal act and in every judgement is the violence at law's inception, the original performative *dictio*, which established the law and predominantly takes the form in the modern nation-state of exclusion of other people, nations and races (Douzinas, 2000). This originary force is entombed in every legal act as a residue or excess, as the force which created law by cutting off an outside and mirroring itself as the proper or inside, as the normative power or will of community to live together, speaking its own law. This force shadows and guarantees the juridical most obviously when jurisdiction is contested. If jurisdiction tries to conceal its forceful creation of law and fake figuring of oneness, the repressed always returns and reveals the contingency of origins and the fragility of communal construction.

The transition from the contingency of the singular to the necessity of the universal is a detour always open to the possibility of mismatch. Jurisdiction as

the mirroring of One and All, as the attempt to hypostasise a united people, law or community, or to limit or eliminate the effects of disunity, is subject to the disarticulation of not being One or the deconstruction of the mirroring effect. If law is not one, then critique is precisely the thinking of the not-One. As such, it will occasionally speak in favour of legal reformism and occasionally for a more permanent and structural kind of change, or even revolution. If the united speaker or subject of law is fake, an impostor, critique's job is to tend the distance between speaker and subjects, and to discern law's different aspects – conservative, destructive and creative.

But where does this ability to challenge law's force lie? How does the repressed return if such care has been taken to protect its metaphysical structure? We must move from the law's mouth to the subject's ear. If the law acts through speaking, law's addressees take the law through hearing. Law's word must pass through the ear; an acoustics regulates our relationship with the law. In one of the most influential essays of political structuralism, the French philosopher Louis Althusser argued that the subject comes to existence through the action of interpellation through a scene of hearing and responding to a call (Althusser, 1984). According to Althusser's theory of acoustic subjection, as someone walks in the street he is hailed from behind: 'Hey you'. He turns and sees that he is called by a policeman. He accepts the terms by which he is called; he accepts that the policeman, the law, has the power to call him to account and, in doing so, to give him identity and responds 'Here I am, officer'. In hearing law's word and accepting it as his true cause and vocation, the subject is called to existence both as free (he could have fled the scene, evaded the policeman or asserted his right not to respond to police inquiries) and as subjected. For Althusser, this acoustic scene is presented as an allegory for the way we come to identity through an ideological misrecognition: the institutions of ideology attribute to us a self-identical but false identity ('You the law's subject') and we accept it. Althusser, while mainly interested in religious and academic institutions, allegorises the social and ideological call that brings us to identity as legal as the demand to hear law's word and to align ourselves with it.

Hearing the word of law, juris-diction, brings us to identity – albeit a false one – in the same way that hearing the word of the sovereign performative gives social identity and political unity. But law's word is only one in a long list of jurisdictions that name and bring into existence. Althusser reminds us of the divine voice, logos or word which names Moses, Peter or light (let there be light) and thus brings them to life. God is the cause of Peter through a divine performative, by virtue of the continuing presence in the name of the one who names. Judith Butler (1997) complicates the scene: in hearing and turning around to face the law, the performative relies on a certain anticipatory attachment on the part of the addressee, a readiness to be compelled. One is already in relation to the voice before one responds, through an original acceptance of guilt, a desire to be reprimanded in order to gain purchase on identity, an original guilt upon which God, conscience and the law feed. Subjectivity is achieved through the guilty embrace of the word of law; guilt

guarantees law's intervention and, through it, the subject's false and provisional totalisation that is identity.

In all these instances, an ear is opened and one passively hears law's word. This acoustic economy is a main characteristic of modernity's *nomophilia*. Before we hear it, the law has spoken. Our ears follow the law's mouth before we can know its contents; we obey the law before we know its demands; we are put under law's jurisdiction before we know what the law is or says. Consider two such cases. First, there is Kant's moral law. Every moral command involves an answer to the question of what I ought to do or to become in a particular situation. But before any formulation of an actual command, the fact that a moral command exists indicates that the law as a fact of reason has taken hold of me. To inquire about what I ought to do in a moral dilemma implies that I already feel that I ought to do something – that a feeling of being bound, of having been put under an obligation, comes before any particular obligation and command. Kant's law is the categorical imperative under which we must follow in each instance a maxim that can act as a principle of universal legislation. In following the law, we become autonomous, rational and free – rational by subjecting the multitude of chaotic representations and feelings to the coherence of concepts and categories; free, by obeying the moral law but acting as if we were the legislators of its commands. The confusion which characterised jurisdiction, the confounding of singular (passions, desires, needs), the particular (the sovereign legislator) and the universal (reason, the law) is reproduced fully. The modern subject is created in a double movement in which we hear and are subjected to the law but at the same time we imagine give it to ourselves as free moral persons. This is the meaning of autonomy, which we can transcribe as oto-nomy, the law of the ear, which brings *autos* (self) into being.

Freud, too, reminds us that we are subjected to the law and we obey it before any knowledge of its content. Our subjectivity, and thus our ideal ego, comes into being through our pre-Oedipal separation from the maternal object and our introduction to the symbolic order of language and paternal law. This originary separation opens and determines our destinies, but as it comes before the ego and before the scene of representation, it cannot be represented and remains repressed and forgotten. Entry to the law not only checks the absolute power of the 'other' but also introduces the subject to the realm of desire. Our *eros* obliges us before any particular obligation and subjects us to the law before we can know its demands. But conversely, our love confronts us as a necessity – as a fate pleasurable and painful, structured by the law. And, in a different context, Freud comments (in Derrida, 1985) that the ear is uncannily the only organ that the infant cannot close and therefore they are continuously exposed to the voice without defence. Butler's guilt, the voice of conscience that prompts our turning to the word of law and identity, is grounded on an earlier and inner law, a silent voice and an undefended but constitutive hearing.

Law's word comes before the ear has been opened or can be closed, before the scene of presence or representation. The word of law appears as the original gift; law's voice (juris-diction) turns us into subjects. The subject is always a hearing

being, someone whose ears place them in a position of a hearing hierarchy, the creation of an oto-subjection or oto-subordination. Indeed, we can venture a general law: coming to subjectivity involves a relationship of obedience between a *sublimus* who speaks and *subditi* who turn towards them to hear the law. It is the great achievement of modernity to turn the mechanism of subjection from Lord and King to an inner voice, that of a transcendent, autonomous or unconscious authority which always already compels us to obey. The foundation of authority is not located outside the individual any longer but within them, in our very being as creature of the verb and extensions of the ear.

Ear's passivity is a well-known theme. For Nietzsche, who was proud of his small and nimble ears and even thought that they held a certain seductive attraction to women, the ear is the most dangerous of organs:

> For there are human beings who lack everything, except one thing of which they have too much … 'An ear! An ear as big as a man!' I looked still more closely – and indeed underneath the ear something was moving, something pitifully small and wretched and slender. And, no doubt of it, the tremendous ear was attached to a small, thin stalk – but this stalk was a human being! … The people however told me that this great ear was not only a human being, but a great one, a genius. But I never believed the people when they spoke of great men … and I maintained by belief that it was an inverse cripple.
>
> (Nietzsche, 1976: 250)

But the greatest danger of the long ear is that it accepts the words of the state, believes the lies it hears and passes them for the word of the law:

> The state? What is that? Well then open your ears to me. For now I shall speak to you about the death of peoples. State is the name of the coldest of all cold monsters. Coldly it tells lies too; and this lie crawls out of its mouth. 'I the state am the people.' That is a lie … And it is only the long eared asses and short-sighted who sink to their knees.
>
> (Nietzsche, 1976: 160–61)

Derrida comments on this text linking the ear to the educational system and the loss of autonomy. It is a question of turning to the law and accepting its call, opening the ear to take our marching orders:

> The hypocritical hound whispers in your ear through his educational systems, which are actually acoustic or acroamatic devices. Your ears grow larger and you turn into long-eared asses when instead of listening with small, finely tuned ears and obeying the best master and the best of leaders, you think you are free and autonomous with respect to State. You open widely the portals of your ears to admit the State … having become all ears for this phonograph dog [called his master's voice] you transform

> yourself into a high-quality receiver, and the ear … begins to occupy in your body the disproportionate place of the 'inverted cripple'.
>
> (Derrida, 1985: 34–35)

And again:

> How is the student connected with the university? … By the ear as a listener. The student listens … When he speaks, sees or takes up some art he is autonomous i.e. not dependent upon the educational institution. Very often the student writes as he listens and at these moments he hangs from the umbilical cord of the university. Eventually the ear grows huge as it nourishes itself with the brain's food and the brain atrophies.
>
> (Derrida, 1985: 35)

Can we defend ourselves against this most innocent and dangerous of organs? We must open our ears, prick up our ears, develop an active hearing, when listening to the law. What does it mean to have small, keen ears? As Derrida intimates, there is an imperceptible difference and a deferral, a time lag between the speaking and the hearing, even if I am only hearing the inner voice. In telling the story, I hear myself speak but in doing so, I hear myself through the ear of the other. It is the ear of the other through which I hear myself and constitute my own *autos* self. Again in hearing, recognition becomes effective not when the word is uttered but later when the ears have managed to receive the message. While the eye is given to permanence and to a fullness of presence, the phone, the voice and hearing belong to temporality, to a diachrony of moments and therefore the possibility of hearing otherwise. Whether hearing can transform whatever befalls it, the word of law and of the various jurisdictions is the crucial question of our times. And it is here that the clash of jurisdiction, of particular and universal, might give us some clue. If, according to the Greeks, law's diction is a gift, the gift of *dike* as order, and if the modern gift of the law is to call us to subjectivity and political identity (albeit one of freedom through subjection), our response could be to try to hear through the ear of the other and confront the community of the sovereign of the One and All with the plurality of many ears. In this sense, critique attaches itself today to the clash of sovereignties and the conflict of laws, to the breakup of unitary territories and laws, and against those who argue for universal jurisdiction and for the unitary logos (reason and speech) of law.

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3 Of the founding of law's jurisdiction and the politics of sexual difference

The case of Roman law

*Maria Drakopoulou**

On defining jurisdiction

> … For the progress of law consists in the destruction of every natural tie, in continual separation and isolation.
>
> (Jhering, 1907: 31)

The concept of jurisdiction designates the authority to speak the law – an authority presupposing a setting apart of the legal from the non-legal.[1] Without such acts of separation, law's existence can be neither adequately conceived nor materially manifested, since their very performance delineates its borders and time of reign.[2] These acts annunciate and bear the 'is' of law rather than being one of its products or functions. Yet, though at once both source of law's being and tangible evidence of its presence, the spatial and temporal boundaries defined by jurisdiction do not simply demarcate the legal empire. Any reference to law embodies designation of who and what occupies its 'space', where its limits lie and what exists beyond them, whilst evocations concerning time render an understanding of what can and cannot move or change within law, of what remains static, perennial or prohibited in its temporal domain. So jurisdictional acts of separation cohere specific structures of human existence – structures which, as well as providing organisational principles for social action, also configure the way in which the social world is understood.[3]

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1 The word 'jurisdiction' derives from the Latin verb *dicere*, to indicate, to speak, to tell, and *ius*, meaning law, right. *Iurisdictio* was defined as the office of saying right (*Digest*, 1973: II.i.1).

2 The significance of the principle of isolation for the establishment of law is acknowledged as one of the most important features of Roman law and hence of the Western legal tradition (Schulz, 1967: 19–39).

3 The temporal organisation of the social is expressed in the making of history and its importance in understanding and explaining of the social world. However, the significance of space is a relative newcomer. The broad position that the social and the spatial are inseparable and that the spatial form of the social has explanatory power – that 'geography matters' – is now increasingly accepted. See, for instance, Gregory and Urry (1985); Lefebre (1991); Soja (1990).

Jurisdiction here transcends the relationship between people and geographical place. It is more than territorial sovereignty, an attribute of political authority expressing the link between the *persona* (prince, emperor, king or legislator) with the power to lay down the law and the *res* (territory) within which this *persona* exercises the prerogative of *ius dicere*, the solemn declaration of law.[4] As the power to speak the law, jurisdiction is apprehended as the unfolding of law in pivotal acts of separation, isolation and delineation – a shift of emphasis from jurisdiction as a structural element of governance to jurisdiction as the birthplace of spatial and temporal forms in which humanity is substantiated. This shift deflects the focus of legal analysis away from the reach and nature of law's normative authority which, in its questioning of who has authority over whom, and what specific rules and commands this authority imposes, is firmly anchored in law's interiority. Taking its place is a morphological analysis whose gaze is directed at the very acts of separation themselves and the consequences of their performance. These consequences are not, however, measured at the level of the individual before the law or evaluated in terms of the implications they have for the construction of legal subjectivities or national and political identities. Instead, they are explored at the intersection between social life and its apprehension in law's imaging and imagining mind, where questions are raised about the forms of social being the founding of law's jurisdiction animates and the reading of the world it engenders.[5]

By privileging issues of separation and engendering, morphological inquiry into the nature of jurisdiction is fundamentally concerned with understanding difference and what it precipitates.[6] Exploration of difference can take many guises. It may spring from juxtaposition, the setting of the objects of inquiry against one another in oppositional, contrasting or disjunctive terms, or it can be based on mutuality, dependency or complementarity, where these objects presuppose, underpin or are implicated by one another. However it is articulated, difference is premised upon a duality wherein constitutive parts are considered in relation to each other, and where it can be either simply affirmed or engaged with through analysis of the objects of inquiry themselves. With foundational moments of law's jurisdiction, difference can be analysed as an outcome of a linear before-and-after comparison or in terms of co-existing 'geographical' distributions and forms of social relations. For the purpose of this paper, however, these dualities will be interrogated in terms of their fundamental reliance on a third parameter – that of sexual difference, which provides the site

4 The territorial conception of jurisdiction as developed in the Public Law of the Roman Empire and qualified by Christian doctrine was transmitted into the Middle Ages. For a discussion of this process see Ullman (1966, 1975: 33–36) and Perrin (1967). This conception of sovereignty still prevails in modern jurisprudence. See, for example, Picciotto (1984: 87–89) and, for a more comprehensive account, see Ford (1999).

5 This representation of law as *anima* is evident in the conception of the ruler as *lex animata*. For a general discussion, see Ullmann (1966: 35–40). For a discussion of this idea in the Roman Republic, see Born (1933).

6 For the etymological relatedness of the concepts of separation and engendering, see Lacan (1994: 213–14). I owe this reference to Julia Chrisostali.

of comparison. In adopting this approach, ways in which sexual difference is inscribed into the apparently innocent, neutral rationality of law's spatial and temporal order will be explored, both in relation to those forms instituted and those left 'outside' or 'behind'.[7]

In estimating law's time and space in terms of sexual difference, deductions based on factual observation of social reality or legal text do not suffice. Evidence is also sought in cultural captivations of the relationship between the legal and social encountered in legends concerning the generation of law and its jurisdiction. These stories have not been purposively thought up to sustain, explain or justify a true state of things. They do not act as mirrors to, or allegorical representations of, a once-existing truth; nor are they derivative or subordinate to an underlying reality. Although they are neither products of studious effort nor idle inventions of the storyteller's mind, they do not lack persuasive authority and their narrative enjoys a peculiar transparency and certainty that neither philosophy nor history can boast. There is never any doubt as to the who, what, when, how and why of their subject matter, for each story speaks and conveys reliable images, unambiguous pictorial representations, unique ways of seeing. They are narratives apparently free of contradictions, gaps or discrepancies, and so within them marks of sexual difference can readily be rendered visible and open to intellectual inquiry.

On Roman law and its jurisdiction

In Western legal culture, where foundational moments of law and its jurisdiction are far from scarce, the commentator is spoilt for choice. In exercising my right to choose the object of inquiry, I posit the foundational moment of the jurisdiction of the law of the Roman republic (451–427 BC) and stories that accompany it. In so doing, I raise questions about Roman law's spatial and temporal distributions, and the modes of social being they engender, both within and outside law's realm.

Lucretia or the story of separation

> The new liberty enjoyed by the Roman people, their achievements in peace and war, annual magistracies, and laws superior in authority to men will *henceforth* be my theme.
>
> (Livy, 1948: II.i)

Accounting for foundational moments almost invariably entails a search for delitescent beginnings wherein questions of 'whence' are followed by those of 'why' because for many, including Gaius himself, addressing these questions is an indispensable part of any fruitful attempt at explaining and understanding law (*Digest*, 1973: I.ii.1). The origin of Roman law is consistently accepted as the Twelve Tables, a legal code said to have been inscribed in bronze and placed

7 For a discussion of the association of space, time and gender, see Massey (1992: 71–76). Also, for the relationship of space and difference, see Sibley (1997: 3–31) and for the relationship of space, time and power, see Foucault (1980: 68–69, 1986, 1986a).

before the Rostra, the orators' platform in Rome's Forum, in 451 BC. Credited as the source of all public and private law, regarded as a comprehensive compendium of philosophical maxims and afforded the utmost respect by the Roman people, it was the subject of numerous encomiums delivered by jurists and historians alike, with every student of law obliged to thoroughly memorise its contents (Cicero, 1963: I.xliv; Livy, 1948: III.xxxiv.6). Its prelude is recounted in the second of the 142 books that comprise Livy's *History of Rome*, a monumental work, which sought to record for posterity Rome's inception, growth, triumphs and tribulations (Livy, 1948: I.9–10).[8] The opening lines mark a distinct break in the story told so far and that narrated thereafter. They boast of new beginnings, of a new order – the Roman Republic – signalling the key role law plays in Rome's rise to greatness, and are followed by an account honouring the most precious of all Roman possessions, the liberty of the Roman people and the political and legal institutions that guaranteed it. With law providing both foundation and safeguard of this liberty, law and liberty become almost indistinguishable in the Roman mind, and much of what subsequently unfolds is therefore interpretable as a narrative on law and its jurisdiction (Adock,1959: 13; Cicero, 1966: liii.146; *Digest*, 1973: I.v.4; Livy, 1948: II.i.7–11, II.viii.1–8, II.xviii.4–11; Radin, 1923; Schulz, 1967: 140–47; Wirszubski, 1950:1–30).

The meaning and limits of Roman liberty are articulated in the first jurisdictional acts of the new legal order. A twin consular magistracy is set up to replace the king and its bearers allowed to wield an authority embracing the military, the executive power and the right to create and enforce the law (Kunkel, 1966: 15). Yet, despite exercising this considerable authority, the consuls are not all-powerful.[9] They are subject to election by the people, in front of whom the fasces, bundles of rods symbolising the magistrate's authority to punish, are now lowered in acknowledgement that the people's power is ultimately the superior (Cicero, 1961a II.xxxi.53; Livy, 1948: II.vii.7–8).[10] This shift in the balance of power is furthered by the institution of the right of *provocatio*, whereby within the city boundaries citizens threatened with corporal or capital punishment can appeal to the people, and by the stipulation that a proportion of senators are to be appointed from outside the patrician class (Livy, 1948: II.i.9, viii).[11]

8 Livy's text has been the standard source for later writers, though of the 142 books only 32 survive intact, with only short summaries remaining of the others.

9 For a comparison of the position of consul and king, see Schiller (1978: 173–74). For a discussion of the consul's imperium as real *potestas regia* in Latin sources, see Henderson (1975).

10 The *lictors*, first appointed by Romulus, carried the fasces, bundles of rods with projecting axe-blades, which served as instruments as well as symbols of physical coercion. They are said to have terrified people, especially subjects of Roman domination abroad. Within the city, the axe-blades were removed (Cicero, 1961a: II.xxxi.55). For a discussion, see Kunkel (1966: 16) and Nippel (1995: 12–16).

11 The right to *provocatio* arose in the struggles between the plebs and the patricians. When these subsequently ended, it was formally recognised by a Lex Valeria. Roman tradition knows of three *Leges Valeriae de provocatione* (509, 445 and 300 BC) but only the last may be historically accurate. For a discussion, see Develin (1978); Kunkel (1966: 15); Nippel (1995: 5–7); Raaflaub (1986: 201–02).

Notwithstanding rank, all now swear the same oath that never again will they suffer a king in Rome.

In so speaking the liberty of the Roman people, the new law differs markedly from that of the past. The first act of Romulus was said to have been to assemble the people and give them laws, and all six subsequent kings reportedly did likewise (*Digest*, 1973: I.ii.2; Livy, 1948: I.viii.1–3). These earlier laws most likely commanded no less authority or respect, but in being the personal creations of Roman kings were enacted to suit particular requirements and were subject to regal vagaries. Thus Romulus, in seeking to maintain, enhance and control military and political power, appointed his own senate of councillors and legislated the composition, rights and obligations of noble and client classes (Dionysius, 1960: II.xxiii–xxx; Plutarch, 1959: XIII), whilst King Numa, favouring peacetime social cohesion and unity, used law to impose agricultural reform, redistribute land and protect the arts and trades (Dionysius, 1960: II.llxiv–lxxvi; Plutarch, 1959: VIII.1–4, XVI–XVIII).[12] Clearly, in stemming from the temper and character of their maker, said to bear his eyes and ears, a king's choice and exercise of law would likely reflect his feelings, passions and indulgences, and could equally well serve to return favours, seek revenge or dispense justice according to preference, mood or wisdom (Livy, 1948: II.iii.1–5). The new law, born of neither individual might, wisdom, will nor whim, contrasts sharply with the highly personal nature of kingly law. By advocating liberty and justice for all, not just 'the great', it can grant no favours to particular transgressors, whosoever they might be, for no personal feelings of sympathy, tenderness or hostility, no relationship to loved one, friend or foe, should influence or mediate its application.[13] This is law worded in the people's common will, reflecting its collective heart and mind, judgement and conviction, not the person of a king creator (Cicero, 1966: liii.146–47; Livy, 1948: II.iii.3–6). Now, as magistrates govern the people, the laws govern the magistrates and it could be said that, whilst the magistrate speaks the law, the law is a silent magistrate for all (Cicero, 1961b: III.i.3, 1975: II.xii.42). Formulated with the people's consent, law becomes 'true' law, grounded upon agreement and reason mediated by custom and the collective wisdom of common ancestors, and delivering its judgements as prudence, moral imperative and equity required (Gellius, 1927: VI.i; Cicero, 1961b: I.xxiii.60, 1975: I.xli.148; *Digest*, 1973: I.iii.20–40; Dumézil, 1996: 122).

This legal transformation radically altered an absolute space that had remained undifferentiated. Although made up of a variety of places – temples, palaces,

12 Debate has raged over the authenticity of the laws of the kings. The two main views are that the information encountered in the historical sources is either an invention of Roman historians or the law of a later period transported back in time. For a discussion, see Momigliano (1969) and Watson (1972).

13 The 'emotionless' character of this new law is epitomised in Brutus's condemnation of his own sons to death after they had been found guilty of conspiring to reinstitute the kingship (Livy, 1948: II.v.7–9).