abodes and commemorative or funerary monuments, each identified by shape and signifying objects – the overall texture and coherence of its vastness remained intact because differences were articulated in terms of religious significance rather than social function. Hitherto law had been concerned in establishing and protecting a harmonious relationship between Rome's human and divine inhabitants, and there were no distinct boundaries between law, magic and religion, with law-giving ascribed a divine origin, augury accepted as an integral part of judging and the act of punishment involving consecrations or offerings to gods (Fowler, 1911: 272–77; Scullard, 1981: 19; Watson, 1972: 103). When giving laws to the people, kings had claimed either to have received them from the gods, as did King Numa in citing Egeria, goddess of fountains and birth, or that they themselves were gods, as Romulus did. Sharing religion's space, law and law-giving had been part of the tradition of ancestral custom and secret rites, ceremonies and cults. It was shrouded in an aura of mystery and jealously guarded in colleges of pontiffs – 'lords spiritual' who, as custodians of all law, had been responsible for its preservation, interpretation and transmission. Law had inhabited a distinct enclosure, whether the 'house' of the king, the temple, the sacrificial altar, or the midst of the private house where the father, as 'priest' of the domestic cult, ruled on transgressions committed by family members (de Coulanges, 1955: 34–39, 85–86; Schulz, 1963: 6–12).[14] And even when spoken 'outside', as in cases concerning the adoption of free persons and in testamentary matters, this interiority had not been lost, for the assembly could only accept or reject the proposed legal arrangements as a whole, not meddle with their form, procedure or substance (Schulz, 1963: 19).

Born of elected magistracies and assemblies of free people, the new 'true' law was not only invested with high public visibility but, in promising an inexorable application of its rules, also became a measure against which people chose right from wrong in the interests of humanity rather than gods. Law thereby claimed a wholly secular existence (Cicero, 1961b: I.vi.19; *Digest*, 1973: I.i.1). Set out and exercised in easily accessible spaces – spaces that quickly achieved their own symbolic prominence and meaning – it entered the body politic and rendered itself known to all. It left religious ritual and priestly books behind, and acquired its own distinct way of communicating, its own language and jurisprudence, and its own class of professional experts to serve it. Gone were king as legislator and religious and political leader sitting at the head of a hierarchically organised sacerdotal order. Law's interpretation and doctrinal systematisation were now entrusted to the expert minds of jurists, its adjudication to praetors and private judges, its performance to the craft and skills of lawyers and orators, and its

14 The word *pater*, Latin for father, did not include the idea of paternity. In religious language it was applied to the gods, in legal language to everyone with property and his own ancestral worship, and in poetic language, to everyone attributed honour. The slave and client applied it to their master. It was synonymous with 'king' and embodied ideas of power, authority, majesty and dignity (de Coulanges, 1955: 90). For a comparison of the authority of father and king, see Lacey (1986).

exercise to the space of the Roman Forum, the dwelling place of Rome's greatest legal monument, the Twelve Tables (Cicero, 1961b: III.i.3).[15]

The jurisdictional acts of new legal beginnings also referenced silent endings; at a time of birth, they insinuated death and formed a temporal demarcation between the 'is' and 'was' of law (*Digest*, 1973: I.ii.2.3). Behind lay an uninterrupted, murky, primordial past where legend mingled with reality, the divine with the human, and where scarce evidence exposed accounts to questions of credibility, making this one of the least attractive periods for historians (Dionysius, 1960: I.viii; Livy, 1948: I.6–9).[16] Indeed, modern manuals, textbooks and sourcebooks of Roman law bear witness to the unreliability of information concerning this past by classifying the era as 'pre-history' and the period of the early law of the Republic as 'archaic', a term derived from the Greek *αρχή*, meaning 'beginning', when history and law began (Jolowicz 1961: 4; Schulz, 1963: 5; Sohm, 1907: 34; Stein, 1999: 128–30). Yet, once started, this history knew no temporal borders. At birth it already touched its future, nurturing Rome's grandeur and leading Her towards a glorious destiny. For, though war and force would win Rome the world, Her laws would bring peace and concord, and found the *pax romana*, ensuring Her *imperium* and future legacy. This was the promise the Gods had made to Aeneas, Romulus's Trojan ancestor, in luring him away from sweet Dido's embrace, and was what Anchises, his father, had foretold (Virgil, 1967: IV.224–31, VI.850–53).

The temporal order that the jurisdiction of the newborn law instituted, in contrast to that which preceded it, spoke to the present and a future life of uninterrupted growth and progress whose end is yet to be glimpsed. From its inception – its embodiment in the Twelve Tables – through its maturity as law of empire and transformation into the Justinian's *Corpus Iuris*, to its revival in the legal codes of modern Europe, Roman law would shine forth (de Zulueta, 1957: 173–76; Jolowicz, 1961: 4–6; Sohm, 1907: 42; Stein, 1999: 104–30). The opening lines of Book II of Livy's *History of Rome* therefore do not merely announce the beginning of Roman liberty and law. They also describe a clear spatial and temporal break from the narrative of Book I, the account of Rome's pre-history from its founding by Romulus in 753 BC to the fall of its last king, Tarquinius the Proud, in 509 BC. Posited at the juncture between Books I and II, the legend of Lucretia forms the bridge between the pre-historical period of kingship and the birth of liberty and law, providing 'one of the hinges on which the history of the Romans turns' (Bayle, in Donaldson 1982: 8). Over the years, following the notable renditions by Livy (1948: I.lvii–lx), Ovid (1931: II.717–852), Dionysius (1960: IV.lxiv–lxxxiv), and Dio (1961: II.13–20), her legend has attracted

15 The word 'forum' was applied to any place that formed the local centre of commerce and jurisdiction. In Rome, it was situated between the Palatine and Capitoline Hills. For a discussion of the spatial arrangement and function of the Roman forum, see Patterson (1992: 190–94). For a comparison of its function with that of the Greek agora, see Lefebre (1995: 237–38).

16 For a contemporary discussion on the problematic nature of the early history of Rome, see Dumézil (1996: 3–12), Fraccaro (1975) and Momigliano (1969).

considerable attention, firing many a creative imagination in art and literature, whilst classicists and historians debated its origin, meaning and truth, and its allegorical and symbolic value.[17] Within the field of law, however, Lucretia has – rather surprisingly – never enjoyed a similar level of interest. Her status has borne no resemblance to the iconic glory afforded Antigone or Portia and, despite her story being in essence one about law, she has attracted only sporadic references in legal commentary.

The curtain rises one night during the siege of Ardea, the capital of Rutili, some 25 miles south of Rome (Ogilvie, 1965: 220). A group of Roman noblemen, feasting in the quarters of the king's son, Sextus Tarquinius, are bragging about their wives, each boasting about the superior qualities of his own. Amidst this rivalry, Tarquinius Collatinus, kinsman of the king, insisting his wife Lucretia surpasses all others in chastity and beauty, proposes they return unannounced to see what their wives are doing in their absence. They discover all spouses revelling, save Lucretia, who sits spinning with her maids in the middle room of the matrimonial home. She is the inimitable winner of their wager. Lucretia graciously welcomes them, and on encountering such beauty and modesty, Sextus is overcome with desire for her. A few days later, he returns unexpectedly and, as the king's son and Lucretia's husband's kinsman, he is received with great courtesy, accorded the best hospitality and duly accommodated in a guest room. That night he enters Lucretia's bedchamber threatening to kill her if she cries out. Using all his wiles in trying to seduce her but finding her equally unmoved by declarations of love, entreaties or threats to her person, Sextus tells her that if she does not yield to him he will kill her, together with his slave, place both naked in her bed, and claim he discovered them together and put them to the sword which, as her husband's kinsman, he had full right to do. Fearing her reputation irrevocably and indefensibly sullied, Lucretia finally submits to Sextus, who then rides back to Ardea.

The next morning, Lucretia sends messages to her father, Lucretius, and husband asking each to bring a trusted friend. Lucretius arrives with Publius Valerius, and Collatinus with Lucius Brutus, a relative of both the king and himself. They find Lucretia inconsolable. She describes her ordeal, proclaims her innocence of mind and calls for vengeance. Then, despite those gathered seeking to appease and comfort her, she takes a knife concealed in her garments and stabs herself through the heart. Everyone is paralysed with grief except Brutus who, incensed by the tragedy that has unfolded before him, pulls the knife from her breast and vows by her blood to vindicate her by expelling the tyrannical house of Tarquinii from Rome. All swear likewise, and Lucretia's body is carried out and displayed in the Forum, where the hitherto timid Brutus, transformed into a

17 The heroine has been invariably represented as the Roman feminine ideal of virtue and seen as complicit with patriarchal values or as a model of resistance to patriarchy (Bromley, 1983: 210–11; Lee, 1953: 117–18; Ogilvie, 1965: 222; Pais, 1971: 203). Her story has also been regarded as an allegory for republican liberty or as one of the founding myths of patriarchy (Arieti, 1997: 213–14; Bryson, 1989: 163–64; Donaldson, 1982: 9–12; Joplin, 1990; Joshel, 1992; Kahn, 1997: 27).

dynamic, eloquent orator, urges the populace to help him make good his word. Mindful of the Tarquinii's many crimes, the people rise up and follow Brutus to liberate Rome. The monarchy is exiled, the Republic founded, and Collatinus and Brutus are elected as its first consuls.

In terms of its structure, setting and language, the legal 'credentials' of this story are clear (Philippides, 1983: 116; Watson, 1975: 35, 167–68). A serious crime is committed, the perpetrator identified and a court of law instituted to judge the case. Sextus's crime was the type the Romans called *stuprum*, an illicit sexual act, whether consensual or not, that imparted injury, corruption or fault to the body of the victim (Adams, 1990: 200–01; Livy, 1948: I.lvii.10, lviii.7–8; Robinson, 1995: 58–64).[18] Where one party had a prior bond of engagement or marriage, the *stuprum* was distinguished as *adulterium*, mainly because it might result in 'counterfeiting', a materialisation in offspring of suspect paternity (*Digest*, 1973: IIL.5.6i; Treggiari, 1991: 262–64). In early Rome, a family court dealt with these offences, and this begins to happen when Lucretia summons her father, husband and family friends to judge the events and participants (Ogilvie, 1965: 219; Pomeroy, 1976: 217–18; Treggiari, 1991: 264–66; Watson, 1975: 167).[19] Before them, she admits the *stuprum* and relates the details of the crime of which she is technically guilty, the issue of consent being relevant only in respect to her punishment, which could be divorce, loss of dowry, exile, even death (Corbett, 1930: 127–33; Robinson, 1995: 58, 66). Defending herself, she declares her lack of culpability but then, without apparent reason, stops this 'legal' process by taking her own life. Lucretia does not perish in compliance with any decision of the court. In fact, her 'evidence' is heard with great sympathy, and in one version she anticipates and dismisses the court's favourable stance towards her, declaring, 'the pardon that you give me I do refuse' (Ovid, 1931: II.830–31). Neither is her self-imposed fate sought in order to avoid punishment; it is equivalent to the harshest penalty awarded a woman found guilty of her crime. True, she must fulfil her victim status in order to provide the force that moves Brutus and the Roman people to revolt, but why could her violation alone not provide sufficient catalyst for this? Her death is problematic because it introduces the possibility that her suicide was the act of a guilty mind, and any suspicion that she might have consented would fundamentally undermine subsequent events. St Augustine (1984: 29–30) was possibly the first to write of the ambiguity surrounding Lucretia's demise, asking whether she should be judged as chaste or adulterous. If chaste, then why suffer a punishment much heavier than the exile imposed upon Sextus? If adulterous, then why praise her honour so highly?

18 Forcible intercourse was not a punishable offence in its own right and initially the verb *rapio*, the Latin ancestor of our own word 'rape', meant to seize and drag off into captivity, as the Romans had done with the Sabine women (Adams, 1990: 175). Rape was first legislated as a crime by Emperor Constantine, with a public criminal prosecution for sexual violation, first introduced at the time of Augustus under the Julian law of violence (Dixon, 2001: 51; Gardner, 1986: 118; Treggiari, 1991: 309–10).

19 This process of summoning first the father and then husband occurs in all principal Roman narrations of the story. Ovid's version of Lucretia closely follows Livy's (Lee, 1953: 108).

It seems as if her words and deeds before the family court are designed to obscure her status, for she accuses her abuser as if victim, protests her own innocence as if accused and condemns herself to death as if guilty. Within a single page of text, she is the victim, accused, judge and executioner, a rapid exchange of roles that seriously compromises her victim status.

The ambivalence surrounding the legend has encouraged commentators to treat it as having two distinct components: personal and public. Focusing on the personal embroils the reader in the nature of Lucretia's character, and the story becomes a tale of a woman's misfortune, injury, pride and vengeance. Adopting a public orientation tends to treat her as simply a vehicle for telling the story of radical political change, thereby ignoring St Augustine's questions altogether. In order to address the paradox of Lucretia's tale, the unity of the story must be maintained, with her death – that which unites these two components – forming the analytical starting point. Traditionally, Lucretia's death has been regarded as the trigger for Brutus turning against the monarchy and the subsequent institution of the Republic. Yet its most immediately significant consequence is to annul the function of the family court. Allowed to continue, it would have deliberated, judged the parties, and decided upon and imposed punishment, thereby making Lucretia's death unnecessary and removing cause for Brutus's decision. By passing and executing a capital sentence upon herself, Lucretia suspends existing law, rendering the court she herself asked to be convened incapable of pronouncing a verdict and meting out justice. In so doing, she opens a new dimension of critique of law, one that does not address the particular case, but which is directed at the kingly legal order, and which is necessary for the birth of the Roman liberty and law that follows. Her death now becomes justifiable. Although set outside the law she initially evokes, her suicide is an act of moral exaltation that transcends any historical, temporal or spatial continuum. If looked at retrospectively, it becomes intelligible, indeed interpretable and legitimate, as the enabling condition for the law that subsequently arises. Lucretia's suicide is neither a heroic act nor a brutal consequence of a rivalry between men that leads to self-sacrifice complicit with patriarchal values, as some have argued (Bromley, 1983: 210; Kahn, 1997). It does sit comfortably within the cultural ideology of her time, accepting the household as the centre of a woman's life, chastity as the most precious female quality and purity as fundamental to her husband's reputation and lineage. Lucretia herself does nothing to contradict this view. Contrary to what has been suggested (Belsey, 2001: 330–34), she is not driven by a wish for self-determination or a questioning of the values of her culture; nor does she take her own life to enlist the community to replace vengeance with submission to the will of people and thereby affirm a model of politics based on consent. Yes, her death *is* necessary to the politics of consent, the consummation of liberty and law, but not as a source of inspiration or active force of progress. It is necessary because it configures a female identity that is excluded from these politics. With her life erased along with the law of kings, there is no place for Lucretia in the latter part of the story. Banished from the space in which liberty and law come to reside, only her corpse – the enabling condition for the new law's

jurisdiction – enters the Forum. And when revenge is taken in her name, when all those who are subjects of law, who establish laws and wield them, are present, she is not.

Lucretia has been exiled outside the time and space of the law to be. Yet her dead body, lying at its origin, irrevocably grounds it in sexual difference. Hence Lucretia's story is not merely one of law, it is one of law and sexual difference – a difference clearly voiced in the demarcations of time and space that form and inform the economy of the legend, and in the displacements these demarcations elicit. Her chastity spent, Lucretia cuts short her life and severs the continuity of time. The knife she uses is that by which Brutus makes his vow, puts out the 'eyes and ears' of laws serving kings and enables laws whose severity and impartiality are blind and deaf. In demarcating these separations, this knife also marks out the space in which her story begins and ends: that of the household. Here is she first encountered, found spinning in the *maedio aedium*, the middle room of the Roman house, and it is in her bedchamber that she suffers violation, 'trial' and death. Here is she the ideal wife set firmly within its interiority, the perfect Roman matron, her chastity and modesty (her *pudicitia*) symbolised by the making of wool.[20] The narrative continues, but does so elsewhere, in the open public space of the Forum, where Brutus 'cuts off' the tears and mourning of the Roman men, leads them to a revolution that bestows upon them their manliness (*virtus*),[21] and where they, in assembly, decide the first laws of the Republic. A double act of violence perpetrated upon Lucretia's body is thus followed by a series of displacements irreparably marked by sexual difference wherein her personal story is wholly displaced by the story of Roman liberty and law. Sextus's individual violence is displaced by the public, political violence of his father; Lucretia's modesty and self-inflicted violence by the revolutionary, liberating violence of Brutus and the Roman men; the space of the household by that of the Forum and finally, the 'lawlessness' of kingship manifested in Sextus's libidinal desire by the institution of the new legal order of the Republic.[22]

20 Roman brides carried a spindle and wool at their weddings, and the act of spinning wool was overseen by the goddess Pudicitia residing in the temple of Vesta, goddess of the hearth of the Roman household (Ogilvie, 1965: 222). Both were honoured in the temples of Juno, goddess of womankind, marriage and motherhood. For a discussion of the relationship of Juno and Pudicitia, see Mueller (1998: 224–27).

21 *Virtus* was the quality distinguishing men from women, which enabled them to perform lawful deeds in the service of the state (Earl, 1967: 70–78; Verro, 1958: V.75). During the period of kings, *virtus* was primarily associated with the pursuit of glory, courage and bravery in military affairs; during the Republic, it was associated with pre-eminence in statesmanship (Earl, 1967: 73–74).

22 In ancient historiography, it is not uncommon for sexual offences to be offered as justification for overthrowing tyranny. For a discussion, see Jed (1989: 3), Rudolph (2000: 159–61) and Shuger (1998: 529–32). However, in examples involving men, political change is not accompanied by a change of legal order. In fact, in the case of one commonly cited example, the overthrow of Pissistratide in Athens, Thucydides (1959: VI.liv.54) argues that the tyrannical laws benefited the city and should be maintained.

Verginia or the story of engendering

> Those who share Law must also share Justice; and those who share these are to be regarded as members of the same commonwealth.
>
> (Cicero, 1961b: I.vii.23)

The newly instituted law did not merely produce a separation of that previously unified. Its space and time, being more than creations of law's mind, of its images and imaginings, imparted their mark upon human relationships and action, and were directly expressed in the mode in which the social was organised – Roman law spoke them and the Romans lived them. Under the thrall of the divine order, social cohesion had been maintained by the dread of violating the *pax deorum*, peace with the gods. Kings, priests, heroes and ordinary people alike acknowledged no other social bond save that of religion, with neither birth nor intimacy providing the key foundation for domestic relationships since only worship could fulfil this function (Fowler, 1911: 273; Scullard, 1981: 19). Accordingly, the family constituted a religious rather than biological association, with blood ties deemed inferior to agnatic ones, those bonds deriving from the shared worship associated with a common patrilineal ancestry (Gellius, 1927: XV.xxvii; Cicero 1961c: XIII. 35–36; de Coulanges, 1955: 40–42, 54–59; Gaius, 1932: I.156; Jolowicz, 1961: 122; Sohm, 1907: 448–51). And, as the community of domestic deities defined kinship, so did common sacra, rites, gods and genii rather than political affiliation or generation define membership of the *curia*, Rome's earliest social and political unit.[23] With law gaining its own 'territory', this pre-existing unity was rent asunder. Beneath the sign of law there now operated a different unifying principle, law's prescriptive reason – its promises, announced in the first jurisdictional acts are fulfilled with clarity, brevity and simplicity in the code of the Twelve Tables, which mould and nurture a novel form of life and sociability. Upon all those it chose to inhabit its realm, those awarded the gift of Roman *civitas* (citizenship), law had bestowed a unique status, one embracing both person and property. Each and every citizen could own and administer property, enter valid contracts, make a will, be made a heir, legatee or guardian of other Roman citizens and possess paternal authority – rights which were enshrined in law – and each and every citizen was free to conduct their own affairs as they saw fit, provided they did so within the parameters set down by law (Schulz, 1967: 146, 158; Tables III–VIII). Subjects of law, all were subordinate to its rules and precepts, and, whenever it demanded, obliged to obey its 'protocols' of procedure (Tables I, II and VII).

23 King Romulus first instituted the curiae, dividing the people into 30 groups on the basis of common worship and allocating specific rites, gods and genii to each. These curiae were sacred brotherhoods under the presidency of the pontifex maximus, Rome's head priest. Each possessed its own priests (curiales), performed its own sacrifices, and ate in its own dining room at the curial hearth (Cicero, 1961a: II.viii.14; Dionysius, 1960: II.vii.3–4, xxiii.1–3; Plutarch, 1962: I.xx.1–3). For a discussion, see Kunkel (1966: 9–11) and Palmer (1970: 67–75, 80).

The novel form of humanity law engendered was not predicated upon a radical transformation of the individual's rights, duties and obligations, with law establishing first-time bearers of proprietary rights, voters, taxpayers or soldiers. They already existed and were called *Quirites*, a term betokening religious ties uniting members of the *curiae* and denoting entitlement of ownership, inheritance and adoption deriving from this membership (Palmer, 1970: 191–97). However, a hitherto unknown form of sociability had been born. Knowing no distinctions of wealth, rank or birth, all citizens participated in the *comitia centuriata*, the supreme, sovereign committee of the Roman people, and shared equally in the rights, freedoms and liberties their *civitas* afforded (Dionysius, 1960: IV.84; Table IX.v).[24] All were endowed with the right to appeal to their fellow citizens when life or liberty were threatened, were protected from punishment without formal trial and conviction, and, following the prohibition of laws granting personal privilege or exception, were shielded from the arbitrary wielding of power and authority (Cicero, 1961a: I.xxvii.43, 1961b: III.xix.44, 1961c: XVI.xvii.43, xxiv.77; Livy, 1948: II.i.7; Table IX.ii;). So, although *Quirites* remained the official term by which Romans addressed each other, the mode of being animated by the new law was by no means exhausted within the parameters defined by the word. Romans had become more than *Quirites*; they were also *cives* – an associative term meaning 'citizens', but which, most significantly, also meant 'fellow citizens'. Like its Indo-European ancestor *keiwos*, *civis* referenced the familiar, dear and friendly, the sentimental aspects of relationships uniting members of a group, be they political or personal, and distinguished these persons from different varieties of 'stranger' posited outside the alliance. Yet it was only in the Latin that such feelings of endearment and friendship binding people together gained a juridical meaning, stemming as they did from an equality of rights secured by law; only in the Latin did *cives* designate a sentimentally based alliance grounded upon a community of rights set in law (Benveniste, 1973: 273–75). Being a Roman citizen was not therefore primarily associated with the territorial space of Rome, for whereas other Italian languages made little or no distinction between *civitas* and *urbs* (city), using them interchangeably to denote a place or its people, the Latin *civitas* referred to the nature of the social relationships and functions that followed the city's foundation; it designated the inhabitants' *mode of being*.[25] Furthermore, because this *civitas* was etymologically linked to *civis*, this was a mode of social being befitting a community united by law. *Civitas* embodied a social partnership (*societas civilis*) wherein the common purpose shaping the partners' will was neither religion or family ties, nor political or military alliance but the desire to live equally under the same law.

24 The *comitia curiata*, the assembly at which the king's decisions on matters of tax, peace and military obligations were announced, survived as a religious vestige with the sole power to formally confirm the auspices and command of certain magistrates (Kunkel, 1966: 10; Palmer, 1970: 189, 276–81).

25 The noun of *civitas* in Latin was used for 'of a situation and a town, also of the rights of a community, and of a body of men' (Flaccus, in Gellius, 1927: XVIII.vii.5).

This new form of sociability was, for the Roman mind, the pinnacle of a developmental process wherein, through reason, language or experience of more primitive forms of association such as those of kinship or religion, humans had eventually come to regard the juridical community as the greatest manifestation of the common good (Cicero, 1949: I.1–3, 1961a: I.xxv, 1961b: I.v.16, 1975: I.iv.11–13, I.xvi.50, I.xliv.156–58; Lucretius, 1953: V.950–60). *Civitas*, posited as the supreme form of companionship and friendship, as the optimum form of humanity, thereby acquired a life and a value above and beyond the lives and qualities of individual citizens. It formed the tangible representation of the bond of law in which all citizens shared, the 'visible' object of their commonality, and as such became the *res publicum*, the common wealth belonging to all citizens, with its management entrusted to those pre-eminent in prudence, virtue and wisdom – the Roman magistracy (Cicero, 1961a: II.xxxiii.58, 1961b: III.i.5). Within this civic community – this 'paradise of freedom' as Cicero (1930: II.29) so fondly called the Roman commonwealth – a dual sense of selfhood was animated. Ordinary private citizens enjoyed a life of liberty under the rule of law, whilst the Roman magistrates engaged in a public life of honour and glory in the government and preservation of the Roman *civitas*, a position which, though open to anyone choosing the path of statesmanship, was awarded to those thought steeped in dignity, the sons of the most worthy families (Cicero, 1961a: I.xix.35).[26]

The story of the code of the Twelve Tables is the story of the Roman *civitas*. It tells us of the sociability law begets and of the balances required to sustain it (Cicero, 1961a: I.iv.8). Yet the codification of law in the Twelve Tables was not easily won. Demands for unambiguous, freely accessible law protecting the weak and limiting the power of the mighty had persisted ever since the early laws of the Republic had first ushered in law's new empire. The intervening period had seen considerable discord and unrest, with the Roman world repeatedly disrupted by social and political struggles between patricians and plebeians, and unsettled by frequent conflicts with external enemies. Finally, in 450 BC, after envoys had returned from studying Greek laws and institutions, the patricians gave way to plebeian demands and agreed the appointment of a board of 10 men (*decemvirs*) to be given one year and Draconian powers to frame the relevant law (Livy, 1948: III.xxxi–xxxiii). The patricians' influence was such that only they were elected to these posts. At first they acted impartially, presenting a draft code of ten tables that was widely accepted but deemed incomplete. So their authority was renewed for another year to allow them to fulfil their mandate (Livy, 1948: III.xxxiii–xxxv). With this second term, however, the picture of harmony suddenly changed when Appius Claudius, hitherto largely unnoticed amongst the *decemvirate*, took control of the committee and proceeded to run it as a tyranny directed against the plebeians (Livy, 1948: III.xxxvi). Amidst the renewed social

26 For discussions of the social, political and economic criteria for election to the Roman magistracy, see Jolowicz (1961: 43–55); Kunkel (1966: 14–22); Nicolet (1980: 206–26); Schulz (1967: 168–72; Wirszubski (1950: 17–24).

unrest this autocracy fermented, neighbouring tribes seized the opportunity to start plundering raids, forcing the *decemvirs* to make the Senate approve a levy to raise an army to defend Rome. However, the soldiers – predominantly plebeians – fought half-heartedly under the unwanted leadership of the *decemvirate*, preferring to hold rather than defeat the enemies approaching the city. And so, with the destruction of Rome imminent, and peace and concord seeming more hopeless a dream than ever before, it was the death of another woman – the plebeian maiden Verginia – that enabled Rome to overcome the threat to its survival and finally institute a code of law.

The story of Verginia, like that of Lucretia, is one of female chastity and death, male sexual desire, freedom and law, and one whose outcome is a new social cohesion for Roman citizens.[27] Verginia, a young maiden betrothed to Icilius, becomes the object of Appius Claudius's unbridled lust. Failing to seduce her with promises and riches, and with her father Lucius Verginius absent defending Rome, he sets his client, Marcus Claudius, to take possession of her by claiming she is the daughter of one of his slaves, accosting her one morning as she enters the Forum. The crowd attracted by her nurse's cries defends her, but Claudius summons her before Appius's tribunal, promising to prove his case and demanding the court grant him his right to hold her until the case is decided. Her uncle pleads that in Verginius's absence Appius must grant them custody so that her honour is not jeopardised before her status is adjudicated but Appius awards custody to Claudius. Icilius protests vehemently and, as the *lictors* attempt to eject him from the hearing, delivers a passionate, rousing speech accusing Appius of coveting his wife-to-be, and the *decemvirate* of stealing the people's liberty and their right to appeal to their fellow citizens. Calling upon the assembled *Quirites* to protect his bride, he pledges his lifeblood to prevent the decree being enacted, and the crowd, deeply moved, turns on Appius who, skilfully retreating, asks Marcus to allow the girl to remain at large until the next day. This he does, and messengers are dispatched to fetch Verginius, who arrives at dawn and, accompanied by a crowd of supporters, leads his daughter to the Forum. Here, in a fit of temper and ignoring proper procedure, Appius summarily finds in favour of Marcus Claudius. When Verginius, Icilius and their fellows try to prevent Claudius from claiming his 'prize', Appius accuses them of promoting sedition, and orders armed men to implement his judgement. Seeing his allies thwarted, Verginius apologises to Appius and, granted leave to question Verginia and her nurse as to how he has been deceived into believing himself her father, snatches a knife from a butcher's stall and stabs Verginia to the heart, exclaiming: 'Thus my daughter, in the only way I can, do I assert your freedom!' devoting her blood to Appius's destruction. Verginius, safeguarded from arrest by his allies, escapes the city, returns to camp and explains his action to his fellow soldiers, warning that Appius's lust might now turn upon any of their own daughters, sisters or

27 The story of Verginia is narrated in Livy (1948: III.xliv–lviii). Other accounts include those by Dio (1961 in Zonaras 7:18) and Dionysius' (1960: XI.xxviii–xxxix).

wives. As those assembled declare loyalty to his cause, news arrives that, in the wake of Appius's latest act of tyranny, the outraged people of Rome, inspired by Icilius, have taken over the Forum, forced the Senate to convene, and are demanding the *decemvirate* immediately abolished. Abandoning the enemy, Verginius's army marches on Rome, seizes the Aventine hill, elects its own military council and demands the election of plebeian tribunes. The senators are in disarray, bickering over how best to respond, so the army, followed by plebeian citizens, marches out of Rome leaving it undefended. Finally goaded into action, the senators force the *decemvirs* to resign and reinstate the former constitutional order significantly strengthened in favour of plebeian–patrician equality (Livy, 1948: III.liv–lv). With the power and liberty of the plebeians now firmly established, the *decemviral* laws, the Twelve Tables, are engraved in bronze and displayed in the Forum, thereby sealing a new civic unity and partnership (Livy, 1948: III.lvii.10). Finally, the army – reconstituted to fight 'for the first time as free men fighting for a free Rome' (Livy, 1948: III.lxi) – marches out of the city to lay waste to Her enemies.

It has been suggested that Livy adapted Verginia's story from Lucretia's in order to further dramatise his narrative (Ogilvie, 1965: 477; Pais, 1971: 186–87; Watson, 1975: 168) and they do exhibit notable similarities. However, the person of Verginia contrasts markedly with Lucretia, being accorded nothing like as much attention, admiration and praise, and being the subject of few, predominantly passing, references in the wider literature – feminist or otherwise.[28] She exhibits no courage and performs no acts of heroism, attracting only pity and sympathy as 'the sweetest maid in Rome' (Ogilvie, 1965: 476), and throughout her lacklustre performance, not only does she not say a single word, she makes no sound at all. No proud, brave speech, no appeal, no call for revenge, passes her lips. When Marcus Claudius grabs her in the Forum, when Appius twice delivers a judgement condemning her to slavery and defilement; even when her father pierces her breast with the knife, she utters no bold declaration, no cry for help, no plea for mercy, no scream or sob, not even a sigh. Neither is she seen to move on her own account; one or other of the male protagonists places her in custody, brings her to court, leads her to death, takes her life, and parades her corpse. Even the trait apparently so crucial to her story, her plebeian social class, is questionable, with some sources presenting her as a patrician (Pais, 1971: 198). Perhaps, as Ogilvie (1965: 477) suggests, she is a hypostatisation of the virgin maiden, for in some texts she is not even named (Cicero, 1961a: II.xxxvii.63; Diodorus, 1945: IX.xxiv). In all accounts she is but an empty name; lacking characteristics, feelings and presence distinguishing her as an individual, she passes invisibly through her own story as if a mask any woman can wear.

It is not just the prosopographical that distinguishes Verginia's from Lucretia's drama; the stages upon which each unfolds also differ radically. No bedchamber

28 For example, see the accounts by Joshel (1992) and Vasaly (1987).

or spinning wheel placed symbolically at the heart of a home to which the heroine is confined is encountered here. Verginia's story starts and finishes in the public space of the Forum, the centre of the city, where men assembled, swore their oath against tyranny, heard speeches from the orator's platform and decided the first laws of the Republic. It was here that law would reside; here the prison would be built; here that the *praetor*, attired in his purple-bordered robe, would convene his semi-circular court; and here that Rome's greatest legal monument, the Twelve Tables, would come to dwell. Though likewise precipitated by sexual desire, the nature of the case differs markedly from that which entangled Lucretia. It involves no sexual offence, concerning instead the maiden's loss of status as free person and Roman citizen, and 'the legal details are stressed and lingered over' more than in any other of Livy's tales (Watson, 1975: 169).[29] In condemning Verginia to slavery, Appius redefines her as a commodity to be owned, possessed and used as her master wishes. No longer a person in the eyes of law, she becomes but 'a mortal thing' – the term the *Digest* employed to define slaves (Crook, 1967: 56). A terrible and unambiguous fate awaits her. Yet those champions leaping to her defence do not address this issue. Their brave speeches castigate Appius's tyranny and speak emphatically and repeatedly of liberty and freedom, but do so in the name of the Roman people, not in Verginia's name (Dionysius, 1960: XI.xxxi.3–4; Livy, 1948: III.l.10–li.8). Even when they finally bring down the *decemvirate*, they vindicate plebeian freedom, not hers. There is only one rhetoric spoken in her name, that of chastity. So when uncle and fiancé elicit the crowd's resistance to her initial surrender to Marcus Claudius's keep, they plead her virginity otherwise jeopardised; when opposing the claimant's attempt to reclaim his 'slave', her father protests on her honour and his having not raised her to gratify men's lust; and, as he plunges the butcher's blade through her heart, proclaiming to thereby assert her freedom, his sole reference is to the loss of her pure, chaste life (Livy, 1948: III.xlv.6–7, xlvii.7, l.6).[30] Vivified on the minds and lips of male protagonists, the association of Verginia with chastity is also evidenced in other details of the plot. Her death occurs by the shrine of Cloakina, deity protector of virgin modesty and purity, and is thought to have initiated a cult honouring the chastity of plebeian women (Livy, 1948: III.xlviii.5, X.xxiii; Ogilvie, 1965: 487; Pais, 1971: 196–99). Yet, most indicatively, at no point do either her defenders or the story's narrator recognise that, in losing her freedom, control of her body would pass to her owner and the issue of chastity would thereby become irrelevant. Neither is there any moment of superimposition or displacement between liberty and chastity, as happened in Lucretia's story. The two remain firmly separated, with liberty associated with the brave men and their fellow citizens – those effecting revolution – and chastity assigned to Verginia and their womenfolk (Dionysius, 1960: XI.xxxv.3; Livy, 1948: III.xlv.9, l.8–9).

29 It is mainly Dionysius's (1960: XI.xxxiv) account that provides details of the trial and the arguments put forward by Verginius.

30 In Dionysius's account (1960: XI.xxxvii.6), Verginus does make passing reference to his daughter's liberty as he kills her.

The assault on Verginia's freedom is not therefore, as has been argued, an attack on the liberty of all plebeians (Vasaly, 1987: 219–20). Verginia bears no measure of this liberty because she falls outside it, with her story and the dual rhetoric that characterises its plot serving to delimit two distinct domains and modes of being. One is occupied by liberty, firmly ensconced in the time and space of law and enjoyed by the civic brotherhood. In the other sits chastity, 'immersed' in the sacred, living fire of the domestic hearth, which, tended by chaste women, was residence of the virgin goddess Vesta and symbol of the household's preservation and prosperity (de Coulanges, 1955: 26–33; Dumézil, 1996: 353–55; Orr, 1978: 1560–61; Pomeroy, 1975: 210–14). First drawn with the blood of a patrician matron, this division is consolidated with that of a plebeian maiden, their stories united by the same rhetoric – that of chastity – and adorned with its insignia. Chastity was their crowning virtue, and both had been sacrificed upon its altar.

To satisfy his libido, Appius could simply have abducted Verginia or tricked his way into her home or her into his. By disguising his lust with a question of law, he transforms a personal sexual matter into a public legal one, a displacement that points to the true nature and significance of the narrative. In posing and adjudicating the legal question of Verginia's status, Appius also poses and adjudicates the question of the feminine and its relationship to law, a question that must be set before law if Her right to inhabit its domain is to be recognised. In the event, his judgement erases the mark of *civitas* from Verginia and her sex, and with it their right to stand before the law. Whilst Lucretia never drew breath in its space and time, Verginia, though a free Roman citizen, has her right to inhabit this realm questioned, adjudicated and negated, cut out by the hand of men. Hereafter, neither they nor their ilk can live the Roman *civitas* as equal partners in law, and enjoy the crowning liberty of the right of *provocatio.*[31] Nor will their names appear in the Roman census, that cornerstone of civic life providing the sole means by which people could prove themselves citizens.[32] Their fate thus sealed, their person has no place in law and therefore no place in the Twelve Tables, even though it was Verginia's passing that brought about their institution. This text bears no legal category that befits the presence of the feminine, and affords it just two references: the first stipulating ownership of the 'fruit of Her loins' (Table IV.iv); the second that women, like chattels, pass under their husband's authority after residing in his house for an uninterrupted year (Table VI.i).

Verginia's story is therefore the story of the codification of the Twelve Tables *and* the story of how law configured the feminine mode of being. Denied residence in law's empire, banished outside its gates and text, She is relegated to the Roman household 'inviolably hedged by all kinds of sanctity' and across

31 The prevailing view among Romanists is that *provocatio* was not available to women as of right, though some argue that it was granted in practice. For a discussion of both views, see Strachan-Davidson (1913: 141–44).

32 Unless widowed, women were assumed under their husband's declaration that he was married. For a discussion of the significance and function of the Roman census see Nicolet (1980: 49–88).

whose threshold law cannot pass.[33] Law has no say on the personal relationships of its inhabitants, the ways and types of marriage, or the reasons for divorce (Cicero, 1961c: xl.106, xli.109, xlix.128; Nevett, 1997: 289; Schulz, 1967: 147; Watson, 1975: 20, 33, 39).[34] Yet this is not, as has been suggested, because its 'humane face' acknowledged its subjects' individuality and respected the freedom of their private lives (Schulz, 1967: 146–63). Such interpretations are premised upon a modern apprehension of public and private as designating distinct, incompatible spheres of life. For Romans, these categories represented co-existing juridical modes of being available to law's subjects only, both being clearly prescribed in the Republic's first laws and the Twelve Tables (IX.i.ii.iv). Whilst the word *publicus* signified a life dedicated to the service of the people, one spent governing and managing the common wealth, a life *privatus* emphasised, as the word suggests, a sense of deprivation distinguishing ordinary private citizens not involved in affairs of state (Cicero1961a: I.iv.7–8; Ernout and Meillet, 1979; Koumanouthis, 1972; Wirszubski, 1950: 15). The sustained mode of being of the Roman *familia* was therefore neither private nor public. Caring nothing about deliberations in popular assemblies, magistracies, or the triumphs and spoils of war, alien to the civic brotherhood whose language of equality and liberty brought strangers together, its concern was with immediate material life. It had originated in the primordial condition of human beings when, under nature's dictate, 'Venus joined their bodies in the woods', created the first human bond – that of the union between husband and wife – and thereby softened the human race to enable subsequent unions of family and kinship (Cicero, 1975: I.iv.11, I.xvii.54; Lucretius, 1953: V.1011–27). Centred on each family's living hearth and religious cult, the domestic mode of being spoke a language of affectionate duty and respectful obedience (de Coulanges, 1955: 26–27; Saller, 1991: 146–51, 1999: 24). It claimed no independent existence beyond those who 'lived' it; it only existed for as long as they, together with the hearth's fire, were alive; and it boasted to be neither the product of intentional activity nor the achievement of human reason. It simply followed from the course of nature.

Just as it was for the order of the household, so too was the life of the feminine ruled and measured by nature alone – not because She, like all beings, originated at birth and terminated at death, but rather because Her person signified the materiality of human existence. Her body provided the source of new life. Her duties and obligations embraced the care of offspring, the elderly and the deceased, and Her right conduct – Her *pudicitia* – resided in Vesta's hearth and

33 The term *familia* in its widest sense refers to all persons and property under the control of the oldest male. More often, however, it denoted the conjugal family, dependents, slaves and freedmen living in the house (*Digest*, 1973: 50.16.195.1–4; Rawson, 1986: 7–9). *Domus* was used to designate the physical space of the house, but also included family, slaves and the broad kinship group – agnates and cognates, ancestors and descendents. For a more detailed discussion of these definitions, see Martin (1996) and Saller (1984, 1994: 71–95).

34 The only interference of law in marriage was Table VI.x, requiring a man to give reason when repudiating rather than divorcing his wife, and, the soon-to-be-abolished Table XI.ii, prohibiting marriage between plebeians and patricians (Dionysius, 1960: XI.xxviii.4).

was responsible for the maintenance of the family's ethical life. It was *Her* guardian goddesses who were called upon to preserve the household's physical and spiritual well-being, and *Her* personhood, which was rooted in the particularity of the household.[35] As if the feminine had remained untouched by law's beginning, She continued to live under a male head of family exercising absolute power over free persons and slaves alike. She could still be married or divorced without legal formality and, as previously, upon marriage had to either join Her husband's domestic cult under his control, or remain tied to Her father's authority (Corbett, 1930: 68; Gardner, 1986: 44–50, 84–85; Treggiari, 1991: 32–36; Watson, 1975: 17–19, 31). Now, as before, She could, on the death of Her male head of family, be called on intestacy as his immediate heir and continue to own this property until She came under a husband's authority (Corbett, 1930: 108–14; Gardner, 1986: 71, 169–71; Jolowicz, 1961: 123–25). And now, as before, whether under the authority of a father or husband, having committed a sexual or other criminal offence, She would, as Lucretia had done, appear before and be punished by the family court, even when, as in later times, She became entitled to a public trial (Pomeroy, 1976: 219; Strachan-Davidson, 1913: 32–35; Treggiari, 1991: 265–75; Watson, 1975: 36–38).[36]

As daughter, wife or mother to be, She of the body, earth and abyss below, She, the most natural person of all, thus emerged as if confined to law's past, to what the Romanists describe as law's pre-history and what Mommsen called 'the original order of things' (Mommsen, in Strachan-Davidson, 1913: 32–33). Although the life of the feminine continued seemingly undisturbed by jurisdictional acts of separation and engendering, in delimiting law's mode of being, these acts also set the interpretative planes through which Her space, time and mode of being would be read. No longer would She inhabit the vast and uncharted space in which Lucretia had dwelt, for this had stopped being an undifferentiated place wherein the social, natural and supernatural were conflated. Redefined in juxtaposition to law's spatial order, it now occupied law's exteriority, forming a domain ruled by nature (*Digest*, 1973: I.i.1.3, 4). There was She exiled as a creature of nature clearly distinguished from the juridical 'animal' (*civis*) who in entering the partnership in law denounced the primacy of His natural existence. Not only was her persona now seen as a gift of nature, but also Her entitlement to property ceased to be akin to that of her male siblings. Theirs became a legal right to own and alienate property;

35 The main goddesses protecting women were Tellus, the earth mother, Ceres, goddess of productivity in the fields, procreation in marriage, and of death and guardian of the *mundus*, the sacred passage to the underworld, and Vesta, goddess of the family hearth (Dumézil 1996: 374–77; Pomeroy, 1975: 214–17). The Penates were tutelary deities of the food supplies, whilst Juno, goddess of birth and fecundity, of the moon and monthly cycles – queen goddess of womankind and protector of her *pudicitia* – measured her right conduct (de Coulanges, 1955: 34–39; Dumézil, 1996: 291–303, 341–43; Orr, 1978: 1559–63).

36 When in 331 BC two women were accused of poisoning their husbands, they were strangled by the decree of their kinsmen, while the women involved in the secret cult of Bachanalia in 186 BC, despite standing trial in public, were executed by their own families (Livy, 1948: VIII.18, XXXIX.xviii.6). Even following the lex Julia, which made adultery a public offence, it was the family council that designated and executed punishments.

Hers remained a material relationship grounded upon agnatic ties and activated on the death of the paterfamilias, a claim to what was already naturally Hers, and that which proved Her unyielding ties to the family – the homestead, burial ground, spring, garden and fields (de Coulanges, 1955: 70–72; Diosdi, 1970: 38–39, 44–46; Gaius, 1932: II.157, 159; Table V.i.ii; D. 28.2.11).

As law's jurisdictional acts reconfigured the space and mode of being of the feminine, so too did they redefine the time of Her being. Her life spent servicing material needs was not born out of rational understanding and reflection, not part of a temporal process motivated by a search to achieve the common good. Clearly distinguished from and immune to progressive moves in which the life of law unfolds, the time of the feminine had no linear, progressive continuity, but like that of nature was ruled by repetition, the cycles of the moon, changes of season, recurrence of birth and death. It was exhausted within its own present and claiming neither past nor future, remained timeless. Thus would Her life and acts never fall within the time of law and unity of history. Unlike those of Brutus, Icilius or Verginius, they could never be cast in the grand spectacle of human activity as forces of change, progress and civilisation shaping the intellectual forms by which our present – the heir of Rome and Roman law – renders its past legible and intelligible. In Appius's court, the question of the feminine before the law was set, and in the same court, it was laid to rest. There would be no place for Her in the Roman law of persons and those legal systems founded upon it; She would hold no public office or perform other civic functions; and She would neither be able to act upon her own property, alienate it, leave it to heirs of her choosing, nor enter commercial contracts – not even when free of the authority of a male head. She would always need a father, husband or male guardian to mediate Her standing before the law (*Digest*, 1973: XVI.1.1; Gaius, 1932: I.iii; Cato in Livy, 1948: XXXIV.ii.11).[37]

On the politics of sexual difference

> … some overtures have been made to the world of women. But these overtures remain partial and local … Has an erosion of the gains won in women's struggles occurred because of the failure to lay foundations different from those on which the world of men is constructed?
>
> (Irigaray, 1993: 6)

The story of Roman law I have narrated here is one not told by historians, jurists and feminists, and is perhaps one to which many might take exception. In asserting the feminine to lie outside the realm of law, I did not intend to nurse a belief in a 'golden' age preceding law when a matriarchal order held sway.[38] Neither did my

37 For a detailed discussion of the guardianship and property ownership of Roman women, see Gardner (1986: 5–29, 163–203).

38 For a discussion of whether a matriarchy existed in pre-historic Italy, see Briffault (1927: 343–50), Hallett (1984: 14–28) and Thompson (1949: 92–101, 171–77). It is commonly accepted, however, that the Twelve Tables, in instituting the principle of agnatic guardianship, substantially strengthened the power of the father (Hallet, 1984: 23; Watson, 1972: 102–03).

analysis merely seek to explore the past; in so doing, I hoped to shed light on current concerns about law, power and sexual difference. To this end, the choice of Roman law might appear anachronistic, contemptuous of time and context, and even if accepted as appropriate – even assuming the tales of Lucretia and Verginia have real contemporary significance – my analysis is still difficult to reconcile with most modern feminist critiques of law. To claim that an ousting of the feminine from law's empire constitutes part of the bedrock of our legal tradition seems, to say the least, forgetful of the struggles of our nineteenth-century foremothers in which our rights and liberties, our personhood and standing before the law, were so obviously won, and our place in the modern *civitas* so clearly secured. Furthermore, its conclusions, so readily interpretable as gloomy and pessimistic, appear at odds with the optimism that the quest for legal change, so dominant within modern feminist legal scholarship, sustains. I admit no great enthusiasm for law-making activities, nor do I share the belief in their potential for instituting significantly positive changes for women; 'better' legal norms have been replacing older ones for almost 200 years, but the promise law once held for us has yet to be fulfilled. In fact, it was my questioning of the transformative aspirations of feminist legal scholarship which first fuelled my interest in notions of stasis rather than change and led me to a morphological analysis of the concept of jurisdiction and my choice of Roman law – both of these appearing so amiable to stasis *and* to change.

The founding of law's jurisdiction always annunciates a discontinuity with, and rejection of, the past. Yet, despite this demarcation, it remains closely linked with this past because the conditions of its possibility lie in the *a priori* positing of a time, space and mode of being that existed without this law, so that the axiom of non-law (or corrupt law) founds the new law's jurisdiction. Here, change embraces a diachronic comparison of the 'before' and 'after' articulated in the statement: the 'B' of then differs from the 'A' of now, wherein analysis indicates the extent of this difference.[39] However, the forms of space, time and life, which jurisdictional acts beget cannot be known through diachronic analysis alone. They can only be properly apprehended by synchronic comparisons whose objects are contemporaneous to one another. This is because the identity of these forms is premised upon their antithesis, relying on a dichotomy wherein the one can only be conceptualised in terms of the absence of the other and articulated as: 'A' and that which is not 'A'. When law claims an interiority, there is an exteriority against which it is defined; if there is a time of law, there must be one which does not belong to law; if there is a juridical mode of being, there must be a non-juridical one as well. So, whilst the diachronic comparisons morphological inquiry employs interrogate jurisdiction's historicity, its synchronic comparisons care little about history and change. Locating their origins in law's 'beginning', they

39 For a discussion of the themes of change and stasis in the founding of law's jurisdiction, see Gordley (1994) and Varga (1978). For a general discussion of the past as the condition of possibility of the present, albeit from different theoretical positions, see Boorstin (1941), Goodrich (1992) and Krygier (1986).

instead point to that which is static in law, its morphological power. This is a constant feature of its nature, a structural element of law's being from which it is unable to liberate itself without being destroyed, for in speaking the law jurisdictional acts do not merely bear law's being, they also bear law's power of separation and engendering. This power is, however, not a mimetic one, with law – like an artist – carving its forms to reflect, translate or reproduce 'true' forms arising from social conditions within its empire. Neither is it the power to enforce these norms – that wielded by a ruling elite, class, order or state controlling the legal institutions. It is an inherent power residing in jurisdictional prescription itself, a power silently deployed in law's displacements and demarcations, in its ordering of domains, spheres and sites of social life.

Merely accounting for the permanence and constancy of this power does not in itself render it visible and open to analysis or critique; the forms of space, time and life that substantiate it can neither find their positive statement nor empirical manifestation in simple juxtaposition of opposing categories. Entwined around the polarity of a binary structure, they cannot be made tangible through the drawing of lines between home/exile, own/alien, same/different or reason/feeling; they appear as little more than abstractions of law's language and logic, and thereby obliterate both the function of law's power and its morphological implications for the social. It is only by introducing a third parameter, one that performs as a comparator against which these binaries can be measured, that the power of law gains social meaning and hypostasis. In my analysis of Roman law, it is sexual difference that fulfils this role. However, sexual difference is not methodologically equated with norms regulating the conduct of men and women.[40] It provides the referent that convokes scattered and seemingly trivial 'evidence' that would otherwise go unrecognised or assume the guise of historical fact or self-evident truth. Unravelling the manner in which the bipartite divisions law institutes map the feminine/masculine dichotomy testifies to law's tactics and strategies of power, forms of domination and its opaque instances of exclusion. The 'legend' of the social being law narrates is thereby exposed and the sexuated nature of law's power laid bare. Carefully surveyed, hitherto 'innocent' evidence can thus yield a common point of reference; they comprise the empirical manifestation of law's morphological power, a power no longer merely juridical, mental or conceptual but now tangible, social and real.

Ingrained in the dichotomies law institutes, sexual difference is evidenced as a systemic element of its power and thereby shares its peculiar affinity to stasis. Permanently attached to law's being, structuring the cultural images that acts of separation and engendering elaborate and transmit, sexual difference becomes integral to the way law images and reads the world, and thus highly resistant to change.[41] It also means that my analysis of Roman law may not be so historically

40 For such an analysis of Roman law, see Thomas (1992).

41 For a discussion of binaries, their relation to the dichotomy feminine/masculine and their resilience to change, see Jay (1981: 47) and Massey (1992: 73).

specific because, though belonging so obviously to our distant past, it is also very much part of our present. For us unwilling heirs to its legacy, much has changed in the years since the Twelve Tables were first displayed in the Forum, yet I would argue that much has remained essentially untouched. For how is it that law and its agencies still recoil at the idea of crossing the domestic threshold when violence is perpetrated against its female inhabitants (Douglas, 2003)? How is it that woman's work in the family continues to be seen as a natural task or labour of love, and Her time not able to be measured against that spent in the workplace (Bottomley, 1994; Conaghan, 2006)? And why does the question of female personhood still occupy us feminists of the postmodern era (Naffine, 1990)?

Establishing linkages across time and raising questions about the constancy of sexual differentiation in law's normative patterns gives credence to feminist ontological knowledge claims identifying law's nature as male, patriarchal or phallocentric and, like my own claims, points to its resistance to change. Yet trans-historical accounts of legal norms, in collapsing the permanent in law into the persistence of norms that discriminate against women, offer little when it comes to understanding the function of law's power and its fundamental reliance upon sexual difference. In employing sexual difference to interrogate law, my approach has argued for a critical inquiry which, unhitched from the chariot of normative analysis, poses as its object law's own language and logic of divisions, and the manner in which these found and shape its relationship to the social world. Here, sexual difference not only provides the condition of possibility of the 'visibility' of law's power, and consequently of its critical analysis but emerges as a critical standpoint thereby opening up a discursive space wherein a feminist rereading of law may take place. This paper, in raising questions concerning law's being, the nature of its rationality and the sexual economy of its power – questions that resist law's own self-representation and thus critical questions of legal ontology – may be seen as a first attempt, however incomplete, to engage in such a rereading.

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Part III

States

4 Guantanamo Bay, abandoned being and the constitution of jurisdiction

*Stewart Motha**

> [U]nder the [US] Government's theory, it is free to imprison Gherebi indefinitely . . . without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees.
> (*Gherebi v Bush and Rumsfeld* at 46)[1]

The detention of persons in Guantanamo Bay is potentially indefinite, contingent on the duration of the 'war on terror', a 'war without end'. There is mounting evidence that detainees are being tortured (for evidence of torture in Guantanamo Bay and Abu Ghraib Prison, Baghdad, see Hersh 2004a,b). The decision on whether the 'life' of a detainee in the 'camp' will be mediated by civil law is ostensibly determined by whether US Federal Courts have jurisdiction to grant the writ of *habeas corpus*.[2] This chapter considers the abject condition of the detainee as part of the complex relation between an 'emergency' or 'exception' determined by a sovereign at 'war', and the juridical structure of a 'life' mediated by law. In several *habeas corpus* cases brought on behalf of the detainees in Guantanamo Bay, this relation has been reduced to a question of jurisdiction.

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1 *Falen Gherebi v George Walker Bush and Donald H Rumsfeld* (2003) United States Courts of Appeals for the 9th Circuit, California, 18 December.

2 By 'life' in the 'camp', I am referring not only to detainees in Guantanamo Bay but also to persons held indefinitely without trial in other US military bases within the United States, and in Diego Garcia, and Bagram Airport, Kabul. The term 'life' connotes a being who is 'outside' political and juridical space, distinct, for instance, from a 'subject' whose life is mediated by right. The distinction is drawn from Agamben who explains this as the difference between *zoē* and *bios* (Agamben, 1998: 1).

By reviewing the *habeas corpus* cases,[3] I argue that it is the figure in the 'camp' – in Jean-Luc Nancy's (1993a) terms, 'abandoned being' – who marks the limits of the juridical and political order. I explore a number of ways in which the condition of the 'life' in the camp is fashioned by law's self-inscribed withdrawal in the face of the sovereign exception.

My argument is structured as follows. Consideration of decisions to grant the writ of *habeas corpus* reveal that courts are far more concerned with delimiting and affirming the province of sovereignty than securing the liberty of the subject. A court's decision on whether it has jurisdiction which is a precursor to granting the writ, first affirms a mode of 'governance' and 'governmentality' before deciding whether to admit the 'life' of the 'camp' into the juridical order. The 'form of life' in the camp is then always already exposed to being interpolated through governmental concerns – and is not merely rendered 'bare' when law accepts the imperative to withdraw in the face of the sovereign exception. Giving an account of the (legal) subject in the 'camp' who is at once inside/outside the juridical order thus follows from the courts' refusal to bring the detainee 'before the law'. This is why the theorisation of 'abandonment' is so essential to revealing the constitutive role of the inhabitant of the 'camp'. We will see that 'life' in the 'camp' is in fact saturated with political and juridical significance. 'Abandoned being', I will argue, reveals the constitution of jurisdiction.

My intention is also to problematise Giorgio Agamben's influential treatment of the relation between the sovereign decision on the exception which constitutes the juridical order and 'life' in the 'camp' (Agamben, 1998). For Agamben, the 'camp' marks the juridical paradigm of modernity, the *nomos* of the political space in which we now live (Agamben, 1998: 166, 174–75). The 'camp' localises a matrix of politics where the distinction between a factual decision on the 'enemy' ('*quaestio facti*') and the legality of detention in the camp ('*quaestio iuris*') become indistinguishable (Agamben, 1998: 170). Contrary to Agamben, I do not consider it possible for a 'form of life' to emerge which is not touched by governmental, biopolitical or exceptional manifestations of power. Agamben's anti-nomian stance seeks to constitute a 'form of life' which is 'wholly exhausted in bare life' (Agamben, 1998: 188). The distinction between 'bare life' and a 'political subject' would then cease to matter. It is not clear how such a life would be less exposed to the contingencies of biopolitical power – for he acknowledges that this 'life' continues to take the form of a 'biopolitical body' (Agamben, 1998). It may be that Agamben loads too many of his anti-nomian ambitions on the figure of 'bare life'. The fact remains that a subject-of-right is contingent on the complex relation between sovereignty and law. It is this relation that is disclosed in the concept of 'abandonment' outlined below.

3 In particular, *Rasul and Odah v Bush* 215 F. Supp. 2d 55 (DDC 2002); *Falen Gherebi v Bush* (2003a) (US District Court for the Central District of California, 13 May 2003); *Rasul v Bush* (Supreme Court of the United States, decided 28 June, 2004) (hereafter '*Rasul v Bush* (2004)'); and *Hamdi v Rumsfeld* (Supreme Court of the United States, decided 28 June, 2004) (hereafter *Hamdi v Rumsfeld* (2004)).

Jurisdiction and the indefinite 'War on Terror'

Around 600 detainees from 40 nations have been held without charge or trial at the US naval base in Guantanamo Bay since January 2002. The land on which the naval base is situated was leased to the United States by Cuba for the purpose of coaling and naval stations in 1903. The individuals labelled 'enemy combatants' were detained by the US military and security agencies in the course of 'military operations' commonly termed the 'War on Terror'. Following the 9 September 2001 attacks on the World Trade Center in New York City and the Pentagon in Washington, Congress authorised the President of the United States to use all 'appropriate force' against nations, organisations or persons who may have planned, authorised or committed the attacks.[4] The Authorisation for the use of force was also directed at nations, organisations or persons who might harbour terrorists or who may commit 'international terrorism' in the future. On 13 November 2001, the President of the United States as Commander in Chief of its Armed Forces issued a 'Military Order' authorising the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'.[5] According to s 2 of this Military Order, an 'individual subject to this order' means 'any individual who is not a US citizen with respect to whom I [the President] determine from time to time in writing' that, *inter alia*, an individual is or was a member of Al Qaida, or the person aims to cause 'adverse effects' to US citizens, security, foreign policy or economy (s 2(1)). There is also a catch-all provision in the Military Order: an individual can be so detained if 'it is in the interests of the United States that such individual be subject to this order' (s 2(2)). Section 4 provides for a Military Commission to try such individuals. Such a Commission may punish such individuals with 'life imprisonment or death' (s 4(a)). The President also declares the limits of all 'other law'. According to s 7(b)(1) and (2), military tribunals shall have exclusive jurisdiction with respect to offences by the individual subject to an order.

This Military Order authorised the indefinite detention of persons in Guantanamo Bay. US citizens such as Hamdi and Padilla have also been detained without trial in military bases within the United States. A Military Commission has been established to try, and potentially order the execution of, persons captured during the 'War on Terror'. To challenge the legality of these detentions, lawyers acting on behalf of the detainees sought the writ of *habeas corpus* from US Federal Courts. The ancient writ is famously supposed to protect the liberty of the individual from the abuse of state power. Where a person is detained, so the mythic story goes, the state authorities can be compelled to produce the prisoner's body in court. But the story of the writ of *habeas corpus* is more complicated. In *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003), Nasser Hussain provides a stunning demystification of the celebrated writ by arguing that:

> Whether in its origin as a facilitation of sovereign power or its subsequent and modern guise as a check on the executive, whether used to intern or to

4 Authorisation for Use of Military Force (AUMF), Pub. L No. 107–40, 115 Stat 224 (2001).

5 *Presidential Documents, Federal Register*, 16 November 2001, Vol. 66, No. 222: 57831–57836.

> free, habeas corpus is a mode of binding subjects to the law and to its economies of power.
>
> (Hussain, 2003: 70)

As Hussain emphasises: 'Capias enforces the writ (Latin: "that you take") by literally capturing the body and bringing it into the law' (Hussain, 2003: 69). As Hussain points out, this is an irony regarding the 'Writ of Liberty' (Blackstone's grand embellishment) that was realised with embarrassment by Edward Jenks: 'Whatever may have been its ultimate use, the writ of *Habeas Corpus* was originally intended not to get people out of prison but to put people in it' (Jenks, 1902: 65, cited in Hussain, 2003: 69). As we will see when we consider the *habeas corpus* cases in relation to Guantanamo Bay, it is the 'custodian' rather than the detainee who is ultimately brought before the law (see *Rasul v Bush* (2004) discussed below).

The availability of the writ to the detainees in Guantanamo Bay in fact consolidates the sovereign's power by determining where the sovereign's 'writ runs'. The province of law is determined by the extent of a court's 'jurisdiction', and which 'subject' will be governed by law. The relevant 'subject-of-law' over whom jurisdiction is ultimately asserted is not the detainee in the 'camp' but the 'official' who imprisons him. Moreover – and this reinforces the point about the writ facilitating sovereign power – the US courts remain heavily deferential to the exigencies of a sovereign at war when determining the extent of 'due process' available to the detainee. In what follows I will consider, through a discussion of the *habeas corpus* cases, how a particular kind of 'abandonment' in the 'camp' discloses the nature of the relationship between sovereignty and jurisdiction.

There are multiple approaches to conceptualising jurisdiction in the *habeas corpus* cases. The first approach, from the US Federal Court for the District of Columbia, is set out in *Rasul and Odah v Bush* (2002) (this decision dealt with multiple *habeas corpus* applications). *Rasul and Odah* treated jurisdiction as a concomitant of a state's sovereignty over 'territory'.[6] Sovereignty over a territory is delimited in time and space, and attributed to one sovereign. The courts of a state can have no jurisdiction over a territory unless the state also has formal sovereignty over that territory. Whether the United States has sovereignty over Guantanamo Bay is determined by the meaning given to the words 'ultimate sovereignty' in the 1903 Lease Agreement between the United States and Cuba in relation to Guantanamo Bay. According to the DC Federal Court's reading of the Lease Agreement in *Rasul and Odah*, Cuba retains 'ultimate sovereignty' and the United States has

6 *Rasul and Odah v Bush* 215 F. Supp. 2d 55 (DDC 2002), two applications heard together, was the first *habeas corpus* application to be brought on behalf of the Guantanamo detainees in a US Federal Court, the District Court for the District of Columbia. The first was for the writ of *habeas corpus* by two British and one Australian national. In the second, *Odah v United States*, 12 Kuwaiti nationals sought a permanent injunction prohibiting the government from refusing to allow them to meet with their families, be informed of the charges against them, consult with counsel of their choice and have access to impartial courts or tribunals. The US Government moved the court to dismiss both actions on jurisdictional grounds.

'jurisdiction and control'.[7] For the court in *Rasul and Odah*, a finite sovereignty over Guantanamo Bay, which cannot be divided, shared or qualified, is attached to the nation-state of Cuba. Thus the court concluded that jurisdiction does not extend to Guantanamo Bay and the writ of *habeas corpus* is not available.[8]

The approach of the Federal Court and Court of Appeals in *Rasul and Odah* transposes the question of jurisdiction into a question of sovereignty over territory. It is an approach that was ultimately retained in the Supreme Court decision in *Rasul* (2004)[9] – with the alteration that the territorial question of jurisdiction relates to the location of the custodians rather than to the location of the detainees (I will say more about the Supreme Court decisions shortly).

The second approach was developed by the majority decision in *Gherebi v Bush and Rumsfeld*.[10] Their approach is multifaceted. On the one hand, 'jurisdiction' is regarded as a notion which can exist without sovereignty. In a circular formulation, the majority argued that jurisdiction follows from the exclusivity of 'control and jurisdiction' exercised over a territory. On the other hand, the majority also tied jurisdiction to sovereignty. Unlike the earlier decisions in *Rasul and Odah* (2002), the majority in *Gherebi v Bush and Rumsfeld* found that the US exercises sovereignty over Guantanamo Bay.[11] The United States–Cuba Lease Agreement of 1903 in relation to Guantanamo Bay states that Cuba retains 'ultimate sovereignty'. The discussion of the concept of 'sovereignty' in *Gherebi* thus turned on the meaning of the term 'ultimate' rather than on 'sovereignty' as such. If 'ultimate' is the key 'modifier' of sovereignty in the Lease Agreement, as the majority put it, should it be construed as a 'temporal' or 'qualitative' modifier?[12] 'Ultimate sovereignty' in the 'temporal' sense would suggest that Cuba's sovereignty over Guantanamo Bay is a 'residual' interest, akin to a reversionary interest that substantively vests in Cuba once the United States 'abandons its physical and absolute control of the territory'.[13] The 'qualitative' meaning of 'ultimate' sovereignty connotes 'basic, fundamental or maximum' sovereignty.[14] The majority conclude that 'ultimate

7 *Rasul and Odah v Bush* 215 F. Supp. 2d 55 (DDC 2002) at 23.

8 In formulating the condition for granting the writ, the court in Rasul applied the Supreme Court decision in *Johnson v Eisentrager* 339 US 763 (1950). The Supreme Court in *Johnson* had held that, although aliens – whether friendly or enemy – may be extended the privilege of litigation when they are in the United States because their presence in the country implied protection, no such basis can be invoked when 'prisoners at no relevant time were within any territory over which the United States is sovereign, and the sentence for their offence, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States' (*Johnson v Eisentrager* 339 US 763 (1950) at 777–78, emphasis added). The District Court in *Rasul*, citing Johnson as authority, declared that a court was unable to extend the writ of *habeas corpus* to 'aliens held outside the sovereign territory of the United States' (*Rasul v Bush* (2004) at 72–73, emphasis added).

9 *Rasul v Bush* (2004).

10 *Falen Gherebi v George Walker Bush and Donald H Rumsfeld* US Courts of Appeals for the 9th Circuit, California, 18 December 2003) (hereafter *Gherebi*).

11 *Gherebi* at 14–24.

12 *Gherebi* at 25–26.

13 *Gherebi* at 26.

14 *Gherebi* at 26.

sovereignty' as used in the Lease 'can only mean temporal and not qualitative sovereignty':[15]

> Under the preferred construction of 'ultimate', the use of the term in the Lease establishes the *temporal* and *contingent* nature of Cuba's sovereignty, specifying that it comes into being only in the event that the United States *abandons* Guantanamo: in such case, Guantanamo reverts to Cuba and to Cuban sovereignty rather than being subject to some other actual or attempted disposition. Most important, under the *preferred temporal construction*, Cuba does not retain any *substantive sovereignty* during the term of the US *occupation*, with the result that, during such period, sovereignty vests in the United States.[16]

There are a variety of meanings attributed to sovereignty in the court's formulation. Sovereignty is at once divisible, temporal and contingent. It is capable of being divided and held by an 'occupying power'. Sovereignty is also capable of being abandoned or disavowed. The fact that the Lease refers to the '*continuance* of the ultimate sovereignty of the Republic of Cuba' is dealt with by treating the Lease as if it were a 'standard land disposition' where 'bundles of rights' are partitioned into present and future interests.[17] Thus what 'continues' as the 'ultimate sovereignty' of Cuba is sovereignty as a 'reversionary interest' which must await the discontinuance of the substantive sovereignty currently indefinitely vested in the United States. Notably, the court supports its conclusion by stating that the 'division or sharing of sovereignty is commonplace. Sovereignty is not an indivisible whole'.[18]

Gherebi v Bush and Rumsfeld demonstrates the extent to which the ambit of jurisdiction is heavily tied to the territorial, temporal and qualitative character of sovereignty. Jurisdiction, far from being enlivened by the indefinite deprivation of the liberty of individuals by US military authorities, is instead articulated as a function of the quality and character of sovereignty. Through the dubious analogy drawn between sovereignty and the temporal quality of a lease, the court turns the capacity of the United States to control territory as an 'occupying power' into the juridical basis for expanding the court's jurisdiction to the occupied territory. In this formulation, it is the construction of sovereignty as a divisible 'temporal interest' rather than the abject 'life' of the detainee that enlivens the court's jurisdiction. As we will see, this economy of sovereign power is more explicitly at stake in the way the Supreme Court dealt with the *habeas corpus* applications.

15 *Gherebi* at 26–27. The key source for this conclusion is the trusty *Black's Law Dictionary*, which defines 'ultimate' to mean: 'At last, finally, at the end. The last in the train of progression or sequence tended toward by all that precedes; arrived at as the last result; final'.

16 *Gherebi* at 29 (emphasis added).

17 *Gherebi* at 31.

18 *Gherebi* at 31.

On 28 June 2004, the Supreme Court of the United States in *Rasul v Bush* (2004), *Hamdi v Rumsfeld* (2004) and *Rumsfeld v Padilla* (2004)[19] decided appeals from the Federal District Court decisions. The issue to be decided in *Rasul* was whether US Federal Courts have jurisdiction to consider the legality of the detention of foreign nationals captured abroad and being held in the US naval base in Guantanamo Bay. The court decided this issue on the very narrow basis that Congress had granted Federal Courts jurisdiction in a statute[20] to hear applications for *habeas corpus* 'within their respective jurisdictions' by persons who claim to be 'in custody in violation of the Constitution or laws or treaties of the United States'. The question that emerged in interpreting the *habeas* statute was the meaning of 'within their respective jurisdictions'. The material question – a matter of statutory construction – was whether it was the 'custodian' or the 'detainee' who was required to be 'within the respective jurisdiction' of the Federal Court. The majority resolved this question on the basis that it was adequate for the 'custodian' of the prisoner to be within the court's jurisdiction. I will go on to argue this discloses that the determination of jurisdiction for the purposes of the *habeas* writ is a function of the court's regulation of government officials within an economy of governmental power in the sense described by Foucault (1991 [1978]).

Previous Supreme Court decisions in *Ahrens v Clark* (1948) and *Johnson v Eisentrager* (1950) had interpreted the *habeas* statute and its words 'within their respective jurisdictions' as requiring the petitioner's presence within the district court's 'territorial jurisdiction'.[21] This interpretation created a 'statutory gap' whereby, if the petitioner was not present within the court's territorial jurisdiction, the court would not be able to grant the writ. In *Rasul*, the majority elected to follow the authority of *Braden v 30th Judicial Circuit Court of Ky*[22] which held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction is not necessary because the writ of *habeas corpus* 'does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody'.[23] The 'custodian can be reached by service of process'. The writ of *habeas corpus*, according to this approach, governs the 'custodian' as a means of granting the relief sought by the prisoner. The person made subject to the law (of the court granting the writ) is not the detainee but the custodian. Indeed, if the status of being a 'subject' is dependent on the law applying to you – on life being mediated by law – the 'subject' here is not the detainee but the custodian. The implications of this formulation for the character of the *habeas* jurisdiction is significant. Is it the 'life' of the detainee that is being mediated by law, or rather is it the authority of the custodian that is being regulated? The answer to this question is quite significant

19 *Rasul v Bush* (2004); *Hamdi v Rumsfeld* (2004); *Rumsfeld v Padilla* (Supreme Court of the United States, decided 28 June, 2004) (hereafter '*Rumsfeld v Padilla*, 2004').

20 28 US.C §§ 2241(a), (c)(3).

21 *Rasul v Bush* (2004) at 8–11, esp 8.

22 *Braden v 30th Judicial Circuit Court of Ky* 410 US 484, 495 (1973).

23 *Braden* at 494–95; *Rasul v Bush* (2004) at 10.

because it discloses that *habeas corpus*, at least as it operates through the US Federal Statute 28 US.C § 2241, contrary to the laudatory claims made about the writ, is not the source of a 'subject' whose 'life' is mediated by right.

Is the 'life' of the detainee 'bare', in Giorgio Agamben's terms, until and unless the custodian of this 'life' is part of a system of governance that regulates the custodian's authority? Or instead, is the 'bare life' of the 'camp' caught in a network of power and governmentality elaborated by Foucault (1991 [1978]). In this latter scenario, it is not the archaic sovereign power over 'life and death', or the juridical status of being a 'subject-of-law' that matters but rather whether the law is made to appear (Foucault and Blanchot, 1987). In these *habeas corpus* cases, the law shows itself in order to regulate the custodian. It is a law called forth by the potential transgression of norms by government officials.[24]

The question of 'jurisdiction' at a time of 'war' complicates the matter even further. War marks the return of an archaic sovereign whose appearance makes the law withdraw. Schmitt's *Political Theology* (1985) and Agamben's *Homo Sacer* (1998) tell us that the sovereign exception in fact makes the law possible. I want to argue that it is precisely this dialectical movement of appearance and withdrawal of both law and sovereignty that we observe in the *habeas corpus* cases which have determined the jurisdiction of US Federal Courts in relation to persons detained at Guantanamo Bay and other military bases.

The Supreme Court in *Rasul*[25] answered the question of whether the Federal District Court's jurisdiction extended to Guantanamo Bay in the following way: the prisoners are in federal custody and alleging the violation of the laws of the United States. As no one disputes that the District Court has jurisdiction over the petitioners' custodians, the court held that '§ 2241 confers on the District Court jurisdiction to hear petitioners' *habeas corpus* challenges to the legality of their detention at the Guantanamo Bay naval base'.[26] While this is a welcome result, I would urge very strongly that it cannot be assumed that the prisoners are likely to have their detention reviewed by civil courts which will apply the normal measures demanded by due process. The law may be called forth, it may be coaxed to make a cameo appearance, but it will not hamper the sovereign at war. Thus an examination of the character of jurisdiction must also consider law's withdrawal in the face of the sovereign exception. The Supreme Court's lengthy and complex decision in *Hamdi* would sustain my contention.

Hamdi[27] involved the detention of a US citizen who was captured during military operations in Afghanistan. The question addressed by the court was

24 These are insights offered by Blanchot's discussion of Foucault (see Foucault and Blanchot, 1987). I cannot expand on this here – but in brief, the account Blanchot gives of the character of law in Foucault's thought is that of a 'limit' that must be transgressed in order to make the law appear. Law is a horizon, a limit that must be transgressed. The space of this limit is the place of law.

25 *Rasul v Bush* (2004).

26 *Rasul v Bush* (2004) at 15–16. This was the line of argument in the Court of Appeals decision in *Gherebi* – but the more complex issues of 'territorial jurisdiction' discussed in *Gherebi* were not canvassed in the Supreme Court decision in *Rasul*.

27 *Hamdi v Rumsfeld* (2004). The references below are to this judgement.

whether the Executive had the authority to detain citizens who were 'enemy combatants'. The court agreed that Congress had authorised Hamdi's detention under its Authorisation for Use of Military Force (AUMF), granted to the President.[28] The court confirmed that Hamdi was validly detained under this authorisation:

> We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorised the President to use.[29]

The capture of lawful and 'unlawful combatants' is an important incident of war. Detention is fundamental to waging war and thus falls within the AUMF as 'necessary and appropriate force'.[30] Can detention be 'indefinite' or 'perpetual'? The court recognised that the 'War on Terror' was 'unconventional' and may be prosecuted for several generations.[31] But indefinite detention for 'interrogation' is not authorised by AUMF.[32] However – and this is the key element that will impact on the future judicial assessment of detention in Guantanamo – the AUMF is interpreted as including the 'authority to detain for the duration of the relevant conflict, and this is based on long-standing law-of-war principles'.[33] The court recognised that the conflict was ongoing in Afghanistan. To the extent that the Executive claims to be prosecuting a 'war' that may be indefinite, individuals may be detained for the duration of that conflict. Detention for the duration of the conflict is only permissible once it is established that the detainee is in fact an 'enemy combatant' – 'whether this is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point'.[34] This criteria must be viewed in light of the ample evidence that torture is used as a means of extracting intelligence and confessions in Guantanamo and Iraq (see Hersh, 2004a,b).

In relation to the duration of detention, Hamdi contended that Congress had not authorised indefinite detention. The Geneva Convention requires that those detained be released and repatriated on the cessation of hostilities.[35] The court recognised that the 'War on Terror' underpinned national security in ways that were 'broad and malleable'.[36] Demonstrating its deference to government concerns,

28 AUMF, Pub. L No. 107–40, 115 Stat 224 (2001).
29 *Hamdi* at 10.
30 *Hamdi* at 12.
31 *Hamdi* at 12–13.
32 *Hamdi* at 13.
33 *Hamdi* at 13.
34 *Hamdi* at 16.
35 Article 118 Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949 [1955] 6 UST 3316, 3406, TIAS No. 3364.
36 *Hamdi* at 12.

it pointed out that the current conflict was unconventional and was not likely to end with a formal ceasefire.[37] The court recognised that the government's consistent position was that this 'unconventional war' may not be 'won for two generations'.[38] Hamdi's detention could thus last for the rest of his life. As long as the United States is engaged in active combat in Afghanistan, detention is recognised to be part of the 'necessary and appropriate force' authorised by Congress.[39] The exception, as far as it concerns Hamdi's life, has become the norm.

If Hamdi is entitled to 'due process' while he is detained under the AUMF, what should this involve? In deciding this, the court balances Hamdi's 'private interest' to liberty with the 'governmental interest' of ensuring that the enemy does not return to the battlefield (the reasoning now slipping back to the scenario of a 'conventional' war).[40] The court recognised that strategic matters in 'warmaking' were in the hands of the Executive. In arriving at what it thought the content of due process ought to be, the court drew particular attention to the fact that Hamdi had the 'privilege' of American citizenship.[41] With these elements in mind – particularly that the government was prosecuting ongoing military operations and that Hamdi was a citizen – the court set out the following elements of due process:

- A 'citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker'.[42]
- A 'properly constituted military tribunal' could meet this requirement of a neutral decision-maker.[43]
- Aside from the first core element of knowing the factual basis of detention in a timely fashion, 'enemy-combatant' proceedings can be tailored to alleviate the potential to burden the Executive at a time of military conflict.
- Hearsay may have to be accepted as the most reliable form of evidence in proceedings that determine the factual basis of detention.[44]
- The Constitution will not be offended by a presumption in favour of the government's evidence – that is, once the government puts forward its evidence, the onus will shift to the alleged 'enemy combatant' to prove that they are not.[45]
- Initial capture in the battlefield will not require this extent of due process. It is only when a determination is made to *continue* to hold the person who has been seized that the due process requirements cut in (original emphasis).[46]

37 *Hamdi* at 12.
38 *Hamdi* at 12.
39 *Hamdi* at 14.
40 *Hamdi* at 17.
41 *Hamdi* at 25.
42 *Hamdi* at 28.
43 *Hamdi* at 31.
44 *Hamdi* at 27.
45 *Hamdi* at 27.
46 *Hamdi* at 27–28.

Will it be necessary for such a 'decision' to 'continue to detain' to be taken before review by an independent tribunal is available? This is an open question yet to be determined by Federal Courts.

- The court emphasises, several times, that it is dealing here with the *citizen's* core right to challenge the government's case.[47]

Although *Rasul v Bush*[48] extends access to US courts to citizens and aliens, what this actually amounts to for the non-citizen detainees at Guantanamo Bay is far from certain. The detainees in Guantanamo Bay will now have the right to ask a District Court to grant the writ of *habeas corpus*, and thus review the decisions and procedures of the Military Commissions in Guantanamo Bay. But it remains uncertain what 'due process' concessions will be made to those whom the government insists are 'unlawful combatants'. The distinction between 'lawful/unlawful combatants' and 'enemy combatants' has not been determined. The Military Commissions which will now consider the factual basis of detention will also determine the nature and status of the prisoner. Jurisdiction of the Federal District Courts remains territorially specific and the detention of (un)lawful combatants will continue for the duration of a conflict which the court in *Hamdi* acknowledged may be for the rest of Hamdi's life (two generations).

The decisions in *Rasul*[49] and *Hamdi*[50] demonstrate that the *habeas* jurisdiction is not a function of law's capacity to intervene to guarantee that an individual has not been illegally deprived of their liberty. Rather, jurisdiction is enlivened by the court's capacity to reach the government official. Once jurisdiction is established, it is 'governmental' imperatives such as a concern not to hamper the sovereign at war or preventing the 'enemy's' return to the battlefield that are balanced with the detainee's 'private' right to liberty. The content of due process is contingent on a governmental calculation. The decision in *Hamdi* also disclosed how the governmental concern to ensure neutral decision-making does not amount to determination of the factual basis of detention by civil tribunals. 'Military tribunals' are adequate to determine the factual basis of potentially indefinite detention. The task now is to explain how the sovereign exigencies at a time of emergency or war come to so heavily dominate whether 'life' is mediated by civil law. What is the relationship between sovereignty and jurisdiction disclosed in these cases?

In discussing the cases, I have identified the various instances where 'governmental' concerns and deference to sovereign power impact on the judicial determination of jurisdiction. In what follows, I will consider what the 'life' abandoned beyond the calculations of civil law can tell us about the constitution of jurisdiction. Is the 'life' indefinitely abandoned in the camp a figure who marks

47 *Hamdi* at 24, 25, 26, 30.
48 *Rasul v Bush* (2004) at 12–13.
49 *Rasul v Bush* (2004).
50 *Hamdi v Rumsfeld* (2004).

the 'permanent exception' in which we all live, or is it rather a sacrificial figure in the economy of sovereign distributions? I will argue that the figure abandoned in the camp does not mark the arrival of a 'permanent state of exception'. Rather, as we observed through Hussain's claims about the writ of *habeas corpus*, it is law's deference to the economy of sovereignty, and its capacity to appear and withdraw within a governmental mode of power, that explains the relation between sovereignty and law in the context of indefinite detention.

In making this argument, I will invoke Agamben's (1998) seminal work on the juridical structure of the 'camp'. According to Agamben's discussion of the juridical structure of the concentration camp, the 'camp' is not an anomaly of the past, but 'the hidden matrix and *nomos* of the political space in which we are still living' (1998: 166). I will distinguish Guantanamo Bay from the indistinction between 'fact' and 'right' which Agamben asserts is central to the 'permanent state of exception' marked by the 'camp': 'the camp is a hybrid of law and fact in which the two terms have become indistinguishable' (1998: 170). The modest contention confirmed by my analysis is that the judiciary cannot be exempted from responsibility for the ongoing detention and abject condition of the detainee. To characterise indefinite detention in Guantanamo Bay as a permanent state of exception where fact has collapsed into right too readily absolves the judiciary and the US Congress of responsibility (recall the AUMF and its central role in the court's reasoning in *Hamdi*).[51]

Law's exception or exception as law?

Is 'abandonment' in the 'camp' a condition where 'life' is utterly bereft of mediation by law? How are we to decide whether indefinite detention in the 'camp' at Guantanamo Bay is a juridical event where the question of fact and the question of right have become indistinguishable? Engaging with Agamben (1998) and one of his key antecedents, Carl Schmitt, will help us to address this question. The distinct contribution made by Agamben for the study of modern power and sovereignty is to bring Schmitt's thought on the sovereign exception to bear on Foucault's genealogy of modern power and characterisation of 'biopolitics' (see Gregory, 2004: 62–63, 282–83, n 43). For Agamben, the decision to 'abandon' life, to place it beyond the calculations of law, is the decision on the exception which constitutes the law (Agamben, 1998: 18). The 'relation of exception' involves the 'inclusive-exclusion' of the 'life' which is 'taken outside' the 'normal juridical order' (1998: 170). The question of whether a person is inside or outside the law is not only a question of law's 'application' but also a more complex case of being 'abandoned', 'inclusively excluded' by the law. For Agamben, it is not the decision to 'apply' the law but the decision to 'abandon' life that constitutes the juridical order: '*The originary relation of law to life is not application but Abandonment*' (Agamben, 1998: 29, original emphasis).

51 *Hamdi v Rumsfeld* (2004).

As Agamben puts it, Foucault attempts to de-emphasise the questions 'What legitimates power?' and 'What is the state?' (Agamben, 1998: 5). But if this theoretical privileging of sovereignty is removed, what explains the point of intersection between 'techniques of individualization' and 'totalizing procedures' (1998: 6)? Agamben attempts to address the nature of power as it is manifested at the point of intersection between 'juridico-institutional' and 'biopolitical' models of power (1998: 6). Before moving to consider whether the 'original activity of sovereign power is the production of the biopolitical body' (1998: 6) and its implications for understanding the relationship between law and its exception, I wish to briefly consider Carl Schmitt's thought on the exception. The 'exception' – its complex position inside/outside the juridical order – is central to attempts by courts to position the actions of the 'sovereign at war' beyond the purview of law. For instance, in cases like *Gherebi*[52] and *Hamdi*,[53] the US Government relied on the 'emergency' and 'state of war' as the grounds for claiming that the judicial branch of government could not interfere with the actions of the 'sovereign at war'. Although the question of jurisdiction has been 'territorialised' – that is, jurisdiction is determined on the basis of whether the custodian is within the 'territorial' jurisdiction of a court – the US Government's rationalisation for 'indefinite' detention, and the possibility of the death penalty being administered by officials who are part of the Executive arm of government, continues to rely on the exceptionality of war asserted by the sovereign and acknowledged by the courts.

Let us look more closely at the sovereign exception. Not every emergency or sovereign decree is necessarily an exception. As Carl Schmitt puts it in *Political Theology* (1985), an 'exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind' (Schmitt, 1985: 12). Not only does order in the juristic sense prevail but also the potential for the exception can be prefigured or anticipated by the law that recedes. This is evidenced by the possibility of such a 'withdrawal': 'the legal system itself can anticipate the exception and can "suspend itself" ' (1985: 14). Indeed, this is assumed by liberal constitutional models that attempt to regulate the exception by enumerating the conditions or criteria by which law would suspend itself (1985: 14; see also Schmitt 2004). However, this capacity of law to suspend itself troubles Schmitt, who asks (without providing any clear response): 'From where does law obtain this force, and how is it logically possible that a norm is valid except for one concrete case that it cannot factually determine in any definitive manner?' (1985: 14). The fact or instance of the exception, according to this account, cannot be determined by law. However, law can anticipate the exception and suspend itself or withdraw. The juridical order is (always already) divided by law's potential to withdraw and the sovereign's capacity to declare an exception.

52 *Falen Gherebi v Bush* (2003a) (US District Court for the Central District of California, 13 May 2003).
53 *Hamdi v Rumsfeld* (2004).

A concrete treatment of the sovereign exception can be observed in Schmitt's discourse on the decision on the 'political' developed in *The Concept of the Political* (Schmitt, 1996). This discourse is reflected in the judicial determinations on both sides of the Atlantic which I will shortly discuss. According to Schmitt, the 'specific political distinction to which political actions and motives can be reduced is that between friend and enemy' (1996: 26). The 'enemy', is the limit figure of the political for Schmitt. The enemy is:

> … the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different, an alien, so that in the extreme case conflicts with him are possible. These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party.
>
> (1996: 27)

The extreme case Schmitt is referring to is war – for a world in which 'war' is eliminated is, for Schmitt, a world without politics (1996: 35). The centrality of the figure of the enemy is expressed thus:

> Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted, or negated by such a term.
>
> (1996: 31)

The principal authority discussed in the US *habeas corpus* cases in relation to the detainees at Guantanamo Bay, *Johnson v Eisentrager*,[54] reflects Schmitt's assertions. Justice Jackson, who delivered the opinion of the majority, stated:

> Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed or diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.[55]

Time has not dimmed the significance of membership in a particular political community. The UK Court of Appeal has recently confirmed that the character of being a subject of law is a direct function of nationality: 'In short, the nationality of an individual is his quality of being a subject of a certain state. In historical terms, the concept of nationality has its origins in the oath of allegiance owed by the subject to his king.'[56] The nationality centred qualifier for being a subject of

54 *Johnson v Eisentrager* 339 US 763 (1950).

55 *Johnson v Eisentrager* 339 US 763 (1950) at 769.

56 *A v Secretary of State for the Home Department* (2002), para 112. This proposition was not endorsed by the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68.

law would not be all that surprising if it were not for the rhetoric of universal human rights that is propounded by the courts and governments of the United Kingdom, Europe and the United States. The subject-of-rights is universal, a concomitant of the triumph of liberal democracy (see Fukuyama, 1992). But being a subject whose life is mediated by law is conditioned on being a member of a particular 'nation' (a point made long ago by Hannah Arendt (1958: Chapter 9)). It is within the limit of being included as a member of a 'nation', and thus within law's jurisdiction, that the sovereign excess is apparently checked. But, as we observed in *Hamdi*,[57] the 'enemy' is now also 'within'. Citizenship is no guarantee of a life mediated by civil law. Crucially, it is the withdrawal of legal protections that creates the appearance of an indistinction between 'fact' and 'right'. The exception is a factual decision of which law is cognisant. The 'indistinction' between fact and right proposed by Agamben seems to turn law's suspension – indeed, its self-authored withdrawal – into a complete disappearance: 'a permanent state of exception'.

We have now considered the nature of the sovereign limit, the character of the exception and the manner in which sovereignty and law mark the 'limit' of the juridical order. But what of the 'subject' abandoned in the 'camp'? The detainee in the camp is the figure that is compelled to occupy the limit. Indeed, it is the question of whether life at the limit will be mediated by civil law which gives rise to many of the debates about the relationship between sovereignty and law. I shall now turn to examine the role of 'abandoned being' in the constitution of jurisdiction.

'Abandoned being' and the constitution of jurisdiction

For Agamben, the 'life' exposed to a sovereign exclusion and thereby included in political calculations is *homo sacer*, or 'bare life' (Agamben, 1998: 85). This is the life that can be 'killed with impunity' but cannot be sacrificed (1998: 81–82). That is, 'bare life' is beyond the calculations of profane and divine law (1998: 72, 82–83). Though law is not utterly absent, its presence – if this formulation can be strained – is as an absence. The figure of 'bare life' discloses the character of law when law is in a state of privation. Recall Schmitt's query, 'With what force does the law withdraw in the face of the exception?' (1985: 14). There is a 'potentiality' in law to prevent itself from becoming actualised – its 'im-potentiality', as Agamben calls it in his collection of essays *Potentialities* (1999: 177–84). This im-potentiality corresponds to the *force* which enables law to withdraw in the face of the exception. *Homo sacer*, or 'bare life', is thus the figure that discloses law's self-privation or im-potentiality. The question is whether the detainee, a figure whose incarceration is based on the assertions of a sovereign at war, and is in any event captured within a sovereign economy of power where detention may be indefinite, is a 'bare life' produced by law's self-inflicted privation. To address this question, we must consider what Agamben calls the 'relation of exception'.

57 *Hamdi v Rumsfeld* (2004).

The 'relation of exception' is the core insight of Agamben's theory on the structure of sovereignty, and the constitution of the juridical and political order. The relation of exception demonstrates the potentiality of law to maintain itself as an absence:

> If the exception is the structure of sovereignty, then sovereignty is not an exclusive political concept, an exclusive juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Hans Kelsen): it is the originary structure in which law refers to life and includes it in itself by suspending it. Taking Jean-Luc Nancy's suggestion we shall give the name *ban* . . . to this potentiality (in the proper sense of the Aristotelian *dynamis*, which is also always *dynamis me energein*, the potentiality not to pass into actuality) of the law to maintain itself in its own privation, to apply in no longer applying.
>
> (Agamben, 1998: 28)

What is useful for my purposes (and Butler, 2004; and Gregory, 2004 have made similar use of Agamben) is that the figure of *homo sacer* is a symbol of the irresolution of the 'limit' between sovereignty and law. It is a figure through which the 'limit' can be understood as a relation – the relation of 'inclusive exclusion'. It is in this way that the detainee in the 'camp', the 'unlawful combatant' captured during the indefinite 'War on Terror', can be regarded as inhabiting a zone of indistinction inside and outside the calculations of the sovereign and the juridical order. It is *law* that refers to life and suspends its juridical and political status as a bearer of rights in Agamben's formulation of the structure of the 'ban'. As we have seen time and again now, law has the 'force' to engage in a withdrawal. It has the capacity to be cognisant of the governmental imperatives of a sovereign at war. For instance, in *Hamdi* (2004), we observed that the Supreme Court was more than willing to be cognisant of the 'exception' – the fact that the Executive was prosecuting a war, and that any intervention made by the judicial branch of government must not overly hinder the exigencies of the 'War on Terror'. The formulation of watered-down 'due process' reflects law's self-privation in the face of the exception. The limit between sovereignty and law is thus wrought through the positioning and treatment of the life of the 'enemy combatant'. The 'enemy combatant' whose life is differentially mediated by civil law marks the 'limit' of jurisdiction. This argument can be developed further by considering Nancy's conception of 'abandoned being'.

The figure of 'abandoned' life harbours the antinomies of sovereignty and law. The etymological root of 'abandon' is *bandon* (*a-bandon*) – and *bandon* means 'jurisdiction and control' (OED). To be abandoned is to be taken 'beyond', cast 'outside' jurisdiction. But to be abandoned is also to be free from constraint or convention, to relinquish to the control of another, or to desert – that is, to leave behind or leave without help. To abandon, then, is to be relieved of certain modes of control and protection. Another way of putting it is to say that abandonment involves being banished from a particular jurisdiction. But to be cast outside a

certain order is in another sense to be subject to an order. Abandonment is a point of ambivalent inter-relation that takes the form of an inclusive-exclusion which Agamben has explored in *Homo Sacer* (1998: 28–29). This is why abandonment cannot be conceived as an instance of absolute sovereignty, or as the condition of a being entirely unmediated by law. As Agamben argues, it is not possible to say whether abandoned being is inside or outside the juridical order. The 'limit' of law is fashioned on the body (that may not be) brought before it. This is what qualifies abandoned being as the figure who lies at the foundation of the political and the juridical:

> The banishment of sacred life is the sovereign *nomos* that conditions every rule, the originary spatialization that governs and makes possible every localisation and every territorialization.
>
> (1998: 111)

Abandoned life thus lies at the limit-point of jurisdiction. Thus the courts administering the 'rule of law' of a particular political community cannot exempt themselves from responsibility for the figure of the abandoned detainee because the detainees' abandonment by judicial decision defines the limits of the 'rule of law'. There is nothing more proximate to 'jurisdiction' than the figure 'abandoned' in the camp. Let me develop this assertion of a link between 'abandonment' and the limits of jurisdiction.

To be abandoned from law is (as we have seen in the cases examined above) also to be abandoned *by law*. That is, the condition of a life 'unmediated' by civilian courts is a function of variable judicial constructions of the notions of 'territorial jurisdiction', 'ultimate sovereignty', 'within jurisdiction' and 'jurisdiction and control' (these are the determinants of jurisdiction in the *habeas* cases examined above). But to be abandoned by law, understood through Nancy's extensive exploration of the question, is to be abandoned to a law: 'one always abandons to a law' (Nancy, 1993b: 44). But what is this *law* that one abandons to? In his essay 'Abandoned Being', Nancy names 'sovereignty' as this 'other law':

> The origin of 'abandonment' is a putting at *bandon*. *Bandon* (*bandum*, *band*, *bannen*) is an order, a prescription, a decree, a permission, and the power that holds these freely at its disposal. To *abandon* is to remit, entrust, or turn over to such a sovereign power, and to remit, entrust, or turn over to its *ban*, that is, to its proclaiming, to its convening, and to its sentence.
>
> (1993b: 44)

To abandon to the law of a sovereign power is also to abandon to the law of a community. That is, to be abandoned is not to be utterly 'bare', entirely alone at the mercy of a 'singular' sovereign. To be abandoned is to be given over, to be remitted and entrusted by an authority with the force and power to perform this act. What we see in the *habeas corpus* cases is that the decision on jurisdiction and the determination of the content of due process is the event of this

'abandonment'. The limits of jurisdiction are wrought on the body of 'abandoned being'. Abandonment constitutes the legal order:

> Turned over to the absolute of the law, the banished one is thereby abandoned completely outside its jurisdiction. The law of abandonment requires that the law be applied through its withdrawal. The law of abandonment is the other of the law, which constitutes the law.
>
> Abandoned being finds itself deserted to the degree that it finds itself remitted, entrusted or thrown to this law that constitutes the law, this other and same, to this *other side of all law that borders and upholds a legal universe*: an absolute, solemn order, which prescribes nothing but abandonment. Being is not entrusted to a cause, to a motor, to a principle; it is not left to its own substance, or even to its own subsistence. It is-in abandonment.
>
> (Nancy, 1993b: 44, emphasis added)

The abandonment of being produces the law. It is in this way that the abandoned subject is before the law (and the political) in the starkest possible way. It is not possible to determine whether the condition of abandonment is one of fact or right. It is always already both. Fact and right in relation to the 'life' of the 'camp' thus do not occupy a zone of indistinction, as Agamben has claimed. Rather, 'abandoned being' discloses the reciprocal constitution of fact and right – a process that produces the abject 'life' of the 'camp'.

Conclusion

The detainees being held at the US Naval Base in Guantanamo Bay bear the sovereign *ban* of a neo-imperial nation-state. Though they have now been given access to US courts, their detention will be subject to the exigencies of a war that may be 'without end'. Such an illimitable sovereign power, I have argued, manifests the 'im-potentiality' of law. The courts, by varied and contradictory pronouncements on the limits of jurisdiction have placed 'enemy combatants' at the mercy of diminished requirements of 'due process'. In the face of what is claimed to be an illimitable sovereign war, the courts are indeed in a state of 'withdrawal' anticipated by Schmitt. This withdrawal paradoxically delimits the plenitude of the illimitable sovereign by enunciating the sovereign event.

A different approach to the question of jurisdiction must seek to overcome the governmental concerns which have featured so heavily in the courts' deferential enunciation of jurisdiction. The decision on jurisdiction, including one that is cognisant of governmental concerns, inevitably contains an account of the (legal) subject. The constitutive centrality of the 'abandoned' subject to the over-heralded triumph of democracy and the 'rule of law' offers another point of entry to a critical understanding of jurisdiction. Decisions on jurisdiction must confront the fact that the juridical and political order is constituted through the abandonment of the (legal) subject refused entry by the law.

The discussion of the *habeas corpus* cases in this chapter should provoke a wider enquiry. 'Abandoned being' marks the limit-point of a juridical order and political community that celebrates the triumph of liberal democratic values and the 'rule of law' (see generally Fukuyama, 1992; Ignatieff, 2003a, b). The person 'abandoned' in the camp is emblematic of the ever-proliferating 'enemies' who must be contained and, if necessary, eliminated in order to sustain 'democracy' and the 'rule of law'. If 'abandonment' in the 'camp' has now become a condition-precedent to securing 'democracy' and the 'rule of law', then 'abandoned being' is a figure that should inform and inspire critical engagements with the character of 'democracy' and the 'rule of law' as they are currently taking shape in a neo-imperial era.

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5 Conjuring Palestine

The jurisdiction of dispossession

John Strawson

Colonialism's embrace

Colonialism employs the most rigorous legalism to effect the subordination of the colonised. For the Palestinians, a form of late colonialism has ensured that the process has continued into the twenty-first century. Despite the much referred to 'peace process' since the signing of the Oslo Agreements in 1993,[1] Israel's primary colonisation of the West Bank through land acquisition and settlement has rapidly increased. At the moment when legal texts appeared to grant Palestinians a measure of jurisdiction over their own lives, growing areas of the land of Palestine were vanishing beneath the bulldozer and the tank. This chapter suggests that law's collusion with colonialism has been a powerful factor in the dispossession of the Palestinians. Israel has been the beneficiary of a British legal bequest.[2]

When Palestine appeared before the International Court of Justice in February 2004 to argue the case that the wall the Israelis were building in the West Bank was illegal, there was a sense of unreality to the event.[3] What was this 'Palestine', represented by eminent lawyers from Britain, Belgium and the Middle East? After all, was not the existence of a Palestinian state the subject of the negotiation of the Oslo Agreements[4] and the Road Map to Peace?[5] Had Palestine arrived before it had been created? The World Court's hearing was to determine an advisory opinion on the issue requested by the United Nations General Assembly (UNGA).[6]

1 Palestine Liberation Organisation (PLO) and the State of Israel, Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, 32 *International Legal Materials* 1525.

2 The argument that is developed here is indebted to Said's (1978) use of Foucault. Said suggestively takes Foucault's use of discourse and the imagery of archaeology (as in Foucault, 2003) and engages in a contextualisation of discourse analysis. In this piece, the sense of archaeological site in the Saidian sense is useful as legal texts and discourses crumble into each other as foundations of buildings are often reliant on earlier remnants.

3 For the statement on the end of the oral pleadings see: http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm

4 For a comprehensive discussion on the Oslo Accords in international law see Watson (2000).

5 For the text of the road map see: www.state.gov/r/pa/prs/ps/2003/20062.htm

6 The 10th Special Session of the General Assembly adopted Resolution A/RES/ES-10/14 on 8 December 2003. It requested an advisory opinion on the legality of the wall being built by Israel in Occupied Palestinian Territories.

The very subject of the wall goes to the heart of whether or not a Palestinian state can be established on viable territory. The 700 kilometre wall cuts through the Israeli-occupied West Bank, dividing communities and people from their land and slicing Palestine into even smaller units of land surrounded by Israeli control. The 'Palestine' that appeared at the International Court of Justice is the nomenclature accorded to the Palestine Liberation Organisation's observer delegation at the United Nations. Since 1974, the UNGA has recognised the Palestine Liberation Organisation (PLO) as 'the sole legitimate representative of the Palestinian people' (UNGA resolution 3210 [XXIX]) and accorded the organisation observer status (UNGA resolution 3237 [XXIX]) (see Sybesma-Knol, 2002). This process has granted the PLO a degree of international legal personality and has allowed it to participate in the UN bodies and UN-sponsored international conferences. This form of legal personality is, however, not connected to the characteristics of state, and does not necessarily imply that any temporal jurisdiction exists (for a discussion of international legal personality, see Higgins, 1994).

Palestine entered the concerns of the international community during the First World War (for a discussion of this period, see Fromkim, 1989). The British occupation after 1917 and the subsequent League of Nations Mandate for Palestine are the two key and related moments. General Allenby's army of occupation arrived with more than the normal military agenda. The Balfour Declaration, issued only a month earlier (2 November 1917) contained the commitment that the British Government 'viewed with favour the creation of a national home for Jews in Palestine'. In the diplomatic arrangements with the French, the British from 1916 (Sykes-Picot Agreement) had decided on an inter-imperial division of the Middle East. Syria and Lebanon would be allocated to the French, while Palestine (with Jordan) and Iraq would pass to British control. However, this was accompanied by a novel addition in the form of the allocation of an as yet unspecified scope of 'national home' for the Jews within one of the areas of British influence. In 1917, there were fewer than 85,000 Jews in Palestine, less than 10 per cent of the total population – most Jews lived in Europe and in the Arab world. Britain thus arrived to create neither a plantation colony nor a settler colony, but with the idea of a unique colonial project for the creation of a national space for a people yet to be assembled. In the British narrative, the Jewish people were awaiting the protective embrace of the Empire (on the way in which the British governed, see Shepherd, 1999). This political policy was transformed into legal norms with the creation of the Mandate for Palestine by the League of Nations in 1922 (for a discussion of Mandate Palestine, see Segev, 2000).

During the Mandate years, immigration created a significant Jewish population amounting to about a third of the total by 1948. British policy wavered through its three decades of rule, at times resisting both Palestinian Arab and Jewish nationalisms. However, the legal infrastructure that Britain established provided for robust institutions for a Jewish proto-state. At the same time, Britain's military policies crushed Palestinian resistance, especially in the mid-1930s, which undermined Palestinian nationalism.

In 1947, the British authorities announced that they would terminate their responsibilities under the Mandate and turned the matter over to the United Nations. As a result, the Special Committee on Palestine recommended that Palestine should be partitioned into a Jewish state and an Arab state, with Jerusalem coming under international supervision (for a discussion on the UN partition plan, see de Waart, 1994). According to UN procedures General Assembly resolutions must be adopted by a two-thirds majority which endows them with a high degree of legitimacy and adds weight to their implementation. In November 1947, the General Assembly adopted resolution 181 by such a majority and the partition plan at that time appeared to be the will of the international community. The currently occupied territory of the West Bank and Gaza was assigned to the Arab State. East Jerusalem was assigned to the international regime, together with West Jerusalem.

While the plan was accepted by the Zionist movement, it was rejected by the Palestinians and the Arab world. It was controversial, not least in the fact that at the time the Jewish population of Palestine constituted only a third of the entire population yet was awarded 54 per cent of the land. More fundamentally, perhaps, the majority of the population had sought to gain self-determination in a unitary state.

Israel's acceptance of the resolution went beyond political rhetoric, as the legal narrative of its Declaration of Independence (14 May 1948) demonstrates. The grounds cited for the legitimacy of the state were the historic claim of the Jewish people and the UN resolution:

> On the 29th of November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their state is irrevocable.
>
> (quoted by de Waart, 1994: 227)

The phrasing of this paragraph is significant. First, it should be noted that in the Israeli text the resolution is 'required' to be implemented. This implies the acceptance of an obligation. Second, it is 'irrevocable'. On the latter point, the argument could be raised that irrevocability applies to the creation of the Jewish state. The Declaration relies on the resolution as a key source of legitimacy for the Israeli state and logically this must imply that all of its provisions are equally valid, including the establishment of the Arab State. Indeed, the decisive part of the Declaration makes it clear that the whole of the resolution is being relied on:

> Accordingly we, members of the People's Council, representatives of the Jewish community in Eretz-Israel and of the Zionist movement, are here established on this day of the termination of the British Mandate over Eretz-Israel and by virtue of our natural and historic right and on the strength of the resolution of

> the United Nations General Assembly, hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel.
>
> (de Waart, 1994: 227–28)

This legal and foundational reliance on the UN partition plan indicates that Israel formally accepted that its jurisdiction did not extend to territories outside those allocated to it. In the 1948 war, the new state was able to expand its territory by conquest to some 78 per cent of the total of what had been British Mandate Palestine. Jordan occupied the West Bank and East Jerusalem and Egypt took control of the Gaza Strip. While Jordan unilaterally annexed the West Bank and East Jerusalem (see Shlaim, 1988) and integrated it into the Kingdom, Egypt left the status of the Gaza Strip unchanged. It was these territories that Israel occupied in the 1967 war (Oren, 2002). As the occupation took root, Israel began to refer to the West Bank and Gaza as 'disputed territories', and unilaterally annexed East Jerusalem in 1980. This slippage in language and the purported change of status of Jerusalem needs to be contrasted with Israel's state practice between 1948 and 1967 of never making any formal claims to any territory beyond the armistice line established in 1949, known as the 'green line' (see Golani, 1999).

By the time these territories were subject to the Oslo Agreements, the Israeli occupation had been in existence for a quarter of a century. The construction of settlements, military installations and road systems, combined with the presence of large numbers of Israeli military forces, transformed the life of the Palestinians. The PLO–Israel Agreements represented the first time that either side had agreed to a formula for discussing the resolution of the conflict. While some Palestinians argued that this represented a shift from occupation to an independent sovereign state, others thought to the contrary that they were a new form of consolidating the occupation – with a new element, Palestinian consent.[7]

The Palestinian National Authority

The Palestinian National Authority is the creation of two agreements between the PLO and the State of Israel, and subsequent instruments emanating from the Authority itself (see Brown, 2003: 12–13). The first agreement, often known as the Cairo Accord,[8] is formally entitled the 'Agreement on the Gaza Strip and the Jericho Area' and dates from 4 May 1994. The purpose is the implementation of the 'interim self-government arrangements' in the context of the 1993 Declaration of Principles. The second is the 1995 Interim Agreement.[9]

7 This can be seen in the differences of approaches by Palestinian contributors to Cotran and Mallat (1996). The argument that the agreements represent a consolidation of the occupation are most forcefully put by Edward Said – see, in particular, Said (1995).

8 Israel–PLO Agreement on the Gaza Strip and the Jericho Area, 4 May 1994: 33 *International Legal Materials* 622.

9 Israel–PLO Agreement on the Gaza Strip and the Jericho Area, 4 May 1994: 33 *International Legal Materials* 650.