A jurisdictional space of and for 'desired bodies'

If the advent and extensive penetration of a normalising model of prostitution regulation is accepted, what of jurisdiction? Does such a concept have relevance beyond a sovereign-juridico model of law? Arguably, even within a normalising regime there must exist a nexus, a relationship of control effected as a purported cause and effect between 'law' and the 'purpose' or object of such normalising regulation. In this context, it is suggested that the question of jurisdiction becomes conflated with the question of who/what is the subject/body upon which such norms 'operate'. Law, in its assertion of a jurisdiction to control bodies – to make them regular – in effect needs to identify a particular status or norm referent for such a 'body' (Butler, 1993). Such a position ultimately questions the degree to which law acts as an imposition upon a 'body' already subject to law and discretely discernible, apart from 'law'. (Butler, 1987: 218). Thus, at one level there is arguably no inherently sinful individual who acts as a prostitute in breach of moral codes as contemplated by a Kantian notion of law, jurisdiction and punishment. Any 'transgressive' body cannot be identified in isolation from law's assertion of its ability to instate and naturalise 'certain taboos regarding the appropriate limits, postures and modes of exchange that define what it is that constitutes bodies'.

Arguably, law's jurisdiction over prostitutes' bodies is achieved through the institution of a spatial and temporal normative framework[7] in which to situate and regulate the activity of prostitution as a sexual practice of the body. Within the jurisdictional space that is designated by law as coextensive with the activity of prostitution, the body known to law as that of a prostitute can be concurrently 'constructed' but contained. This system is not simply a cultural inscription upon a 'natural' body (Butler, 1987: 215). It confounds the view that the body is 'subjected' to law's jurisdiction as a precultural individual (Butler, 1987: 187). Indeed, the very construction of a body as designating some predetermined, biological or natural entity has been consistently challenged (Padgug, 1979). A corresponding identification of 'body' with a core identity formulated in terms of a sexed or gendered subject has also attracted criticism:

> Such a view necessitates the location of sexuality within the individual as a fixed essence… These in turn involve the enshrinement of contemporary sexual categories as universal, static and permanent, suitable for the analysis of all human beings and all societies.
>
> (Weeks, 1990: 40)

One response to universalism, biological determinism and fixed essences is to suggest that 'bodies' and 'subjects' rely on more shifting, contingent linguistic and/or cultural constructions employed by law as a deployment of sexual discourses.

7 The intention here is to stretch the meaning of normative as something beyond simply informal 'law or rules'. The use of normative is to convey a sense of creating and sustaining rather than the merely prohibitive.

Drawing also on cultural and linguistic constructions, yet another view suggests that the body identified at law as a 'sexed' or 'gendered' body cannot be understood without reference to 'desire' and the repressive law that 'engenders the culturally accessible experience of desire' (Butler, 1987: 215). Perhaps desire and its limits cannot be conceived apart from the law? Is the desired but corruptive body of the prostitute to be understood as socially conceived by reference to the strictures of family order, the Oedipal complex and incest taboo (Butler, 1987: 201)? Such a suturing of body, law and desire has also been criticised. Feminist writers have argued that the seemingly disembodied law that 'constructs' identities for women by reference to rules of desire is already predicated upon the primacy of an idealised male subject. This signification privileges an inherently gendered and paternalistic order (Stacey, 1996), wherein women's bodies can only signify lack, negation. As Irigaray (1985) contends, such discursive formulations that construct women as constituting 'lack' mark an erasure of the feminine in order to 'produce' identities that are readily 'intelligible' within such a dominant male-oriented gender structure. Putatively, therefore, women's bodies are 'always' the subject of cultural prohibition, even when 'desired' (Butler, 1987: 219). The gender orderings that underlie the designation of the prostitute as a body, seemingly desired but ultimately that which is prohibited, are clearly discriminatory. Such discursive significations of gender and body also privilege an understanding of the institution of law and family in terms of primary negative social prohibitions dealing with 'desire' (Foucault, 1980: 109). 'The consequent formulation of desire as a lack requires that we accept this juridical model of the law as the fundamental political and cultural relation informing the structure of desire' (Butler, 1987: 204). Indeed, the implication that such models of law replicate a more fundamental ordering requires careful assessment of its particular gendered assumptions. Therefore, any analysis that accepts that sexuality is 'socially created out of disciplinary power and discourses of knowledge' also must acknowledge that such discourses are not gender neutral (MacKinnon, 1992: 117).

A performative perspective on law, jurisdiction and sexed bodies

Accordingly, this chapter negotiates the various theoretical positions outlined above to develop an alternative perspective about the relationship between law in its regulatory mode, jurisdiction and the control of 'sexed' bodies. Clearly the appeal to a biologically determined 'body' that is inscripted by, and subject to, law as discussed in relation to the criminal control of prostitution largely relies upon a concept of 'natural bodies' and fixed essences (i.e. as the inherently sinful and sexually corrupt). It also represents a model of law and jurisdiction that has been effectively displaced in many regulatory contexts.[8] The following analysis of the regulatory control of prostitution in Queensland accepts that the body identified

8 See MacKinnon's critique of Nietzsche's will to power as a history of the active and striving: a history of desire (MacKinnon, 1992: 117); cf Peah and Grosz (1996: 3) who recognise the relevance of Nietzche's arguments, but are cautious in their adoption.

to law as a prostitute is formed through a process of social construction and that law inscribes a particular status for that body. Yet the process of construction is not a simple imposition of gender-specific, determinate identities and categories. Rather, it is suggested that bodies and sexuality – and hence prostitution when characterized at law as a sexual practice of bodies – can best be understood as 'performative' (Butler, 1993). Performance in this sense encompasses both the bodily activity of the prostitute as a sexual practice and a relationship in which the body is held in discursive and physical tension with a corresponding assertion of a regulatory technology to control that activity. Moreover, performance as an active process always has the potential to transcend boundaries, and thus calls forth a need for a context for, and boundary to, that activity. Accordingly, the practices set by regulation that prescribe the manner and mode of prostitution as sexual 'performance' institute through law's assertion of a jurisdiction of control the very 'essences' and 'identities' that are claimed to exist prior to the law and which are subsequently held to be 'subject to law' (Butler, 1999: 172–73).

In setting the limits of the 'performance' of such practices, law as regulation institutes and defines its own bounds and promulgates its own basis for existence. Thus it is argued that the fixing of the desired, but potentially transgressive, body of the prostitute occurs through a diffuse yet active structuring of a 'space', both metaphoric and physical. This fixing is not gender neutral, as it stylises the body of a prostitute as potentially fluid and corruptive – one requiring containment. Further, if we accept the trend to increasingly identify a subject with body-referenced sexuality, any challenge to a pre-given 'sexed' body must extend also to the 'subject' itself: 'Indeed the "subject" now appears as the false imposition of an orderly and autonomous self on an experience inherently discontinuous' (Butler, 1987: x).

Thus law's jurisdiction to control prostitution may be regarded as existing in a symbiotic relationship that, in identifying a body to control, constructs an identifiable 'subject' for that regulation; ironically, that subject is realised as both 'body' and 'purpose' in relation to discrete regimes of prostitution control (Cheah and Grosz, 1996: 3–5). The fixing in law of a prostitute's body as corruptive implicitly constructs the subject within discriminatory gender frameworks as a corruptive one that must be contained, or sublimated, in order to preserve the boundaries of that framework. Such technologies of jurisdiction as a manifest framework of containment and sublimation are projected through the spatial and temporal dimensions instituted through licensing regimes and local government planning laws, as exemplified by the Queensland *Prostitution Act*.

Prostitution, law and an economy of bodies and pleasures

While the legal character of state regulation of prostitution in Australia has varied over time, its central function in delivering women's bodies for the use of, and enjoyment by men has not altered radically (Allen, 1990: 2). Thus in order to understand the 'functionality' of law, a mediated understanding of bodily 'performance' and 'activity' is engaged. It acknowledges the physical and economic dimensions of prostitution as an activity transcending the immediate focus on the

individual body. Any identification at law of a body as an object for regulation does not 'exist' purely in the abstract designation of status. Object and purpose of regulation become congruent in the need to acknowledge the role of regulation in prescribing bounds for prostitution as an activity operating in an economy of bodies and pleasures (Stanton, 1992: 1). Accordingly, a wider approach is required which places the assertion of jurisdiction as a control over specific bodies in the context of controls over populations and their cultures of economy, pleasures and 're-productivity'. Thus there is a need to existentially situate the prostitute's body, as it is designated at law, by reference to the discursive formation of culturally acceptable forms of 'bodily' consumption in Australian society (see Deleuze on forms of cultural consumption, as discussed in Butler, 1987: 212). In this manner, the role of regulatory practices as instituting particular social and economic forms of bodily 'consumption' is maintained (Butler, 1987: 213). Accordingly, the idea of law as simply a repressive measure that directly institutes its jurisdiction in a negative manner through taboos and prohibitions on a given body must be substantially qualified.[9] Rather, the prostitute's body is known to law as a sexually active body, even while law asserts its power to make that body 'regular' and 'productive' by setting the bounds of acceptable sexual 'activity' and 'consumption' against wider social norms.

The regulatory technologies of the Prostitution Act

Queensland provides an interpenetrating model of law, norm and jurisdiction in its models of prostitution control. The criminal law model of personal jurisdiction operating through physical coercion and exclusion continues to exist alongside a legislative and regulatory regime for prostitution control that functions along two pivots of sexuality. On the one hand, this sexuality is tied to a discipline of the body, and a stylising and structuring of its energies. At another level, it operates in a broader economic and social sense, regulating the bodily exchange relationships germane to family and community, and the bodies that threaten to subvert that order. In 'both categories at once, giving rise to infinitesimal surveillances, [there are] permanent controls, extremely meticulous orderings of space, indeterminate medical or psychological examinations, to an entire micro-power concerned with the body' (Foucault, 1980: 145–46).

The Queensland *Prostitution Act* legalises, yet strictly regulates, prostitution in the State of Queensland.[10] The *Act* allows small, licensed brothels[11] and individual sex workers to operate within the brothel, but street soliciting continues to be illegal.[12]

9 The approach here draws extensively on Foucault's discussion of models of law in his *History of Sexuality Vol. 1*. See also the critique by Butler that for Foucault the subject is always subjected (i.e. historically regulated and produced). Nonetheless, Foucault acknowledges that this power is not monolithic and negative but profoundly affirmative, diffuse and productive.

10 See Prostitution Bill 1999 (Qld), Explanatory Notes, p 1.

11 *Prostitution Act*, Part 6.

12 *Prostitution Act*, s 73.

Indeed, there are increased penalties for street solicitation that are designed to 'remove this activity from suburban streets'.[13] The following analysis concentrates on four aspects of the process by which the prostitution reforms simultaneously create and contain the bodies known to law as prostitutes. These aspects are the bureaucratic licensing process which legitimates the bodily activity as economically productive, the system of bodily constraints and surveillances designed to promote health and safety, the spatial and temporal configuration of bodies within the enclosed spaces designated for prostitution and finally the broader spatial ordering that separates the spheres of commercialised desire from the 'pure' spaces of family and community.

Economies of desire

The foundation for the economic productivity of prostitution as a bodily activity of commercial utility and value is to legitimate and license these sexual practices. Accordingly, the *Prostitution Act* institutes a strict system of licensing for brothel owners who manage such activities.[14] Applicants for licences must be of good character and possess the attributes of honesty, integrity, good business sense and sound financial backing. A Prostitution Licensing Authority oversees the licensing process[15] and there is ongoing supervision of the regime by criminal justice authorities.[16] The ostensible objective is the government's concern to ensure that organised crime does not infiltrate the 'legal' prostitution industry.[17] A similar range of screening controls operates for certifying managers for brothels.[18]

A focus on the personal reliability and business acumen of licensees and managers reveals the normalisation of prostitution as a legitimated economic activity. Rather than being the preserve of corrupt flesh, the brothel is now the space of commercial integrity, and its productivity requires sound financial management. This tightly enclosed sexual activity is identified as a legitimated bodily labour that can participate in the civic parameters of market exchange (Scutt, 1986: 399). Indeed, the very application of industrial and commercial terminology in the legislation points to the integration of this space with other industries which 'use' bodily labour and thus are required to be efficiently and effectively managed (Allen, 1990: 168–80). In keeping with the managerial perspective, the bodily coercion is obtuse and indirect, rather than a direct exhortation upon the prostitute's body. It operates through setting parameters for the activities of managers and licensees as supervisors of the prostitute's bodily labour – a common model in many industrial 'workplaces'.

13 Prostitution Bill 1999 (Qld), Explanatory Notes, p 1.

14 *Prostitution Act*, s 10.

15 *Prostitution Act*, ss 10–16.

16 The need for oversight by the Criminal Justice Commission has its genesis in the Fitzgerald Inquiry into Police Corruption in Queensland, 1987–1988. This inquiry revealed the links between prostitution, organised crime and police corruption.

17 Prostitution Bill 1999 (Qld), Explanatory Notes, p 6.

18 *Prostitution Act*, ss 34–38.

Authorised police powers, including powers of entry and inspection, are designated within Part 3 of the *Prostitution Act*. This Part also contains a provision that a licence must be refused where the grant to a particular person would result 'in the area becoming a red light district'.[19] This concern highlights the central paradox in the legislation: prostitution, in its legitimated form, is to be concentrated into certain locales to facilitate surveillance and supervision, yet the presence of such an enclave of difference – a red light district – is not to be made obvious to the wider community. In these seemingly conflicting aims, a double movement of regulatory legitimation but containment of the sexual practices of prostitution is readily apparent. The bodily activity of prostitution, while clearly of exchange value, is not to intrude upon other more respectable forms of commercial activity that might be threatened by a red light district.[20] Such distinctions underscore the extent to which the regulatory technologies of the *Prostitution Act* operate with reference to wider social norms and power differentials, and yet also remain excised from the dominant 'non-industrial' discursive modes of the heterosexual family.

Promoting life: regulating social contagion

Integral to the economic viability of prostitution as an exchange relationship of bodily consumption is the need for a technology that focuses upon accessing 'life'. This access is exercised through a regulatory concern with health and bodily integrity. Indeed, one of the main outcomes of the reform of prostitution legislation across Australia has been to enable more efficient and transparent regulation of the sex work industry (Scutt, 1986: 406). Concomitant with the trends to equate legitimate prostitution with economic productivity has been an enhanced focus on the health and well-being of the workers regulated within that 'industrial' space.

The *Prostitution Act 1999* explicitly imposes public health standards upon the activity of prostitution by requiring periodic medical checks for sex workers and creating offences where persons work as prostitutes when they know they are suffering from a sexually transmissible disease.[21] While there has long been a public health rationale for the control of prostitution, this emphasis is enhanced in the prostitution law reforms. Even the very decision of when and where and how to 'perform' the sexual practice of prostitution is configured by reference to broader communal concerns that evince an apprehension about the need to ensure the well-being of populations.

The intricacy of the relationship between the body and its disciplining within the parameters set by public health standards are clearly evident in a range of

19 *Prostitution Act*, s 16. See also Prostitution Bill 1999 (Qld), Explanatory Notes, p 6.

20 A similar situation occurred in Victoria where small-business operators in the St Kilda area vociferously denounced proposed reforms to street solicitation laws.

21 *Prostitution Act*, ss 89 and 90.

duties imposed on licensees by the Prostitution Regulation. Section 13 of the regulation provides that a licensee must ensure that each room in the brothel has enough lighting to enable prostitutes to check for clearly visible signs of sexually transmissible disease – on other bodies![22] The regulatory technology that prescribes controls by reference to the lighting of rooms simultaneously thus sets the mode of performance for bodies as a sexual practice. Moreover, such regulatory constraints, while offering protection for sex workers, simultaneously also seek to contain and enclose a social contagion.[23]

Indeed, the state regulatory apparatus assumed by the licensee in controlling the bodily activity of prostitution is detailed, intimate and constricting. Its reach extends from the intimacy of guaranteeing that no prostitution takes place without the constraint of a prophylactic device[24] to ensuring that prostitution is only available within a properly enclosed building.[25] The licensee is the intermediary of a regulatory technology that surveys the body at work, subjecting it to a series of public health criteria and occupational health standards. Accordingly, the bodies engaged in prostitution are not just passive recipients of externally imposed rules. Instead, such 'bodies' represent a realisation of prostitution as a life-energy of bodily consumption and bodily exchange.

Spatial regulation of desired bodies

The *Prostitution Act* implements a range of measures that effect a precise detailing of prostitution as a spatially organised performative practice.[26] Part 6 of the *Act* imposes a number of spatial compliance norms. For example, the activity of prostitution authorised under a licence is only permitted to take place in the premises for which a licence is issued, and this building must be properly enclosed.[27] Although the licence requirements attach to the person of the licensee or manager, they have a wider compass in controlling the spatial and temporal limits of the bodily activity associated with prostitution. A licensee or manager must be personally present during brothel opening times thus imposing a personal obligation of supervision. Indeed, surveillance is one of the primary regulatory technologies employed under the *Prostitution Act*. The bounds of surveillance institute a jurisdiction of bodily control. Imposition of surveillance often requires enclosure – the specification of a place, different to others, and closed in upon itself (see Foucault, 1977: 141–44 for an argument that discipline requires enclosure).

22 Prostitution Regulation 2000 (Qld), s 13 (b).

23 Prostitution Bill 1999, Explanatory Notes, p 2.

24 A licensee must take reasonable steps to ensure that a person does not provide or obtain prostitution involving sexual intercourse or oral sex unless a prophylactic is used. In addition, it is an offence to actively discourage the use of prophylactics. See *Prostitution Act*, s 91. A separate offence is created for the individual prostitute who fails to use a prophylactic in the provision of prostitution.

25 'A building means a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a floating building and any part of a building': see *Prostitution Act*, s 79.

26 For example *Prostitution Act*, s 29(1).

27 *Prostitution Act*, s 19(3).

Within such enclosed, differentiated space, an individual body can be noted in terms of its presence and absence, its classification and its merits. Mechanisms for the allocation, disciplining and indeed classification of the body are clearly evident in the legislative regulation of prostitution in Queensland. For example, licensed brothels must have: a maximum of five 'working rooms';[28] a maximum of one sex worker per room at any one time; and a maximum of ten workers allowed on site at any one time.[29] The combination of spatial allocation mechanisms, together with the intimate surveillance of prostitutes' bodies, reveals the extent of the access to the body and its energies that is provided by the process of normalisation of prostitution. Regulatory technologies which set the bounds of acceptable activity subtend the prostitute's body in a space imbued with distributive functions that contribute to its 'utility'.

Indeed, law as 'norm', in its delimitation of these regulatory practices, shapes the confines and functions of the social space in which prostitution takes place. To the extent that prostitution now takes place in a 'safe controlled environment', a subtle derivative form of panopticism is instituted. It is a privatised panopticism, exercised not by the state itself, but in a more diffuse manner through its agent, the brothel licensee. This intermediary promotes the productivity of the prostitute's body while simultaneously subjecting it to a series of spatial and temporal compliance norms that define appropriate limits, postures and modes of exchange for the prostitute's body. This new mode requires the assertion of law's jurisdiction to control the 'body', but within an attenuated framework of spatial and public health parameters set by bureaucratic state. It is a regime of bodily styling that simultaneously creates the desired, productive body of the prostitute while providing evidence of the need for such technologies to effect surveillance and containment. Thus the 'physical' dimensions of jurisdiction are not simply prohibitory, but also 'productive' of a construct of a specified body and therefore the purpose for the regulation itself. Yet, potentially, the prostitute's body is seen as corruptive of broader patterns of bodily productivity at the level of the 'population' or community.

Planning the spaces of economy and desire

In Queensland, the personal licence system and the regulatory technologies of the *Prostitution Act* operate in conjunction with development and building controls exercised by the local government planning authorities. The mechanisms of access to, and control over, the body manifests therefore not only in the licensing system, but also in laws directly controlling physical spaces. The *Prostitution Act* made consequential changes to the *Integrated Planning Act 1997* (Qld) so that a legal brothel must undergo planning approval.[30] Once again, the technologies of spatial fixity are evident. It is a mandatory requirement that brothels must be located well away from residential areas. Indeed, there are precise instructions on

28 *Prostitution Act*, s 64(1)(d).

29 *Prostitution Act*, Part 6.

30 See definition of development, *Integrated Planning Act 1997*, Sched 10.

how this distance is to be calculated.[31] In one sense, prostitution is no longer beyond the bounds of respectable society, as technically it occurs within the public spaces regulated by the bureaucratic state. Yet in another sense it remains a space of difference, to be kept a safe distance of 200 metres from a 'place of worship, hospital, school, kindergarten, or any other place regularly frequented by children for recreational or cultural activities'.[32] Prostitution must retain its distance from the labour of love that is family. In addition, a brothel must have no identifying street signage.[33] Brothels must have discrete, unobtrusive lighting and their design must reduce noise levels for neighbouring premises, especially when 'clients' are entering or leaving the premises. These design requirements highlight the extent to which brothel activity is equated with other forms of nuisance or pollution – an intrusion into the legitimate and privileged activities of family and community.

In Queensland, a regulatory technology model that incorporates a personal licence system with broader planning approval processes is used to regulate industries that produce environmental pollution.[34] Given analogous regulatory treatments, it suggests prostitution is now viewed as a form of social or moral pollution. The potential pollution of prostitution is an undesirable 'by-product' of an activity that the state regulates as part of its broader compass to promote and mange 'life'. Such pollution is seen to emanate primarily from the perceived fluidity of women's bodies (Grosz, 1994: 192). The association of prostitution with moral pollution is not surprising given that much of the present environmental and planning laws had their genesis in moral reform discourses of the late- to mid-nineteenth century. These discourses sought to impose middle-class family and community values through an amelioration of both the physical and the moral condition of the working classes (see Hunt, 1999: 185).

The necessity of protecting family and community values from potentially harmful incursions manifests very clearly in the converging aims of the *Prostitution Act* and the *Integrated Planning Act*. Typically, planning legislation posits a desired model of community that forms a baseline against which to assess a diverse range of spatial activities. The incorporation of brothel development within the integrated planning assessment framework means that brothels are to be assessed against the normative standards set out in the planning laws which posit a set of 'desired environmental outcomes' for a given area. The desired environmental outcomes articulate a range of natural, social, cultural and economic environmental goals to be achieved by reference to set 'performance objectives' of the industry or development that is regulated.[35]

31 *Prostitution Act*, ss 64(1)(a) and 64(2).

32 *Prostitution Act*, s 64(1)(b).

33 *Prostitution Act*, s 93.

34 See the *Environmental Pollution Act 1994* (Qld) and *Integrated Planning Act 1997* (Qld).

35 The definition of environment includes 'ecosystems, natural and physical resources, qualities and characteristics of places that contribute to … amenity, harmony, and a sense of community, and the social, economic and cultural conditions …': *Integrated Planning Act 1997*, Schedule 10.

The normative planning standards of the *Integrated Planning Act* envision a particular type of community.[36] Arguably, this community signifies an ordering of society that enshrines the model of middle-class respectability and the heterosexual reproductive contract that underlines many aspects of this respectability.[37] Moreover, this discourse of community is strongly assimilative, and it provides the rationale to quarantine or sublimate elements that do not conform. Accordingly, brothel development must assimilate its external characteristics and its spatial and temporal forms to this vision. A brothel design must contain any disparate, potentially polluting elements within the building itself by a procedure of spatial compliance, and bodily containment and disciplining.[38] The jurisdiction to control prostitution as sexual activity thus extends to the spatial configuration of the very buildings where such activities are to be performed.

Imposition of 'performance criteria and standards' upon the activity of prostitution, and ultimately thereby upon the bodies so engaged, reveals a sophisticated, if largely unacknowledged, regulatory jurisdiction of bodily construction and 'performance'. Prostitution regulation, which proceeds on the basis of licensing and planning performance standards, metaphorically and existentially also locates the prostitute's body within a wider network of legitimated activities. These activities are codified and legitimated by reference to criteria designating acceptable 'spatial' activities and modes of performance for activities. The body so identified becomes the subject/object to be regulated through the very laws that determine its performance and thereby instantiate its 'being'. Yet this body is not neutrally constructed in its relationship with the regulatory technologies that prescribe and proscribe its 'essence'.

Women's bodies as a source of transgression

The regulatory technologies of prostitution law effect a space for the prostitute's body in its sexual practice, with reference to other 'spaces' which assume a particular normative – and indeed spatial and temporal – reference point for that body. For prostitution, that reference point is that of the heterosexual, normative order of family and community. Law asserts its jurisdiction over prostitution through regulatory practices which maintain the separate spheres of family and proper community and the physical and metaphorical 'spaces' where prostitution takes place. Moreover, law, in its assertion of a spatially configured jurisdiction over a prostitute's body, operates to give material and cultural value to a 'framework' that purports to provide a truth about bodies and sexuality by

36 *Integrated Planning Act*, s 1.3.3.

37 Hunt (1999) notes a similar identification between middle-class 'respectability' and the urban reform agendas that focused on the control of prostitution in the late nineteenth century in the United Kingdom and United States. The promotion of this ideal of organic community serves to ostracise all those who do not conform to prevailing models of community values.

38 On this point of the coercive function of space see generally Bracken (1991).

prescribing their ultimate limits. Within this framework or jurisdiction, 'bodies' can only be 'known' to law and hence subject to its jurisdiction through a consideration of their sex and the practices of that sexuality (Foucault, 1980: 68–72). Yet there is a subtle 'slippage' and tension, as the Queensland prostitution reforms reveal. The 'subject' of law's jurisdiction as a fluid, sexed body is one that has the potential to transgress and threaten the very spaces of family and community that are its reference point of sexual 'truth' and spatial differentiation.

The identification of women's bodies with corruption and contagion is prominent in many social contexts (Grosz, 1994: 202–06). In anthropological terms, various social taboos (laws) institute the boundaries of the body in regard to what should not be mixed or *joined* (Douglas, 1969: 113). Indeed, it can be suggested that the very contours of the body are established through cultural codes of activity that institute interiors and exteriors and the boundaries in between (Douglas, 1969: 4). Women's bodies are seen as corruptive in that their perceived fluidity presupposes a potential for transgression of boundaries (Butler, 1999: 169–70). Pollution or contagion in this sense becomes a crossing of boundaries, a joining of that which should not be joined. As noted, the identified association between fluidity and transgression is integral to the manner in which women's bodies are identified as sexed or gendered bodies and thus arguably constructed as potentially polluting or corruptive. Thus the limits set for the bodily activity of prostitution provide a boundary but also a point of transmission. Such bodies threaten to pollute by transgressing beyond the legitimated modes and performance limits set by prostitution laws.

Conclusion: the boundaries of prostitution as a sexual practice of bodies

The parameters of the regulatory technologies of the *Prostitution Act* and the *Integrated Planning Act* form a boundary between legitimate, reproductively oriented sexuality and economically productive, but illicit sexuality. But boundaries are also a source of danger. Dangerous 'bodies' and sexual practices ostensibly cross into the interior spaces of family and community through the legislative regime that legalises prostitution. On the other hand, such bodies and the associated practices must still remain distinct from that community and family order to preclude defilement of these 'spaces' (Kristeve, 1980: 65). Accordingly, the purpose and object of prostitution law and regulation become integrally linked to setting the limits for the performance of prostitutes' bodies, the extent of their 'legitimate' activity and the maintenance of a separate realm of family and community.

Given the highly ambiguous objectives of prostitution reform in Queensland, it is hardly surprising that regulatory controls should so clearly institute regimes of surveillance, disciplining and containment while simultaneously legitimating and promoting the activity of prostitution. What is perhaps less obvious is the manner in which such laws also simultaneously identify and construct the subject and purpose for that surveillance, delimitation and containment – the desired but

corrupting body of the prostitute. It is a body known to law only through its engagement in a sexual activity that, by its very designation as potentially corruptive, calls into being a need for regulation. Regulation of the boundaries of this activity and bodily 'performance' are then instituted through the practices of law as a regulatory jurisdiction. In this manner, the body of the prostitute and the activity of prostitution cannot pre-exist their regulation or the assertion of law's jurisdiction to regulate given forms of sexuality. Conversely, though, law as a regulation of prostitution in turn cannot have meaning except in the context of the relationship of control over such bodies and activities.

Again, this particular manifestation of the dynamic between regulatory technologies, jurisdiction and bodily control has parallels in broader trends in the management of 'life' through recourse to a control over sexuality. Sexuality as a pervasive discourse institutes a fictitious unity and causal principle for the assertion of control over bodies. As 'the notion of sex made it possible to group together in an artificial unity, anatomical elements, biological functions, conducts, sensations and pleasures … it enabled one to make use of this fictitious unity as a causal principle, an omnipresent meaning' (Foucault, 1980: 54). Thus, if the prostitute's body when subject to law's jurisdiction can only ever have meaning as a sexed body requiring containment and control of its activity, then arguably this institutes 'a fictitious unity and causal principle'. Disparate elements such as restrictive building design, locational constraints and bodily elements are unified by the asserted need to control sexual bodies and their performance – and this unity is in turn dependent on the assignment of a particular status in law. Thus it is the imposition of jurisdiction as a form of control over the mode and limit of sexual performance which constructs the fictitious unity of purpose that is the perceived subject of prostitution regulation. If the fictive character of such unity is accepted, it indicates why the earlier model of jurisdiction as primarily the imposition of a negative prohibition upon a body already 'subject' to law is not sustainable under a regulatory form of prostitution control. The older model of the criminal law also assumed a status for the prostitute's body. However, that status arguably was regarded as pre-existing any imposition of a jurisdiction of punishment and bodily coercion. The model of jurisdiction controlling prostitution through the criminal law 'attaches' sanction to a body that it deems as already having a status of being subject to, or outside of, the law.

By contrast, in a regulatory mode, the parameters of jurisdiction as an assertion of a space, time, body and activity to be 'controlled' are not simply inhibitory but also 'productive' of such status (Butler, 1993: 117). The prostitute's body under the Queensland laws is constituted as 'productive' within the normative framework that accords 'proper' spaces for commercial sexuality, family and community. Any putative neutrality in that construction is undermined by the concurrent designation of the prostitute's body as potentially corruptive of that ordering. As a potential source of pollution, this body must be regulated, contained and made safe even as it is normalised against the dominant, familial-based ordering. The manner and form of the symbiotic relationship through which law

simultaneously asserts jurisdiction to control prostitution and identifies the sexed yet fluid body subject to that regulation is predicated upon setting the performative limits that act to maintain the 'division' between the bodily exchange relationships that constitute legal prostitution and those which exemplify the traditional virtues of family and community. Jurisdiction in a regulatory regime exists as a setting of boundaries for the prostitute's body and sexual activity by 'identifying' the concurrent necessity for such bounding.

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Prostitution Act 1999 (Qld)
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11 Subjects of jurisdiction

The dying, Northern Territory, Australia, 1995–1997

*Shaun McVeigh**

> Blessed are the dead that die.
>
> (Beckett, 1974: 115)

This chapter considers the emergence of a jurisdiction over dying under medical supervision in the Northern Territory of Australia between 1995 and 1997. It does so to explore a number of ways in which the technologies of jurisdiction have been used in the production of an account of dying well subject to the interests of the state or the public interest.[1] In this context, two questions – not altogether distinguishable – will be considered: 'How might a jurisdiction over dying under medical supervision be exercised?' and 'What might amount to dying in a humane and dignified manner?' These questions back into a question asked of jurisdiction: if one of the functions of law is to institute human beings and lead them, so to speak, to their death, what form of life can be instituted through contemporary jurisdictions over dying?

The immediate subject-matter of this chapter is the Northern Territory's *Rights of the Terminally Ill Act 1995* (NT) and the subsequent litigation and legislation.[2] The *Act* briefly permitted, in certain circumstances, a registered medical practitioner to assist a patient to 'die in a humane and dignified manner' without thereby being subject to prosecution for unlawful killing.[3] In juridical terms, this rendering of assistance in dying without legal impediment was achieved by suspending the operation of the criminal law and rendering any such assistance non-justiciable. The validity of the legislation was unsuccessfully challenged in the

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1 On the relationship between interests of state and public interest, see Hunter and Saunders (2003). Hunter and Saunders link the difference in terminology to the reception of Pufendorf's natural law jurisprudence into England in the seventeenth century. In contemporary Anglo-Australian discourse, interests of state are generally restricted to security and the public interest relates to the public good. However, in civil jurisprudence the state also has an interest in the public good.

2 The legislation can be viewed at www.nt.gov.au/lant/parliament/committees/rotti/rotti95.pdf

3 The terminology of 'dying in a humane and dignified manner' is taken from Sched 7 of the *Rights of the Terminally Ill Act 1995* (NT).

Northern Territory Supreme Court in *Wake and Gondarra v NT and Asche* (1996) 109 NTR 1 before it was rendered ineffective by the *Euthanasia Laws Act 1997* (Cth). While it is unlikely that this legislation will ever become a model for future legislation, the *Rights of the Terminally Ill Act 1995* (NT) stands as the first assisted suicide legislation enacted in a common law jurisdiction.[4] However, the *Act* remains instructive in the way that it draws on a civil jurisprudential tradition to establish the legal personality of the terminally ill person as well as in the way its jurisdictional devices establish the horizons of the concerns of civility and civil government.

An initial indication of what might be in dispute by way of dying in a dignified manner can be taken from the work of Dr Philip Nitschke. Dr Nitschke was instrumental in lobbying for the passage of the legislation and was the only doctor to act under the provisions of the legislation. He also developed a device to aid with the giving of assistance in dying in a dignified manner. It consisted of two elements. The first was a machine that, once activated, would inject sufficient drugs to end the life of the recipient; and the second was a computer software program designed to offer a step-by-step approach to the self-administration of the same.[5] The working of this machine evokes two images. The first image is of a proper death: the computer software program provided a way to manage the demise of an individual patient with the minimum intervention from the medical practitioner. The second image is of judicial and medical murder: the machine bears an uncanny resemblance to the chemical injection devices employed in the United States to inflict the death penalty. In this light, it is tempting to consider Dr Nitschke's machine as a device or emblem of judicial and elective self-execution.

The use of such images in political and ethical polemics is well known. On the one side are those who would insist that the significant features of euthanasia are concerned with freedom of choice (autonomy) and the duties of health care provision. On the other side are aligned those who equate the use of the machine, and euthanasia in general, with judicial and moral murder. Both dispute euthanasia as an issue of moral personhood. However, in this chapter, the polemical representation of Dr Nitschke's machine is re-cast as disputing the exercise of a jurisdiction – literally the power to state the law but also, in this case, a power of life and death over the subject. The image of dying and the uncertain institutional status of the ethical arguments over the meaning of assisted suicide and euthanasia mirror the interaction of the medieval order of spiritual and temporal jurisdictions of church and state (Goodrich, 1996: Chapter 1).

4 However, see Lord Joffe's Assisted Dying for the Terminally Ill Bill that was presented to the UK legislature in 2004.

5 A simulation of the program can be found at www.geocities.com/CapitolHill/Lobby/1921/resources/software.html (last viewed October 2004). More recently, Dr Nitschke has been involved in developing a 'suicide pill' to be manufactured by the user from readily available substances. Here dying was to be removed from the medical and legal spheres altogether. See Nitschke and Stewart (2005: Chapter 5) for a general account of the development of the technologies of assisting suicide.

Both the proponents of autonomy and of the sanctity of life lay claim to the authority of what would once have been a spiritual jurisdiction. In contemporary terms, since these jurisdictions have been enfolded into the jurisdiction of the State, they might be distinguished in terms of a jurisdiction over the subject and a social jurisdiction. The former responds to questions of the filiation (authentification and attachment) of the subject as belonging to law and the latter to the governmental inscription of the person within legitimated social forms (Legendre, 1997a: 169–72). In this chapter, the analysis of the *Rights of the Terminally Ill Act 1995* (NT) tracks the representation of these aspects of jurisdiction and their intersection with the state-centred civil jurisprudence that informs the legislation.

As with much contemporary state regulation of dying under medical supervision, in the *Rights of the Terminally Ill Act 1995* (NT), the jurisdiction over dying in a dignified manner was elaborated through an array of procedural, administrative and classificatory devices that focused on questions of the status and role of legal persons. Against an autonomous or sanctified form of dying, it established an *ars moriendi*, or preparation for death, that referred to an ethic and practice of civility, particularly social honour, suitable for medically assisted suicide and euthanasia. These concerns were met as matters of state or public interest. Yet it is far from clear how this state-centred *ars moriendi* can be related to the jurisdictional tasks of instituting the legal person and of ensuring social legitimacy.

In responding to the questions that opened this chapter, two lines of elaboration will be followed. First, largely by way of re-description, the *ars moriendi* established by the *Rights of the Terminally Ill Act 1995* (NT) will be considered in relation to the tasks of jurisdiction. Second, in a more critical manner, consideration is given to the form of life, or courting of death, that can be ordered through a contemporary practice of jurisdiction. To do this, the *Act* is considered in terms of a dogmatic staging of a form of life appropriate to a state-centred civil jurisprudence – that is, in terms of its institution, judgement and address. Briefly, questions of institution are taken up here as referring to the means by which the grounds of law are established as an order or grammar of legal actions; those of judgement direct attention to the individuation achieved in the judgement or performance of law both within and outside the legal order; and questions of address consider the transmission of law as both the end or destination of law – its purpose and audience – and as a mode of interrogation (McVeigh and Rush, 1997). What is circulated amongst these terms is a form of legal life that addresses both a political–legal concern with cruelty, compassion and suffering, and a concern with the formation of a citizenship 'project' of dying properly under medical supervision – whether referenced to a social domain of health or a biological one of suffering (Rose and Novas, 2005).

As the image of Dr Nitschke's machine suggests, the institution of legal life established by the *Rights of the Terminally Ill Act 1995* (NT) was not unequivocal in the manner of attachment it offered. In particular, it could be argued that the

way in which the *Act* circumscribed its jurisdiction threatened the collapse of the subject of the jurisdiction it sought to establish. By suspending aspects both of the criminal law relating to homicide and of the power to determine the cause of death, the *Act* could be said to have confused or threatened both the possibility of representing the authority of law and of instituting a suffering terminally ill person as a legal subject. Since the institution of a new form of state-authorised killing remains the scandal or trauma of assisted suicide or euthanasia laws, the last part of this chapter addresses what might be held in contemporary jurisdictions over dying. Finally, in elaborating the civil prudence of the *Act*, an attempt is made to stage the question of jurisdiction as the idiomatic practice of law.

Address

Within a dogmatic order, an opening to questions of jurisdiction can be phrased in terms of the address of law as a procedure of transmission and a mark of destination. At the outset, the *Rights of the Terminally Ill Act* 1995 (NT) answered its question of address in terms of what was instituted – as if the law had already arrived. The preamble simply states that the *Act* is enacted:

> . . . to confirm the right of a terminally ill person to request assistance from a medically qualified person to voluntarily terminate his or her life in a humane manner; to allow for such assistance to be given in certain circumstances without legal impediment to the person rendering the assistance; to provide procedural protection against the possibility of abuse of rights recognised by this *Act*; and for related purposes.

Rather than turn immediately to the order of law instituted by the *Act*, an opening for its address can initially be offered in terms of the interests of the state or the public interest. These interests are diverse and could include the preservation of the life of its citizen-subjects, the project of the government and self-government of the health of its citizen-subjects, the protection of the vulnerable, the protection of the dignity of the medical profession and the management of scarce resources. The legal practice of dying in a dignified manner that the *Act* sought to inaugurate could be viewed as engaging with a number of these interests. However, its form as *ars moriendi* – or preparation for death – suggests a citizenship 'project': how to die properly under medical supervision. Some reconstruction is required to bring out the civil form of this address.

The literatures of the *ars moriendi* have been both religious (spiritual) and secular (temporal). Manuals for preparation for death, mourning and the conduct of funerals can be taken here as emblematic. In Christian theologies, preparedness for natural death is as for transformation, and has two aspects – one doctrinal and the other dialectical. The doctrinal arguments established the Christian meaning of death; the dialectical exercises establish a form of spiritual training that has an other-worldly concern, that of separation of the spirit or immortal soul from the

mortal body. Many contemporary non-religious guides to dying and death share both a desire for transformation in death and the practice of spiritual exercises. It is through the development of the 'inner' aspect of conscience or spirit that a person prepares themself for death, often as the final stage of 'growth' in life (Elias, 1985; Lavi, 2003; Nuland, 1994).

In the context of the present chapter, it is the more worldly modes of instruction in the *ars moriendi* that are of interest. These are concerned as much with relations between the dying and the living as with questions of conscience. A state-centred *ars moriendi* could be understood as establishing the repertoires of meaningful dying – that is, as an interest of government and government of the self (Elias, 1985: 33; Hockey, 1990; Jacob, 1988; Lawton, 2000: 17–20).[6] To bring out the juridical form of this *ars moriendi*, it is necessary to make a link between civil jurisprudence, civility and civil conscience.

Civil jurisprudence can be considered as a state, or public, interest-centred prudence that responds to a situation where the requirements of moral perfectibility create irreconcilable conflict. It seeks a de-sacralised understanding of the state that could be viewed as a response to the fallible conditions of political and social life. A civil jurisprudence in this respect might be considered in terms of deliberation about contingent and contested matters.[7] Two aspects of prudence will be taken up here: the formation of a de-sacralised jurisprudence of a state with limited interests in government; and the government of value through the institution of office. The latter feature will be considered as a practice or means of institution. The civil jurisprudence that was developed in seventeenth-century Europe was mainly concerned to displace sectarian or confessional religious dispute from the centre of politics and government. For the natural law jurisprudence of the German 'state jurisprudence' of Samuel Pufendorf and, to a lesser degree, the civic humanist jurisprudence of the Scottish and English enlightenments, the key component of this task was the construction of an ethics and jurisprudence that responded to questions of political order more so than to questions of ethical redemption or fulfilment.[8] To do this, it was necessary to develop accounts of the state and of jurisdiction in which there was no need for transcendental or superior justification. These accounts revolved around civilising power and making the sovereign state the sole authority of law.

6 In the *Loneliness of Dying* (1985), Norbert Elias argued that these repertoires were largely concerned with the management of fear and the maintenance of propriety and status. Their meaning was to be found in the statuses and roles that enable dying to be practised rather than in any natural ontological arrangements.

7 To find assisted suicide and euthanasia a non-contingent wrong would remove it from the domain of prudence.

8 See Hunter (2001) for details of the German civil jurisprudence; Pocock (2003) for civic republican accounts; and Phillipson (1993) for accounts of politeness and civic humanism in eighteenth-century England and Scotland.

Redescribed in jurisdictional terms, the development of a state-centred civil jurisprudence sought to produce an account that concentrated on relations within an instituted state juridical order. It gave priority to the external forum of the government of social relations rather than the internal forum of filiation of the subject. The address of this jurisprudence was the behaviour of the citizen – or rather, the conduct or 'form of life' necessary to behave as a citizen subject to the authority of the state. What was suspended or separated from the juridical–political domain was the confessional jurisdiction of the Church – and the internal forum of conscience. It was this domain, as Legendre has succinctly put it, that 'authenticated the subject' by binding or attaching it to the institutional order of truth (Legendre, 1997a: 171). In the contemporary order of jurisdiction, the question of the authentication of the subject remains, but the question of how it is enfolded into a state-centred jurisdiction is subject to dispute (Goodrich, 1996; Saunders, 2004).

Institution

The *Rights of the Terminally Ill Act 1995* (NT) was as brief in its description of modes of institution as it was in its address. Section 4 confirmed a right to request assistance in dying in a dignified; ss 6 and 7 set out a number of requirements that had to be fulfilled before a doctor could give assistance in dying in a dignified manner without criminal prosecution.

To draw out the manner of this institution, it is necessary to develop a second feature of civil jurisprudence: the management of the interests of the state through the institution of offices and the practice of role as a specific prudential ethic. For civil jurisprudence, questions of value were to be related to an office, and an ethic of office or status, rather than a generalised practice of virtue, right or principle (Minson, 1993: Chapter 2). The particular inflection of this jurisprudence made in eighteenth-century Scotland and England was to mediate the interest of the state through the public interest and manners (Pocock, 1995: 35–50). What civil jurisprudence offered to eighteenth-century legal thought – and continues to offer in a more diffuse way – was a way to develop an institutional account of ethical and prudential judgement governed through a range of jurisdictional devices relating to office, legal status and the administrative delimitation of role. It is this account that is developed in the *Rights of the Terminally Ill Act 1995* (NT).

The *Rights of the Terminally Ill Act 1995* (NT) addressed the rights of the terminally ill along two distinct registers, one in the language of rights and the other in terms of legal immunity. The patient was represented as a petitioner before the medical practitioner and the medical practitioner was considered in relation to the Northern Territory (the state). In the *Act*, a patient could initiate proceedings by petitioning the medical practitioner for assistance to die in a dignified manner (s 4) by using a standard form found in Sched 7 of the *Act*. The relation between the doctor and the state was established by the suspending of the laws relating to unlawful killing (s 16(1)) and establishing an immunity from

prosecution (ss 20(1) and (2)).[9] Should the medical practitioner have elected to assist the petitioner, then the requirements of capacity, good practice, good faith and due process set out in ss 6 and 7 would have had to be met.

The legal relations enacted in the *Rights of the Terminally Ill Act 1995* (NT) did not then, as might be expected, express an exclusive ethical relation between the doctor and the patient. What bound a person to a practice of dying in a dignified manner was not an ethical relation as such, but a series of documentary exchanges. (This is not to say that there was no ethical relation between the doctor and patient but from the viewpoint of a civil jurisprudence the legal arrangements carry the weight of any ethical ordering.) Central to this was the link made between institution and status. Section 6 established the proper comportment and behaviour of the medical practitioner, and s 7 did the same for the patient. Section 6 confirmed that the medical practitioner should not be influenced by any reward or advantage, other than reasonable payment for medical services. Section 7 set out the conditions under which the medical practitioner may assist the patient. In summary terms, the medical practitioner must be satisfied that:

- the patient has the requisite capacity to decide to die in a humane and dignified manner;
- the patient is suffering from an illness that will, without extraordinary measures, lead to death, and whose only reasonable treatment is palliative with the aim of providing a comfortable death;
- the patient's illness is causing severe pain and suffering;
- all alternative treatments that might be available to the patient have been rejected;
- the patient has considered all the implications of the decision for their family; and
- a period of seven days has elapsed since the appropriate documentary formalities have been completed.

The status established by the legislation is hardly classical in form. It did not refer to a tenurial relation or to an office of state. It had only limited legal effect and its conditions of assumption were voluntary. However, in other respects it was typical

9 Section 16(1). Notwithstanding s 26(3) of the *Criminal Code*, an action taken in accordance with this *Act* by a medical practitioner or by a health care provider on the instructions of a medical practitioner does not constitute an offence against Part VI of the *Criminal Code* or an attempt to commit such an offence, a conspiracy to commit such an offence, or an offence of aiding, abetting, counselling or procuring the commission of such an offence.

Section 26(3) of the Northern Territory *Criminal Code* states: 'A person cannot authorize or permit another to kill him or, except in the case of medical treatment, to cause him grievous harm.' Part VI of the *Criminal Code* deals with offences against the person and other matters. Division 1 of Part VI outlines duties relating to the preservation of human life. A death that had occurred in accordance with the *Rights of the Terminally Ill Act 1995* (NT) would not be in breach of a duty to preserve human life, but it would have remained the case that this death was not authorised or permitted by the deceased.

of a common law legal status: it did not address the whole legal person so much as make a status out of an exception to the (natural) legal person (Graveson, 1953: 5). In doing this, it might be analogised to the status of a child at common law.

The mutability of the status developed in the *Rights of the Terminally Ill Act 1995* (NT) also suggests that the language of office needs more specificity to bring out what is being instituted. To do this, it is necessary to reinscribe the language of office and status in the idiom of common law regulation. Three broad legal concerns dominated early modern law in relation to dying: one relating to inheritance and estate management; a second to sumptuary law; and a third to the treatment of the dead. Of these, it is sumptuary law that is of interest here since it establishes the governmental form of the management of dying. At their broadest, sumptuary laws regulated the proper place and appearance of the divine and social order. They did so primarily through the regulation of consumption and dress – including that of funeral ceremonies and the laws of mourning (Hunt, 1996). Sumptuary law not only produced and protected an institutional order of offices and images, but it also regulated the domains of conscience and the household (Goodrich, 1998). Such laws might be considered as contributing to the licit representation of divine and temporal authority. In the context of the common law tradition, sumptuary laws joined the discourse – and war of images – on the true meaning of the ecclesiastical and later secular polity (Hunt, 1996: 312). Much of the contemporary debate surrounding the legal status of euthanasia can be situated within this polemical domain.

In narrower civil prudential terms, sumptuary law was involved in establishing and governing the hierarchies and status of the temporal social order and of daily life (Goodrich, 1998: 725). Funerals and preparations for death were thus ready objects of regulation.[10] Whilst sumptuary law ceased to be of direct legislative importance in the seventeenth century, sumptuary concerns can be discerned in the domains of both police and health care (Hunt, 1996: 373–92). The *ars moriendi* instituted by the *Rights of the Terminally Ill Act 1995* (NT) might be viewed not so much as an archaic revival of a sumptuary law but as a continuation of a concern with the dignity of the offices of dying.

Judgement

If questions of institution represent the form of jurisdiction, then those of judgement represent its performance. Where questions of institution refer to questions of validity, those of judgement relate to questions of value. It is at the level of judgement and historical particularisation of a form that life gets to be represented in law.

The administrative requirements of judgement suitable for the conduct of dying in a dignified manner were outlined in the legislation, although to substantiate

10 Hunt (1996: 18) has argued that the first 'European' sumptuary laws were funerary. Hocart (1970) argues the same for the practice of administration.

them it is necessary to treat a number of administrative measures as establishing attributes of personality. (This reworking of the parts of legal speech is taken up in the last part of this chapter.) First, someone making a request would have needed to show a demonstrable capacity to understand the purpose of killing oneself in social, ethical and clinical terms. Second, they would have had to possess a set of competencies in the management of one's affairs in relation to kin. Third, if Dr Nitschke's machine was to have been used, it would also have been necessary to master the discipline of using the computer-generated program to inject a lethal dose of drugs.

In terms of the evaluation or judgement of the performance of roles, the *Rights of the Terminally Ill Act 1995* (NT) drew attention to the capacity to conduct ethical arguments and the ability to direct regulatory practices to carry out identifiable procedures and achieve particular ends. The emphasis of manners and civility in the performance of role established the conduct necessary to sustain a status within an institutional and ethical milieu (Minson, 1993: 37). While Dr Nitschke's machine offered one polemical representation of dying in a dignified manner, the requirements of status suggested that a more elaborate set of decisions and responses would have been required of both patient and doctor in order to fulfil their roles. In formal terms, both the doctor and patient were required to conduct themselves in a way appropriate to medical treatment. This might be characterised in terms of a certain practice of restraint or disinterest (*adiaphora*) to give it a stoic inflection.[11] It involved the medical practitioner taking a distance from their ethical beliefs or conscience in order to adopt the appropriate 'professional' manner – for example, the setting aside of personal beliefs in order to carry out medical treatment. The same was required of the patient.

If this reads as an impoverished description of dying in a humane and dignified manner, this in itself should be no surprise. In descriptive terms the *Rights of the Terminally Ill Act 1995* (NT) was primarily concerned with establishing the legal conditions of the conduct of dying under medical supervision. More prosaically the *Act* was only one source of information about the appropriate conduct of doctors, patients and the state. Other sources of guidance as to conduct might be

11 This is one aspect of a more general link between manners and law that can be made through the Stoic literatures of dying and natural law jurisprudence. In the early modern period, it was Stoicism and Epicureanism that provided the first established temporal (de-sacralised), or at least not entirely Christian, discourse on the conduct of both government and dying in Western and Northern Europe (Houlbrooke, 2000; Marshall, 2002; Oestreich, 1982; Warren, 2004). The virtues of uprightness and restraint, and the ability to conduct one's life according to the exigencies of office, have their counterparts in the Stoic literatures on the conduct of dying. Seventeenth- and eighteenth-century common law jurisprudence not only took manners and honour as a subject-matter of law, but also took the practice of jurisprudence and government as a training in personality (Boyer, 1997). The specifically Christian and humanist contexts of fifteenth- and sixteenth-century writing on manners and spiritual exercises, exemplified by Erasmus (1988), were transformed in the eighteenth century into that of the cultivation of politeness, civic humanism, civic virtue and in the process became a discourse of propriety (sensibility and sentiment) (Porter, 2003: 21–26).

found in the documentation of the practice of palliative care, professional ethics, and choices of the patient and their kin. However, this description of the regulation that permits dying in a dignified manner is 'thin' for another reason: the performance of dying well is studiously left out of the governmental account, as is the role of the doctor whether as health care provider or judge. These questions are met by the consent procedures. There were two judgements to be made in the *Act*, the first by the patient or terminally ill legal person and the second by the doctor. For the terminally ill, the question is not whether the *Act* is to be 'applied', since the decision is made from within the legislative regime, but whether a liberty is to be exercised. For the doctor, the decision to assist the patient is described in terms of treatment rather than judgement. How these actions are represented within the symbolic order of law will be considered in the next section.

In civil prudential terms, taking issues of civility and manners as a starting point for the regulation of death and dying under medical care has a number of attractions. Civility and manners establish (or attempt to establish) the conditions in which disputes over the significance of assisted suicide and euthanasia are to be conducted. This takes on importance both with the negotiation of health care provision and in considering the civil prudential framing of the task of legislation in areas of moral controversy. In establishing something like a legal status for the terminally ill legal person, the *Rights of the Terminally Ill Act 1995* (NT) also marked the conditions and limits of the exercise of a jurisdiction and the interests of the state (Saunders, 2004). What has been described here is an account of dignity that is tied to the *dignitas*, or legal ordering of office and role, rather than that of fundamental human dignity (Kantorowicz, 1957). Dignity when associated with office concerns questions of the duties of rank and authority. What is presented in the *Act* is a legal account of dignity delimited by a range of concerns relating to honour (Margalit, 1996: Part 1; Nussbaum, 2004: Chapter 4).

Jurisdictional devices

The first part of this chapter placed the exercise of a jurisdiction over dying within a domain of civil jurisprudence cast in terms of the conduct of manners. Central to this was the delimitation of a relation between institutional order and judgement framed in terms of the sovereign address to the citizen. Here attention is turned from examining jurisdiction as a scene or context for civil jurisprudence to the understanding of jurisdiction as a legal action or device that sustained the civil prudential form of life inaugurated in the *Rights of the Terminally Ill Act 1995* (NT). The particular concerns taken up here lie with what could be considered the function and idiom of jurisdiction: establishing the relation of a subject to a founding order or Reference of law that makes it possible to exist with legal meaning and securing the manner of the government of the legal subject (Legendre, 1997b: 147–50). Or, in an older language of jurisdiction, what is of interest here is the relation between the confessional–penitential (spiritual) jurisdiction of the internal forum that authenticates the subject of law and that of the (temporal)

governmental jurisdiction of the external forum that is concerned with exchanges between subjects. In the earlier parts of this chapter, jurisdiction was considered in relation to the formation and delimitation of something like legal status. Here the jurisdictional devices will be figured as delimiting rival formulations of the jurisdictional ordering of law as well as determining the address of law.

The typical gesture of civil jurisprudence has been to accentuate the importance of the external forum of government. The risk, as critics have pointed out, is the loss of a subjective attachment to the normative structure of law and of the means of government.[12] This situation is brought into relief in the *Rights of the Terminally Act 1995* (NT) through its legislative strategy of suspending reference to established jurisdictions in order to produce its legal effects. No doubt this particular formulation of the suspension of laws was designed to minimise opposition to the enactment of laws permitting assisted suicide and euthanasia. However, on its face, it proceeds without reference or attachment – and so, it might be argued, without civil prudence. In different ways, the problematisations of jurisdiction presented here are concerned with the potential of the abandonment of the subject of law.

At the outset, the jurisdiction established by the *Rights of the Terminally Ill Act 1995* (NT) imposed a number of limits to the way that questions of value could be represented. Questions concerning the provision of health care services that shorten life, of ethics and of the representation of dying only indirectly form the subject-matter of the regulatory scheme established by the *Act*. Some of these jurisdictional limits were quite general: questions of justification were restricted to those of the validity of the legislation (see *Wake and Gondarra v NT and Asche* (1996) 109 NTR 1), and those of substantive law were addressed by a number of administrative procedures. Others, however, were more specific to the genre of assisted suicide and euthanasia legislation.

The *Rights of the Terminally Ill Act 1995* (NT) accommodated dying in a humane and dignified manner in relation to the jurisdiction of criminal law by pursuing three approaches. First, in s 16 the *Act* established that there was no crime committed by a doctor who assisted a patient in dying in a dignified manner. Section 16(1) stated that acts in accordance with the legislation would not be in breach of Part VI of the *Criminal Code* – laws relating to the preservation of human life (murder, manslaughter, assisted suicide and so forth). Section 16(2) stated that, for legal purposes, 'assistance given in accordance with this *Act*... is taken to be medical treatment for the purposes of the law'. From this it might be inferred that there was no jurisdiction of criminal law because there was no crime. What was at issue was the manner of dying, not the *mens rea* of the killer (Rush, 1997: 275). Another approach taken in the *Act* was to suspend the operation of the criminal law. Section 20 granted immunity from prosecution if a death complied with the terms of the legislation. However, the general criminal law relating to the authorisation of killing was not repealed or amended

12 These issues have been more fully canvassed in social theory than in jurisprudence (see, for example, Gellner, 1994).

in any way. Section 26(3) of the *Criminal Code* (NT) remained in force: 'A person cannot authorise or permit another to kill him or, except in the case of medical treatment, to cause him grievous harm.' The provisions prohibiting assisted suicide also remained in place (*Criminal Code* (NT), ss 167 and 168). The criminal courts had jurisdiction, but it was not to be exercised. Finally, s 13(2) stated that a death that resulted pursuant to the act need not be reported to the Coroner as unexpected, unnatural or violent. No criminal investigation need be initiated.

In jurisdictional terms, two features stand out in the formulation of the address of the legislation. First, the status of the terminally ill person was given meaning by creating a domain of law apart from the criminal law. Assisted suicide and euthanasia were to be considered as medical treatment, but the relation between medical treatment and criminal law was suspended. Second, s 16 of the *Rights of the Terminally Ill Act 1995* (NT) figured a terminally ill legal person who could be killed without the attribution of legal responsibility. From the viewpoint of the civil jurisprudence already elaborated, the suspension of the law, or the suspending of a law within a legal order, is most comfortably viewed as addressing a number of discrete concerns about the relation between the exercise of sovereign power and the practice of government. The most notable of these was to establish the technology and limits of a jurisdiction.

As a question of institution, the suspension of law might be viewed in relation to two aspects of jurisdiction – one relating to the authority of the external forum of the government of social relations and the other to the confessional–penitential jurisdiction of the subject. In terms of the external forum, the suspension of laws seems to displace the office of the judge and the legal categories through which institution proceeds. In the *Rights of the Terminally Ill Act 1995* (NT), the doctor was required to take up the structural position of the judge without direct recourse to the jurisdictional arrangement of the social meaning of dying in a dignified manner. In s 20 of the *Act*, the intentional killing of the terminally ill patient was given criminal legal significance but the operation of the law was suspended in advance. This suspension links government through law to a generalised system of administration that operates alongside and apart from law.[13] In juridical terms, the decision that was to be made within this excepted domain joined the sovereign act of making die or letting live to the governmental concern, in the field of the health of the population, of making live or letting die. It did so in terms of making survive or letting perish (Agamben, 1999: 82–83, 155). One consequence of this was that the *Rights of the Terminally Ill Act 1995* (NT) did not direct regulation to issues of legal personality; instead, the force of law was handed over to the administration of the medical profession and directed to the question of the

13 Even the document that initiates procedures, the standard form request for assistance in dying in a dignified manner contained in Sched 7 of the *Act*, refuses juridical form. While this form might usefully have been viewed as a 'prayer for relief', the part of a writ requesting relief for a wrong suffered, it reveals no cause of action. Instead, it provides a certification of compliance with the requirements of the *Act*.

biological and social survival of the terminally ill patient. The doctor, however, was required only to make a professional decision about medical treatment.

While the doctor's decision was set apart from the judicial tribunal in the *Rights of the Terminally Ill Act 1995* (NT), it was still judicial in function insofar as it related to the determination of questions of life and death. Viewed from the position of the external forum of government, the problem is not so much the fact that a doctor is putting a patient to death but that the juridical character of the action is not acknowledged. More generally, the administrative arrangements within the *Act* render the dogmatic ordering of the public and social limits of law opaque. No doubt one of the purposes of the suspension of law was to lessen the impact of the institution of a new judicial and medical relation to life. The question here is whether this suspension can be separated from a more general displacement of law into administrative procedure and information exchange – and with this a loss of the institutional substrate necessary to secure social attachment through jurisdictional means (Legendre, 1997c: 106–07).

Much the same point can be made about the institution of the subject of law. Here, however, the suspension of laws invokes another jurisdiction either displaced or lost. What might have been recognised in the suspension of the general law is the authority of a penitential–confessional jurisdiction. At issue in this domain is not so much the government of public conduct but of the institution of the subject into an order of legal meaning. In contemporary terms, since this jurisdiction has been enfolded in the common law, the suspension of laws might be taken as a partial recognition of another jurisdiction in which the subject is brought to their proper end. The doctor in this jurisdiction would take up a confessional role. Alternatively, far from creating a new legal status, the suspension of laws could also indicate that the terminally ill person had lost all their important legal attributes. The terminally ill person had been suspended from both the external and internal forums of jurisdiction. What was instituted was a situation where it was possible to elect to be treated as a 'bare', or suffering, life (Agamben, 1998: 136–43).[14]

Turning to the performance of judgement, the suspension of law can be viewed as bringing law into relation with an anomic element (whether political or ethical). This relation might be situated either as a state of exception – an event outside of the jurisdiction of law but still belonging to it – or as belonging to a penitential jurisdiction – an event staged inside the law but not (or no longer) belonging to it. As a state of exception to sovereign civil authority, the decision on life is made in terms of the interests of the state – it is a decision on the political value or non-value of life (Agamben, 1998: 139–40, 153). If taken as part of a confessional–penitential jurisdiction, the decision is taken in terms of the norms of subjective life: the management of guilt (interdiction) (Legendre, 1997a: 165–69).

14 Agamben does not develop an account of jurisdiction. In *State of Exception*, he provides a brief historical account of states of exception in terms of jurisdiction (2005: 11–22) and in *Remnants of Auschwitz* an account of authority and enunciation in language is given that corresponds closely to his understanding of law (1999: 137–45).

In either account, it marks a decisive threshold where the relations between law and life are fatally blurred. In this light, the *Act* could be viewed not as an exercise in de-juridification, or as a loss of jurisdiction, but as a de-subjectivation and a de-legitimation.

Set against these strong claims for the loss of the social and subjective jurisdiction of law, civil jurisprudence seems to offer a rather fragile position from which to institute and sustain relations between law and life. The problematisation of the institutional staging of the subject and the performative limits of social exchange runs against the claims of a civil prudence to enact and stay within established state jurisdictions. The purpose here is not to return these critical formulations to a proper assertion of the authority of state law, but to give some brief indication, by way of re-description, of how a civil jurisprudential account of jurisdiction might respond and attend to the limits that have been posed.

In Legendre's formulation of the institutional aspects of jurisdiction, the greatest difficulties arise in terms of sustaining a relation to the founding order of law. In Agamben's account of the performance of jurisdiction, the legal subject is abandoned and held in a state of exception (where it is possible to be killed without legal responsibility). Where Legendre takes the internal forum of the penitential jurisdiction to be prior to that of external forum of social government, civil jurisprudence has typically been conducted through the external forum. The gesture of de-sacralisation that has characterised state-centred civil jurisprudence has operated by establishing a number of demarcations between the two jurisdictions (Saunders, 2004). With the enfolding of jurisdictions within common law, the function of filiation has not so much been abandoned as viewed indirectly from the external forum as a concern of the government of social relations and as a particular mode of legal and civil association (Oakeshott, 1991: 165–69). The question, then, is what form of life can be sustained in the absence of, or without a clearly organised, penitential jurisdiction.

In the *Rights of the Terminally Ill Act 1995* (NT), it is the statuses established through sumptuary order of dying in a dignified manner that must institute a de-sacralised authority of law and hold out a form of legal life. Whether or not such a jurisdictional device is capable of so doing is questionable. It has been argued that the great normalisation of government and law in the nineteenth and twentieth centuries has abstracted the medium of status and manners of its meaning and significance (Murphy, 1997). Government, through regimes of statistics, insurance and psychology – that is, through management and administration – has required only a general account of social action and moral responsibility, rather than a substantive jurisdiction of law, in order to secure a form of life (McVeigh and Rush, 1997). The issue here is whether the government of conduct through manners and social honour can secure a mode of transmission sufficient to sustain a legal form of life. The work of Norbert Elias (1972, 1978, 1985) has given centrality to the place of manners and social honour in institutionalising modern forms of living and dying. However, it is also necessary to consider the intransitive aspects of institution – the institutional substrate of

a legal speech capable of inscribing or giving ground to normative effects. In the context of the jurisdictional arrangements of the *Rights of the Terminally Ill Act 1995* (NT) this would depend on whether the *Act* was considered as a juridification or de-juridification of dying in a dignified manner.

Agamben's emphasis on the performance of law draws attention to the manner in which the jurisdictional structures of inclusion and exclusion complicate older distinctions between life and law. In the first part of the chapter it was suggested that the status of the terminally ill person depended on an available account of a natural person. However, it is questionable whether nature, or the suffering body, can be figured any longer as being a deeply embedded substrate capable of supplying the divisions necessary to establish a difference between a dignified or undignified death. For Agamben, government through a state of exception has meant that life has become a product of law (Agamben, 2005: 88). Agamben's ontological concern with de-subjectivation is directed to the effects of the 'biopolitical' struggle for life (Being).[15] By contrast, civil jurisprudence proceeds with an artefactual account of the (legal) person and with the means by which life is, or is not, brought within a jurisdiction. It gives priority not to the ontological status of the subject but to the limits of the government of biological life. This requires both a degree of institutional positivity (a status must be describable in terms of positive effects) and some sustainable distinctions between law and life.

In the *Rights of the Terminally Ill Act 1995* (NT), the performative relation of life and law was managed in two ways: the first was by not formally delineating a legal status for the dying; and the second was through making the distinction between law and life a matter of choice. In terms of the questioning of jurisdiction presented here, these devices passed over the problem of the political–legal delimitation of life. Whatever the status established, and the choice made, the linking of the killing of another without responsibility to the governmental management of dying takes place. For a civil jurisprudence to succeed, it must be capable of coming to judgement without encompassing or confronting the generality of these questions. Just as the institutional ordering of civil jurisprudence depends on not capturing all of life, the performance of the *Act* does not judge a whole life (even if the end of life is its sole point). What is performed is not a de-subjectivation so much as a narrow subjectivation, one that is left partially determined by the *Act*. One consequence of this is that dying in a dignified manner, and the status attributes that organise it, emerge from within the legal field. Life – or at least dying in a dignified manner – becomes a matter of legal convention (second nature). What is actualised in legal judgement is not a natural life but a set of legal relations. The effectiveness of such a judgement depends on sustaining a legal address.

15 Loosely, the 'biopolitical' is concerned with the exercise of power over the population in general by means of biology. Agamben develops Foucault's accounts of the government of populations through the investment in life and returns it to a juridical order and of government through the state of exception (Agamben, 1998: 5–10).

As indicated, a strong account of the suspension of law in the *Rights of the Terminally Ill Act 1995* (NT) would suspend the relation of both sovereign and subject to law. The sovereign would act without law and the citizen-subject without attachment – a civil jurisprudence would proceed without a recognisable legal address or authority. This is not solely a question of the authority to make law, a matter considered in *Wake and Gondarra v NT and Asche* (1996) 109 NTR 1 and the *Euthanasia Laws Act 1997* (Cth). It is also one of authorisation and transmission: the relationship of a sovereign and a subject to a jurisdiction.

Viewed as an action of civil jurisdiction, the suspension of the address of law can be considered in two aspects: first, in terms of the pluralisation of jurisdictions over dying under medical supervision; and second, in terms of the audience of law. In relation to the former, it can be noted that the suspension of laws continued both to maintain the jurisdictional authority of law in relation to other discourses of homicide and other practices of suicide and euthanasia. In the *Act*, state law was represented as being subordinate neither to a higher ethical law – for example, the ethic of relieving suffering or of medical necessity – nor to an administrative regime that departs fully from legal normativity.[16] The form of rights represented in the *Act* was also specific to a particular jurisdiction. The *Act* did not make statements of general rights (natural, human or constitutional), but established a specific set of rights and immunities within a legal-administrative structure. It proceeded, that is, by attributing a specific status (the terminally ill patient in unbearable pain) for a particular purpose (dying in a dignified manner), rather than by elaborating a general status (the bearer of human rights or subjectivity). In short, the *Act* provided another juridical manner of dying. It was concerned more with de-moralising and de-politicising disputes about assisted suicide and euthanasia than with a desire to de-juridify dying under medical supervision (this has also been the case in the Netherlands – see Griffith, 1998; Keown, 2002).

In relation to the audience of the address, the suspension of law appeals to a form of prudence. The suspension of law is to be recognised as a (temporary) solution to a conflict that takes place both without and, it has been argued here, within the law. What is suspended is adherence to the representation of law in terms of a direct alignment between sovereign power, statutory authority and legal personality. Formally, what was invoked in its place was left open, but insofar as the address of the *Rights of the Terminally Ill Act 1995* (NT) is prudential, it would involve, it might be imagined, both a recognition of the trauma or scandal of permitting assisted suicide and euthanasia, and a need for it to be addressed indirectly as an *ars moriendi* (van Oenen, 2004: 153–55). In short, the suspension of law invoked – wrongly, as it turned out – the possibility of its addressees accepting the conflict of legal ordering. With this, a return is made to the civil prudential ordering of sovereign–citizen relations.

16 The state of exception is without representation. See also the *Euthanasia Laws Act 1997* (Cth), which rendered the *Rights of the Terminally Ill Act 1995* (NT) ineffective. This legislation contains no substantive sections.

Jurisdiction has been cast here in terms of the authorisation of a number of responses both to the dogmatic order of law and to questions of government. What has been recognised or misrecognised in a civil prudential account of jurisdiction is the limits of the authorisation (or guarantee) of the grounds of institutional life, of the performance of judgement, and of the destination of address. It is this that allows for the characteristic civil prudential reasoning with and through the instruments found in the *Rights of the Terminally Ill Act 1995* (NT). Civil jurisprudence begins with the suspension of confessional truths in favour of a state-centred re-description of interests. The suspension of laws both recognises the trauma or scandal of the laws enacted and suggests a way of living with it without forgoing legal responsibility in its entirety.

Concluding comments

This chapter has followed the work of jurisdiction in establishing a legal domain for providing medical assistance in dying in a dignified manner. The analysis of the *Rights of the Terminally Ill Act 1995* (NT) presented here has drawn out the ways in which a contemporary jurisdiction over dying in a dignified manner might be understood through a state-centred civil jurisprudence. At the centre of the civil prudential understanding of dying in a dignified manner were a number of technical jurisdictional delimitations that organised the authentification of the subject and the government of social relations. Focusing on the dogmatic ordering of law, dying in a dignified manner allowed for an examination of the way in which questions of jurisdiction can be understood as continuing to structure and perform an ethical–prudential arrangement of 'dying in a dignified manner'. More broadly, the assemblage of legal materials considered was used to draw out the way in which questions of civil prudence might be viewed as bringing into relief the relationship between sovereignty and jurisdiction.

To close briefly with the image that opened this chapter: Dr Philip Nitschke's representation of computer-assisted suicide. Initially, it was stated that the rival ethical theories of autonomy and sanctity of life could both be viewed jurisdictionally as occupying, or attempting to occupy, a confessional–penitential jurisdiction. As such, they remain somewhat eccentric to the concerns of a civil jurisprudence that is articulated from another jurisdiction, that of government. In dealing with sovereign–subject relations, the network of concerns of civil jurisprudence is more easily cast in terms of cruelty, compassion and suffering than in terms of autonomy and the sanctity of life. The image of assisted suicide might be understood as representing the exercise of a compassionate or cruel state interest in dying in a dignified manner. The claim of a civil jurisprudence is that it is still possible to reason within law about such concerns and to direct them to a number of citizenship projects – whether viewed in terms of civility, social health or biology. The place of jurisdiction has been rendered here as the idiomatic device of such a prudence, both as the site of enunciation of the law and as an instrument of actualisation.

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Euthanasia Laws Act 1997 (Cth)

Part V

Dictions

12 Embracing jurisdiction

John Ford's *The Man Who Shot Liberty Valance*

Bill Grantham

The critic Georg Lukács wrote:

> The genuine categories of literary forms are not simply literary in essence. They are forms of life especially adapted to the articulation of great alternatives in a practical and effective manner and to the exposition of the maximal inner potentialities of forces and counterforces.
>
> (Lukács, 1970: 21)

Lukács, whose major work included a study of the historical novel (Lukács, 1962), might have had the cinema's major counterpart of historical fiction, the western film, in mind. Often dismissed, in the famous 'slanguage' of the film trade paper *Variety*, as 'oaters' – because of the omnipresence of oat-eating horses – the Western, in part because of its permanent witness to American life and its simple, persistent generic forms, was often a powerful vehicle for articulating the 'great alternatives' contemplated by Lukács.

On the other hand, the master director of Westerns, John Ford, insisted on the empiricism of his narrative approach. He claimed that he was driven only by what actually happened, telling one interviewer: 'I am not trying to make a legend live. I simply recall historic facts. Because it is based on American history, on people who existed, the Western moves me' (Mott, 2001: 95).

Ford was famously resistant to critical engagement with his films. 'I hate the cinema,' he once said, adding: 'But I like making Westerns' (Leguèbe, 2001: 73). One reason for making Westerns, he told the future director Bertrand Tavernier, was that they offered 'a chance to get away from Hollywood and the smog', which partly meant getting away somewhat from the pressures and interferences of the Hollywood studio system (Tavernier, 2001). Ford rejected not only critical readings of his own westerns but also theoretically driven forms of cinematic practice – for instance, telling the French critic Eric Leguèbe:

> What I like in filming is the active life, the excitement of the humming of the cameras, and the passion of the actors in front of them, the landscapes on top of that, the work, work, work . . . It takes a huge effort to remain lucid and not fall in the traps of aestheticism and, above all, intellectualism. What counts

> is what one does and not what one says. When I make a western, all I have to do is film a documentary on the West, just as it was: epic. And from the moment that one is epic, one can't go wrong. It's the reality, outside time, that one records on the negative.
>
> (Leguèbe, 2001: 73)

However, Ford made a point of identifying himself with Western films, and the identification carried more than merely factual force. In an often-told story, he began an address to fellow directors attacking the Hollywood blacklist with the introduction: 'My name is John Ford. I am a director of Westerns' (McBride, 2001: 416). And yet, in one 20-year period of his career, between the silent hit *3 Bad Men* (1926) and *My Darling Clementine* in 1946, Ford directed just one Western – *Stagecoach* (1939) – out of some 44 feature-length films (Bogdanovich, 1978: 113–49). Ford's decision to return wholeheartedly to the Western – and, as the winner of six Academy awards for non-Western films (Libby, 2001: 53), to project himself as 'a director of Westerns' – was the product of deliberate reflection on what he sought to achieve as a film-maker following his experiences in the Second World War. As one biographer, Joseph McBride, puts it:

> Ford consciously set out to keep the values of pioneer America alive in the minds of his fellow countrymen . . . The genre reflected a continued need among the American public for mythic parables of national identity in an age when America was grappling with the disturbing responsibilities of its new–found superpower status.
>
> (McBride, 2001: 417–18)

In his later films, Ford used the Western genre to expose what he saw as America's ills in the postwar world. In *The Searchers* (1956), he probed racism and the taboos of miscegenation. More explicitly, in *Sergeant Rutledge* (1960), he depicted the affair of a black cavalry soldier falsely accused of raping a white woman. Ford had participated in the D-Day landings in Normandy on 6 June 1944 (McBride, 2001: 396–97), and claimed that the experience had changed his views on race in America. 'When I landed at Omaha Beach,' he told Samuel Lachise, the film critic for the French communist daily *L'Humanité*, in 1966, 'there were scores of black bodies lying in the sand. Then I realised that it was impossible not to consider [negroes] full-fledged American citizens' (Tavernier, 2001: 107). A similar revisionism informed his depiction of wronged Indians in another cavalry Western, *Cheyenne Autumn* (1964). As Ford told Peter Bogdanovich:

> [I] wanted to show [the Indians'] point of view for a change. Let's face it, we've treated them very badly – it's a blot on our shield; we've cheated and robbed, killed, murdered and massacred and everything else, but they kill one white man and, God, out come the troops.
>
> (Bogdanovich, 1978: 104)

Although Ford's meditations on postwar American were not limited to Westerns – his depiction of machine politics in *The Last Hurrah* (1958) and of the travails of women in *7 Women* (1966) lay outside the genre – he nonetheless persistently revisited the conventions of the Western to explore the national and social themes that stirred him in the later part of his career. In *The Man Who Shot Liberty Valance* (1962), Ford's treatment of his themes is possibly the most complex and nuanced of his late films, a meditation both of historical consciousness and contemporary ideologies, of foundation myths and modern legends and, above all, of the developing role of the law in a society reaching the end of its frontier state. This latter theme is, of course, a staple not only of the Western genre but also of American consciousness itself, and one which Ford had touched upon previously. In *Stagecoach* (1939), two protagonists of the story – a prostitute and a drunken doctor – are banished from their town by the emerging forces of law, religion and civilisation and cast out into the desert in the company of, among others, a louche gambler, a corrupt banker and an outlaw. The banishment theme is an echo of one of the earliest successful Western stories, Bret Harte's *The Outcasts of Poker Flat* (1869) (filmed by Ford in 1919 in a now-lost version), in which the eponymous frontier town experiences 'a spasm of virtuous reaction, quite as lawless and ungovernable as any of the acts that had provoked it' and duly casts out a gambler, a drunk and two prostitutes (1869: 12).

But the issues of law in *Liberty Valance* go far beyond these generic commonplaces; the film contains layers of searching and sophisticated meditation upon a number of areas of jurisdiction which are significant both as an exercise of historical memory and as a contemplation of the America of the early 1960s in which the film was made.

In *The Man Who Shot Liberty Valance*, Ransom Stoddard (James Stewart), a senator and former governor of an unnamed American state, returns by train to the small town of Shinbone with his wife Hallie for the funeral of Tom Doniphon (John Wayne), a forgotten man who has died a pauper, leaving only his black servant, Pompey, and the town's former marshal, Link Appleyard, to mourn him. Stoddard's trip piques the curiosity of the local newspaper editor, who demands to know why so distinguished a man would attend the funeral of so obscure a figure as Doniphon. In flashback, Stoddard relates his arrival by stagecoach in Shinbone many years earlier, as a young lawyer from the East who has determined to make his fortune on the frontier. Stoddard's stagecoach is held up by a group of desperadoes headed by Liberty Valance, a cruel and violent thug who beats Stoddard viciously and desecrates his law books. Stoddard is rescued by Doniphon and Pompey, and brought to Shinbone, where he is nursed by Hallie, whom Doniphon loves, and her Scandinavian immigrant parents, the Ericsons, who own a restaurant. Stoddard, faithful to the legal principles that have formed him, wants Link Appleyard to arrest Valance and his men for robbing the coach, but Appleyard, clearly afraid, claims that he has no jurisdiction over criminals outside the town's boundaries. Doniphon mocks the young lawyer's scruples, explaining that his vision of the law does not prevail on the frontier.

Stoddard takes a job washing dishes and serving in Hallie's parents' restaurant. He also opens a school for the town's children and adult illiterates, where the pupils include Hallie herself, who has become attracted to Stoddard, Pompey and Appleyard's children by his Mexican wife. The students not only learn to read but are also inculcated in the virtues of America's Declaration of Independence and Constitution. These values provide a link to a back story of the film, the efforts of the territory in which Shinbone is situated to become a state of the Union. Stoddard becomes involved in Shinbone's efforts to elect representatives to the territorial convention that will vote on statehood.

Liberty Valance, who turns out to be in the pay of wealthy ranching interests determined to block statehood, attempts unsuccessfully to intimidate the Shinbone townspeople into electing anti-state representatives to the convention and, having failed, determines to be rid of Stoddard for ever. Valance challenges Stoddard to a shootout. Stoddard, who has earlier been shown to be an incompetent gunman, appears for the challenge and during the gunfight Valance is killed. Stoddard becomes a hero, 'The Man Who Shot Liberty Valance', goes to the territorial convention and is swept on a wave of popularity into a lifetime of public office. He also wins Hallie, who becomes his wife. But Doniphon reveals to Stoddard that it is he, Doniphon, who killed Valance in order to save Stoddard's life, even though he knew that he would lose Hallie as a result.

Back in the present, Stoddard completes his confession that his entire political life was based on the lie that he shot Liberty Valance. The newspaper editor, however, decides to 'spike' the story. 'When the legend becomes fact', he comments, 'print the legend'. Stoddard and Hallie, clearly bereft at Doniphon's death, leave Shinbone – one surmises for ever.

This rather bald summary does not do justice to the richness of *The Man Who Shot Liberty Valance*. But it is sufficient to illustrate the three aspects of jurisdiction, as reflected in the film, which are discussed in this chapter. First, there is the willingness – or unwillingness – of the state to assert jurisdiction over the person, as reflected by the inability of the inhabitants of Shinbone, most notably the cowardly Marshal Appleyard, to bring Liberty Valance and his men to justice. Second, there is the back story of the territory's campaign for statehood – in effect, its desire to embrace the jurisdiction of the US Federal Government. And third, there is the way in which the film is a mirror of the period when it was made, the early 1960s, when the expansion of federal jurisdiction brought about a social revolution in the United States that is still, 40 years on, one of the essential fault lines in American life.

Criminal jurisdiction over the person

The fulcrum upon which the plot of *The Man Who Shot Liberty Valance* turns is the inability of the inhabitants of Shinbone to bring Valance and his violent gang to justice. The clear reason is fear. The ostensible reason, however, is that the authorities in Shinbone, such as they are, do not have jurisdiction over Valance for acts committed outside the town. Valance's very presence on his trips into Shinbone

terrorises the natives, but his acts fall short of arrestable offences. The territorial government, which apparently does have jurisdiction over Valance's crimes, is invisible in the film. Accordingly, Valance operates with impunity and, until the arrival of Stoddard, is unchallenged. In *Liberty Valance*, Marshal Link Appleyard is played by the reedy-voiced Andy Devine, a member of John Ford's extended repertory company of leading and character actors. Devine is always a comic figure in the director's films, 'Ford's broad-beamed Falstaff' (Sarris, 1975: 177), who was sometimes typed as a person who bridged the Anglo and Latino cultures of the West: he once claimed in an interview that every time he worked with him, Ford 'saw to it that I had a Mexican wife and nine kids' (Anderson, 1999: 217). In Liberty Valance, Appleyard is a comic coward, an inept, Dogberryish constable who would rather eat free food in the Ericsons' restaurant than pursue Liberty Valance and his men. Terrified of enforcing the law, he declares that, as far as Liberty Valance's crimes committed outside town are concerned, 'I ain't got no jurisdiction. What Liberty does out on the road ain't no business of mine.' (It later turns out – at least according to Stoddard's law books – that Appleyard *does* have jurisdiction to arrest Valance. This, naturally, makes no difference at all.)

The idea of jurisdictional limitations on police action recurs in the American western, Ford's included. The cavalry led by John Wayne in *Rio Grande* (1950), respects the river border between Texas and Mexico, even where the principles of hot pursuit might allow it to cross. In historical re-enactments reaching as late as the 1930s, fugitives are depicted racing for the state line to escape the police whose jurisdiction ends at the border – for instance, the glamorous criminals in Arthur Penn's quasi-western *Bonnie and Clyde* (1967). And, in a moment of homage to Liberty Valance, the sheriff in Lawrence Kasdan's *Silverado* (1985) abandons his pursuit of escaping presumed outlaws when a bullet comes too close. 'Today,' he announces while turning back, 'my jurisdiction ends here'.

But in Liberty Valance, the meditation on this familiar theme is more complex than simple boundary-drawing. Stoddard has been robbed of all of his money and severely beaten. In the power vacuum represented by Link Appleyard, the only choice offered to him by Tom Doniphon is to learn how to use a gun – a suggestion that repels Stoddard, persistent in his attachment to the rule of law. Of course, the law that Stoddard is attached to is the law of the East, the law of the books that have been brought to Shinbone and violated by Liberty Valance. Tom Doniphon follows a different law, in which each person sets his or her own jurisdiction, a concept of law set forth somewhat sentimentally in Walter Prescott Webb's classic study *The Great Plains*:

> The West was lawless for two reasons: first, because of the social conditions that obtained there during the period under consideration; secondly, because the law that was applied there was not made for those conditions. It did not fit the needs of the country, and could not be obeyed… We know, for example, that in the early period the restraints of law could not make themselves felt in the rarefied population. Each man had to make his own law because there was no other to make it… In the absence of law and in the

> social conditions that obtained, men worked out an extra-legal code or custom by which they guided their actions.
>
> (Webb, 1981: 496–97)

This 'code' called for the rough and ready morality that Tom Doniphon represents, again in Webb's words:

> The code demanded what [Theodore] Roosevelt called a square deal; it demanded fair play. According to it one must not shoot his adversary in the back, and he must not shoot an unarmed man. In actual practice he must give notice of his intention, albeit the action followed by the notice as a lightning stroke. Failure to abide by the code did not necessarily bring formal punishment for the act already committed; it meant that the violator might be cut off without benefit of notice in the next act. Thus was justice carried out in a crude but effective manner, and warning given that in general the code must prevail.
>
> (Webb, 1981: 497)

The rule of the gun was a reality in the West. For instance, it has been estimated that some 50 per cent of homicides in seven California counties between 1850 and 1900 were caused by handguns, which were also implicated in 68 per cent of the murder indictments in one Colorado mining community between 1880 and 1920 (McKanna, 1995). Gun rule gave rise to forms of gun-ruled institutions, such as the vigilante movements and committees that proliferated in the West. However, it has been argued that, like Tom Doniphon, these vigilantes were not themselves lawless; they were simply trying to provide an apt form of law where none otherwise existed. As Lawrence Friedman has said:

> Social control, like nature, abhors a vacuum. The 'respectable' citizens – the majority, perhaps? – in Western towns were not really lawless. Quite to the contrary, people were accustomed to the rule of law and order… They were Americans; they were unwilling to tolerate too sharp a break in social continuity; they reacted against formal law which was too slow, or too corrupt, for their purposes, or which had fallen into the hands of the less respectable.
>
> (Friedman, 1985: 369)

Moreover, it has been shown by John Phillip Reid (1980) that the pioneers who travelled West in the nineteenth century had substantial and sophisticated notions of law, taken from their sense of the legal systems that they had left behind, adapted to the new circumstances in which they found themselves, and applied as a form of customary law while they found themselves in places where no palpable apparatus of the law otherwise existed. Once settled, the West generated its own special forms of law, at least divergent from, if not contrary to, English precedents, to meet its own special conditions, whether topological, historical or both – governing, for instance, water rights (Bakken, 2000: 127–204), land tenure (Bakken, 2000: 311–55), mining practices (Bakken, 2000: 205–47) and marital

property (Friedman, 1985: 171). Why, then, did the criminal law, represented in *Liberty Valance* by the aspirations of Stoddard, not also develop its own particularities, forged by the special conditions of the West? One possible reason may be that, despite the thoughtful voice given to Tom Doniphon in *Liberty Valance* and more lurid accounts of frontier lawlessness portrayed elsewhere (Shirley, 1957, 1978), violent crime may have been less prevalent and justice may have functioned better in the West than has previously been acknowledged.

But, whatever the reality, the 'code of the West' is portrayed in *Liberty Valance* as having existed as historical fact, and it is embodied in John Ford's perennial hero, John Wayne, who provides easy opposition to James Stewart's stolid and somewhat priggish Ransom Stoddard. The transformation of the West from Doniphon's world to Stoddard's is not questioned: as famously described by Frederick Jackson Turner, by 1890 the West had its own existential sense of a frontier coming to an end (Turner, 1958). When Stoddard and Hallie return to Shinbone, transformed by the railway into a prosperous but dull small town, they are mourning not only the passing of a friend – and, in Hallie's case, a lover – but of a time when, it is suggested, moral people set their own moral compass. At the beginning of *Liberty Valance*, only Stoddard calls on Appleyard to assert the jurisdiction of the state in running down criminals. By the end of the flashback, even Doniphon hectors Appleyard to lock up the remnants of the Valance gang, now deprived of their leader. Paradoxically, and of course ironically, it is Doniphon who is the midwife of this institutional change, by making the last assertion of the code of the West, and murdering Liberty Valance. What is striking is the deep sense of melancholy surrounding this change. Just as the banishment of the incorrigible in *Stagecoach* seems to portend a loss of fibre in the civilisation that can cast out such people, so does the sacrifice of the floating jurisdiction of the old West in *Liberty Valance* suggest a moral loss. Formal institutions may be the inevitable outcrop of growing complexity in societies, but they suggest a system of values that has been externalised and removed from the sphere of action occupied by those who do not look to others to assert jurisdiction over matters and persons that need to be dealt with. It is Doniphon, the moral man who sets his own jurisdiction, who is the heroic centre of the film, while Stoddard – equally moral but defined by the jurisdictional institutions that he embraces rather than by his own character – is the one who takes the spoils and gets the girl.

Federal jurisdiction in historical memory

In *The Man Who Shot Liberty Valance*, we never know where Shinbone is. We are not told in the short story on which the film was based (Johnson, 1953), nor in the novelisation of the movie (Bellah, 1962). The only geographical reference in the film is to the 'Picketwire', or Purgatoire River (Sarris, 1975: 179), which flows in south-eastern Colorado, near the borders of Kansas, Oklahoma, Texas and New Mexico. It could, in other words, be anywhere in the flat plainslands where the five states meet (or elsewhere), and the back story involving the transformation of the territory in which Shinbone is located into a state is, despite

Ford's never-substantiated claim that *Liberty Valance* was 'based on historical fact' (Tavernier, 2001: 108), a work of historical imagination rather than historical reconstruction. The process of transforming the contiguous territories of North America under US rule to full statehood was a major preoccupation of American politics until well into the twentieth century. While some major states, such as California and Texas, became part of the United States following wars, major states of the West, such as Arizona (1912), Colorado (1876), Kansas (1861), Oklahoma (1907), New Mexico (1912) and Wyoming (1890), were territories that became late entrants to the union (*World Almanac*, 2004: 515).

The newly created United States of America took jurisdiction of American territory that had not achieved statehood as early as 1787, when Congress passed the Northwest Ordinance, the template for territorial government that covered the territories – including new territories added by purchase or conquest – for many more years (Eblen, 1968: 1–7). The territories thus created sent representatives to Congress in Washington, DC from 1797 to 1959, when Hawaii became the fiftieth and (so far) last state (Bloom, 1973: 65–75). The territories had appointed governors and often elected assemblies. Their powers to legislate were often subject to quite specific federal interference – for instance, prohibitions on the creation of unapproved banks (Eblen, 1968: 185).

In *The Man Who Shot Liberty Valance*, the benefits of statehood are seen to be twofold. First, the 'ordinary' population of Shinbone – and, by implication, the entire territory – is offered the chance to shake off the influence of powerful vested interests: the cattle ranchers who have hired Liberty Valance. Second, as manifested in the civics lesson that Stoddard gives to his school class, the federal government is presented as the locus and guarantee of fundamental rights. When Phil Ericson dresses in his Sunday best and carries his beribboned and sealed certificate of American citizenship to the saloon to cast his vote for the first time, his is the comic portrayal of a serious point: that the complete embrace of the jurisdiction of the federal government is the highest benefit a citizen can obtain in the American democracy. The reality, of course, is that the impulse to territorial statehood was not as simple as this. Unsurprisingly, the territorial conventions were dominated by special interests, and the concerns of territorial constitution-makers often extended to fundamental rights that were deemed to be less well delineated either in other states or under the federal system (Bakken, 1987). Moreover, some territorial constitutional conventions have been characterised as demonstrating 'a definite and concerted effort to restrict liberty rather than to expand it', particularly in areas such as female suffrage, race and religious freedom (Bakken, 1990). Furthermore, in *Liberty Valance*, the actual expansion of federal power in the years following the Civil War – for instance, improvements in the habeas corpus laws and the recalibration of the jurisdiction of the federal courts (Wiecek, 1988: 237) – is not portrayed as among the benefits of the acquisition of statehood in the film; instead, it appeals to demotic and fundamentally romantic notions of the benefits of American citizenship. In this sense, the film's historical consciousness of jurisdiction – fundamentally, a false or at least highly partial consciousness – can be viewed as an iteration of the 'print

the legend' dichotomy, which has been astutely perceived by Christian Delage 'not as a binary proposition between the truth and a lie, but instead as the space between an event and its narrative' (Keller, 2001: 32). The importance of the 'historical' jurisdictional account of statehood accordingly lies not in its depiction of historical fact – which, as we have seen (despite Ford's claims to the contrary) to be simplistic, if not fanciful – but in the telling of the tale, the force with which these essentially precatory elements of the benefits putatively conferred by federal jurisdiction are shown.

So, if the main thrust of the 'historical' *Liberty Valance* presents the benefits of federal jurisdiction merely simplistically, why is this theme of the film nonetheless interesting? The answer lies in the connection of the first theme of this chapter – the replacement of self-validating jurisdiction by the apparatus of the state – with the last, a discussion of how *Liberty Valance*'s historical reflections additionally had contemporary relevance for the audiences of 1960s America living on John F Kennedy's 'New Frontier' (McBride, 2001: 643). This connection is characterised by the sombre, regretful tone of the film's frame, the visit of the Stoddards to Shinbone for Tom Doniphon's funeral. Of this flashback device – itself a manipulation of historical consciousness – Robin Wood has written:

> The Old West, seen in retrospect from beside Tom Doniphon's coffin, is invested with an exaggerated, stylised vitality; in the film's 'present' (still, of course, our past, but connected to our present, as it were, by the railroad that carries Senator Stoddard and Hallie away at the end) all real vitality has drained away, leaving only the shallow energy of the news-hounds, and a weary, elegiac feeling of loss.
>
> (Wood, 2001: 25–26)

The contemporary sense of federal jurisdiction

The observation that Ford drifted politically to the right in his old age is a commonplace of Ford criticism and biography, but as a view of the director it also lacks clarity. It is true that Ford was an uncompromising supporter of American military power, including the Vietnam War, who ended up supporting the neo-conservative 1964 Republican presidential candidate Barry Goldwater and later President Richard Nixon (McBride, 2001: 6). It is also true that, during his lifetime, he described himself as 'a definite socialist democrat – always left' (2001: 271) and, as late as 1966 (to a communist interviewer) as 'a liberal' (Tavernier, 2001: 106). And, as we have seen, his later films included attempts to revise and reconfigure some of the classic figures both of Western film-making and of the American cinema in general. Such reconfigurations are among the most powerful elements of *The Man Who Shot Liberty Valance*.

The Shinbone of the film's pre-statehood flashback sequences is an emblem of an old America that would have been easily recognised in America of the 1960s. The town is segregated – Pompey may not drink in the saloon where Tom

Doniphon goes, and the Mexican community is confined to separate housing and meeting places. The women, of course, do not have a vote in the elections to the territorial convention, and a rather elderly-looking youth is ejected from the hustings for being under age. In the America of 1962, women had had the vote since the ratification of the Nineteenth Amendment to the Constitution in 1920, but were only beginning to give voice to the broader grievances of the women's movement. Eighteen-year-olds would not receive the vote until the passage of the Twenty-Sixth Amendment in 1971. And, of course, the burning domestic political issue then, as it is to a great extent now, was race.

Although the impulse for racial justice in America came from below – from the marchers, bus passengers, lunch counter squatters and others who took a stand against racial discrimination – the key to the dismantling of the formal system of the segregation system was its federalisation. In the nineteenth century, the federal Supreme Court had systematically used jurisdictional and standing arguments to deprive non-white groups of the protections of the law, thereby denying Indians recourse in property cases[1] and blacks in citizenship and equal protection cases,[2] and retreating from applying federal jurisdiction to certain categories of state action that caused the Constitution, in the dissenting words of Justice Harlan, to be 'sacrificed by a subtle and ingenious verbal criticism'.[3] In Ransom Stoddard's manifestly anachronistic classroom, however, the races are mixed as they are taught the virtues of an inclusive constitutional order – one that would have been unrecognisable to the historical participants represented there, had they existed.

But *Liberty Valance* was made at a time when federal power has been in full expansion for a quarter of a century, beginning with Roosevelt's New Deal in the 1930s, continuing through the Second World War in the 1940s, the growth of the military–industrial complex in the 1950s and the ambitions of the New Frontier and, ultimately, the Great Society projects of the 1960s. Federal power had contributed to the end of the Great Depression, helped win a world war (in which Ford was a decorated officer), turned the country into an economic and military superpower and appeared to be ready to tackle the great stain on the country's conscience, the legacy of slavery. The landmark *Brown v Board of Education* case of 1954,[4] outlawing racial segregation in state-run schools, finds its echo in the unsegregated Shinbone schoolroom imagined in 1962.

But, as always in this film, the apparent positive has its discontents. Critics have remarked on Stoddard's condescension to Pompey in the classroom, and there is some evidence that Ford, manipulative with his actors to the point of cruelty, deliberately played on James Stewart's personal discomfort in the

1 *Johnson and Graham's Lessee v M'Intosh* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US (5 Pet) 1, (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832).

2 *Scott v Sandford* [Dred Scott] 60 US 393 (1856); *Slaughter-House Cases* 83 US 36 (1872); *Civil Rights Cases* 109 US 3 (1883).

3 *Civil Rights Cases* 109 US at 27.

4 *Brown v Board of Education of Topeka* 347 US 483 (1954).

presence of black people to foster a sense of ambivalence in Stoddard's teaching Pompey about the Declaration of Independence (McBride, 2001: 631). In the 'new' Shinbone, when the Stoddards return for Doniphon's funeral, Pompey – the old black retainer – and Appleyard – the film's indirect connection to Latino America – are melancholy and ineffably alone, in a sense segregated from the new order of feeling. The railway line – another manifestation of federal power (Meinig, 1999: 4–28) – points directly to Washington; the newspaper, produced in the old days by a soused idealist, is now in the hands of slick newshounds; and the undertaker steals the boots off Doniphon's feet before placing the body in the cheap pine coffin of a pauper's funeral. If the 'old' Shinbone is today, so is the 'new' Shinbone. It is not exactly the new Eden.

Conclusion

How many movies even use the term 'jurisdiction'? In *Liberty Valance*, Appleyard has to get Stoddard to remind him of the word and the lawyer, understanding all things, enlightens him. It is a comic moment but, as discussed previously, resonant of the crisis of living within and without jurisdiction. We need the law, and at times yearn for it, but we are not necessarily improved by it. Stoddard, who has had a glittering career among the institutions that he strove to build, leaves Shinbone determined to retire. And Hallie, the one person in the film who seems to have had a choice, and who chose the 'new' Shinbone, leaves with him, haunted by and heartbroken at Doniphon's death. We may need the new jurisdictions of the modern world, Ford seems to be saying – indeed, we must demand and embrace them. But with them comes a longing that is beyond mere nostalgia, an existential regret for what has – as it had to – passed.

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