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Nicole Rogers
Southern Cross University

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Terrorist v Sovereign: Legal performances in a state of exception

Nicole Rogers

Stephen Sewell's (2003) play *Myth, Propaganda and Disaster in Nazi Germany and Contemporary America* (hereinafter *Myth*) depicts the fate of Talbot, an Australian academic working in New York, whose outspoken criticism of American complacency in the post–September 11 environment is ruthlessly punished by a representative of the state known only as the Man. The task of the Man is to reveal to Talbot that he, Talbot, is blinded by myth and propaganda, in his case the myth of liberalism and its associated rhetoric of human rights, and that it is in fact violence and power which define truth in contemporary America. The Man identifies himself only as Talbot's 'judge and jury', his 'confessor', with the stated role of 'facilitat[ing his] return to reality' (Sewell 2003: 20).

The Man quotes the first line of Kafka's *The Trial* when he initially visits Talbot (Sewell 2003: 21); this is apposite, given the parallels between Talbot's story and that of Joseph K in *The Trial*. *Myth* and *The Trial* are both about the inexorable pursuit, and eventual execution, of an individual by an extra-judicial body which operates outside the legal system. In both works of fiction the individual is never offered an explanation of his crime and tries to resist the process by resorting to ineffectual tools: the rhetoric of due process, ordinary legal procedures and rational argument. Even when confronted by the Man's escalating violence, Talbot continues to defend his faith in legal principles, truth and reason: 'you just can't move into someone's life and start monstering them' (Sewell 2003: 46). Talbot describes the Man's behaviour as 'a grave infringement of my rights' (Sewell 2003: 67), only to be told that 'you don't have any rights' (Sewell 2003: 67), that 'your world doesn't mean shit' (Sewell 2003: 43) and that there is no 'right to freedom of thought' (Sewell 2003: 84).

The violence which the play depicts is extra-legal violence intended to silence dissenters. Sewell is describing an orchestrated and brutal assault on the ideas which challenge the authority and supportive myths of an increasingly repressive state. The title of his play is drawn from Talbot's own work-in-progress and, as it would suggest, in that book Talbot draws a number of parallels between Nazi Germany and contemporary America. The accuracy of Talbot's observations is highlighted by the violence which is unleashed upon him as a consequence of his politically unacceptable views. Talbot's book is part of a work of fiction, but various scholars, including Naomi Wolf (2007), have similarly argued that there are similarities between the Third Reich and the Bush administration. Wolf has not, as far as we know, been subjected to the brutality experienced by Talbot but it has been reported that a United States academic, who referred to the victims in the World Trade Centre as 'little Eichmanns', lost his job (*The Sydney Morning Herald* 26 August 2007).

The world Sewell describes, in which legal rights have been superseded by acts of brutality orchestrated by the executive, and individuals have no recourse to the protection offered by fundamental human rights, resembles the exception or emergency situation first investigated by German theorist and Nazi supporter Carl Schmitt. Schmitt's work is 'experiencing a timely or untimely renaissance' (Sharpe 2006: 97) in a political environment characterised by loss of liberties, an unprecedented level of executive control and a perceived erosion of the rule of law. A number of theorists, including Georgio Agamben, believe that this political landscape is best characterised as a state of exception, which now prevails as 'the dominant paradigm of government in contemporary politics' (Agamben 2005: 2). According to such reasoning, the state of exception described in *Myth* is not, therefore, merely a work of fiction. In particular, Guantanamo Bay is portrayed as a contemporary state of exception, a legal black hole which is 'entirely removed from the law and from judicial oversight' (Agamben 2005: 4), although this view is not universally held. Fleur Johns has argued, for instance, that the regime at Guantanamo Bay displays an 'over-abundance of legal procedures, and regulatory

effects' (2005: 614) and is far from being representative of 'Schmittian exceptionalism' (2005: 631).

The purpose of this article is to draw upon, and interrogate, Agamben's thesis on the contemporary state of exception by exploring the function and role of a number of recent legal proceedings in Australia, the United Kingdom and the United States. I shall focus predominantly, although not exclusively, on legal contests between the state and the accused terrorist.

The sovereign, homo sacer and the state of exception

Carl Schmitt believed that the exception lay outside the legal order (1985: 7) and that the rule of law was not applicable within the framework of the exception. His ideas have attracted a considerable amount of attention in the contemporary Western political environment, in which recurrent references to exceptionalism can be found in popular and official discourses, and suggestions that the rule of law should be set aside have been made by representatives of both the Blair and Bush governments (Dyzenhaus 2006: 1). Various legal theorists, including Bruce Ackerman, Cass Sunstein and Oren Gross, have endorsed Schmitt's views and argued that judges have only a minimalist role to play in the current state of exception. Furthermore, Agamben has been accused of an uncritical engagement with Schmitt's theory of exception (Sharpe 2006: 101).

According to Agamben, the distinguishing feature of the state of exception is that, within this realm, law merges with life. The state of exception is exemplified by the concentration camps of Nazi Germany (Agamben 1998: 20); Guantanamo Bay is a contemporary example. The critical point made by Agamben is that, far from being the exception, the state of exception has 'reached its maximum worldwide deployment' (2005: 87). In the modern configuration of the state of exception, individual liberties are no longer protected by constitutional guarantees or constitutional norms, and the executive's powers are significantly enhanced such that its decrees have the force of

law (Agamben 2005: 5). The distinction between legislative, executive and judicial powers becomes blurred or disappears (Agamben 2005: 7). As the state of exception acquires an increasingly universal political relevance, 'bare life' has become a central part of the political order (Agamben 1998: 9), and the camp has become 'the fundamental biopolitical paradigm of the West' (Agamben 1998: 181).

Agamben draws upon or arguably completes Foucault's work on biopolitics (1998: 9), which encompasses the 'growing inclusion of man's natural life in the mechanisms and calculations of power' (1998: 119). In doing so, he contemplates the role and nature of his 'protaganist', homo sacer or bare life (1998: 8). Homo sacer, originally an 'obscure figure of ancient Roman law' (Agamben 1998: 8), is the scapegoat without legal status; excluded from the 'city of men'; abandoned by the law; 'exposed and threatened on the threshold' between life and law (1998: 28) like an unwanted foundling. This vulnerable figure can be killed with impunity, and the violence of his killing falls outside 'the sanctioned forms of both human and divine law' (1998: 82). Significantly, Agamben places homo sacer outside 'the mediations of the law' (Fitzpatrick 2001: 258) but, as Fitzpatrick points out, at least two of the Roman authors on which Agamben relies argued that homo sacer could be incorporated within the legal order and judged, possibly by way of trial (2001: 256–7).

Agamben asserts that 'we are all virtually *homines sacri*' (1998: 115), but it is easier to discern the characteristics of homo sacer in a more discrete group: the individuals accused of terrorist offences or suspected of involvement in terrorism-related activities. These individuals, stripped of basic rights, surveilled by the state, subjected to house arrest or even more extreme forms of violent detention by the state, can be readily identified as the contemporary incarnation of homo sacer. However, since such individuals are able to mount legal challenges against these forms of surveillance and control by the state, they do not share the central defining characteristic of homo sacer: that of being outside the law.

Agamben distinguishes his approach from that of Foucault in that he focuses on the connection between biopolitics and sovereignty, or the 'hidden point of intersection between the juridico-institutional and the biopolitical models of power' (Agamben 1998: 6). He acknowledges an unlikely symmetry and relationship between homo sacer, controlled and disciplined by the biopolitical mechanisms which characterise the contemporary political era, and the sovereign, who creates and administers such biopolitical strategies. Both homo sacer and the sovereign are, for different reasons, outside the law, and thus they represent 'the two poles of the sovereign exception' (Agamben 1998: 110). This point is made with some poignancy by Terry Hicks, the father of David Hicks who, for so long, in his extended incarceration in Guantanamo Bay, exemplified homo sacer; Terry has marvelled over the fact that his son's name is so frequently mentioned by President Bush (Souter 2006). Others have observed that the sovereign and the terrorist are linked in the 'war against terrorism' discourse. Anna Szorenyi and Juliet Rogers argue that 'the sovereign in contemporary legal discourse is located vis-à-vis the terrorist' and that terrorism, which is 'an injury to the body sovereign', provides meaning for the sovereign figure (2006: 11).

There is no doubt that legal contests between the accused terrorist and the sovereign are occurring with some frequency in the state of exception which arguably characterises contemporary Western societies. Their very occurrence could be perceived as an anomaly given the theoretical parameters of the state of exception as a lawless void. However, Agamben describes a relationship of mutual dependency in which the judicial order 'must seek in every way to assure itself a relation' with this 'space devoid of law' (2005:51). In any event, some of these 'legal' performances, for instance those staged by the Bush administration in processing the Guantanamo Bay detainees, are quasi-legal proceedings and not necessarily representative of the rule of law. Fleur Johns rejects this conclusion and contends that the regime at Guantanamo Bay is, in fact, 'a profoundly anti-exceptional legal artefact' (2005: 615) with no space for option, doubt and responsibility in the legal procedures which apply therein. This

description, however, suggests bureaucracy rather than law — the sort of murderous bureaucracy which engendered mass genocide during the Third Reich: the 'governmental violence that — while ignoring international law externally and producing a permanent state of exception internally — nevertheless still claims to be applying the law' (Agamben 2005: 87).

In fact, the legal performances which are taking place in the contemporary state of exception can be divided into three categories. In the first category we find the true legal black holes, in which the courts refuse to judge the actions of the executive. Yet such performances are limited in number. More common are the second category of legal performances, in which the courts conduct only a procedural review and ignore the substance of the rule of law (Dyzenhaus 2006: 35). From these performances emerge what David Dyzenhaus has labelled the legal grey holes — far more dangerous, in his view, than the black holes (2006: 50) because in deferring to the executive the judiciary 'place a thin veneer of legality on the political' (2006: 39). Into this category fall challenges by accused terrorists to varying circumstances of non-criminal detention, rigorous conditions of surveillance and extreme restrictions on their freedom of movement and association. In the final category, however, we find legal contests between accused terrorists and the sovereign in which, despite the deployment of biopolitical strategies and an overt display of intimidatory force on the part of the sovereign, the courts have demonstrated an adherence to the rule of law and a resistance to the Kafka-esque qualities of the state of exception. In this final category of legal performances the sovereign is indeed constrained by the rule of law.

Black holes

The existence of legal black holes is apparent in two legal performances in which political activists argued that the decision on the part of the United States and its allies to wage war on Iraq lacked legitimacy. The courts made it clear that such decisions could not be reviewed by the judiciary. One of these cases resulted in a statement of reasons as to

why a law student could not bring a common informer suit against the Prime Minister of Australia in relation to his role in the Iraq war; the other case was a House of Lords decision on whether the alleged illegitimacy of Britain's act of aggression in Iraq provided a defence for activists accused of various criminal acts carried out at military and air bases in England.

In 2004, Eric Bateman, a law student, attempted to bring a common informer suit against the Australian Prime Minister, John Howard, under the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth). In a statement of claim, which the High Court of Australia Registry ultimately rejected, Bateman argued that Howard's actions, including, most importantly, his decision to follow the United States into war in Iraq, amounted to an acknowledgment of allegiance to a foreign power. This, according to Bateman, disqualifed the Prime Minister from continuing to sit as a member of the Australian Parliament under section 44 of the Australian Constitution.

In his statement of reasons for refusing Eric's application to have a writ of summons issued, Gummow J stated that:

> The question which the Constitution would present is not whether the Prime Minister has conducted himself in a particular way but whether, as a matter of law, he is 'under' any acknowledgment of 'allegiance, obedience or adherence to a foreign power' within the meaning of s 44(i) (*In the matter of an application by Eric Bateman*: 2–3).

Of course, the Constitution does not 'present' a question so clearly. The High Court of Australia was expressing, rather, a clear reluctance to judge the legal consequences of the political decision-making of the executive arm of government, a reluctance which is mirrored in the next case study. The 2006 House of Lords decision in *R v Jones* also suggests that the courts are not prepared to support attempts by activists to challenge the decision of their government to engage in war.

In February and March 2003 the appellants carried out various criminal acts on English military air bases including damaging fuel tankers and bomb trailers, damaging a runway and aircraft, destroying a fence, trespassing and chaining themselves to tanks and vehicles.

Although such acts involved force and the perpetrators had political motives, they were not prosecuted for terrorist offences or labelled 'terrorists'. The appellants argued that their actions were lawful 'because they were aimed at preventing a greater evil, namely the war in Iraq and its probable consequences' (*R v Jones*: 43). The House of Lords dismissed this argument. Lord Hoffman expressed the strongest sentiments in response to the defendants' arguments.

Lord Hoffman acknowledged the 'theoretical difficulty in the Courts, as part of the State, holding that the State has acted unlawfully' (*R v Jones*: 65). Furthermore, 'the decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs' (*R v Jones*: 66).

Lord Hoffman commented that one of the defendants had portrayed herself as 'a lonely individual resisting the acts of a hostile and alien State to which she owes no loyalty' (*R v Jones*: 75). He found this puzzling given that the state in question had 'protected and sustained her' and 'the legal system which had to judge the reasonableness of her actions was that of the United Kingdom itself' (*R v Jones*: 75). Here the judge drew a distinction between the British state, which he perceived as benevolent, and oppressive regimes such as the Nazi regime in World War II. This distinction, according to Agamben, is illusory; he argues that in the age of biopolitics there is an 'inner solidarity between democracy and totalitarianism' (1998: 10) and, in fact, democracies and totalitarian regimes are indistinguishable and interchangeable (1998: 122). Given the judge's partial view of the state, it is unsurprising that he and the other judges condemned the use of force by citizens in an attempt 'to see the law enforced in the interests of the community at large' and stated that 'the law will not tolerate vigilantes' (*R v Jones*: 83).

Lord Hoffman concluded his judgment with strong criticism of the strategy of activists to use the courts as a forum for challenging the legitimacy of state acts, including acts of war; he called this 'litigation as the continuation of protest by other means' (*R v Jones*: 90). The

court's refusal to look behind the state's use of force and interrogate the legitimacy of the decision to go to war delineates a classic legal black hole: an area into which the rule of law does not extend.

The refusal on the part of the courts to judge certain forms of executive decision-making is not unique to the contemporary state of exception. Well before the onset of the war on terror Robert Cover alluded to the 'apologetic and statist orientation of current jurisdictional understandings' which 'prevents courts from ever reaching the threatening questions' (1992a: 159), and to the 'very common paradox of jurisdiction' (1992a: 179) contained in the law in the Talmud: namely, 'The king does not judge and we do not judge him'. It is worth noting, however, that where legal black holes exist activists have staged extra-legal proceedings in an attempt to hold the executive accountable for its decisions. The refusal on the part of the courts in the United States to respond to challenges to the Vietnam war (Cover 1992b: 198) motivated philosophers Bertrand Russell and Jean-Paul Sartre to create their own International War Crimes Tribunal, which would determine whether the United States government had committed acts of aggression and whether other governments had been complicit in these acts (Cover 1992b: 199). Russell and Sartre argued that it was necessary to set up the trial because neither governments nor the people were prepared to do so (Cover 1992b: 200).

In the contemporary context of the war on terror, the self-styled World Tribunal on Iraq considered the legitimacy of the Iraqi war in twenty hearings held in different cities, concluding that the perpetrators of the war were guilty of violations in international law. The tribunal claimed that its own legitimacy was 'located in the collective conscience of humanity'. A more overtly theatrical challenge to the sovereign can be found in the staging of the trial of British Prime Minister Tony Blair at London's Tricycle Theatre in April and May 2007 (Riding 2007). In preparing for *Called to Account — The Indictment of Anthony Charles Lynton Blair for the crime of aggression against Iraq — A Hearing*, journalist Richard Norton-Taylor and director Nicolas Kent created their own

trial of Blair in which prominent barristers cross-examined witnesses who had been directly involved in the build-up to the Iraq war.

Terrorist v sovereign: the grey holes

In the United Kingdom, the United States and Australia, accused terrorists have mounted a succession of legal challenges to their indefinite detention by the executive, or to extreme restrictions on their freedom of movement and association. The courts have been prepared to concede that they have jurisdiction to hear such challenges, even in situations in which there have been no clear precedents. However, in general the courts have adopted a procedural approach, ensuring that the executive can exercise such powers over accused terrorists provided that such powers are conferred in validly enacted legislation. Thus the rule of law is diluted, and the courts have deferred to 'the executive's judgment about what is required' (Dyzenhaus 2006: 19). Dyzenhaus believes that such judgments are far more destructive of the rule of law than is the judicial recognition and acknowledgement of legal black holes (2006: 5).

A good example of the potentially broad ambit of the courts' jurisdiction in relation to such challenges can be found in the Australian Federal Court's ruling in *Hicks v Ruddock*. In this ruling the court held that David Hicks's challenge to the refusal on the part of the Australian Government to request his release from Guantanamo Bay was justiceable, and dismissed the Commonwealth's argument that it was not appropriate for the court to rule on the lawfulness or otherwise of particular political decisions and actions on the part of the Australian and United States governments. Tamberlin J concluded that 'there are no bright lines which foreclose, at this pleading stage, the arguments sought to be advanced in the present case' (*Hicks v Ruddock*: [93]).

However, the judge emphasised that his decision by no means paved the way for a successful outcome to Hicks's challenge (*Hicks v Ruddock*: Explanatory Statement); the significance of the case was simply that Hicks's challenge could be heard. Hicks's subsequent release from Guantanamo Bay has left unanswered the question of whether the

court would have been prepared to curtail the discretionary powers of the Australian state in relation to accused terrorists and to declare certain actions and decisions on the part of the Australian and United States governments unlawful. The critical issues underpinning the challenge, 'the relationship between the Judiciary and the Executive', or between the rule of law and the executive, and 'the relationship between the protection of individual liberty and the national interest' (*Hicks v Ruddock:* Explanatory Statement), will not now be resolved by the court in the context of Hicks's detention.

The court has been prepared to apply the rule of law in some of the challenges brought by accused terrorists against the executive. Stephen Humphreys cites the cases of *A v Secretary of State for the Home Department* and *Rasul v Bush* as examples of decisions which 'hold out — however temporarily — against the encroachment of rule by exception' (Humphreys 2006: 686). In the first of these cases the House of Lords ended the indefinite detention of non-citizen terrorist suspects in Belmarsh prison on the basis that the government was acting in a discriminatory fashion. In the second, the United States Supreme Court held that non-citizen terrorist suspects detained at Guantanamo Bay were entitled to habeas corpus review within the United States judicial system. Humphreys argues that in both cases the courts were conferring rights on homo sacer, 'an outcome which suggests at least the relevance of a judicial role to Agamben's story' (2006: 687).

In most cases, however, in which challenges to executive power have been mounted by an accused terrorist, there has been no substantive victory for the rule of law but rather the rule *by* law approach deplored by Dyzenhaus, with its careful attention to procedure. *Hamdan v Rumsfeld* (hereinafter *Hamdan*), which involved a challenge by a Guantanamo Bay detainee to the exercise of sovereign power by the United States executive government, provides an example of this approach. The case could be read as an attempt on the part of the court to rein in the power of the sovereign and assert the pre-eminence of the rule of law. Certainly Stevens J in his majority judgment in *Hamdan* held that 'in undertaking to try Hamdan and subject him to

criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction' (*Hamdan*: 2798). However the decision of the United States Supreme Court did not effectively curtail the power of the executive; in ruling that military commissions contravened the international law of war as contained in Common Article 3 of the Geneva Conventions and were thus invalid, the majority judges nevertheless invited the President to seek an appropriate authorisation for such military commissions from Congress (*Hamdan*: 2799). The judges pointed out that the requirement for compliance with Common Article 3 could be waived by Congress, and that 'the rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments' (*Hamdan*: 2799). President Bush acted upon this suggestion in securing the passage of the *Military Commissions Act* through Congress in October 2006, and thereby established an almost identical replacement regime of military commissions.

In *Hamdan v Rumsfeld*, therefore, the glaring procedural problems with the first military commissions, including the excessive degree of executive interference in, and control of, the proceedings, and the failure to observe fundamental standards of fairness, were problematic only because Congress had imposed a statutory requirement in the Uniform Code of Military Justice that military commissions must conform to the law of war. The case did *not* contain a clear statement from the highest court in the United States that the executive must always respect fundamental legal safeguards; instead, by resorting to principles of statutory interpretation, the majority judges decided an 'extraordinary' case in accordance with 'ordinary rules' (*Hamdan*: 2799).

In considering the validity of control orders on accused terrorists or terrorist suspects, the courts have also adopted a procedural approach. Control orders, which fetter an individual's freedom of movement, communication and association in varying degrees of severity, are, as Humphreys has pointed out, clearly biopolitical strategies (2006: 687); as the name would suggest, the sovereign seeks to control homo sacer

through disciplinary techniques and continuous surveillance. Control orders reflect the central focus in modern democracies on 'bare life' as the 'political subject' (Agamben 1998: 123). In challenges mounted by accused terrorists to control orders, the courts have accepted that control orders are a valid component of the new legislative framework developed in response to the threat of terrorism.

In a key constitutional decision in 2007, *Thomas v Mowbray*, the High Court of Australia upheld the validity of Division 104 of the *Criminal Code*, pursuant to which a federal magistrate had issued an interim control order against Jack Thomas within a week after his conviction was overturned by the Victorian Court of Appeal. Although then Australian Attorney-General Philip Ruddock claimed that 'the issue is about protecting the Australian community and not punishing a person for an offence' (Robinson & Davis 2006), the imposition of the control order looked like the latest attempt on the part of the state to identify Thomas publicly as a terrorist and impose special restrictions which isolated him, at least to a limited degree, from the rest of the community. As Kirby J noted, 'this sequence of events inevitably gave rise to an appearance, in the plaintiff's case, of action by the Commonwealth designed to thwart the ordinary operation of the criminal law and to deprive the plaintiff of the benefit of the liberty he temporarily enjoyed pursuant to the Court of Appeal's orders' (*Thomas v Mowbray:* [182]). In fact the control order was hardly the most effective way to protect the community from terrorism; if Thomas were indeed a sleeper agent it would have been more strategic to engage in covert surveillance and track down Thomas's associates. One commentator observed that the control order made Thomas 'an investigative dead end' (Hartcher 2006).

The restrictions placed on Thomas's freedom of movement, association and communication were considerable, as were the authorised levels of state surveillance. He was expected to stay home between midnight and 5.00 am each day and to report to the police three times a week; he was also prevented from leaving Australia without police permission. The legislation was challenged on the

grounds, firstly, that there was no head of legislative power to support it, and secondly, as contrary to Chapter III of the Australian Constitution, which 'gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy' (*Thomas v Mowbray*: [61]).

A significant consideration for the majority judges was the existence of a sequence of analogous court orders which curtailed the liberty of individuals but did not amount to detention (*Thomas v Mowbray*: [16], [79], [116]–[119]). However, such reasoning was rejected by Kirby J in his dissenting judgment, in which he described the impugned legislative provisions as 'unique', 'exceptional' and 'an attempt to break new legislative ground' (*Thomas v Mowbray*: [331]). Kirby J was scathing in his condemnation of the 'legal and constitutional exceptionalism' which, in his view, characterised the legislative scheme (*Thomas v Mowbray*: [388]). In particular, he deplored the subservience of the courts to the will of the executive: he stated that 'in effect, and in substance, the federal courts are rendered rubber stamps for the assertions of officers of the Executive government' (*Thomas v Mowbray*: [369]). Here we find a powerful judicial critique of legal grey holes in which the courts provide a façade of legality for the actions of the executive while the rule of law is undermined.

Interestingly enough, one of the majority judges, Gleeson CJ, suggested that a problematic consequence of placing control orders outside the powers of the federal judiciary would be the consignment of this area to the executive, an outcome which would not be conducive to the protection of human rights (*Thomas v Mowbray*: [17]). However, the second dissenter, Hayne J, indicated that in his view legislation which conferred an equivalent power to issue control orders on the executive would not necessarily be valid (*Thomas v Mowbray*: [506]).

In a sequence of English judgments which were handed down at approximately the same time as *Thomas v Mowbray*, the House of Lords looked at the legality of non-derogating control orders issued against six respondents suspected of, but certainly not charged with or prosecuted for, terrorist activity. A number of issues relating to the application of

the European Convention on Human Rights were considered by the court, and a detailed examination of these lies beyond the scope of this article. What was revealing, in exposing the biopolitical thrust of modern democracies, was the willingness on the part of the law lords to consider exactly how many hours of involuntary confinement to one's house amounted to a deprivation of liberty. Eighteen hours of confinement, and associated restrictions on movement, communication and visitors, were considered excessive by a narrow majority in the case of JJ (*Secretary of State for the Home Department v JJ*). However, a 14-hour curfew in the case of AF (*Secretary of State for the Home Department v MB (FC); Secretary of State for the Home Department v AF (FC)*) was not, nor was the 12-hour curfew imposed on E (*Secretary of State for the Home Department v E*). Lord Brown of Eaton-under-Heywood in particular was quite prepared to state that 'the acceptable limit was 16 hours [of confinement], leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day' (*Secretary of State for the Home Department v JJ*: [105]). The peculiarly biopolitical strategy of attaching electronic tags to suspected terrorists was also accepted by the law lords.

The above discussion reveals that, in general, the courts are prepared to limit their scrutiny of dealings by the executive with accused terrorists to procedural reviews in which substantive issues are glossed over. The biopolitical tactics deployed by the state in supervising and controlling the movements and activities of accused terrorists have not been invalidated by the courts. The abundance of legal grey holes in this area lends support for Agamben's claim that the state of exception has now become the norm. However, somewhat surprisingly, in other forms of legal contests between the state and the accused terrorist, the rule of law has been applied. I turn now to the Australian terror trials.

Sovereign v terrorist: the terror trials

Trials can be viewed as law as propaganda (Boorstin 1971: 96). As state-orchestrated spectacle, the Australian terror trials are intended

to reinforce certain messages: specifically, that Australia is at high risk of terrorist attacks, that individuals and groups within Australia are currently engaged in preparing for these attacks and, furthermore, that terrorist attacks on Australian soil have been avoided thus far by the diligence and hard work of the Australian Federal Police and the Australian Security Intelligence Organisation (ASIO) in pre-empting and thwarting terrorist attacks by bringing would-be terrorists to trial. To ensure that such messages are effectively conveyed, the members of the Australian Federal Police have been directed to lay as many charges as possible under the new terrorism legislation (Allard 2007b).

These messages can be found in, for instance, Cummins J's judgment in the 2006 trial of Jack Thomas. Cummins J emphasised the importance of the 'principle of general deterrence' in the context of terrorism (*Director of Public Prosecutions (Cth) v Thomas* 2006b: [14]). The Attorney-General also emphasised that successful prosecutions of individuals in Thomas's situation would have a deterrent effect. According to Ruddock, the outcome of the trial, which resulted in two convictions, demonstrated 'the seriousness with which these issues are dealt with by the law and highlights the consequences of becoming involved in these activities' (Munro 2006).

The message of deterrence can further be found in statements by the government and court in relation to the 2006 trial of Faheen Khalid Lodhi. After the verdict had been handed down in this trial, a spokesperson from the Australian Federal Police commented that the conviction demonstrated the determination of the Australian government and its security apparatus 'to counter any attempts of terrorist activities on Australian soil' (King & O'Brien 2006). In sentencing Lodhi, Whealy J identified the 'obligation of the Court' as being 'to denounce terrorism and voice its stern disapproval of activities such as those contemplated by the offender here' (*R v Lodhi*: [92]).

The performances of the terror trials are designed to supplement and reinforce the strategies of the state in fighting its domestic 'war against terrorism'; they are intended to be massively publicised ceremonies in which the terrorist is prosecuted, convicted and then

isolated from the community in extremely punitive circumstances. Philip Boulten, Lodhi's barrister, believes that the exceptional circumstances of the terrorism trials, characterised by metal detectors, an over-abundance of lawyers and the invasion of the courtroom by the state's security apparatus, create a 'forceful and theatrical statement' about the state's view of the accused (Boulten 2007). He has stated that 'the jury are quick to perceive the nature of the struggle, when the state is waging war on terror in the courtroom' (Madden 2007). In the trials themselves, and in the preliminary proceedings, we find a representation of the accused terrorist as homo sacer.

Most terrorist suspects are denied bail. The accused terrorists experience the most extreme security conditions, virtual solitary confinement, continuous surveillance and extraordinary security when attending court. Lodhi appeared at his trial shackled at the ankles, arms and waist (Wallace 2006). At his committal hearing, Thomas was accompanied by four guards in body armour and extra court staff wearing sidearms (Epstein 2004). The thirteen men arrested in the November 2005 raids in Melbourne and the nine men arrested in the same raids in Sydney attended their committal hearing in a dock encased in armoured glass (Kennedy & Allard 2007, Hoare 2006). This is not without precedent; the 1961 Israeli trial of the Nazi war criminal Eichmann also featured the court appearances of the defendant within a bullet-proof glass box (Schechner 2002: 177). Terrorist suspects have been dressed in orange overalls, thereby evoking comparisons with Guantanamo Bay detainees.

This treatment is clearly dehumanising. It corresponds to the process of 'bestialization of the human' which Judith Butler has described in relation to the treatment of detainees at Guantanamo Bay. She writes that in such oppressive conditions of imprisonment 'there is a reduction of these human beings to animal status, where the animal is figured as out of control, in need of total constraint' (Butler 2004: 78). The representation of accused terrorists as less than human corresponds with one of the mythical archetypes of homo sacer: the werewolf, 'a monstrous hybrid of human and animal' (Agamben 1998:

105). Agamben argues that in the state of exception 'the city is dissolved and men enter into a zone in which they are no longer distinct from beasts' (1998: 107).

It is not simply the conditions in which the trials are conducted, and the visible degradation of the accused terrorists to beings less than human, which suggest a state of exception. The evidence provided by the prosecution in the terror trials also supports a conclusion that the courts are operating within a state of exception in which an apparently innocent sequence of events can inexplicably trigger prosecution and the imposition of harsh punitive penalties. Agamben repeatedly describes the state of exception as a place in which fact is indistinguishable from law (2005: 29). Peter Fitzpatrick has questioned whether the legal question can ever be strictly distinguished from the factual question (2001: 262). However, this merging of fact and law is certainly apparent in the Lodhi trial, in which the evidence regarding Lodhi's activities was not necessarily incriminating: the collection of two maps of the Australian electricity system, a request for information about materials which could be used to make explosives, the downloading of aerial photographs of Australian defence establishments, and the possession of a document describing how to make various poisons and explosives. Evidence about his purchase of a large amount of toilet paper, which could produce nitrocellulose for a bomb, formed the basis of a further count (later dropped) in the original indictment. Such conduct could not be described as transgressive and was clearly capable of innocent explanation. Yet it is in accordance with the arbitrary decision-making processes of the state that the author of such conduct is labelled a terrorist. This confusion between transgression and compliance with the law, 'such that what violates a rule and what conforms to it coincide without any remainder' (Agamben 1998: 57), is a central paradox of the state of exception.

Yet despite the apparently absolute control which the state exercises over these legal performances, despite the representation of the defendants as homo sacer and the state's labelling of seemingly innocuous conduct as transgressive, at least two of these trials have in

fact assumed the form of law as *failed* propaganda and the rule of law has prevailed. There has been only one successful prosecution, that of Lodhi, and the verdict is even now, at the time of writing, being appealed. The evidence amassed by the state against two other men accused of terrorism, Jack Thomas and Izhar Ul-Haque, has been dismissed as tainted by, respectively, the Victorian Court of Appeal and the New South Wales Supreme Court.

In the *Thomas* case, the Victorian Court of Criminal Appeal set aside the two convictions on the basis that the prosecution had relied on statements obtained from Thomas under conditions of inducement and pressure, and these statements were therefore inadmissible (*R v Thomas*: [92]–[94]). Thomas is currently facing a re-trial on the basis of separate admissions, which were broadcast in a *Four Corners* program on the day after his conviction. In the case of Ul-Haque, Adams J was scathingly critical of the interrogation methods utilised by ASIO officers and members of the Federal Police. According to Adams J, the ASIO officers were guilty of criminal offences of false imprisonment and kidnapping (*R v Ul-Haque*: [62]) and the conduct of both ASIO and Australian Federal Police officers was oppressive (*R v Ul-Haque:* [98]). In Adams J's view, the state is clearly subject to the rule of law. The violations and 'gross interference with the accused's legal rights as a citizen' — rights which, according to the judge, Ul-Haque possessed despite being an accused terrorist and a Muslim (*R v Ul-Haque*: [95]) — not only destroyed the evidentiary case against Ul-Haque but led to the announcement of three inquiries into the practices of ASIO and the Australian Federal Police (Allard 2007b) and the real possibility of the instigation of future civil proceedings for compensation on the part of Ul-Haque (Allard 2007a).

Sewell deliberately cross-references Kafka's *The Trial* in his portrayal of a state of exception in his play and, in fact, Agamben argues that Kafka depicted a state of exception in his novels in which an apparently innocent sequence of events, 'the most innocent gesture or the smallest forgetfulness' (Agamben 1998: 52), could inexplicably trigger prosecution and the imposition of a death sentence. It is

interesting, therefore, to find explicit references to such Kafka-esque conditions, and a repudiation of Kafka's fictitious world, both in one of Cummins J's rulings in Thomas's trial ((*Director of Public Prosecutions (Cth) v Thomas* 2006a: [13]) and in Adams J's ruling in Ul-Haque's case (*R v Ul-Haque*: [31]).

Such judicial repudiation of a Kafka-esque state of exception has not met with unanimous approval. The heated debate which ensued after the quashing of Thomas's convictions and the issue of the interim control order suggests that there is a division in the community between those who believe that the rule of law should be upheld in the 'war against terrorism' and those who believe that the law should be 'servant, not master' in such critical times (Devine 2006). As the President of the Human Rights and Equal Opportunity Commission commented in a lecture in September 2006, 'the culture of trial by media is a recipe for outrage when the courts reach a different verdict' (von Doussa 2006). The reaction by much of the media and many commentators to the quashing of Thomas's convictions and the issue of the control order gestured towards a moral panic or collective persecution. Some opted for an emotive response. *The Australian*, for instance, featured the appalled reactions of relatives of the Bali victims under the heading 'Fury after Jihad Jack walks free' (Robinson 2006). Jack Thomas, the scapegoat, was represented as doubly culpable, responsible not simply for his own misdeeds in 'travelling to Afghanistan to serve the cause of terror' but also, somehow, responsible for the flaws in the legal system which permitted him to '[avoid] punishment for this evil act' (*The Australian* 21 August 2006). Rhetoric appropriate to wartime was used. The decision was 'a victory for our enemies' and 'a defeat for common sense and Australia's national security' (*The Australian* 21 August 2006).

Despite such emotive responses, one commentator, Gerard Henderson (2006), accused the 'civil liberties lobby' of resorting to 'hyperbole', exaggeration and dramatic but unrealistic comparisons; in his view, Australians capable of drawing rational conclusions from the facts before them supported the imposition of the control order.

Here, rational discourse is privileged over emotive discourse, which according to Henderson is part of the weaponry of the misguided 'civil rights lobby'. Similarly, another commentator described the critics of anti-terrorism measures as having 'a tenuous understanding of reality' (Merritt 2006).

Deep misgivings were expressed about the role of what was described as 'the blackest of black-letter law' (*The Australian* 21 August 2006), but in reality this was the application of a fundamental legal prohibition against the use of evidence obtained through torture. The 'civil libertarian types', according to Henderson (2006), 'focus on legal process'; they believe that 'the rule of law trumps all' in contrast to their critics, who 'believe the law is servant, not master' (Devine 2006). Here, the implication is that the law should be a 'servant' to the Australian community rather than produce unpopular results like a capricious tyrant. Such statements are extraordinary because in normal circumstances positivism in the law, or adherence to black-letter law and its legal technicalities, meets with the approval of conservative thinkers who direct their criticism towards legal activism.

However, these are not ordinary times. Chris Merritt wrote that 'Jihad Jack is on the wrong side in a war. And in war, different standards apply' (Merritt 2006). More surprisingly a barrister, Peter Faris, also suggested that the rule of law should not apply in wartime and that 'we are at war, this is a war of terror'. This revealing faux pas was then quickly corrected: 'a war against terror, I should say.' In his view, in such critical times, it was inappropriate and undesirable for seven Australian High Court judges to 'effectively run the war against terror and tell us what we can do and what we can't do' (*Lateline* 29 August 2006). One of these High Court judges, Gleeson CJ, subsequently pointed out at the annual judicial conference in Canberra that courts sometimes had the unpopular task of upholding the law 'in the face of public impatience and fear'; he also stated that the rule against forced confessions may be viewed as an 'inconvenience', but the alternative 'is a price we are not prepared to pay in order to secure convictions' (Wilkinson 2006).

The contribution of such an eminent public figure to the debate temporarily stymied some (but not all) critics of the 'civil rights lobby'. However, extreme intolerance of dissenting views is one of the more alarming characteristics of the war on terror; those who fail to punish the 'terrorist' or to support the government in its efforts to see the 'terrorist' punished, are represented as traitors whose misguided views and actions handicap the government in its attempts to fight terror and thereby endanger the Australian community.

The indignation and outrage which greeted the decision of the Victorian Court of Appeal to quash the convictions of Jack Thomas was illuminating: when the legal performances of the terror trials fail to condemn and isolate the accused terrorist, the rule of law comes under attack from commentators and community members.

Conclusion

In a state of exception, legal performances work within the power apparatus of the state. In the majority of legal performances considered above, we find support for Agamben's contention that the state of exception prevails in contemporary Western societies and the rule of law carries little meaning. Biopolitical strategies utilised by the state to control and monitor the activities of the contemporary form of homo sacer, the accused terrorist, are accepted by the courts. The executive, with appropriate legislative endorsement, can exercise an extraordinary degree of power over the body of the accused terrorist. Legal performances confer legitimacy upon this regime.

The terror trials are designed with a predetermined outcome in which the guilt and need for containment of the accused terrorists are conclusively established. Antonia Quadara's description of a hypothetical Australian trial of David Hicks as 'an official performative sacrifice at the hands of the law' (Quadara 2006: 147) has a broader application. Yet it is within the context of the Australian terror trials that we find, surprisingly, the application of the rule of law. Despite an attack on the rule of law by prominent members of the community, it seems that the contemporary state of exception is not absolute.

The lesson from the *Thomas* and *Ul-Haque* cases is that the courts, in reaching a final decision on the guilt or innocence of accused terrorists, are prepared to apply the rule of law.

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