



THE JEAN MONNET PROGRAM

Professor J.H.H. Weiler
European Union Jean Monnet Chair

Jean Monnet Working Paper 03/04

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Trade, Human Rights and the Economy of Sacrifice

NYU School of Law • New York, NY 10012

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ISSN 1087-2221
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New York University School of Law
New York, NY 10012
USA

JEAN MONNET WORKING PAPER

JUNE 2004

TRADE, HUMAN RIGHTS AND THE ECONOMY OF SACRIFICE

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ABSTRACT

My starting point for this paper is an uneasiness with the current internationalist literature on the 'linkage' of trade and human rights, and with the effects of my attempts to teach, write and speak about this literature. In the first part of the paper, I outline my reasons for this uneasiness, and suggest that there is a need to think again about the intimate relationship between the two fields of law. The second part of the paper traces the forms of law and political organisation that are made possible by the WTO harmonization agreements, focusing particularly on the General Agreement on Trade in Services (GATS) and the Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement). Those who support these agreements do so on the basis that they enshrine rationality, science, objectivity and transparency as the norms governing public decision-making. However, these agreements can better be understood as incorporating passion, secrecy and singularity as the repressed foundation of responsible decision-making. I suggest that this form of law, with its secret relationship to mystery, can be understood through the Christian doctrine of sacrifice, and that this Christian story of fathers and sons is itself premised upon an unacknowledged maternal sacrifice. The third part of the paper asks whether human rights can offer a secular response to the demands of the market. The human rights tradition, at least as translated into the declarations and covenants of modern international law, would seem to challenge the logic of sacrifice to a mysterious God, through its commitment to creating the conditions enabling individuals to participate in the neutral and impartial functions of the liberal democratic state. Yet I suggest that here, too, the sacrifice of the feminine comes before the law. This attention to the place of the feminine reveals that human rights law and trade law function as doubles. The final part of the paper returns to the suspended question of feminine sacrifice, in order to begin to think about a form of international law that might be able to remain open to the possibility of encountering difference.

Anne Orford

I believe that globalisation, in tandem with a new democratic internationalism, provides the world with its best hope for growth and security ... We owe a duty of care to false prophets, because they alert us to potential dangers. But while end-of-the-world doomsayers can carve out a higher profile than last century, thanks to the wonders of the Internet and the global media, we are nonetheless on the threshold of delivering longer and more sustained peace, longer and more sustained economic growth, and a fairer and better society ... [I]f we cannot know the future, we can see the shape of some of the things to come.¹

Belief, prophesy, wonders and the world to come – these recognizably theological concepts shape the vision of former WTO Director-General Mike Moore. His descriptions of the ends of globalisation embody the messianic spirit of twentieth-century international law.² Yet as the above quote also suggests, the engagement of economic globalisation with its twin, democratic internationalism, raises questions about the nature of this coming community and how we are to understand what must be done to prepare for its arrival. The messages of false prophets and doomsayers must, Moore suggests, be recognised as such, so that we are not led to doubt those who can truly see the shape of things to come. This paper is an exploration of this troubled encounter between two forms of multilateral messianism, as played out in the debate between trade lawyers and human rights lawyers about the proper ends of globalization. I understand this encounter as religious in character, one that it is best addressed by exploring its relationship to Christian theology.³

The paper begins by attempting to convey a flavour of the current debate about the human rights effects of the World Trade Organization (WTO) as an agent of economic liberalization. Democracy as an end is regularly invoked in these debates. While many critics of the organization argue that it is undemocratic in its current form and that member governments have ignored democratic processes in negotiating trade agreements under its auspices, the most forceful debates on this issue relate to the effects of free trade agreements on the future of politics, on that which is ‘to come’. The debate often leads to a dead end – trade lawyers dismiss human rights critiques on the basis that economic freedom is the precursor to, or at least the partner of, political freedom, and human rights lawyers argue that trade lawyers have engaged in a bad faith cooption of human rights norms for instrumentalist ends. Proponents and

¹ Mike Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance*, 2003, 249-50.

² For a discussion of messianism as the central spirit guiding cosmopolitan international lawyers of the twentieth-century who assumed ‘the fallibility of present society’, ‘the fallibility of the human beings that inhabit that society and the law that they create out of their narrow vision’, see Martti Koskenniemi, ‘Legal Cosmopolitanism: Tom Franck’s Messianic World’ (2003) 35 *New York University Journal of International Law and Politics* 471, 486.

³ In thinking about economics as a form of theology, I am drawing on Jennifer Beard, *The Political Economy of Desire: Law, Development and the Nation-State* (GlassHouse Press, forthcoming 2004); Judith E Grbich, ‘Aesthetics in Christian Juridico-Theological Tracts: The Wanderings of Faith and Nomos’ (2000) 12 *International Journal for the Semiotics of Law* 351; Meaghan Morris, *Ecstasy and Economics*, 1992.

opponents of the WTO both use an appeal to ‘democracy to come’ as the foundation of the arguments about the need to reform existing domestic laws and institutions, yet disagree about the nature of this future community. My aim here is to give a sense of the relations and subtle distinctions between the forms of messianism that shape these visions of the future. On the basis of this description, I will suggest that we need to approach the trade and human rights debate quite differently. In order to develop a sense of the relations between trade law and human rights law, it is necessary to focus on the *forms* of law embodied in the two fields. Each can be understood in relation to a shared history, and in particular, a history of European Christianity. This relation between the two forms of law is at the heart of any arguments to be made about the possibilities for achieving justice through international law.

Part 2 of the paper traces the forms of law and political organisation that are made possible by the agreements negotiated as part of the Uruguay Round of GATT trade negotiations. The Uruguay Round outcomes significantly expanded the range of activities brought within the scope of the multilateral trade regime to include trade-related aspects of intellectual property,⁴ trade in services⁵ and trade-related investment measures,⁶ and greatly increased the enforcement powers of the regime through the establishment of the WTO.⁷ I will focus here on two of the WTO covered agreements – the Agreement on Sanitary and Phytosanitary Measures and the General Agreement on Trade in Services. These agreements aim at ‘harmonization’ of existing laws in member states. The debate about the human rights effects of these agreements is premised on the ways in which they constrain political decision-making. Those who defend these agreements do so on the basis that they enshrine rationality, science, objectivity and transparency as the norms governing such decision-making. The agreements, it is argued, merely prevent domestic law-makers from succumbing to the dark forces of national protectionism, by obliging states to exclude passion, secrecy, irrationality and singularity (or deference to special interests) from the domestic legislative process. However, I will suggest that these agreements can better be understood as incorporating passion, secrecy and singularity as the repressed foundation of responsible decision-making. Drawing on the work of Jacques Derrida, I suggest that this form of law, with its secret relationship to mystery, can be understood through the Christian doctrine of sacrifice, as inaugurated in the story of the call to Abraham to sacrifice his only son Isaac. The trade laws of the WTO, with their insistence on giving up political passions in the name of harmonized regulation or the creation of a common market, are characterized by such a Christian logic of sacrifice as the price of inclusion in the community of believers. This economy of sacrifice is accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees all. Yet in a critical departure from Derrida, I suggest that this Christian story of fathers and sons is itself premised upon an unacknowledged maternal sacrifice.

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15, 1994, in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 1999, 321 [hereinafter TRIPS].

⁵ General Agreement on Trade in Services, Apr 15, 1994, in World Trade Organization, above n4, 284 [hereinafter GATS].

⁶ Agreement on Trade-Related Investment Measures, Apr 15, 1994, in World Trade Organization, above n4, 143.

⁷ Agreement Establishing the World Trade Organisation, Apr 15, 1994, in World Trade Organization, above n4, 3.

Part 3 asks whether human rights law can offer a secular response to the demands of the market. The human rights tradition, at least as translated into the declarations and covenants of modern law, would seem to challenge the logic of sacrifice to a mysterious God, through its commitment to creating the conditions enabling individuals to participate in the neutral and impartial functions of the liberal democratic state. Indeed, in the recent *Refah Partisi* case, the European Court of Human Rights held that a party proposing to organise a State and society according to religious or divine rules poses a threat to liberal democracy.⁸ Giorgio Agamben also argues for the secular nature of that combination of formal law with biopolitics that characterizes the human rights regime.⁹ In this version of the law of the father, political fraternities are not organised around sacrifice but around the potential for ‘abandonment’ of what which is sacred – of the son by the father, of the subject by the sovereign.¹⁰ Yet critical attention to the place of the women who inhabit the margins of Agamben’s text suggests that here, too, the sacrifice of the feminine comes before the law. This attention to the place of the feminine reveals that human rights law and trade law function as doubles. The price of inclusion as the subject of human rights will continue to be the sacrifice of the objects of human love according to the logic of trade law, unless and until the political theology of the two versions of international law is addressed.

Part 4 concludes the paper by returning to the suspended question of feminine sacrifice. I suggest that the question of the feminine allows us to see that something escapes sacrificial substitution. It is here that there may be possibilities for an outside to the economy described in the texts of law. This reading draws on the work of Luce Irigaray and her suggestion that the ‘new pattern of relations between God and men’ announced in the testamentary narratives of Christianity need not be interpreted solely as a relation between Father and son.¹¹ It is only if we move beyond such a reading that we can prepare for that which is to come without re-establishing the sacrificial economy.

1. Debating trade and human rights

There is a great deal of institutional energy in the field of international law currently channelled into a discussion about the proper relationship between trade law and human rights law. My starting point for this paper is an uneasiness with this existing literature on the ‘linkage’ of trade and human rights. I want to begin by attempting to convey the flavour of this literature. For critics of the WTO and of economic globalization more broadly, WTO membership poses a source of constraint on the choices open to peoples and governments. The legal harmonization required of WTO

⁸ *Case of Refah Partisi (The Welfare Party) and Others v Turkey*, Applications nos 41340/98, 41342/98, 41343/98 and 41344/98, ECHR, Judgment, 13 February 2003.

⁹ For Agamben’s argument that the Nazi concentration camp, as the bio-political paradigm of the European nation-state, must *not* be interpreted within a biblical doctrine of sacrifice or granted ‘the prestige of the mystical’, see Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, 1999, (trans Daniel Heller-Roazen), 26-33. For a critical response to Agamben’s ethical project of rewriting ‘the sacred nature of destruction’, see David Fraser, ‘Dead Man Walking: Law and Ethics after Giorgio Agamben’s Auschwitz’ (2000) 12 *International Journal for the Semiotics of Law* 397.

¹⁰ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 1998, (trans Daniel Heller-Roazen).

¹¹ Luce Irigaray, ‘the crucified one: epistle to the last christians’ in *Marine Lover of Friedrich Nietzsche* (1991, trans Gillian C Gill) 164 – 190.

Members extends to the regulation of intellectual property protection, foreign investment, human and animal health and safety, product labelling, genetically modified foods and biotechnology, and standards of service provision in sectors as far-ranging as child-care, burial, tourism, waste disposal, education and health care. These new WTO agreements mandated the erasure of existing laws in Member States, and the inscription of new laws in the forms laid down in the trade agreements.¹² For critics of these agreements, their broad reach significantly limits the extent to which people can participate in making decisions in a wide range of areas of political and social life.¹³ Such developments, along with the perceived effects of economic liberalization on the livelihoods and communities of people in states subject to such legal transformations, have informed the widespread challenges to the legitimacy of the WTO and related institutions.

A few examples will suggest the nature of this body of writing about the WTO: polemical, angry, revolutionary. In 2003, Oxford University Press published the Amnesty International Lectures on *Globalizing Rights*. A number of contributors to that volume argue passionately that economic liberalization threatens the future of human rights. For Susan George, if neoliberal globalization continues, ‘politics will concern primarily the deadly serious issue of survival’.¹⁴ The ‘bottom-line issue of human rights’ will become ‘who has a right to live and who does not?’¹⁵ George argues that human beings can and must challenge the neoliberal model, and ‘seek to restore power to communities and states while working to institute democratic rules and fair distribution at the international level’.¹⁶ The critique of existing institutions in the name of a democracy to come is echoed in the contribution by Noam Chomsky: ‘We need not quietly accept the suffering and injustice that are all around us, and the prospects, which are not slight, of severe catastrophes if human society continues on its present course’.¹⁷ In the same volume, Vandana Shiva argues that globalization and free trade ‘has hijacked our most powerful aspiration – the will to be free’.¹⁸ Corporations are granted rights and ‘absolute irresponsibility’ through trade laws,¹⁹ the livelihood of millions in the Third World is destroyed, and trade agreements privilege ‘arbitrary technocratic and corporate decision-making’ about the limits of regulation of the market.²⁰ ‘The human rights movement must address globalization as the most basic and universal threat to human rights in our times’.²¹

¹² Agreement Establishing the World Trade Organization, above n7, Art XVI:4: ‘Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’.

¹³ In addition, once a rule is agreed to as part of a trade negotiation it is very difficult to alter it, while the importance of the WTO for all its Members means that the costs of withdrawal are enormous. The resulting ‘irreversibility’ of rules agreed to at the WTO means that proposed agreements are increasingly subject to intense scrutiny by ‘outsiders’ to the regime, including human rights experts and NGOs. Robert Howse, ‘From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime’ (2002) 96 *American Journal of International Law* 94, 107.

¹⁴ Susan George, ‘Globalizing Rights?’ in Matthew J Gibney (ed), *Globalizing Rights*, 2003, 15, 23-4.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 32.

¹⁷ Noam Chomsky, ‘“Recovering Rights: A Crooked Path’ in Matthew J Gibney, above n14, 45, 80.

¹⁸ Vandana Shiva, ‘Food Rights, Free Trade, and Fascism’ in Matthew J Gibney, above n14, 87.

¹⁹ *Ibid.*, 91-2.

²⁰ *Ibid.*, 100.

²¹ *Ibid.*, 106-7.

This argument about the threat posed to democracy by the WTO is well developed in much activist literature, including the influential book by Lori Wallach and Michelle Sforza, entitled *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*.²² The book was published by the NGO Public Citizen, just before the ill-fated Seattle Ministerial Meeting of the WTO in 1999.²³ In the preface, Ralph Nader argues that we now face ‘a race against time: How will citizens reverse the expanding globalization agenda while democratic instincts and institutions remain, albeit under attack?’²⁴ Wallach and Sforza develop this theme further, arguing that the creation of the WTO represents ‘an insidious shift in decision-making away from democratic, accountable forums – where citizens have a chance to fight for the public interest – to distant, secretive and unaccountable international bodies, whose rules and operations are dominated by corporate interests’.²⁵ The WTO’s undemocratic processes make it a forum for avoiding responsibility and accountability,²⁶ while the agreements negotiated under its auspices constrain democratic politics.²⁷ The WTO thus ‘serves as the engine for a comprehensive redesign of international, national and local law, politics, cultures and values’.²⁸

The difference in style and tone between this literature and that written in response by trade lawyers is quite striking. These trade lawyers on the whole are part of a ‘specialized policy elite’ of technocrats, officials and ‘GATT-friendly academics’,²⁹ who move between WTO panels, government positions, independent trade consultancies and academia. For such ‘enthusiasts of globalization through law’ seeking ‘legally rigorous economic integration’,³⁰ these critiques and the growing phenomenon of anti-globalization protests are best met with bigger doses of liberal rationality and better design proposals. This literature worries about how best to ‘micromanage divergent public orders’³¹ or manage ‘the interface’ between ‘trade liberalization and the regulatory state’,³² understands the WTO as a ‘linkage machine’,³³ and engages in endless attempts to allocate tasks to different global actors

²² Lori Wallach and Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*, 1999.

²³ For a critical review of the book setting out its influence and its role in the development of activist thinking on globalization, see Larry Lee, ‘Reading the Seattle Manifesto: In Search of a Theory’ (2003) 78 *New York University Law Review* 2305.

²⁴ Ralph Nader, ‘Preface’ in Lori Wallach and Michelle Sforza, above n22, ix, xii. See also Ralph Nader and Lori Wallach, ‘GATT, NAFTA, and the Subversion of the Democratic Process’ in Jerry Mander and Edward Goldsmith, *The Case Against the Global Economy and For a Turn Toward the Local*, 1996, 92.

²⁵ Lori Wallach and Michelle Sforza, above n22, 2.

²⁶ *Ibid.*, 215.

²⁷ *Ibid.*, 222.

²⁸ *Ibid.*, 222.

²⁹ Robert Howse, above n13, 98–9; J H H Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats’ (2001) 35 *Journal of World Trade* 191.

³⁰ See Robert Howse, ‘Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence’ in J H H Weiler (ed), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, 2001, 35, 37.

³¹ Kyle Bagwell, Petros C Mavroidis and Robert W Staiger, ‘It’s a Question of Market Access’ (2002) 96 *American Journal of International Law* 56, 75.

³² Michael J Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd edition, 1995, 500.

³³ On the ‘allocation of jurisdiction’ as the key to solving linkage problems, see Joel P Trachtman, ‘Institutional Linkage: Transcending “Trade and ...”’ (2002) 96 *American Journal of International Law* 77, 88. The view of the WTO as ‘a linkage machine’, and the related notion that ‘centralized, quasi-

according to a functional logic - ‘what institutions, if any, with the authority to manage linkage – that is, to enable states effectively to negotiate and agree on linkage – will best allow us to achieve our goals’.³⁴

Unlike earlier economic theorists, those writing about economic globalization do not make explicit the cultural forms or political order that underpin their sense of the ideal destination of economic globalization. Yet we do catch glimpses of this destination through their discussions of what international economic law is *for*: ‘an engine for prosperity’,³⁵ the achievement of harmony through regulation, economic integration defeating the dark forces of national protection. This political vision of economic globalization appears most clearly in the work of its self-identified “liberal” friends’,³⁶ who suggest that there is nothing to be afraid of in the institutional linking of trade and human rights. For example, Ernst-Ulrich Petersmann sees human rights and markets as having a common telos – as ‘organized dialogues about values’ they both ‘promote peaceful coexistence, tolerance and scientific progress’.³⁷ Human rights serve ‘instrumental functions’ – they ‘make human beings not only better democratic citizens but also “better economic actors”’.³⁸ The goal of international economic organizations should be to transform “market freedoms” into “fundamental rights” which – if directly enforceable by producers, investors, workers, traders and consumers through courts ... can reinforce and extend the protection of basic human rights (eg to liberty, property, food and health).³⁹ Trade-related rights to property or due process could be enhanced through WTO decision-making, thus achieving both “economic efficiency” and “democratic legitimacy”.⁴⁰ Similarly, Robert Howse suggests that democracy-based critiques can usefully be accommodated - ‘the law of international economic integration, having survived and/or been reshaped by such critique and contestation, will possess all the more social legitimacy’.⁴¹ And for those who are supporters of the American vision of a new world order, ‘WTO admission and participation would set up a kind of tutorial in rule-of-law values’ and might provide the means to push a human rights violating state ‘not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on’.⁴² Here economics works as a kind of ‘moral fable’,⁴³ in which poverty, AIDS, child labour, suffering bodies, all appear as proofs of the need to overcome the limitations of our current politics and achieve greater

autonomous institutions may be relatively effective vehicles for the promotion of interstate cooperation between rational, egoistic state actors’, is developed in José E Alvarez, ‘The WTO as Linkage Machine’ (2002) 96 *American Journal of International Law* 146.

³⁴ Joel P Trachtman, above n33, 77.

³⁵ Remarks by Frederick M Abbott, ‘Human Rights, Terrorism and Trade’ (2002) 96 *American Society of International Law Proceedings* 121, 126.

³⁶ Robert Howse, above n30, 69.

³⁷ Ernst-Ulrich Petersmann, ‘Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’ (2002) 13 *European Journal of International Law* 621, 627.

³⁸ *Ibid*, 626.

³⁹ *Ibid*, 629.

⁴⁰ *Ibid*, 624.

⁴¹ Robert Howse, above n30, 69.

⁴² Remarks of Lori Fisler Damrosch, ‘Human Rights, Terrorism and Trade’ (2002) 96 *American Society of International Law Proceedings* 128, 130.

⁴³ See Judith Grbich, ‘The Problem of the Fetish in Law, History and Postcolonial Theory’ (2003) 7 *Law Text Culture* 1, 14.

freedom and prosperity for empowered individuals through the free market.⁴⁴ As the former Director-General of the WTO writes:

It is the human condition to believe that we can always do better; that is what defines our species. Otherwise we would still be in caves, or driving model Ts, or it would still cost a working family a year's pay to purchase the *Encyclopaedia Britannica*, instead of it coming at the price of Internet access ... This constant struggle for improvement flourishes best in conditions of political and economic freedom, which are the pre-eminent preconditions for development and social justice. Freedom is growing globally, and democracy is now the best and sometimes most revolutionary option in places plagued by poverty and failure. Where freedom grows, poverty and injustice retreat. Where freedom in all its forms stalls, so does human progress.⁴⁵

In these ways, human rights or democratic challenges are absorbed into the vision of the future that informs the work of proponents of economic globalization. For some commentators, this is a source of frustration. Sara Dillon wonders at the lack of open confrontation in trade law literature with 'the manifestations of intellectual and political crisis, which have simmered from the time of November 1999 events in Seattle'.⁴⁶ While the reason for dealing with trade and human rights issues 'arises from human experience, and human suffering, one might get the impression from the legal academic literature that non-trade matters offer a primarily theoretical challenge to the existing global trade regime, and can be mulled over at our intellectual leisure'.⁴⁷ For Dillon, the debate about whether trade and human rights should be linked ignores questions about where 'the WTO and its substantive law fit within the larger picture of the legal construction of globalization, and, how this legal development should proceed, conceived of as a contestable area of human endeavour'.⁴⁸ Thus, she suggests, the 'linkage' debate, 'like the Vatican news conference, is not about unimportant topics – but rather about important topics presented in irrelevant form'.⁴⁹ Similarly, Philip Alston has been highly critical of attempts to appropriate human rights to legitimise the free trade regime. For Alston, there is a marked difference between the rights promoted by the WTO and those promoted by international human rights law.

[A]ny such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy but not as political

⁴⁴ For examples of this genre of moral fable, see Mike Moore, above n1, 2003; Ernst-Ulrich Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 *European Journal of International Law* 845.

⁴⁵ Mike Moore, above n1, 9.

⁴⁶ Sara Dillon, 'A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators' (2002) 55 *Rutgers Law Review* 87, 90.

⁴⁷ *Ibid.*, 90.

⁴⁸ *Ibid.*, 92.

⁴⁹ *Ibid.*, 92.

actors in the full sense and nor as holders of a comprehensive and balanced set of individual rights.⁵⁰

For Alston, the suggestion of an existing link between WTO law and human rights law involves ‘a form of epistemological misappropriation’.⁵¹ The debate over the proper relationship between trade and human rights must take a new direction,⁵² involving a recognition that trade law and human rights law have ‘a fundamentally different ideological underpinning’.⁵³ I share with these commentators on the ‘trade and human rights’ debate a sense that these issues do have to be discussed in a different form. Yet unlike Dillon and Alston, I am not so sure that the trade law literature avoids confronting the challenge that human rights pose to the global trade regime. The latter parts of the paper explore the possibility that human rights law as currently conceptualised in fact does *not* pose a challenge to trade law, and that there is an intimate relationship between the forms of law embodied in the two international regimes.

My uneasy response to the existing conversation about trade and human rights is also produced by the effect of my attempts to speak and write about this conversation. The moment in which my disenchantment with the genre of writing about this topic became impossible to ignore came in the middle of teaching a subject called *Trade, Human Rights and Development*.⁵⁴ The subject involves a close analysis of texts in which capitalism and human rights are linked. The discussions in the early part of the subject, which involved readings of classic economic and human rights texts with texts by critical and feminist, was productive, thoughtful, responsive. The students generated insightful analyses of value, waste, democracy, nature, participation, nationality, exchange, gifts, charity and property as these terms functioned in legal and economic narratives.

Later in the subject, we moved to look closely at the work of international economic institutions and trade agreements, using human rights texts and norms to explore the forms of law that these agreements require states to enact. In particular, we talked about whether these trade agreements constrained democratic participation and those civil and political rights designed to enable that participation. At this point, the mood shifted quite dramatically. The critique became sharper, yet a sense of hopelessness also began to grow. As one student said dully: ‘But there is no other way, there is no alternative’. I felt that the discussion was deadened, that the more I talked about the nature of the legal forms mandated by the various agreements and their relation to human rights norms, the more my speech sounded like a drumbeat heralding some terrible catastrophe. Instead of engagement and critique, of opening texts out to

⁵⁰ Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (2002) 13 *European Journal of International Law* 815, 826.

⁵¹ *Ibid.*, 842.

⁵² *Ibid.*, 844.

⁵³ *Ibid.*, 842.

⁵⁴ My attempt throughout the paper to place this writing body in the institution of the university is a response to the argument by Gayatri Chakravorty Spivak that ‘the real political model’ that underlies any piece of academic writing is ‘the educational institution’. See Gayatri Chakravorty Spivak, ‘Schmitt and Poststructuralism: A Response’ (2000) 21 *Cardozo Law Review* 1723, 1729. For her reading of the politics that secures the opening of texts when you talk about them to ‘clusters of alterity – groups of others’ (classes, public audiences), see Gayatri Chakravorty Spivak, *Outside in the Teaching Machine*, 1993, 142.

alternative readings, this discussion seemed to produce an exhausted acceptance of the inevitability or necessity of sacrifice and punishment in order to reach the goals of development or economic integration. Why did the appeal to democracy and human rights when read with capitalism produce this sense of closure? We all know (don't we?) that we don't have to organise ourselves according to this economic vision, that there are all sorts of other worlds out there that look nothing like this fantasy of perfect control and endless profit, docile bodies and redeemed souls. So what was my role in (re)producing this fantasy in my classroom? How might I approach this differently?

In the final session of the subject, I felt I needed to communicate to my students my certainty that there is an outside to these economic narratives, that other ways of being are possible. In doing so, I drew on two texts about writing, economics and value. The first was a piece by J K Gibson-Graham, in which she writes:

[W]hat we have blithely called a capitalist economy in the United States is certainly not wholly or even predominantly a market economy ... The market, which has existed throughout time and over vast geographies, can hardly be invoked in any but the most general economic characterization. If we pull back this blanket term, it would not be surprising to see a variety of things wriggling beneath it. The question then becomes not whether 'the market' obscures differences but how we might want to characterize the differences under the blanket.⁵⁵

Gibson-Graham uses the household as one of the examples of this claim that we don't inhabit purely market economies. It may be that our relations with the people we live with aren't capitalist.⁵⁶ They might be feudal (involving 'the appropriation of surplus labour in use value form and relations of fealty and mutual obligation);⁵⁷ they might be fascist (governed by the fantasy that all are working in an idealised unity towards a common end),⁵⁸ or even socialist; we might give and receive gifts from the people with whom we live. So we discussed this location as one site that might suggest the inadequacy of the capitalist account of the possibilities of social life.

The second set of relations I invoked to my class were those with friends and students in and around the academy. These involve teaching, learning, listening, speaking, reading and writing - scenes I inhabited with these students. Of course the university is in (increasingly large) part governed by capitalist market relations – these relations produce the student body, my students and I are invited to see each other in market terms (me as service provider, they as consumers). My judgments of their work, their

⁵⁵ J K Gibson-Graham, *The End of Capitalism (as we knew it)*, 1996, 261.

⁵⁶ But for a reading that suggests a close relationship between exchange relations and the modern marriage as a mode of 'intimacy organization', see Laura Kipnis, 'Adultery' in Lauren Berlant, *Intimacy*, 2000, 9, 11.

⁵⁷ J K Gibson-Graham, above n55, 212.

⁵⁸ See the discussion of the economic grounds of fascism in Juliet Flower MacCannell, *The Hysteric's Guide to the Future Female Subject*, 2000, 133: 'Fascism was founded on antidemocratic principles for structuring relations between owners and producers, races and sexes ... Classical fascism as an economic structure was modelled on, but not materially connected to, patriarchal feudal forms. Though firmly hierarchical, it was supposed to incorporate all members of a productive unit in one structure. From the lowest floor sweeper to the CEO and the owner, all were supposed to be part of a single corporate body. One spoke of joy in work, and of making the workplace pleasant'.

judgments of me, are used in our various workplaces as one amongst many markers of value. But also, much of the time for me, and I hope often for my students, there is something that goes on in the space of the classroom or the university office, which is not explicable in terms of capitalist exchange relations. I don't experience our creativity and thought as being purely in the service of corporate profit or governed by its forms.⁵⁹ As Eve Kosofsky Sedgwick comments:

For some faculty at some colleges and universities, it is still strikingly true that our labour is divided up by task orientation (we may work on the book till it's done, explain to the student till she understands) rather than by a draconian time discipline; that what we produce is described and judged in qualitative as much as quantitative terms; that there is a valued place for affective expressiveness, and an intellectually productive permeability in the boundaries between public and private; that there are opportunities for collaborative work; and most importantly, that we can expend some substantial part of our paid labour on projects we ourselves have conceived, relating to questions whose urgency and interest make a claim on our minds, imaginations, and consciences.⁶⁰

So this paper is also a more sustained attempt to make sense of that moment in my teaching where I became aware of a problematic relationship in my linking of trade and human rights discourse, and also of the gesture I felt was required of me to address that moment – the recollection of an outside to this liberal economic account of the world. I want to think about whether economic law and human rights law somehow are complicit in creating a sense of despair, a sense that there are no political alternatives available, that we really have in some meaningful way reached that much-vaunted end of history. In trying to see whether there is some deep complicity between the two forms of law, I want also to try to hold onto the idea that there is nonetheless something that escapes those forms of law, that might lead critique somewhere.

2. Sacrifice and the secrets of international trade law

In the beginning was the Word, and the Word was with God, and the Word was God.⁶¹

(a) Mystery and rationality

Many of the trade agreements implemented under the auspices of the WTO are concerned with the harmonization of domestic regulatory standards. They achieve this end by mandating or prohibiting particular ways of writing law or particular forms of law. In so doing, these agreements can be understood as embodying two ways of understanding the responsibility of the law-maker and the relationship of that figure to the absolute other, here the market. The first such approach to responsibility is a Platonic form involving the exclusion of mystery or secrecy from the decision-making process, while the second is a sacrificial form of responsibility which can be traced to a Christian doctrine.

⁵⁹ Eve Kosofsky Sedgwick, *Tendencies*, 1994, 19.

⁶⁰ *Ibid*, 19.

⁶¹ John, 1:1 (Revised Standard Version).

In order to begin this reading of the forms of law embodied in WTO agreements, it is useful to compare the WTO with earlier free trade regimes, such as those embodied in the original General Agreement on Tariffs and Trade 1947 (GATT). The GATT was essentially an agreement about trading in goods or commodities, and took as its foundational premise the norm of non-discrimination. The barriers to moving goods to market were material (such as quarantine stations where goods were kept for spurious reasons, or customs inspectors seized goods that were in excess of a designated import quota), or monetary (classically the imposition of tariffs to imported goods that might threaten the market in goods produced domestically). Under GATT, parties agreed to convert quantitative barriers to trade into tariff barriers, to gradually lower tariff barriers, and not to discriminate between different trading partners or in favour of domestic over foreign producers of goods.

The GATT also addressed some barriers to trade that were invisible and interior, such as charges imposed internally and regulations that functioned as disguised barriers to trade, such as taxes that were imposed in a discriminatory fashion internally and effectively functioned as tariffs. As Robert Howse describes the basis for these provisions:

Something like a non-discrimination requirement would seem essential to sustain a trade liberalization bargain, even on tariffs and other traditional “border” measures; if countries can “cheat” on trade liberalization concessions by creating the same protective effect through domestic regulations, then confidence in such a bargain will likely be weak.⁶²

However, this move away from a focus on ‘border’ measures into the interior of the state, and the attempt through trade agreements to control ‘domestic regulations’, became uncoupled from the non-discrimination norm during the Uruguay Round of trade negotiations. This was the trade round that resulted in the creation of the WTO, and the new harmonization agreements implemented under its auspices aim at the removal of regulatory barriers that might limit the movement of goods, services and capital. The aim is to harmonize divergent regulatory environments that threaten to constrain commercial activity, whether or not the domestic regulations discriminate between foreign and domestic producers, or between different foreign producers. Such agreements aspire to ‘an economic life without friction’.⁶³

As trade liberalization, at least with respect to border measures, has continued to advance, these ‘within the border’ regulatory measures are increasingly seen by many liberal trade proponents as the most prominent and arguably the most costly form of non-tariff barriers to trade (NTBs), requiring new disciplines under international trade rules, particularly in a globalizing economy which, it is argued, has a low tolerance for ‘system frictions’.⁶⁴

WTO agreements are unusual in international law terms, in that they are ambitiously prescriptive in terms of legal systems, judicial processes, legislative processes and

⁶² Robert Howse, ‘Democracy, Science, and Free Trade’ (2000) 98 *Michigan Law Review* 2329, 2332.

⁶³ David Kennedy, ‘Laws and Developments’ in John Hatchard and Amanda Perry-Kessaris, *Law and Development: Facing Complexity in the 21st Century*, 2003, 17, 24.

⁶⁴ Michael J Trebilcock and Robert Howse, above n32, 500.

substance of laws that states must have in place. Underpinning this constraint of legislative activity and this commitment to regulatory standardization, is the end of ‘harmonization’.⁶⁵ Harmonization moves beyond a concern with discrimination, to draw legal regimes into one integrated system. Difference is conceptualised as discord. The musical metaphor of harmony exerts its pull – nations and their laws become ‘closed wholes whose elements call for one another like the syllables of a verse’.⁶⁶ That which prevents the achievement of the harmonious whole (unreason, passion, special interests, culture) must be outlawed. Democracy becomes a problem to be managed.

Let me describe the operation of two key agreements to give a sense of this – the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the General Agreement on Trade in Services (or GATS). The SPS Agreement sets out obligations and procedures relating to the use of sanitary and phytosanitary measures, including measures relating to human or animal health and safety, and applies to all sanitary and phytosanitary measures which may directly or indirectly affect international trade.⁶⁷ Members of the WTO are obliged to ensure that any such measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without scientific evidence.⁶⁸ In addition, measures must be based on a risk assessment of the risks to human, animal or plant life or health, conducted ‘taking into account risk assessment techniques developed by the relevant international organizations’.⁶⁹ Under the Agreement, Members also agree to base their measures on international standards, guidelines or recommendations where they exist.⁷⁰ Members may introduce or maintain standards which result in a higher level of protection than would be achieved by measures based on such international standards, if there is a scientific justification for such increased protection or where the Member has engaged in a process of risk assessment as laid down in Article 5 of the Agreement.⁷¹

The effect of the agreement is then to mandate a particular approach to decision-making about issues that include food security, consumer safety, regulation of genetically modified food, sustainable farming practices, animal welfare or the effects of agribusiness on small farmers. In the approach to regulation authorised by the SPS Agreement, the production of authorised knowledge and management of risk must be premised on ‘science’. ‘Science’ has been defined by the Appellate Body of the WTO in terms of a method or technique for understanding the relationship of a subject to

⁶⁵ See Agreement on Sanitary and Phytosanitary Measures, Apr 15, 1994, in WTO, above n4, 59 [hereinafter SPS Agreement]; preamble (‘*Desiring* to further the use of harmonized sanitary and phytosanitary measure between Members ...’) and Art 3.

⁶⁶ Richard Kearney, ‘Levinas and the Ethics of Imagining’ in Dorota Glowacka and Stephen Boos (eds), *Between Ethics and Aesthetics, Crossing the Boundaries*, 2002, 85 – 96 (132??).

⁶⁷ Key terms including ‘sanitary or phytosanitary measure’ are defined in SPS, above n14, Annex A.

⁶⁸ *Ibid*, Art 2. The only exception to the obligation to base such measures upon scientific evidence occurs where relevant scientific evidence is insufficient. In that situation, Members can provisionally adopt measures on the basis of pertinent information, but must seek to obtain additional information necessary for a more objective assessment of risk within a reasonable period of time: Art 5(7).

⁶⁹ *Ibid*, Art 5:1.

⁷⁰ *Ibid*, Art 3(1).

⁷¹ *Ibid*, Art 3(3). According to a footnote to Article 3, there is a scientific justification for adopting a higher standard if, on the basis of an examination and evaluation of available scientific information, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve the appropriate level of protection.

knowledge. In its 1998 decision in the *EC Measures Concerning Meat and Meat Products (EC - Hormones)* dispute, the Appellate Body sought to articulate the factors to be considered in carrying out a risk assessment in order to legitimately ground a national health policy.⁷² It noted that the list of factors to be taken into account in the assessment of risks as set out in Article 5.2 begins with ‘available scientific evidence’.⁷³ The decision refers to a US statement of administrative action as to the meaning of scientific:

The ordinary meaning of “scientific”, as provided by dictionary definitions, includes “of, relating to, or used in science”, broadly, having or appearing to have an exact, objective, factual, systematic or methodological basis”, “of, relating to, or exhibiting the methods or principles of science” and “of, pertaining to, using, or based on the methodology of science”.

Science provides a method for evaluating ‘risk’, ‘not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.’⁷⁴ Thus the absence of certain (extremely expensive) forms of scientific evidence and the failure to conduct risk assessments invalidates laws or regulations that directly or indirectly affect international trade.⁷⁵

The process of regulating is presented as mechanical – regulations must be justified according to risk assessment procedures and risk management strategies based on detailed scientific data, and such risk assessment must reasonably support or warrant the regulatory measure adopted in response. Risk assessment requires ‘the evaluation of the *likelihood* of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological or economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs’.⁷⁶ Even if a challenged measure is based on such a risk assessment, it may be found to be in breach of the SPS Agreement if *all* comparable products are not subject to similar regulatory measures based on equally detailed scientifically-based risk assessments.⁷⁷

The much discussed *EC - Hormones* decision provides an example of the ways in which laws and regulations are to be written under this harmonized trade regime. The measures in dispute were a series of EC directives which operated to ban the importation or sale within the EC of meat from animals treated with any of six

⁷² *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, DSR 1998:I, 135 [*EC – Hormones*].

⁷³ *Ibid.*, para 187.

⁷⁴ *Ibid.*

⁷⁵ That basis for law-making excludes, or at the least marginalises, other community concerns or other forms of knowledge from consideration as part of the process of writing the law. For a discussion of this effect of the Agreement, see Anne Orford, ‘Globalisation and The Right to Development’ in Philip Alston (ed), *Peoples’ Rights*, 2001, 127.

⁷⁶ SPS Agreement, above n14, Annex A.

⁷⁷ *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, Report of the Appellate Body, adopted 6 November 1998, DSR 1998:VIII, 3327.

specified growth hormones. The Appellate Body of the WTO found that, while the measures in dispute did not result in discrimination between domestic and foreign producers or in a disguised restriction on international trade, the ban on importation of meat treated with hormones was nevertheless in breach of the SPS Agreement. It held that the EC was not entitled to regulate the use of growth hormones as its decision to do so was not based on sufficient scientific evidence. There must be a risk assessment based on detailed scientific data in order for such measures to be in compliance with SPS obligations, even where there is no clear scientific opinion regarding the risks posed by a product. In its argument to the WTO Appellate Body, the EC relied upon scientific opinion that ingestion of the hormones in dispute is potentially carcinogenic.⁷⁸ The Appellate Body held that the scientists upon whose opinion the EC was relying had not evaluated the carcinogenic potential of MGA when used *specifically* as growth promoters.⁷⁹ In a footnote, the Appellate Body held that even if the scientific evidence concerning the risk to women was correct, only 371 of the women currently living in the Member States of the European Union would die from breast cancer as a result of trade in hormone-related beef, while the total population of the Member States of the European Union in 1995 was 371 million.⁸⁰ By implication, the deaths of this number of women would not justify enacting measures that could constrain the operation of the market or inhibit progress towards economic integration.

In the *Japan – Measures Affecting the Importation of Apples* decision, the Appellate Body again stressed the centrality of science, objectivity and rationality as the grounds for legitimate decision-making under the SPS Agreement.⁸¹ Japan had in place a phytosanitary measure designed to prevent the spread of the disease fire blight through apple fruit imported from the US.⁸² These measures included inspection, spraying and chlorine treatment of packaging and containers. The Appellate Body confirmed that a measure is maintained ‘without sufficient scientific evidence’ in breach of Article 2.2 ‘if there is no “rational or objective relationship” between the measure and the relevant scientific evidence’.⁸³ This includes situations where the measure is considered to be ‘clearly disproportionate’ to the risk of infection. The Appellate Body rejected Japan’s argument that national authorities be given a ‘certain degree of discretion’ in their approach to the evaluation of the risks established by scientific evidence. Here, Japan argued that it sought to take a prudent and

⁷⁸ For example, the EC presented scientific evidence relating to the broader relationship between levels of progesterone - the hormone mimicked by one of the hormones in question, melengestrol acetate (MGA) – and increased rates of breast cancer. While the complainants, Canada and the US, had scientific data relating to the health risks posed by MGA residues, the report of the Appellate Body notes that those parties ‘declined to submit any assessment of MGA upon the ground that the material they were aware of was proprietary and confidential in nature’: *EC – Hormones*, para 201. That information was presumably owned as intellectual property by the company producing the hormone. The Appellate Body found that as ‘there was an almost complete absence of evidence on MGA in the panel proceedings’, the EC could *not* justify banning the use of that hormone.

⁷⁹ *Ibid*, para 199-200. As a result of the *EC – Hormones* decision, the onus of proof as to the safety of a particular growth hormone rests, not with the agricultural corporations who profit from the use of such hormones, but with the states where the resulting products are to be sold. See further the discussion in Anne Orford, above n75.

⁸⁰ *Ibid*, footnote 182.

⁸¹ *Japan – Measures Affecting the Importation of Apples*, Report of the Appellate Body, WT/DS245/AB/R, 26 November 2003.

⁸² *Ibid*, para 14.

⁸³ *Ibid*, para 147.

precautionary approach to evaluating the risks posed by importation of even ‘mature, symptomless apples’, given the fact of ‘trans-oceanic expansion of the bacteria’, the growth in international trade and ‘the fact that the pathways ... of transmission of the bacteria are still unknown’.⁸⁴ However, for the Appellate Body ‘total deference to the findings of the national authorities would not ensure an objective assessment’,⁸⁵ and thus it was not appropriate to defer to ‘Japan’s approach to scientific evidence and risk’.⁸⁶

A similar approach to the making of law is imposed by the GATS. According to free trade logic, the GATS ‘combats domestic standards that are unnecessarily restrictive’.⁸⁷ It works by proscribing many forms of regulation in the field of services provision. The agreement relates to measures by Members applying to trade in services.⁸⁸ ‘Services’ is not defined in the GATS, although most commentators define services as products that are not tangible commodities. ‘Measures’ can take ‘the form of a law, regulation, rule, procedure, decision, administrative action, or any other form’.⁸⁹ Measures ‘by Members’ extend to measures taken by central, regional or local governments and authorities and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.⁹⁰ The treaty covers ‘any service in any sector’, so that no service sector is excluded from the outset.⁹¹ ‘Trade in services’ is defined broadly, to include any means of supplying services internationally.⁹² Perhaps most significantly, this includes supply by a service supplier of one Member through commercial presence in the territory of another Member. This brings foreign direct investment under the GATS. A measure ‘affecting’ trade in services has been defined by the Appellate Body equally broadly, to include any measure ‘that has “an effect on” trade in services.’⁹³ Thus the constraints on introducing or maintaining laws, regulations, rules, procedures, decisions, or administrative actions are potentially extremely far-reaching.

Two sets of obligations that form part of GATS illustrate this potential effect. Both sets of obligations are conditional or ‘bottom-up’ in nature. This means that these conditional obligations apply only to those service sectors that a Member explicitly agrees to submit to GATS disciplines by including that sector in its GATS schedule.⁹⁴

⁸⁴ Ibid, para 150.

⁸⁵ Ibid, para 165.

⁸⁶ Ibid, para 167.

⁸⁷ Steve Charnovitz, ‘Triangulating the World Trade Organization’ (2002) 96 *American Journal of International Law* 28, 38.

⁸⁸ GATS, above n4, Art 1.1

⁸⁹ Ibid, Art XXVIII.

⁹⁰ Ibid, Art I:3(a).

⁹¹ Ibid, Art I:3(b). In particular, this means that governments are bound to non-conditional obligations across all sectors, and that all sectors are subject to the ongoing negotiations mandated in Article XIX.

⁹² Modes of supply are defined in Art I:2 to include (a) cross-border supply from the territory of one Member into the territory of any other Member; (b) consumption abroad by a service consumer of one Member in the territory of another Member; (c) supply by a service supplier of one Member through commercial presence in the territory of another Member, and (d) supply by the service supplier of one Member, through the presence of natural persons of that Member in the territory of another Member. The commitments and limitations made by each Member during trade negotiations are entered with respect to these four modes of supply.

⁹³ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, para 220.

⁹⁴ While Member States can decide which sectors will be subject to these obligations, most Members have already made substantial commitments. Most developed countries have made commitments in

Once a service sector is included in a schedule, these conditional obligations apply to it unless an exception is also listed with respect to that obligation. The first such obligation that is of relevance here is the National Treatment provision, which obliges Members to ‘accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers’.⁹⁵ Treatment ‘shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member’. Thus even if such measures formally treat foreign and domestic service suppliers identically, or alter the conditions of competition merely as an unintended consequence in the legitimate pursuit of other vital policy goals’,⁹⁶ they may be in breach of this requirement if they ‘modify the conditions of competition in favour of domestic services or service providers’.⁹⁷ Measures that might breach this provision include programs that favour enterprises owned or controlled by indigenous peoples, or that offer funding to non-profit child or aged care providers in situations where most non-profit providers are local rather than foreign, or that direct research funding to local educational services providers in situations where they are in commercial competition with foreign educational service providers, or that require that publicly funded research and development produce benefits in the local community.⁹⁸ While GATS does not require Members to privatise public services, if services in sectors covered by a country’s GATS commitments *are* privatised, the market for such services must be opened to foreign investors as a result of the national treatment provision. This makes it far more difficult to reverse failed privatisations and return services to public ownership.⁹⁹ As states around the world experiment with the privatisation of services such as banking, water supply, electricity, telecommunications and urban transport, this kind of built-in privileging of private ownership reduces the scope for democratic participation in assessing such experiments.¹⁰⁰

The Market Access obligation in Article XVI is also restrictive in its effects on the measures that a Member may have in place. Article XVI provides that Members shall not maintain or adopt ‘market access’ measures in sectors covered by their GATS obligations. Prohibited measures include measures that limit the number of service suppliers, restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service, or limit foreign capital participation. For example, under the prohibition on measures restricting or requiring specific types of legal entity through which a service supplier may supply a service, Members are

100 or more sectors. This is partly because member governments were under strong pressure to liberalise at the time of the Uruguay Round. Any limitations to commitments had to be scheduled at the time they were made. The Canadian Council for Policy Alternatives notes that the ‘frenetic atmosphere at the conclusion of the UR was not conducive to sober reflection about potentially non-conforming measures’ and ‘[t]here was no phase-in period during which governments could consult, reflect, and add to their limitations’: Scott Sinclair and Jim Grieshaber-Otto, *Facing the Facts: A guide to the GATS debate*, 2002, 32. Member governments remain under such pressure. This is built in to the GATS through Article XIX, which mandates successive rounds of negotiation aimed at ‘achieving a progressively higher level of liberalization’.

⁹⁵ GATS, above n4, Art XVII.

⁹⁶ Scott Sinclair and Jim Grieshaber-Otto, above n17, ix.

⁹⁷ *Ibid*, 49.

⁹⁸ *Ibid*, 50.

⁹⁹ *Ibid*, 33–5.

¹⁰⁰ Robert Howse, above n13, 113.

precluded from restricting the private delivery of certain basic or social services, such as child care, nursing homes, water distribution, to non-profit agencies or providers. Members cannot restrict degree-granting in education to educational institutions constituted as non-profit entities. These measures would breach Art XVI even if their effect was non-discriminatory, that is, even if the ‘limitation on the types of legal entity permitted in a given sector is applied to both national and foreigners’.¹⁰¹ The prohibition on measures limiting the number of service providers means that Members may not restrict the number of beachfront developments in environmentally fragile areas, or fishing licenses or whale-watching operations to conserve resources.¹⁰²

If a Member seeks to add new exceptions later it will have to pay compensation. Pursuant to Article XXI, a member may modify or withdraw commitments after three years from the time the commitment is made but must compensate other GATS members for doing so or face retaliatory measures.¹⁰³ This idea was imported from the GATT regime relating to bound tariffs on goods, where governments accepted that they would have to pay compensation if they wanted to withdraw previous commitments. However, unlike the GATT, the ‘scope of the GATS is not confined to a well-defined set of government measures such as tariffs’.¹⁰⁴ Instead, it potentially restricts ‘an almost unlimited range of measures’, so that ‘the transposition of the practice of bound commitments from tariffs to a vast new range of public policies and measures diminishes democratic choice’.¹⁰⁵ In this sense, ‘GATS is more of a governance agreement than a trade agreement’.¹⁰⁶ This has an effect on the nature of public policy debate in democratic societies. If a country has a ‘domestic multipartisan consensus’ on issues to do with regulation or privatisation of services in a particular sector, then it is likely that it can maintain limitations on GATS in that sector. However, where there is ideological division, it requires only one government in power even for a short term to remove limitations or to include a sector and that will be extremely difficult to reverse for future governments.

(b) ‘your Father who sees in secret will reward you’¹⁰⁷

Much initial concern with agreements such as the SPS Agreement and GATS has been framed around the criticism that, in the pursuit of harmonization, the agreements provided no place for uncertainty, caution or even politics in their approach to the writing of laws and regulations. The agreements seemed to adopt a programmatic, and thus deeply irresponsible, approach to knowledge. The relationship of responsibility to risk and uncertainty is developed by Jacques Derrida in his reading of the meaning of the Christian legacy for European politics. Derrida links responsibility, understood as ‘the experience of absolute decisions made outside of knowledge or given norms, made therefore through the very ordeal of the undecidable’, with ‘religious *faith*

¹⁰¹ Scott Sinclair and Jim Grieshaber-Otto, above n94, 54.

¹⁰² Other international trade agreements (such as NAFTA) merely require governments to list such non-discriminatory regulations for transparency purposes – see *ibid*, 53.

¹⁰³ While this provision has not yet been interpreted, it appears likely to mean that a member would have to provide compensation to foreign governments on behalf of every affected foreign service provider.

¹⁰⁴ Scott Sinclair and Jim Grieshaber-Otto, above n94, 34-5.

¹⁰⁵ *Ibid*, 34-5.

¹⁰⁶ *Ibid*, 35.

¹⁰⁷ Matthew, 6:1-4 (Revised Standard Version).

through a form of involvement with the other that is a venture into absolute risk, beyond knowledge and certainty'.¹⁰⁸ For Derrida:

Responsibility and faith go together, however paradoxical that might seem to some, and both should, in the same movement, exceed mastery and knowledge ... History depends on such an excessive beginning [*ouverture*].¹⁰⁹

At first glance, this linking of responsibility with risk seems excluded from the approach to knowledge set up by SPS, GATS and related agreements. These trade agreements appear to be quite the opposite of this – far from involving a ‘venture into absolute risk’ or the realm of the undecidable, no human decision in the realm of politics could be based on anything other than scientific method, assessment and management. All the language of the agreements is about privileging the rational and the scientific. Indeed, for those supporting the form of these agreement, it is the focus on rationality and reason that is the contribution of these agreements to democratic politics. As Robert Howse argues, the provisions of the SPS Agreement:

can be, and should be, understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberation about risk and its control. There is more to democracy than visceral response to popular prejudice and alarm; democracy’s promise is more likely to be fulfilled when citizens, or at least their representatives and agents, have comprehensive and accurate information about risks, and about the costs and benefits associated with alternative strategies for their control.¹¹⁰

Yet a closer analysis of the structure of the agreements makes clear that it is only the claim to know better than the market that has to be proved according to these scientific methods. The logic of the agreements is that the state and its people may not regulate in the name of constraining the activities of the market where the form of that regulation is prohibited (as in GATS) or *unless* those actions can be justified according to the most stringent levels of scientific evidence, rationality and risk analysis (in the case of the SPS Agreement). These agreements govern the decision to lay down a law that would restrict the operation of the market. In other words, these agreements *mandate* ‘a venture into absolute risk’ – risk can only be contained through law *if* that risk can be quantified and the measure taken to control against that risk balanced against the greater good of trade liberalization. Faith is evidenced through the act of sacrificing to the transcendent god of the market those things that democratic peoples hold dear. It is this form of a law that champions rationality, while repressing a secret relationship to mystery or the unknown, that I want now to explore drawing on the work of Derrida.

Derrida suggests that both the Christian religion and European politics inherit a Platonic approach to thinking about the relationship of the subject, responsibility and knowledge.¹¹¹ Plato tries to deliver philosophy from ‘the secret of the orgiastic

¹⁰⁸ Jacques Derrida, *The Gift of Death* (trans David Wills), 1995, 5-6.

¹⁰⁹ Ibid.

¹¹⁰ Robert Howse, above n62, 2330.

¹¹¹ Jacques Derrida, above n108. Derrida develops this account by engaging with the essay ‘La civilisation technique est-elle une civilisation de declin, et pourquoi?’ (‘Is Technological Civilisation a

mystery'.¹¹² The Platonic conversion involves the subordination of orgiastic mystery to responsibility and 'the turning of one's gaze towards the Good and the intelligible sun, out of the cavern'.¹¹³ Thus Platonism 'introduces or *presents* itself as a moment without mystery' – it 'openly declares that secrecy will not be allowed'.¹¹⁴

Thenceforth whatever there is in Europe and even in modern Europe that inherits this politics of Greco-Platonic provenance, either neglects, represses, or excludes from itself every essential possibility of secrecy and every link between responsibility and the keeping of secret; everything that allows responsibility to be dedicated to secrecy.¹¹⁵

This translates into a version of politics, in which rationality, transparency and public accountability are all understood to be required for a responsible decision to be made. In this vision of politics, 'responsibility is tied to the public and to the nonsecret, to the possibility and even the necessity of accounting for one's words and actions in front of others, of justifying and owning up to them'.¹¹⁶ We can hear an echo of this approach to politics in the passages from Howse and Petersmann analysed above. Yet Platonism does not succeed in moving 'from orgiastic mystery to nonmystery', but instead involves the 'subordination of one mystery by another'.¹¹⁷ The 'soul's relation to the Good' retains 'its mystical element; it still takes the form of a mystery, this time unacknowledged, undeclared, denied'.¹¹⁸ Christianity inherits from Platonism this relationship to an excluded mystery that is secretly at work, yet unlike Platonism, Christianity does not simply repress its relationship to mystery. Instead, mystery appears in Christian thought as 'the *mysterium tremendum*: the terrifying mystery, the dread, fear and trembling of the Christian in the experience of the sacrificial gift'.¹¹⁹

The subjects of trade law are inheritors of these two traditions for thinking responsibility – that of the Platonic notion which purports to break with orgiastic mystery but in fact retains something of that mystery at its foundation, and that of Christianity and its 'genesis of responsibility'.¹²⁰ It is this split sense of responsibility that makes sense of the trade agreements with which I opened this Part. The language of the trade agreements appears to exclude mystery or secrecy from politics, with the commitment to the meticulous standards of scientific evidence and risk assessment as the basis of political decision-making. Yet as with the secret history of Christianity, these trade agreements incorporate that which they claimed to exclude. Mystery remains at the heart of these agreements.

This form of law, with its secret relationship to mystery, can be understood through the Christian doctrine of sacrifice. Of particular relevance to the theological form of trade agreements is the need to affirm and betray universal principles as part of the

Civilisation in Decline, and If So Why?') by Jan Patočka, the Czech philosopher and spokesman for the Charta 77 human rights declaration.

¹¹² Ibid, 7.

¹¹³ Ibid, 7-8.

¹¹⁴ Ibid, 33.

¹¹⁵ Ibid, 33-4.

¹¹⁶ Ibid, 60.

¹¹⁷ Ibid, 8.

¹¹⁸ Ibid, 8.

¹¹⁹ Ibid, 6.

¹²⁰ Ibid, 7.

response to the sacrificial demand of the absolute other. Sacrificial responsibility in the Christian tradition involves a singular relationship to God. This responsibility can be acted upon only in silence, in solitude and in the absence of knowledge (thus opposing it to the Platonic form of responsibility). This mapping of sacrifice with responsibility is traced by Derrida, beginning with the story of Abraham, of whom God demands ‘that most cruel, impossible, and untenable gesture: to offer his son Isaac as a sacrifice’.¹²¹ God tells Abraham to take his son, whom he loves, and offer him as a burnt offering.¹²² In this demand by God, Abraham is confronted by this experience of God as absent and mysterious:

God doesn’t give his reasons, he acts as he intends, he doesn’t have to give his reasons or share anything with us: neither his motivations, if he has any, nor his deliberations, nor his decisions. Otherwise he wouldn’t be God, we wouldn’t be dealing with the Other as God or with God as *wholly other* [*tout autre*]. If the other were to share his reasons with us by explaining them to us, if he were to speak to us all the time without any secrets, he wouldn’t be the other, we would share a type of homogeneity.¹²³

Christians encounter this demand from a God who does not explain his reasons, and must obey in his absence, in solitude. This experience of God is rendered more profound in the call to sacrifice, and particularly to sacrifice a beloved son. This ‘supposes the putting to death of the unique in terms of its being unique, irreplaceable, and most precious’.¹²⁴ It is this sacrifice of ‘what is one’s own or proper, of the private, of the love and affection of one’s kin’ that gives meaning to sacrifice as the gift of death.¹²⁵ The moment when Abraham obeys God and puts the knife to his son’s throat ‘is the moment when Abraham gives the sign of absolute sacrifice, namely, by putting to death or giving death to his own, putting to death his absolute love for what is dearest, the only son’.¹²⁶

Abraham does not speak of what he has been called to do, not to Sarah, the mother of Isaac, nor to Isaac himself. Indeed, when Isaac asks his father where the sacrificial lamb is to be found, Abraham replies that God will provide the lamb for the burnt offering.¹²⁷ This is the meaning of responsibility – it ‘consists in always being alone, entrenched in one’s own singularity at the moment of decision’.¹²⁸ To the extent that I am responsible, this ‘responsibility remains mine, singularly so, something no one else can perform in my place’.¹²⁹ This responsibility that consists in ‘being alone ... at the moment of decision’ is taught to us by the silence of Abraham. Abraham must not only act in secret, but also in the absence of knowledge:

¹²¹ Ibid, 58.

¹²² Genesis, 22:2 (Revised Standard Version).

¹²³ Jacques Derrida, above n108, 57.

¹²⁴ Ibid, 58.

¹²⁵ Ibid, 95.

¹²⁶ Ibid, 95.

¹²⁷ Genesis, 22:8 (Revised Standard Version).

¹²⁸ Jacques Derrida, above n108, 60.

¹²⁹ Ibid, 60.

The knight of faith must not hesitate. He accepts his responsibility by heading off towards the absolute request of the other, beyond knowledge. He decides, but his absolute decision is neither guided nor controlled by knowledge.¹³⁰

Abraham's hand is stayed, at the moment when he takes the knife to his son's throat. The angel of God calls to Abraham from heaven: 'Lay not thine hand upon the lad, neither do thou anything unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son, from me'.¹³¹ 'I see that you have understood what absolute duty means, namely, how to respond to the absolute other, to his call, request, or command'.¹³² So, Derrida says, whether or not one *believes* the bible, 'it could still be said that there is a moral to this story'.¹³³

Absolute duty means that one behave in an irresponsible manner (by means of treachery and betrayal), while still recognizing, confirming, and reaffirming the very thing one sacrifices, namely, the order of human ethics and responsibility.¹³⁴

The trade agreements I have described affirm in this way principles of transparency, rationality and universality of application without discrimination.¹³⁵ Yet they also require that the subjects of these agreements sacrifice such public virtues in the political realm to meet the demands of sacrificial responsibility. Like Abraham, the responsible subjects of these agreements must wait 'sad and dangerous',¹³⁶ ready to respond to the call of this unique, secret God. These agreements ask of most Member States that they sacrifice those values they espouse publicly and collectively – democracy, civility, politics, the family of the nation – for the global market, and as the price of inclusion in the community of believers.

Christian sacrifice is economic, organised around relations of exchange rather than gift. This is the third way in which this Christian doctrine informs the trade agreements discussed here. Sacrifice initially appears in *Genesis* in the form of a gift. Abraham gave his gift of death of that which is priceless 'outside of any economy ... without any hope of exchange, reward, circulation, or communication'.¹³⁷ Yet God gave back the life of Abraham's beloved son once he was assured that there was this absolute gift.¹³⁸ So 'because he renounced calculation', God gave back to Abraham

¹³⁰ Ibid, 77.

¹³¹ Genesis, 22:12 (Revised Standard Version).

¹³² Jacques Derrida, above n108, 72. The experience of a relationship with God as distant, unknowable, other and mysterious is at the heart of the experience of sacrifice for Derrida. He explores it further through the invocation of the relationship to a mysterious God that is invoked in St Paul's letter to the Philippians: 'Wherefore my beloved, as ye have always obeyed, not as in my presence but now much more in my absence, work out your own salvation with fear and trembling.' See further at 56, citing Philippians 2:12 (King James).

¹³³ Ibid, 66.

¹³⁴ Ibid, 67.

¹³⁵ See, for example, the obligations set out in the SPS Agreement, above n14, Art 2(3) (non-discrimination), Art 7 (transparency), and in the GATS, above n4, Art II (most-favoured-nation treatment); Art III (transparency), Art XVII (national treatment).

¹³⁶ Martti Koskenniemi, 'The Silence of Law/The Voice of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 488, 510.

¹³⁷ Jacques Derrida, above n108, 96.

¹³⁸ Ibid, 96.

the very thing he had decided to sacrifice.¹³⁹ Yet the Christian doctrine established upon this act of sacrifice inaugurates an *economy*. Sacrifice becomes part of a relationship of exchange or substitution, although the Christian cannot know or calculate what will be received as a reward for this sacrifice. This is an economy grounded on the law of the father.¹⁴⁰ Through the promise that ‘thy Father which seeth in secret shall reward thee’,¹⁴¹ Derrida suggests that ‘God the Father re-establishes an economy that was interrupted by the dividing of earth and heaven’.¹⁴²

Something passes from one father to another but authentic filiation is reinstated (“that ye may be children of your Father”); it occurs on condition that there is a gift, a love *without reserve*.

Christians are still called upon to sacrifice, to love God more than a father, mother, son or daughter, in return for the promise of the ‘reward of the righteous’.¹⁴³ Christian justice requires giving without knowing what the reward will be – there is a paying back, but it is ‘one that creatures cannot calculate and must leave to the appreciation of the father who sees in secret’.¹⁴⁴ This economy of sacrifice is accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees all.¹⁴⁵ It is founded on a series of relations between fathers (God, Abraham) and sons (Abraham, Isaac). Yet something escapes the closed circle of this sacrificial economy. Where is the mother in this story of fathers and sons? What part do her gifts and sacrifices play in establishing this economy? Attention to this question is the key to understanding the relationship between the forms of trade law and human rights law, and the possibilities for developing a critique of the economy of sacrifice that might take us beyond the dead end of my classroom discussion.

(c) The suspended question of woman’s sacrifice

Would the logic of sacrificial responsibility within the implacable universality of the law, of its law, be altered, inflected, attenuated, or displaced, if a woman were to intervene in some consequential manner? Does the system of this sacrificial responsibility and of the double “gift of death” imply at its very basis an exclusion or sacrifice of woman? A woman’s sacrifice or a sacrifice of woman, according to one sense of the genitive or the other? Let us leave the question in suspense.¹⁴⁶

¹³⁹ Ibid, 97.

¹⁴⁰ Ibid, 97.

¹⁴¹ Ibid, 97.

¹⁴² Ibid, 99.

¹⁴³ Matthew, 10:34-40: ‘*The reward of the righteous*. Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword. For I have come to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man’s foes will be those of his own household. He who loves father or mother more than me is not worthy of me; and he who loves son or daughter more than me is not worthy of me; and he who does not take his cross and follow me is not worthy of me. He who finds his life will lose it, and he who loses his life for my sake will find it.’

¹⁴⁴ Jacques Derrida, above n108, 107.

¹⁴⁵ See Matthew, 10:34-40 (Revised Standard Version).

¹⁴⁶ Jacques Derrida, above n108, 76.

This suspended question of the feminine haunts the religious institutions founded on an economy of sacrifice. The Christian tradition is one which traces the capacity to generate new life to the Word of God, but not to the body of woman or to the carnal encounter of sexual intercourse. Derrida's conventional decision to begin his discussion of sacrifice with the story of Abraham and Isaac means that the relationship between God, word, father and son is left undisturbed. As Derrida's reading stresses, the drama of the story of Abraham and Isaac turns on God's call to Abraham: 'Take your son, your only son Isaac, whom you love, and go to the land of Moriah, and offer him there as a burnt offering upon one of the mountains of which I shall tell you'.¹⁴⁷ The singular and loving relationship between a father and his only son is central to the meaning of sacrifice – as Derrida reminds us, it is not a sacrifice to put to death what one hates.¹⁴⁸ So the object of sacrifice must be the object of one's love. But we also see in this reading that sacrifice relates to one's own, that which one knows intimately, perhaps even one's property – 'those I love in private, my own, my family, my sons'.¹⁴⁹ In his discussion of sacrifice, Georges Bataille suggests that '[w]hen the offered animal enters the circle in which the priest will immolate it, it passes from the world of things which are closed to man and are *nothing* to him, which he knows from the outside – to the world that is immanent to it, *intimate*, known as the wife is known in sexual consumption [*consumation charnelle*].'¹⁵⁰ 'Take your son, your only son', God tells Abraham the father. How then to understand the meaning of paternal ownership as it relates to this founding story of sacrificial responsibility?

Before this sacrificial economy is inaugurated, there exists a set of relations that suggest another beginning. If we start with a different genesis, we might find that the biblical texts open out in ways that disturb the place of paternity and property in the stories of sacrifice. So let me return to Genesis, and to an event that occurs between the birth of Isaac and the testing of Abraham. For Isaac is in fact not self-evidently the 'only son' of Abraham. Indeed, Sarai (later renamed Sarah by God) did not bear children to Abram (later renamed Abraham) for many years. Sarai told Abram that as 'the Lord has prevented me from bearing children', Abram should take her Egyptian maid Hagar as his wife.¹⁵¹ Hagar bore Abram a son, whom Abram named Ishmael. Then God came to Abram and told him that he would make a covenant with Abram, that he would 'be the father of a multitude of nations' and that his name would be Abraham.¹⁵² God then tells Abraham that his wife shall be named Sarah, and that she will be blessed by God who will give Abraham a son by her. 'I will bless her, and she shall be a mother of nations; kings of peoples shall come from her'.¹⁵³ In this story of sons and of naming, we see beginning an account of the economy of words and of rewards circulating between God and Abraham.

God visits Sarah and she conceives and bears Abraham a son – 'Abraham called the name of his son, who was born to him, whom Sarah bore him, Isaac'.¹⁵⁴ Here begins

¹⁴⁷ Genesis 22:2 (Revised Standard Version).

¹⁴⁸ Jacques Derrida, above n108, 64.

¹⁴⁹ Ibid, 69.

¹⁵⁰ Georges Bataille, 'Sacrifice, the Festival and the Principles of the Sacred World' in Fred Botting and Scott Wilson (eds), *The Bataille Reader*, 1997, 210.

¹⁵¹ Genesis 16:1-3 (Revised Standard Version).

¹⁵² Genesis 17:4.

¹⁵³ Genesis 17:15-16.

¹⁵⁴ Genesis, 21:1-3.

two parallel stories of sons and of their relationship to their mother, their father and God. In the story that comes first in time, Sarah sees Ishmael and Isaac playing together. She says to Abraham, ‘Cast out this slave woman with her son; for the son of this slave woman shall not be heir with my son Isaac’.¹⁵⁵ This is displeasing to Abraham ‘on account of his son’,¹⁵⁶ whom we understand to be his son Ishmael. God then speaks to Abraham:

Be not displeased because of the lad and because of your slave woman; whatever Sarah says to you, do as she tells you, for through Isaac shall your descendants be named. And I will make a nation of the son of the slave woman also, because he is your offspring.’ So Abraham rose early in the morning, and took bread and a skin of water, and gave it to Hagar, putting it on her shoulder, along with the child, and sent her away. And she departed, and wandered in the wilderness of Beersheba.¹⁵⁷

Thus Abraham is promised that his descendants shall be named through Isaac – authentic filiation is established through this promise. Yet the story does not end here. In contrast to the more famous account of the call to sacrifice Isaac, a drama that is played out between God, Abraham and his son, this story does not end with the action of the father. Instead, we follow Hagar and Ishmael into the wilderness. When their water is gone, Hagar casts Ishmael under a bush.

Then she went, and sat down over against him a good way off, about the distance of a bowshot; for she said, ‘Let me not look upon the death of the child’. And as she sat over against him, the child lifted up his voice and wept. And God heard the voice of the lad; and the angel of God called to Hagar from heaven, and said to her, ‘What troubles you, Hagar? Fear not; for God has heard the voice of the lad where he is. Arise, lift up the lad, and hold him fast with your hand, for I will make him a great nation’. Then God opened her eyes, and she saw a well of water; and she went, and filled the skin with water, and gave the lad a drink.¹⁵⁸

The relation of these two stories is essential to making sense of God’s command to Abraham that he sacrifice his ‘only son’. Isaac’s designation as the ‘only son’ is true in a complicated way. Ishmael is conceived through insemination by Abraham, Isaac is conceived by the Lord doing to Sarah ‘as he had promised’.¹⁵⁹ Abraham is the father of Isaac through the promise of God, while Abraham is the father of Ishmael through his sexual encounter with Hagar. In order to experience the morality of this story about the sacrifice of a proper and only son, we must believe in the promise of the Lord as ‘the instrument of generation’.¹⁶⁰ As Judith Grbich has shown, it is this story about fathers and mothers that continues to underpin the narratives of economics and explanations of the qualities of paper money, credit and interest.

¹⁵⁵ Genesis 21:10.

¹⁵⁶ Genesis 21:11.

¹⁵⁷ Genesis 21: 12-14.

¹⁵⁸ Genesis 21: 15-19.

¹⁵⁹ Genesis, 21:1.

¹⁶⁰ Judith Grbich, above n43, 19.

While mother appears to possess the instrument of generation she does not have fatherly powers, these are passed to any child who can imagine using her like father. Where ... paper money is used generatively in the expectation that it will produce more than the holder possesses, the child speculator becomes like 'father'.¹⁶¹

Christianity accepts Abraham's understanding of authentic filiation. The story of Ishmael and Abraham, although involving the separation of father and son and the sparing of the son's death by God, is not recounted as a founding fable of Christian doctrine. The differences between the two stories are telling. In the story of Ishmael, the son who is exiled not sacrificed, the action is not immediately economic. In a much stronger sense than that involved in the story of Isaac, this is a narrative of dissemination or 'that which doesn't come back to the father' – Abraham and the reader expect 'neither response nor reward' from this decision to exile a son and a lover.¹⁶² The mother, Hagar, remains a central player in the story. She intervenes 'in some consequential manner', and as a result 'the implacable universality' of the law of sacrificial responsibility is subtly altered. We feel the distance between Hagar and the son whose coming death she dreads – we hear the cries of the child as he mourns his separation from his mother. The angel of the Lord speaks directly to the mother, and relieves her suffering. We do not forget the memory of the flesh, the intimate relation between mother and son. What might it mean to begin our theology here, with the twinned stories of Isaac and Ishmael, of father's word and mother's body, rather than beginning with the drama of Abraham and Isaac alone? Here I, like the writers of the scriptures, am preparing the way for the gospel, because as we will see in Part 4, this privileging of the Father's word over the Mother's body is forever complicated in the Christian doctrine of the Word made flesh.¹⁶³

3. Abandonment and the subject of human rights

I have so far suggested that trade agreements are structured by a Christian doctrine of sacrifice. Human rights and democracy are regularly invoked as a response to economic excesses, as evidenced in the linkage debate discussed in Part 1. The democratic rights-bearer of liberal legalism would seem to be the counter to any theological fundamentalism, whether economic or otherwise. This sense of liberal democracy as the scourge of theocracy is evident in much current internationalist rhetoric and reasoning. The war on terror, for example, is often portrayed in these terms.¹⁶⁴ The European Court of Human Rights has also recently affirmed this

¹⁶¹ Ibid, 19.

¹⁶² For the description of the story of Isaac in these terms, see Jacques Derrida, above n108, 96.

¹⁶³ John, 1:14.

¹⁶⁴ The linking of theocracy and terrorism is well illustrated in a speech given by US President Bush in Whitehall Palace, London on November 19, 2003 (available at www.georgewbush.com). In his discussion of the need to bring freedom to the Middle East, President Bush declared: 'Many governments are realizing that theocracy and dictatorship do not lead to national greatness; they end in national ruin ... Our part, as free nations, is to ally ourselves with reform, wherever it occurs ... We will consistently challenge the enemies of reform and confront the allies of terror'. Yet the instability of such a position is very apparent in this speech – while terrorists are linked with theocrats and fundamentalists, the text seems almost to work as a parody, describing the Americans as 'a religious people', invoking the common beliefs of the British and American peoples ('We believe in open societies ordered by moral conviction. We believe in private markets, humanized by compassionate government. We believe in economies that reward effort'), affirming 'the God-given dignity of every person' and ending with the words 'May God bless you all'.

opposition in the *Refah Partisi* case, where it held that a theologically grounded political party was a threat to democracy.¹⁶⁵ But can human rights offer a secular response to the demands of the market?

(a) Bio-politics and human rights

Despite his comprehensive critique of the emancipatory claims of European human rights traditions, this secular function of human rights would seem to be the direction in which the work of Giorgio Agamben would take us. For Agamben, the price we pay for inclusion in the democratic community of potential law-makers, the regime of the brother, can be understood in terms of the secular form of abandonment rather than the religious form of sacrifice. This form of abandonment is represented in Roman law by the figure of *homo sacer*. *Homo sacer* is the man who can be killed but not sacrificed. For Agamben, this relationship of abandonment is prefigured by that between a juvenile son and his father in Roman law. There, the son is the one who can be killed lawfully by the father. The act of a father killing his son is not a sacrifice, but neither is it a criminal act characterised by terms such as murder or manslaughter. Instead, the adolescent son is in a relation with his father premised on the father's power and authority over his son's body, even unto death. This potentiality for violence is the price paid by the son for his ultimate inclusion as a citizen in the masculine institutions of the city. Thus he pays for his entitlements as a citizen through this capture by and complicity with the law of the father.

It is as if male citizens had to pay for their participation in political life with an unconditional subjection to a power of death, as if life were able to enter the city only in the double exception of being capable of being killed and yet not sacrificed.¹⁶⁶

This is the pure form of law described by Kant in the *Critique of Practical Reason*. The relationship of the democratic subject to the law is one evacuated of moral content, so that the subject must obey a purely formal law 'reduced to the zero point of its significance, which is nevertheless in force as such'.¹⁶⁷

Now if we abstract every content, that is, every object of the will (as determining motive) from a law," he writes, "there is nothing left but the simple form of a universal legislation."¹⁶⁸

To stand before the open door of the law, a law that 'demands nothing of him', a law now abstracted from content, is the condition for the male citizen in modernity. Agamben equates this to the 'structure of the sovereign ban ... that of a law that *is in*

¹⁶⁵ *Case of Refah Partisi (The Welfare Party) and Others v Turkey*, Applications nos 41340/98, 41342/98, 41343/98 and 41344/98, ECHR, Judgment, 13 February 2003, particularly at paragraphs 122 – 125 (discussing statements by Refah's leaders referring to 'religious or divine rules as the basis for the political regime which the speakers want to bring into being' and as giving 'a clear picture of a model conceived and proposed by the party of a State and society organised according to religious rules. The Court supported the banning of this party on the basis that 'Refah's policy of establishing sharia was incompatible with democracy' and expressed support for Turkey's 'form of secularism which confined Islam and other religions to the sphere of private religious practice'.

¹⁶⁶ Giorgio Agamben, above n10, 90.

¹⁶⁷ *Ibid*, 51.

¹⁶⁸ *Ibid*, citing Immanuel Kant, *Kritik der praktischen Vernunft*, 1913, 27.

force but does not *signify*'.¹⁶⁹ This Kantian relationship to a purely formal law founds the democratic, human rights state. The male citizen stands before the law, transfixed by its brilliance and wasting away, as in Kafka's short parable 'Before the Law'.¹⁷⁰ This is the story of the man from the country, who journeys to the door of the law and finds it open. The open door is guarded by a gatekeeper, who refuses to let the man enter but stands aside to let the man see through the door. The man from the country wastes away as he waits before the open door of the law, asking regularly whether he might yet be permitted to enter, and even trying to bribe the gatekeeper to allow him through the gate. When, towards the end, he asks why no-one else has come to the door, the gatekeeper tells him it was there only for him, and that now he is going to close it. The citizen-subject thus is doomed to stand, dazzled, before the law, awaiting the decision of the gate-keeper to enter the kingdom of the law-maker/father. He 'is delivered over to the potentiality of law because law demands nothing of him and commands nothing other than its own openness'.¹⁷¹ The price of obedience is inscribed on his wasted body.

Agamben suggests that this shape of a law in force without signifying, grounded on the management and transformation of human life, is the stuff of Michel Foucault's bio-politics. In his influential text, *The History of Sexuality: An Introduction*, Foucault argues that power operates in liberal states in ways that differ from what he terms the juridical model of power that is accepted in much political and legal theory.¹⁷² For Foucault, coercive juridical or sovereign power is no longer the dominant form of power operating within liberal states. It has been replaced as the central mode of exercise of power by what he has termed 'disciplinary power', a new mechanism of power that emerged in the 17th and 18th centuries in Europe.¹⁷³

If one can apply the term *bio-history* to the pressures through which the movements of life and the processes of history interfere with one another, one would have to speak of *bio-power* to designate what brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of transformation of human life. It is not that life has been totally integrated into techniques that govern and administer it; it constantly escapes them ... But what might be called a society's "threshold of modernity" has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.¹⁷⁴

For Agamben, the transformation of human life into a task or project for governance marks 'the biopolitical turn of modernity'.¹⁷⁵ It is through assuming the bare life of

¹⁶⁹ Ibid, 51.

¹⁷⁰ Franz Kafka, 'Before the Law' in *Metamorphosis and Other Stories* (trans Malcolm Pasley), 1992, 165-6.

¹⁷¹ Giorgio Agamben, above n10, 50.

¹⁷² Michel Foucault, *The History of Sexuality: An Introduction*, (trans. Robert Hurley), 1980.

¹⁷³ Michel Foucault, 'Two Lectures' in Colin Gordon (ed.), *Power-Knowledge: Selected Interviews and Other Writings 1972-1977*, (trans. Colin Gordon, Leo Marshall, John Mepham and Kate Soper), 1980, 78-108, at 105.

¹⁷⁴ Michel Foucault, above n172, 143.

¹⁷⁵ Giorgio Agamben, above n10, 153.

homo sacer ‘as a task’ that this life becomes ‘explicitly and immediately political’.¹⁷⁶ Unlike Foucault, who supported struggles framed in human rights terms,¹⁷⁷ Agamben sees human rights as a central mechanism by which human life has been brought into the realm of biopolitics and as hopelessly implicated in the production of state legitimacy. Indeed, ‘the fates of the rights of man and of the nation-state’ are so inextricably linked together for Agamben that declarations of rights represent ‘the originary figure of the inscription of natural life in the juridico-political order of the nation-state’.¹⁷⁸ Bare life ‘now fully enters into the structure of the state and even becomes the earthly foundation of the state’s legitimacy and sovereignty’.¹⁷⁹ Yet this bare life has a ghostly presence in the biopolity of the liberal state – while the ‘pure fact of birth’ appears as the source of rights,¹⁸⁰ this same natural or bare life ‘vanishes into the figure of the citizen, in whom rights are preserved’.¹⁸¹ It is thus possible to declare, as does the 3rd article of the French Declaration, that ‘[t]he principle of all sovereignty resides essentially in the nation’, because the Declaration ‘has already inscribed this element of birth in the very heart of the political community’.¹⁸² Any possibility that incarnation might be revolutionary is contained through this economy. ‘The nation – the term derives etymologically from *nascere* (to be born) – thus closes the open door of man’s birth’.¹⁸³ Human rights are unable to counter the forms of power exercised in liberal European democracies as human rights ‘can only grasp human life in the figure of bare or sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers they sought to fight’.¹⁸⁴

Agamben makes of this a warning of the price that we all must pay to be included in democratic societies. In particular, he argues that the biopolitics of the modern democratic and fascist states is a development of this relation. The concentration camps of Nazi Germany are for Agamben (merely) a localization of this broader relation of subject to sovereign in the modern state. For Agamben, the story of the holocaust and of the genocidal states of our age is *not* a story about sacrifice. Rather, he insists that the relation between subject and sovereign in such regimes is one already premised on the body of *homo sacer*, the person who can be killed lawfully but not sacrificed. The true horror of the camps and of genocide is not that their administrators were willing to sacrifice their victims, but rather that the acts of administrative killing which they undertook so efficiently were *not* acts of sacrifice, which would at least vest them with religious significance.

¹⁷⁶ Ibid, 153.

¹⁷⁷ See David M Halperin, *Saint Foucault: Towards a Gay Hagiography*, 1995, 80, discussing Foucault’s political support for gay rights, despite developing quite different approaches to resistance in his life and writing (‘It is important ... to have the possibility – and the right – to choose your own sexuality. Human rights regarding sexuality are important ...’).

¹⁷⁸ Giorgio Agamben, above n10, 127.

¹⁷⁹ Ibid, 127.

¹⁸⁰ Ibid. Agamben cites the French Declaration on the Rights of Man, Article 1 (‘Men are born and remain free and equal in rights’), but we could equally turn to the Universal Declaration of Human Rights, Article 1 (‘All human beings are born free and equal in dignity and rights’).

¹⁸¹ Ibid, 128, citing Article 2 of the French Declaration (‘The goal of every political association is the preservation of the natural and inalienable rights of man’.)

¹⁸² Ibid, 128.

¹⁸³ Ibid, 128.

¹⁸⁴ Ibid, 133.

(b) Bio-politics and economic globalization

The vision of the state, the body and the accompanying forms of law proposed by development institutions mirror those discussed in the work of Foucault and Agamben. Here, as in the bio-political state, the rule of law is envisaged in terms of a law in force without signifying. Thus in a key 1992 World Bank document on the introduction of the rule of law, the Bank defines the rule of law as involving ‘the processes of formulating and applying rules’.¹⁸⁵ ‘It is not enough for a law to be on the books; it has to be applied, it has to be in force in reality’.¹⁸⁶ For the Bank, the basis of ‘a good order’ is ‘a system in place, based on abstract *rules* which are actually applied and ... functioning *institutions* which ensure the proper application of such rules’.¹⁸⁷ This creates the necessary relation between state and citizen: ‘the elements of the rule of law discussed above are an important element of the procedural framework and institutional system which – if adhered to by the governments concerned – encourages stability and predictability ... and elicits compliance with the rules’.¹⁸⁸ And this political realm of compliance is intimately linked to the realm of economics – ‘elements of the rule of law are needed to create a sufficient stable setting for economic actors – entrepreneurs, farmers, and workers – to assess economic opportunities and risks, to make investments of capital and labor, to transact business with each other, and to have reasonable assurance or recourse against arbitrary interference or expropriation’.¹⁸⁹ Similarly, development institutions are engaged in bio-political management of states.¹⁹⁰ The World Bank is intimately involved in reproductive education, developing nutrition and population programs, providing microfinance programs to help ‘youth development’ in Eastern Europe, responding to the ‘development problem’ of HIV/AIDS, and providing statistics and reports on issues such as nutrition, gender, poverty reduction and communicable diseases. Patricia Stamp comments of the local centres of power-knowledge constituted through this development enterprise:

There is a certain sleazy intimacy to the posters tacked up in countless village community development offices, with their infantilizing charts and graphics showing how to feed a baby, how to wash yourself, how to plant corn and keep your yard tidy. How did it become routine and acceptable that the mundanities of daily hygiene, personal and family maintenance became poster subjects, fit material for didactic instruction by people from other continents? ... [I]n the Third World states whole populations are policed, the criterion for selection being whether one’s community or demographic group has been targeted for an aid project.¹⁹¹

The engagement of human rights law with international economic institutions has been precisely through this bio-political ground, as prefigured by Agamben. So the

¹⁸⁵ The World Bank, *Governance and Development*, 1992, 30.

¹⁸⁶ *Ibid.*, 32.

¹⁸⁷ *Ibid.*, 38.

¹⁸⁸ *Ibid.*, 39.

¹⁸⁹ *Ibid.*, 28.

¹⁹⁰ For a discussion of development practices as manifesting the disciplinary force of the Christian rule of law, see Jennifer Beard, ‘Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology’ (2003) 18 *Australian Feminist Law Journal* 27, 43-48.

¹⁹¹ Patricia Stamp, ‘Foucault and the New Imperial Order’ (1994) 3 *Arena Journal* 11, 17.

World Bank sees possibilities for engaging with the human rights community in these areas of health, sanitation, extending safety nets for children and the aging,¹⁹² while human rights commentators in turn see World Bank programmes on child labour, alcohol and drug issues relating to children, HIV/AIDS prevention, judicial reform and press freedom as some areas of potential engagement with human rights approaches.¹⁹³ Human rights in its bio-political guise does not challenge this subjection of Third World populations to bio-political management and normalization. Indeed, in a sense it intensifies that process. Bodies become the ground of political control, now exercised globally, and calculations of population control, the measurement of human development, the promotion of human capital, and public health policy are all capable of reformulation as human rights questions.¹⁹⁴ At its crudest, this is understood as providing the 'human capital' necessary to reproduce markets. So in its *Governance and Development* report, the World Bank authors note:

Among the underlying causes of poor development management is the level of economic, human, and institutional development. Lack of an educated and trained work force and weak institutions can substantially reduce the capacity of countries to provide sound development management.¹⁹⁵

Similarly, the most successful engagement, both strategically and in terms of capturing the imagination of activists, between WTO law and human rights law have been in the areas of access to medicines under the TRIPS Agreement, and in the linkage of trade preferences to labour rights standards. In each case, adding human rights to the debate seems to close off alternatives. Rather than explore more generally the possibility that international law might open up different ways of being, might make a space for contesting 'what counts as a problem and a solution', or might support people to grapple 'with ambivalence, conflict and the unknown', the contesting of globalization ends up taking preordained forms.¹⁹⁶ The problem of HIV/AIDS then becomes how to gain access to medicines patented in Europe and the US, and how to balance the human rights of patent owners with the right to 'the highest standard of physical and mental health' of sufferers. The problem of child labour or poor working conditions is translated into a problem for wealthy countries seeking to limit the importation of goods from countries who have not yet 'developed' to a stage in which the human rights of their workers are protected.

It may be that human rights simply cannot offer a counter to the excesses of the sacrificial economy because of their intimate connection. Both posit the redesign of existing societies and assume the fallibility of their present inhabitants. Both see the suffering bodies of human beings as a problem to be solved or a proof of a lack of faith – the texts of trade law and human rights law are organised around silent bodies whose suffering is made to speak in the name of the coming community. Matter

¹⁹² World Bank, *Human Rights and Sustainable Development: What Role for the Bank?*, May 2, 2002, 5.

¹⁹³ Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, 2003, 156-166.

¹⁹⁴ For a reading of Iraq reconstruction as an example of this relationship between human rights, development and bio-political management, see Anne Orford, 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179, 190-1.

¹⁹⁵ The World Bank, above n185, 10.

¹⁹⁶ David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 111.

(bodies, earth) is represented as inert, incapable of generating this new future without the help of the calculations of human rights lawyers or the capital of economic man. Both trade law and human rights law mediate social relations through the third term of the Father. In trade law this involves the responsibility to sacrifice that which is loved while waiting for the word of the Market. For human rights law, despite a ‘relentless suspicion of the state’, emancipation is nonetheless structured ‘as a relationship between an individual right-holder and the state’. The focus in human rights treaties on the appropriate organisation of the state means that the state is placed ‘as the center of the emancipatory promise’.¹⁹⁷

(c) Abandonment and sacrifice

What does this mean for the possibility of grounding a critique of economic globalization on human rights? I want to suggest that it is the repressed relation of sacrifice to this regime of bio-power described by Agamben that provides the outside to his vision of the liberal state and its laws. This reading will return us to that realm of theology from which Agamben sought to remove us. If we pay attention to the woman at the margins of Agamben’s text, we find that he does not so much take us outside a logic of sacrifice, but rather outside an *economy* of sacrifice. For in the texts of Agamben, as in the biblical texts discussed in Part 2, the nonchalant sacrifice of women and other marginalized figures is narrated as merely framing the important story of fathers and sons. There are other figures scattered around the margins of Agamben’s text – in particular, adulterous wives and daughters and servants, all of whom are subject to a different kind of power to kill. For example, in his relation of the key concept of *homo sacer* to the unconditional power and authority of the *pater* over his sons in Roman law, Agamben draws this distinction:

[T]his power follows immediately and solely from the father-son relation (in the instant in which the father recognizes the son in raising him from the ground, he acquires the power of life and death over him) ... [T]he father’s power should not be confused with the power to kill, which lies within the competence of the father or the husband who catches his wife or daughter in the act of adultery, or even less with the power of the *dominus* over his servants. While both of these powers concern the domestic jurisdiction of the head of the family and therefore remain, in some way, within the sphere of the *domus*, the *vitae necisque potestas* attaches itself to every free male citizen from birth and thus seems to define the very model of political power in general.¹⁹⁸

The father’s power over the son is scandalous because it otherwise contradicts the principle ‘according to which a citizen could not be put to death without trial’ and thus ‘took the form of a kind of unlimited authorization to kill’.¹⁹⁹ The unlimited authorization to kill a wife, daughter or slave is unremarkable – this authority becomes a public question only in the case of the son. Thus ‘every male citizen (who can as such participate in public life) immediately finds himself in a state of virtually being able to be killed, and is in some way *sacer* with respect to his father’.²⁰⁰ The

¹⁹⁷ Ibid, 113.

¹⁹⁸ Giorgio Agamben, above n10, 88.

¹⁹⁹ Ibid, 89.

²⁰⁰ Ibid, 89.

authority of the father over the son is understood to be ‘a kind of public duty’, and the magistrate’s *imperium* can be understood as this paternal authority ‘extended to all citizens’.²⁰¹ For Agamben, the figure of the son is at the hinge of the two realms separated in classical politics – the *domus* and the city. The son’s bare life ‘is the hinge on which each sphere is articulated’.²⁰² Lost is any sense of the sacrifice grounding this relation of father and son and thus enabling the separation of *domus* and city. And in particular, the relation of mother and son is completely absent from the discussion – the sexualized figures of mother, daughter, wife can be killed or required to sacrifice that which they love without further comment.

A similarly dismissive treatment of the figure of the wife occurs in Agamben’s discussion linking the figure of *homo sacer* to the bandit or outlaw who has been punished by being banned from the city. In this passage, Agamben is exploring Germanic and Anglo-Saxon legal sources which evoke the liminal status of the bandit by defining him as wolf-man, wolf’s head or werewolf. He suggest we should hear an echo of these laws in Hobbes founding of sovereignty ‘by means of a reference to the state in which “man is a wolf to men”’.²⁰³ Modern sovereignty is grounded on a state which ‘is not so much a war of all against all as, more precisely, a condition in which everyone is bare life and a *homo sacer* for everyone else’.²⁰⁴ Yet this ‘everyone’ is again defined against the feminine. This is made explicit in Agamben’s retelling of a narrative poem by Marie de France. The story is of a baron who is very close to his king. Every week he hides his clothes under a bush and is transformed into a werewolf for three days. This transformation is temporary although if the clothes were to be lost, or the werewolf caught putting them, on he would remain a wolf forever. His wife suspects the baron’s secret life and persuades him to tell her where he leaves his clothes. She steals his clothes, with an accomplice who becomes her lover, and the baron remains a wolf. One day the king goes hunting in the forest, and when his dogs are let loose they find the werewolf. As soon as he sees the king the werewolf runs towards him and licks the king’s legs and feet ‘as if imploring the king’s mercy’. Impressed by ‘the beast’s humanity’, the king brings the werewolf ‘to live with him, and they become inseparable’.²⁰⁵ Agamben’s ends his recounting of this story as follows:

The inevitable encounter with the ex-wife and the punishment of the woman follow. What is important, however, is that [the werewolf’s] final transformation back into a human takes place on the very bed of the sovereign.²⁰⁶

For Agamben, the ‘inevitable encounter with’ and ‘punishment of the woman’ are passing incidents noted on the way to ‘[w]hat is important’. Yet the ‘special proximity of werewolf and sovereign’ is dependent upon just such a casual repression of the sacrifice of the feminine. These sacrifices are not economic but ‘aneconomic’ in the sense used by Derrida – they are not the subject of an economy of circulation, but work outside it. If we follow Agamben and focus on the forms of law that bind the

²⁰¹ Ibid, 89.

²⁰² Ibid, 90.

²⁰³ Ibid, 105-6.

²⁰⁴ Ibid, 106.

²⁰⁵ Ibid, 108.

²⁰⁶ Ibid, 108.

descendants of the sons of Rome to the sovereign of the democratic state, then it is true to say that the logic that governs these regimes is bio-political rather than sacrificial. However, if we return to the realm of the household, we can see that sacrifice does continue to work its logic in the democratic state. The place of sacrifice is in effect pre-democratic – Agamben’s fraternal institution is produced by rendering the sacrifice of the sexualized figures of women, slaves, daughters, to a marginal site outside the frame of the central and important story of fathers and sons. We are thus returned to the Biblical tradition in which a paternal economy is instituted and maintained upon the repressed sacrifice of the feminine. This is necessary to ground a relation premised on the sovereign/citizen waiting before the door of the law for the word of the Father.

He comes from the Father. To the Father he aspires. Toward the Father he walks and never falters. By the Father alone he fears to be forsaken.²⁰⁷

The abandonment which Agamben traces as central to the modern liberal democracies of Europe thus involves this fear of being forsaken by the Father alone. Agamben’s text reveals that this sacrifice in the realm of the household or economy *precedes* the constitution of the bio-political body of the European polity. The sphere of politics becomes that space in which economic man stands before the law, awaiting his redemption.²⁰⁸ The sacrifice of all that is cherished to the realm of civil society or the market underpins the constitution of the bio-political realm, and gives it its monstrous form. The citizen/son who waits before the law is always already produced as bare life, as that which can be known intimately by the sovereign/father, through that form of sacrifice that has already taken place in the economic realm. To wait as a citizen before the law for the word of the Father means already having sacrificed the feminine and the body to the Word of God, in the secret knowledge of a reward in the future.

The religious, and indeed Christian, nature of the relationship that exists between these economic and political forms of law has perhaps best been explored by Karl Marx in his essay ‘On the Jewish Question’. For Marx, the political community of the liberal democratic state is famously ‘a mere means for the preservation of these so-called rights of man’, the rights to liberty, private property, equality (in the sense that ‘each man shall without discrimination be treated as a self-sufficient monad’) and security (‘the concept of the police’).²⁰⁹ The democratic state emancipates itself from state religion and from private property, so that neither religious belief nor the ownership of private property are qualifications for participation in elections or for

²⁰⁷ Luce Irigaray, above n11, 165.

²⁰⁸ Indeed, in the aftermath of the Holocaust, a number of theorists were to write that there is a hidden content to the Kantian moral law, a secret command beyond the simple ‘Obey!’, and that content is: *sacrifice that which you love*. Sacrifice your wonder, joy, passion, tenderness. Stand before the law emptied of all but your rationality and your capacity to obey the principle behind the law. For Jacques Lacan, Kant’s ‘moral law ... looked are more closely ... culminates in the sacrifice, strictly speaking, of everything that is the object of love in one’s human tenderness’: Jacques-Alain Miller (ed), *The Seminar of Jacques Lacan Book XI: The Four Fundamental Concepts of Psychoanalysis* (trans Alan Sheridan), 1981, 275. See the discussion of Lacan and Hannah Arendt on Kant in Juliet Flower MacCannell, ‘Fascism and the Voice of Conscience’ in Joan Copjec (ed), *Radical Evil*, 1996, 46-73, at 67.

²⁰⁹ Karl Marx, ‘On the Jewish Question’ in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, 1987, 137-150, at 146-7.

holding private office. Yet the state still allows religion and private property to exist.²¹⁰ Indeed, the state can only affirm itself as a state through opposition to these forms.

Far from abolishing these factual differences, its existence rests on them as presuppositions, it only feels itself to be a political state and asserts its universality by opposition to these elements.²¹¹

As a consequence, the subject in such a state is split, becomes both a citizen in the political community or the subject of human rights law, and an individual in what Marx calls civil society, or as we might think of here, the subject of trade law.

When the political state has achieved its true completion, man leads a double life, a heavenly one and an earthly one, not only in thought and consciousness but in reality, in life. He has a life both in the political community, where he is valued as a communal being, and in civil society, where he is active as a private individual, treats other men as means, degrades himself to means, and becomes the plaything of alien powers. The political state has just as spiritual an attitude to civil society as heaven has to earth.²¹²

This leads to a kind of metamorphosis or as Marx argues, a ‘decomposition’ of the subject of capitalist democracy: ‘The difference between the religious man and the citizen is the difference between the trader and the citizen, between the labourer and the citizen, between the property owner and the citizen, between the living individual and the citizen’.²¹³ Marx suggests that we can learn from this the way that the citizen deals with ‘impediments’ to emancipation such as differences in property or religious belief – ‘through the medium of the state and politically by entering into opposition with himself’.²¹⁴ Man as citizen liberates himself politically through a detour or a medium. From this, it will not be a big step to say that in modern times we understand our freedom through the form of our state. Marx specifically labels this form of emancipation through an intermediary as Christian.

As Christ is the intermediary onto whom man unburdens all his divinity, all his religious bonds, so the state is the mediator onto which he transfers all his Godlessness and all his human liberty.²¹⁵

This, then, is already a Christian logic and form of the state. The state is Christian because of this founding dualism between individual life and communal or species-life. While the ‘perfect Christian state is the one that recognizes itself as a state and abstracts itself from the religion of its members’, the state nonetheless remains recognizably Christian precisely through these acts of recognition and abstraction.²¹⁶

²¹⁰ Ibid, 139-140.

²¹¹ Ibid, 140.

²¹² Ibid, 140.

²¹³ Ibid, 141.

²¹⁴ Ibid, 139.

²¹⁵ Ibid, 139.

²¹⁶ Ibid, 144.

It is ‘the human foundation of Christianity’ rather than Christianity itself that founds this state.²¹⁷ It is worth setting out in detail Marx’s conclusion on this point:

What makes the members of the political state religious is the dualism between their individual life and their species-life, between life in civil society and political life, their belief that life in the state is the true life even though it leaves untouched their individuality. Religion is here the spirit of civil society, the expression of separation and distance of man from man ... The fantasy, dream and postulate of Christianity, the sovereignty of man, but of man as an alien being separate from actual man, is present in democracy as a tangible reality and is its secular motto.²¹⁸

In such a state of ‘complete democracy’, religious consciousness has particular force because its history is forgotten – the force of religion derives from its lack of ‘political significance and earthly aims’.²¹⁹ It is within such a vision of the relation between politics, economics, religion and the state that Marx’s famous dismissal of human rights can then be understood. Responding to the claim by his colleague Bruno Bauer that ‘man must sacrifice the “privilege of belief” in order to be able to receive general human rights’, Marx argued that this was true only in the sphere of public or communal life – in the economic sphere of civil society man can continue to hold on to his privileges free of interference from his fellow men or the community.²²⁰ With this double movement, the sacrifice of belief becomes the necessary condition for the receipt of human rights communally, while the maintenance of that belief remains as the foundation of the economy. In the words of Marx, while ‘[r]eligion is no longer the spirit of the state ... religion has become the spirit of civil society’.²²¹

For international trade law, the relationship between the market/Father and economic man/son is one of sacrificial responsibility. The subject of international human rights law, the rights-bearing citizen, is produced out of the sacrifice to the God of the market discussed in Part 2. The split subject who is produced out of the intimate relation between the two forms of law sees freedom and liberation as its telos, and yet is forever caught within a sacrificial economy. If human rights cannot provide an outside to the economy of sacrifice, does reading the two traditions together leave us at the dead end of my classroom discussion? In my view, this question cannot be resolved outside of the theological doctrines and cultural forms that give it moral force. In the concluding Part, I want to suggest another reading of this Christian tradition. I will draw on the feminist tradition of engaging ‘law’s doubleness’ in order to ‘critique *somewhere*, opening up rather than occluding an alternative space’.²²² This space is one in which a law based on the Mother’s Body might emerge.

²¹⁷ Ibid, 143.

²¹⁸ Ibid, 143.

²¹⁹ Ibid, 143.

²²⁰ Ibid, 144.

²²¹ Ibid, 142.

²²² William P MacNeil, ‘The Monstrous Body of the Law: Wollstonecraft vs Shelley’ (1999) 12 *Australian Feminist Law Journal* 21, 39.

4. The memory of the flesh

And the Word became flesh and dwelt among us ...²²³

This Part returns to the question of the feminine as at once the outside and the inside of the narratives of paired fathers and sons that I have told here. Feminist thinking about difference and divinity suggests that the return to the flesh (of the mother, of the lover) gives us a place to start to think about that which escapes every attempt at sacrificial substitution in language, as in economics. I want to focus particularly on the reading of the ‘testamentary narrative’ of Christianity by Luce Irigaray.²²⁴ Irigaray asks why the ‘new pattern of relations between God and men’ announced in the Christian gospels has been interpreted as a story about the relation between Father and son. The word made flesh has meant the coming into a body that ‘will find communion with the whole and within the unique only through the sacrifice of his person to the Father’.²²⁵

The Christ would open up the walls of this tomb. Not toward the depths of the earth but toward the abysses of Heaven, not through or for the mother’s passion, but by identification with the Father’s Word. He would go from the Father to the Father, without a backward look at this birth into the body.²²⁶

Nor does Christ experience the ‘fulfilment of carnal exchange’ with women, ‘for he is already bound to his heavenly Father’.²²⁷ For Irigaray, this closing off of relations with the feminine amounts to a sacrifice of the sexual and maternal body. This is symbolised through the part played by Mary as ‘Mediatrice between Word and flesh ... the means by which the (male) One passes into the other’.²²⁸ The sacrifice of Mary is echoed in the crucifixion of Christ: ‘the virgin who lives forever because she dies to her generation in order to become the vehicle of the other, corresponds, in a sort of mimetic representation, [to] the murder of the man she loves’.²²⁹ The sacrifice of the generativity of Mary takes place in order to represent her as a ‘[r]eceptacle that, faithfully, welcomes and reproduces only the will of the Father’.²³⁰ As with the stories of fathers and sons I traced in *Genesis* and *Homo Sacer*, this first sacrifice ‘is not noticed’.²³¹ Instead, it is ‘forgotten as a condition for the – apparently – singular event of the second’.²³² The Christian story is retold as if it were only about fathers and son. The sacrifice of the mother is taken for granted, as if it were of no matter – there is no recognition that her sacrifice prefigures that of the Christ. This means that the story misses out that passing through the body of woman and then incarnation, as if the flesh were simply to be endured on the journey back to the father. For Irigaray, those interpreters of the Christian narrative who ‘suspend meaning’ in the World ‘immobilize life in something that is merely the trace of life’.²³³ In so doing, they

²²³ John, 1:14.

²²⁴ Luce Irigaray, above n11, 164.

²²⁵ Ibid, 164

²²⁶ Ibid, 165.

²²⁷ Ibid, 166.

²²⁸ Ibid, 166.

²²⁹ Ibid, 166.

²³⁰ Ibid, 166.

²³¹ Ibid, 167.

²³² Ibid, 167.

²³³ Ibid, 169.

‘paralyze the becoming of peoples’ and ‘indefinitely repeat the identical, because they are unable to discover difference’.²³⁴ As I have suggested, this Father/son relationship governs the ways in which both economics and human rights understand human community, and means that relations with other human beings are regulated and mediated via the Father, or through the institutions of state or market.

Yet, Irigaray asks, must this narrative ‘be univocally understood as a redemptory submission of the flesh to the Word?’²³⁵ What if we turned to Mary as a model for the experience of the divine?

And what if, for Mary, the divine occurred only near at hand? So near that it thereby becomes unnameable. Which is not to say that it is nothing. But rather the coming of a reality that is alien to any already-existing identity. Relationship within a more mystical place than any proximity that can be localized. An effusion that goes beyond and stops short of any skin that has been closed back on itself. The deepest depths of the flesh, touched, birthed, and without a wound.²³⁶

I remember the moment, pregnant with my first child, when I first began to understand that alterity had taken up residence in the ‘deepest depths of my flesh’. My body made mystery through ‘the coming of a reality that is alien to an already-existing identity’. What if we took seriously this symbol of the word made flesh, this experience of the divine ‘near at hand’? For Irigaray, it is this ‘most intimate perception of the flesh’ which ‘escapes every sacrificial substitution, every assimilation into discourse, every surrender to the God ... [T]his memory of the flesh as the place of approach means ethical fidelity to incarnation. To destroy it risks suppressing alterity, both God’s and the Other’s.’²³⁷ This experience of incarnation and reincarnation would assign a place to the body as ‘divine source’ rather than ‘receptive-passive female extra’ in religious scenarios, and in turn would unsettle the ‘code of law’ and ‘nets of institutions’ that seek to consign all people to a relationship with the Father alone.²³⁸

And, Irigaray asks, what if the word made flesh and the exit from the tomb meant ‘an invitation to become shared flesh’? ‘Passage from body-corpses to a saying that transfigures them – pulls them out of the walls of their death. Crossing their own frontiers in a meeting with the flesh of the other’.²³⁹ What if the message of divine incarnation were to ‘create oneself and grow in the grace of fleshly fulfilment’?²⁴⁰ ‘That God might be engendered in love, in a fertility that goes beyond and falls short of actual procreation’.²⁴¹ Such a reading might make possible a resistance to the disciplinary productivity I have explored in this paper. Rather than providing a model for the sacrifice of passion, love, tenderness and touch in the name of the Father, the

²³⁴ Ibid, 169.

²³⁵ Ibid, 169.

²³⁶ Ibid, 171.

²³⁷ Luce Irigaray, ‘The Fecundity of the Caress: A Reading of Levinas, *Totality and Infinity*, “Phenomenology of Eros” in *An Ethics of Sexual Difference* (trans Carolyn Burke and Gillian C Gill), 185 – 217, 217.

²³⁸ Luce Irigaray, above n11,.

²³⁹ Ibid, 169.

²⁴⁰ Ibid, 170.

²⁴¹ Ibid, 170.

message of the journey of Christ becomes the ‘quest for some incredible nearness in life’.²⁴² This resonates with Foucault’s description of the challenge that gay male relationships pose to the bio-political state.

Imagining a sexual act that does not conform to the law or to nature, that’s not what upsets people. But that individuals might begin to love each other, that’s the problem. That goes against the grain of social institutions: they are already crisscrossed by emotional intensities which both hold them in place and fill them with turmoil – look at the army, where love between men is endlessly solicited and stigmatized. The institutional regulations cannot approve such ... relations ..., with their multiple intensities, variable colorations, imperceptible movements, and changing forms – relations that produce a short circuit and introduce love where there ought to be law, regularity, and custom.²⁴³

Perhaps then the gift of Christianity is this return to the flesh, to the encounter with the other as the absolute unknown who is also near at hand. This rethinking of matter and of fertility (that does not necessarily result in procreation) would radically undo the founding tenets of both economic law (which has long seen nature as passive and capital as generative) and human rights law (in which bodies are the material of bio-political management and control). It would also represent a challenge to those attempts to silence the body that have been the result of this meeting of the nation-state, biopolitics and economics in our time.²⁴⁴ However, this re-evaluation is only possible if we go ‘beyond the Father-son relationship’.²⁴⁵

[O]nly through difference can the incarnation unfold without murderous or suicidal passion. Rhythm and measure of a female other that, endlessly, undoes the autological circle of discourse, thwarts the eternal return of the same, opens up every horizon through the affirmation of another point of view where fulfilment can never be predicted ... A reminder that man comes from the earth-mother, that he returns to her, and that at each step a shadow walks by his side.²⁴⁶

Can international law make a space for this shadow, remain open to this horizon through the affirmation of difference? I have suggested that both trade law and human rights law close off the possibility of encountering difference through the imposition of a universalist account of what we are all becoming. These two fields of law, like institutionalised Christianity, know what the Father will want, know the message of the Messiah. They do not open to the divinity of the flesh but to the word of the Father. While human rights might offer an outside to the sacrificial economy I have traced here, this would be so only if it could disturb the paternal order which grounds both trade and human rights law. There is a natural law tradition informing human rights which might provide resources for figuring nature, the body and the feminine as

²⁴² Ibid, 181.

²⁴³ David M Halperin, above n177, 98.

²⁴⁴ Andrew Hewitt, ‘The Bad Seed: “Auschwitz” and the Physiology of Evil’ in Joan Copjec (ed), *Radical Evil*, 1996, 74, 97-8, analysing Nazism as ‘an attempt (impossible, of course) to silence the body’; David Fraser, above n9, 411-2, on ‘Auschwitz as the place where law attempts to inscribe bodies which cannot be confronted and addressed ethically’.

²⁴⁵ Luce Irigaray, above n11, 188.

²⁴⁶ Ibid.

sources of divinity rather than as tasks to accomplish. Yet in these times, it does not seem to me that this is a direction that international human rights law is likely to take. It is more and more made captive by the instrumental demand that human rights organisations prove their usefulness and fall into line with the priorities of powerful states, themselves seen as functional machines for maximising the interests of rational stakeholders.²⁴⁷

Yet there is a tradition in international law that represents an ‘openness to the possibility of community between different-thinking particularities’ and resists ‘the closed world of fixed identities’ that founds the international law of our post-Cold War era.²⁴⁸ In his critical history of European international legal writing, Martti Koskenniemi finds an approach that ‘represents the possibility of the universal ... but it does this by remaining “empty”’.²⁴⁹ International law then maintains ‘the possibility of an open area of politics’ that reaches towards a non-imperialist universality as a ‘horizon of possibility’.²⁵⁰ It is here, if anywhere, that international law seems to offer a narrative that is not organised around the Father/son dyad. This is an approach to international law that does not dictate the forms that everyday life must take, but ‘exists as a promise of justice’.²⁵¹ Despite, or perhaps because of, the many differences between states, international law does not articulate its normative commitments in terms of ‘substantive values, interests, or objectives’.²⁵² Rather, it ‘describes the international world as a political community in which questions of just distribution and entitlement are constantly on the agenda’.²⁵³ This too is a form of messianism, ‘the announcement of something that remains eternally postponed’.²⁵⁴ Yet this ‘account of the “messianic”’ resists ‘the claim to circumscribe a horizon for the future coming – to identify, in the idiom of language and law, the content of the Messiah’s message in advance of its arrival’.²⁵⁵ It is here that I find the space in which another law might emerge, in which that which is to come is prepared for not by closing off, but by remaining open.

5. Conclusion

In order for there to be any sense in asking oneself about the terrible price to pay, in order to watch over the future, everything would have to be begun again.²⁵⁶

²⁴⁷ For a more optimistic vision of the possibilities for reinvigorating the international organization as ‘a useful abstraction in which political debate can take place beyond national boundaries’, see Jan Klabbers, ‘The changing image of international organizations’ in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, 221 – 255, 244.

²⁴⁸ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 2001, 504.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Martti Koskenniemi, ‘What is international law for?’ in Malcolm D Evans (ed), *International Law*, 2003, 89, 111.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Shaun McVeigh, Peter Rush and Alison Young, ‘A Judgment Dwelling in Law: Violence and the Relations of Legal Thought’ in Austin Sarat (ed), *Law, Violence and the Possibility of Justice*, 2001, 101-141, at 119, describing this as the form of messianism developed in the work of Derrida.

²⁵⁶ Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (trans Peggy Kamuf), 1994, 175.

To begin again, not with the Word, but with the Word made flesh. This has been my response to the recognition that ‘we are still always moving inside theology, however, critically we may be moving’.²⁵⁷ Those fraternal institutions that are founded upon the word of the Father forget this ‘intimate perception of the flesh’. I speak, write and sacrifice, am abandoned or inscribed, experience love and freedom, within such institutions. Those that govern the project of writing and speaking about trade and human rights are often universities, and so I begin with scenes of academic life as the place from which this writing body, and my paper, begin again, open out. There is a secret history to these modern institutions, a relationship to mystery that might allow them to be inhabited differently. It is perhaps through my teaching that I am most often reminded of the need to write in this way of an outside (or an inside), to take critique *somewhere*. I do not purport in this paper to have been able to write an account that is outside theology. My aim has been a different, though perhaps no less ambitious, one – to develop a project inside theology that is not ‘a return of the crusades’.²⁵⁸ I fear that it may be ‘a professional and a social mistake’ to write and speak about trade and human rights using the language of bodies, divinity, mysteries, gods, sacrifice and abandonment.²⁵⁹ In the face of this fear that I may be exiled, considered extraneous if I write yet again in ways that breach the generic rules of international law, my faith in writing is itself maintained through communities that exist inside and outside the institutions I inhabit – friends, students and colleagues who return me to questions about what it is to write, about the body and the text, about economies and theologies. It is such relations, and the languages and encounters through which they are lived, that allow me the sense of that which escapes sacrifice, a memory of the flesh.

²⁵⁷ Karl Marx, above n209, 137.

²⁵⁸ On the dangers of a return to the crusades, see Gayatri Chakravorty Spivak, ‘Schmitt and Poststructuralism: A Response’, above n54, 1736.

²⁵⁹ For a discussion of being disciplined in terms of learning the style which will be credible to the disciplinary audience, and the professional and social mistake that results if the wrong style is paraded, see Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ (1999) 93 *American Journal of International Law* 351, 357.