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## The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law

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I. INTRODUCTION

In this article I present an argument about the rule of law—one which I think has not been adequately articulated previously. To develop this argument I want to draw on two distinct perspectives. The first is historical. In order to try to understand the ways in which ideas about the rule of law operate, I return to a powerful, yet perhaps unfamiliar, statement of rule of law values from colonial Van Diemen's Land (now called Tasmania and part of the Commonwealth of Australia) in the first part of the nineteenth century. I contrast this statement with a notorious abandonment of those values at the same time and in the same place: the genocide of its indigenous inhabitants. The historical comparison will help us see just how it is that governments then and now seem able to hold simultaneously in their heads two contradictory realities—the rule of law on the one hand and the treatment of indigenous people on the other—without, apparently, exploding at the irony of it.<sup>1</sup>

The second perspective, related to the first, is methodological: in trying to comprehend what it means to talk about the rule of law in relation to colonized peoples, this essay focuses not on essays in political theory or pieces of legislation, but on two art works. One of the earliest and most celebrated articulations of the “rule of law” in all of Britain's imperial history is to be found in a series of illustrations that spoke directly to the colonial government's relationships with Aboriginal people. These images afford a remarkably complex, revealing, and relevant representation of the rule of law. But they should not be understood as merely illustrative of the law, if such a distinction can be maintained. Art and law are here entwined and inseparable.

That one of the most significant statements of the rule of law in Australian colonial history was produced for Aboriginal people and in the form of a picture tells us something. In the first place, the rule of law is not merely a legal or technical term. It is a social fact. To understand it properly, our sources must extend beyond the pages of textbooks and law reviews (present company excepted) into the social world—its representations and deployment in art, literature, children's books, movies, and newspapers. Secondly, the genre of a work of art brings distinct and important dimensions to our legal analysis. On the one hand, images offer an accessibility and an immediacy that should not be underestimated. By and large, one has to take my word for the purport of the articles and written sources I am going to discuss. But the images that form the basis of this article are available to any reader who can draw (so to speak) their own conclusions. The reciprocity between writer and reader that this establishes contributes significantly to the richness and power of the interpretative

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1. In Desmond Manderson, *Not Yet: Aboriginal People and the Deferral of the Rule of Law*, 29/30 ARENA J. 219 (2008), I develop an extended application of these ideas to contemporary indigenous policy in Australia, making the argument that radical changes to government policy and legislation in 2007 entrenched radical and unexamined departures from rule of law principles in line with the historical argument I develop here. See generally *Northern Territory National Emergency Response Act 2007* (NT) (Austl.); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (NT) (Austl.); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (NT) (Austl.).

conversation.<sup>2</sup> On the other hand, images have an essential role to play as we learn more about how communities understand law and justice. Images have a *density* to them, a complexity in their depiction of the *relationship* of ideas and forces. Their non-linearity makes them a particularly appropriate means of communicating paradoxical, ambiguous, or double-edged ideas. Writing, particularly academic or legal writing, privileges and perhaps even demands the communication of a single well-organized logic.<sup>3</sup> Art is more multiple than that.<sup>4</sup> The image's honesty—its capacity to say to us more even than it intended to say—to reveal assumptions, tensions, and paradox, is part of what makes it such a genuinely revelatory and gravely underutilized legal resource.

## II. AN AUSTRALIAN MYTH

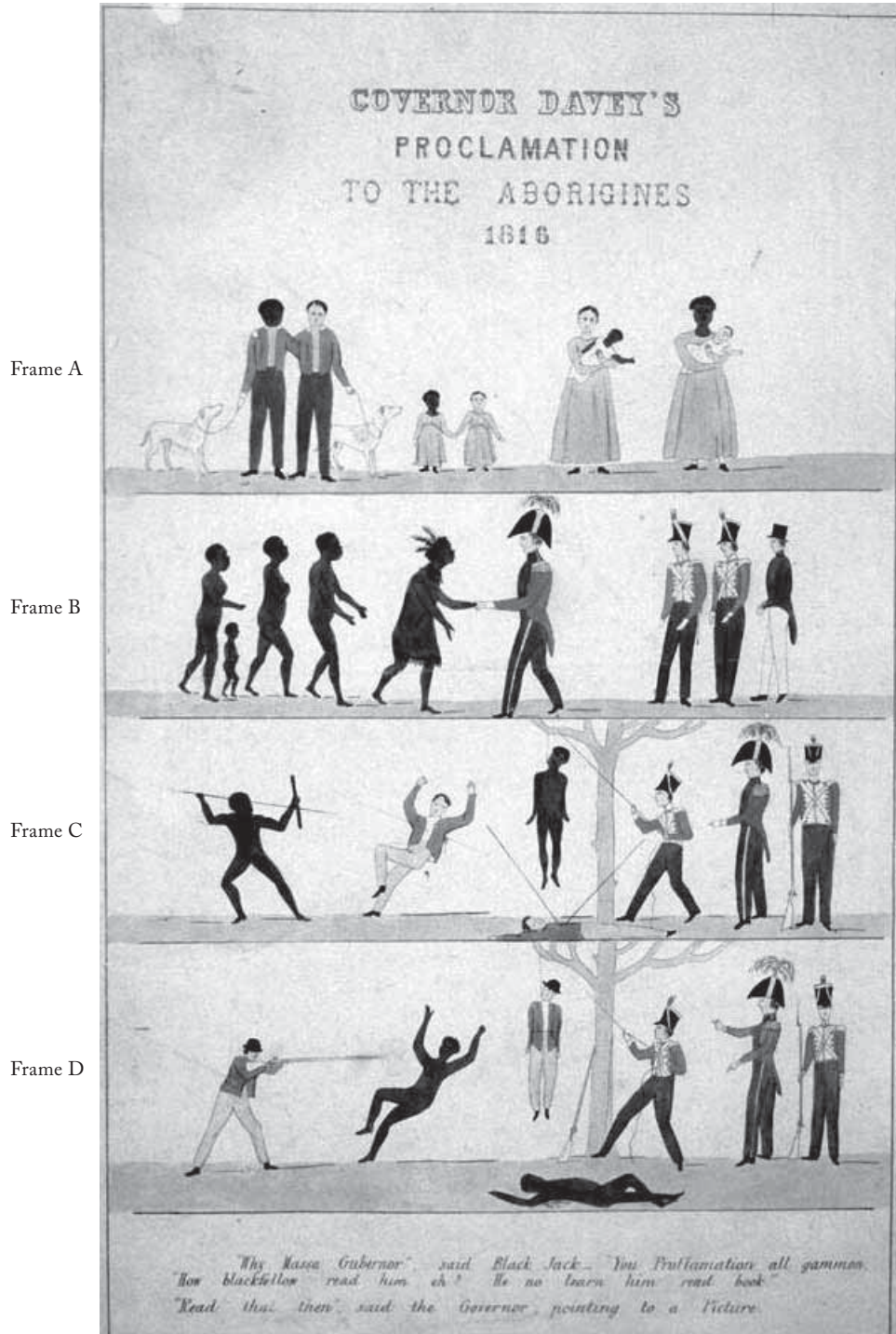
The “rule of law” is a phrase that encompasses a body of principles which endeavour to prevent, through law, the arbitrary or tyrannical exercise of state power and to enhance society's faith in government. One thinks immediately of Aristotle: “[A] government of laws and not of men.”<sup>5</sup> But in attempting to put some flesh on this idea, to work out what kind of lawmaking is impermissible in a government committed to legality, there is an enormous diversity of opinion. This is not the place to spend too much time on a question that I have explored at greater length elsewhere.<sup>6</sup> Suffice it to say that scholars are divided between those who adhere to a more or less formal conception of the rule of law and those for whom it must include protections of substantive equality of treatment too.<sup>7</sup> But theoretical debates will take you only so far. If we want to better understand what it means to talk about the rule of law, we need to be more specific about culture and context. And it is often in a legal system's treatment of minority or underprivileged groups that the rule of law is challenged and developed.

With that in mind, I turn to the specific context of British colonial history and to one of the earliest and most remarkable articulations of the rule of law in Australia. This articulation is not in words, but in images. What is often called *Governor Davey's Proclamation to the Aborigines 1816* (fig. 1) is an iconic document in Australian

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2. See M.M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* (Michael Holquist ed. & trans., Carly Emerson trans., 1981).
  3. See IVAN ILLICH & BARRY SANDERS, *ABC: THE ALPHABETIZATION OF THE POPULAR MIND* (1st Vintage Books ed., Vintage Books 1989) (1988); JACK GOODY, *THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY* (1986).
  4. See *LAW AND THE IMAGE* (Costas Douzinas & Lynda Nead eds., 1999).
  5. Iain Stewart, *Men of Class: Aristotle, Montesquieu and Dicey on 'Separation of Powers' and 'The Rule of Law'*, 4 *MACQUARIE L.J.* 187, 194 (2004).
  6. See DESMOND MANDERSON, *KANGAROO COURTS AND THE RULE OF LAW: THE LEGACY OF MODERNISM* (2012).
  7. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3 (2004).

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FIGURE 1



history.<sup>8</sup> A full fifty years before A.V. Dicey,<sup>9</sup> it represents an idea of the rule of law occasioned by the clash between colonial and indigenous peoples. Confronted by the clash of two radically different cultures and mutually incomprehensible languages, the *Proclamation* does so without using words—a picture that is also a law.<sup>10</sup>

First circulated in Van Diemen's Land in the early part of the nineteenth century, the *Proclamation* was largely forgotten until it turned up during renovations of Old Government House in Hobart. It formed part of the Tasmanian display at the Melbourne Intercolonial and the Paris Universal Exhibitions in the 1860s,<sup>11</sup> a proud statement of the benevolent virtues of the imperial civilizing process.<sup>12</sup> Yet for all its fame, few have bothered to really analyze the picture. Descriptions of the *Proclamation* mostly cast it as an explanation of martial law or as a warning to the Aborigines of the consequences “of continuing in their present murderous and predatory habits.”<sup>13</sup> Lyndall Ryan's pioneering *The Aboriginal Tasmanians* erroneously interprets it as endorsing the separate and harmonious living of two cultures,<sup>14</sup> whereas it clearly represents the coming together and indeed conformity of those cultures under British rule. The *Proclamation* is a myth—an object so familiar that it has ceased to be seen.

Images are treacherous; labels more so. As it happens, *Governor Davey's Proclamation to the Aborigines 1816* had nothing to do with Governor Davey. It does not date from 1816. And it is not really a proclamation. It was commissioned by Lieutenant-Governor Sir George Arthur; in 1830, around one hundred copies were published by the government printer in Hobart, placed on wooden boards, and disseminated.<sup>15</sup> The misattribution dates from its re-discovery in the 1860s and might be explained in two ways. First, by setting the date back almost a generation, the notion that the British colony was *founded* on the principle of the rule of law is thereby promoted. Law always needs some mythic retrospectivity to shore up its legitimacy—a penal colony established by dispossession and maintained by violence over whites and blacks alike, especially.<sup>16</sup> The violence and chaos that mark the birth of any new legal order thus become cloaked in a myth that emphasizes instead its inevitability, its order, and its naturalness. By the 1860s, it surely served the interests of Tasmania's

8. GOVERNOR DAVEY'S PROCLAMATION TO THE ABORIGINES (c. 1828–1830). Oil on huron pine board, 36 x 22.8cm, State Library of Tasmania. Kind permission to reproduce acknowledged.

9. A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION (2d ed. 1886).

10. The words at the top and bottom of *Figure 1* were added later; probably at the time of the republication of the document for the Melbourne Intercolonial Exhibition, 1866.

11. THE DICTIONARY OF AUSTRALIAN ARTISTS 274 (Joan Kerr ed., 1992).

12. Penelope Edmonds, *Imperial Objects, Truths and Fictions: Reading Nineteenth-Century Australian Colonial Objects as Historical Sources*, in RETHINKING COLONIAL HISTORIES: NEW AND ALTERNATIVE APPROACHES 73, 83 (Penelope Edmonds & Samuel Furphy eds., 2006).

13. THE DICTIONARY OF AUSTRALIAN ARTISTS, *supra* note 11, at 273.

14. LYNDALE RYAN, THE ABORIGINAL TASMANIANS 97 (Allen & Unwin Pty Ltd. 2d ed. 1996) (1981).

15. See THE DICTIONARY OF AUSTRALIAN ARTISTS, *supra* note 11, at 272–74.

16. See generally Jacques Derrida, *Declarations of Independence*, 7 NEW POL. SCI. 7 (1986).

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free settlers to inject the rule of law into their narrative of legitimate settlement, as early as possible.

Secondly, Thomas Davey cuts a more attractive figure as author of the *Proclamation* than Sir George Arthur. As governor, Davey had protested in 1814 his “utter indignation and abhorrence” about the kidnapping of Aboriginal children.<sup>17</sup> But Governor Arthur was an altogether more paradoxical figure, a man who oscillated wildly between expressions of concern for the Aborigines and military campaigns against them; between inciting white settlers to kill Tasmania’s first inhabitants and expressing outrage when they did. He was a man who combined eruptions of extreme action with outbursts of remorseful reflection.<sup>18</sup> Above all, as the man behind the notorious Black Line, the dragnet which attempted to corral like cattle the Aboriginal population of the whole island, Arthur symbolizes a way of thinking about the original Tasmanians that “would be laughable were it not so criminally tragic.”<sup>19</sup> Such a background surely taints and complicates the promise of the rule of law.

The cartoon was suggested and apparently drawn by Arthur’s Surveyor-General George Frankland, and he in turn was inspired by Aboriginal bark paintings. In 1829, Frankland wrote to Arthur,

I have lately had an opportunity of ascertaining that the Aboriginal natives of van Diemen’s Land are in the habit of representing events by drawings on the bark of trees . . . . In the absence of all successful communication with these unfortunate people, with whose language we are totally unacquainted, it has occurred to me that it might be possible through the medium of this newly discovered facility, to impart to them to a certain extent, the real wishes of the government towards them, and I have accordingly sketched a series of groups of figures, in which I have endeavoured to represent in a manner as simple and as well adapted to their supposed ideas as possible, the actual state of things . . . .<sup>20</sup>

The four panels of the pictogram (Frames A–D) trace a development, but not an historical one. Instead, the pictures might be said to trace a movement from philosophy to politics to law. Frame A describes abstract equality: men and children are presented as the same regardless of colour, and the image of a white woman nursing a black baby parallels that of a black woman nursing a white one. The image is *not* a statement of what the rule of law requires, *nor* a statement of what the rule of law will achieve, but instead it is a declaration of underlying principles. Two related features of what we might call this “state of nature,” whose idealism and peacefulness clearly owe more to Rousseau than to Hobbes, stand out.<sup>21</sup> The first is its

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17. HENRY REYNOLDS, *FATE OF A FREE PEOPLE* 90 (1995).

18. *Id.*

19. LLOYD ROBSON, *HISTORY OF TASMANIA* 225 (1983).

20. *THE DICTIONARY OF AUSTRALIAN ARTISTS*, *supra* note 11, at 273.

21. See THOMAS HOBBS, *LEVIATHAN* (Edwin Curley ed., 1994); ROUSSEAU, *THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS* (Victor Gourevitch ed., 6th prtg. 2003).

individualism: humans are presented here not as belonging to societies or cultures. The equality that matters is individual and pre-social, not collective and cultural. Secondly, this individualism does not lead to a world in which everybody is different from each other but in which everybody is fundamentally the *same*. The men have identical dogs. White and black wear identical clothes (paradoxically, European clothes are represented as “natural,” perhaps because the alternative would have required Frankland to draw his white figures as naked as his black). Thus the principles upon which the rule of law will be based are established—equality, individual rights, and sameness.<sup>22</sup> By presenting these principles of justice as *a priori*, Frame A naturalizes their truth and their applicability to all societies.

In Frame B, we enter the world of politics and history. The Aborigines lose their clothes and gain a community. White and Black are no longer depicted as the same; instead, they are representatives of *different* societies, hands outstretched towards an agreement. But this is clearly not an agreement between equals. Frame B depicts as unproblematic the transfer of sovereignty from native to colonial rulers. A new political authority and hierarchy is acknowledged, reflected in the movement from left to right of the picture—from Aboriginal to British society, from naked to clothed, from subservient to dominant. Neither Frankland nor Arthur were naïve. They did not believe for a moment that this transfer was as consensual as Frame B suggests. On the contrary, the Aboriginal people were waging a guerilla war against the fledgling British colony. But, as Arthur remarked, “I cannot divest myself of the consideration that all aggression originated with the white inhabitants.”<sup>23</sup> Frame B not only portrays the *fait accompli* of British sovereignty, it justifies it by looking both forward and back: forward, to the day when the Tasmanian Aborigines might indeed consent to the reality of that rule, and back, to the principles in Frame A according to which they are given a *reason*—a duty, even—to consent to that rule. The picture suggests the second part of a syllogism: *because A, then B*. Because of the universal promise of the rule of law (Frame A), you should accept as legitimate the government that is committed to uphold it (Frame B).

The final two frames expand this syllogism by explicating the legal consequences of its logic. This is not philosophy in the subjunctive mood or history in the *futur antérieur*,<sup>24</sup> but law in the present tense. Abstract principles are brought into the real world, where violent justice is meted out to violent crime. The last two pictures declare a substantive legal rule—the prohibition against murder. But more importantly, they relate that prohibition to basic principles of justice and to the legitimate role of the government in enforcing them. There is an implied threat in Frame C, but it is clearly balanced by the implied guarantee of Frame D and by the insistence that in each case the British army stands quite apart from the actors and neutrally enforces the law. Governor Arthur had said as much in his very first *Proclamation* as governor,

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22. WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

23. RYAN, *supra* note 14, at 94.

24. *See* Derrida, *supra* note 16.

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some years previously: “The Natives of this island being under the protection of the same laws which protect the settlers, every violation of those laws in the persons or property of the Natives shall be visited with the same punishment as though committed on the person or property of any settler.”<sup>25</sup>

But the pictorial *Proclamation* goes further than a mere statement of judicial neutrality in its articulation of justice to Aboriginal peoples. It gives justificatory pride of place, as we have seen, to principles of equality, individualism, and sameness. Governor Arthur’s *Proclamation* presents a more complex and substantive reading of the rule of law than one might have expected. It builds the legitimacy of law on a promise to treat all persons, black or white, with equal respect for their individuality and an assumption of their fundamental sameness.

### III. GOVERNOR ARTHUR AND THE DEFERRAL OF THE RULE OF LAW

The paradox that this drawing raises lies in the difficulty of squaring “the real wishes of the government,” as the *Proclamation* presents it, with the “the actual state of things” in Van Diemen’s Land. At the very same time that Governor Arthur’s *Proclamation* elaborated an expansive commitment to the rule of law, he was extending martial law throughout Tasmania. Martial law had initially been declared in 1828 in the face of Aboriginal resistance to colonial settlement.<sup>26</sup> In February of 1830, a reward of five pounds was proclaimed for the capture of adult Aborigines (two pounds for a child), describing them as “a horde of [s]avages” consumed by “revengeful feelings.”<sup>27</sup> In October of 1830, faced by “continued repetitions of the most wanton and sanguinary acts of violence and outrage,” Arthur extended martial law to “every part of this Island.”<sup>28</sup> On October 7, “the [white] community . . . en masse” was to spread out like a human chain across the whole island and, by moving forward, herd the Black or Aboriginal Natives on to Tasman’s Peninsula where they could be penned in once and for all.<sup>29</sup>

Yet martial law had always been understood as involving the suspension of the rule of law.<sup>30</sup> In 1829, the brutal murder of an Aboriginal woman was deemed by the Solicitor-General to be beyond the reach of the common law precisely because it fell

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25. REYNOLDS, *supra* note 17, at 91.

26. *Id.* at 109.

27. Colonial Secretary’s Office, *Government Order No. 2*, HOBART TOWN GAZETTE (Tas.), Feb. 27, 1830, available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1830/notices\\_concerning\\_aborigines/notice\\_1\\_1830/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1830/notices_concerning_aborigines/notice_1_1830/).

28. George Arthur, *A Proclamation*, HOBART TOWN GAZETTE (Tas.), Oct. 2, 1830, available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1830/notices\\_concerning\\_aborigines/notice\\_7\\_1830/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1830/notices_concerning_aborigines/notice_7_1830/).

29. Colonial Secretary’s Office, *Government Order No. 11*, HOBART TOWN GAZETTE (Tas.), Sept. 22, 1830, available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1830/notices\\_concerning\\_aborigines/notice\\_6\\_1830/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1830/notices_concerning_aborigines/notice_6_1830/) [hereinafter *Government Order No. 11*].

30. The connections with Agamben’s articulation and study of the state of exception are evident and need not be spelled out here. See GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005); see also R. W. KOSTAL, *A JURISPRUDENCE OF POWER* (2005).



under the very broad rubric of “necessary operations against the enemies.”<sup>31</sup> Subject to “an active and extended system of Military operations against the Natives generally” and until the “cessation of hostilities,” Aboriginal Tasmanians were specifically placed *outside* the rule of law.<sup>32</sup> The Black Line, a dismal and notorious folly, led to the capture of a grand total of two Aborigines and the shooting of two more, but it was powerfully evocative of the colonial government’s attitude towards them.<sup>33</sup> The last full-blooded Tasmanian Aborigine died in 1876.

One might argue that Frankland’s depiction of equality under the law in Frames C and D is a trick. The rule of law is not without its critics: in general, they argue that its noble rhetoric disguises in two ways how those with power actually enforce the law. First, the *Proclamation* does not tell the truth. Its promise of equal treatment was a lie: in fact, white attacks on black people were virtually *unpunishable*, whereas black attacks on white settlers were branded as the emanations of “a wanton and savage spirit.”<sup>34</sup> Secondly, the *Proclamation* begs the question: what does it mean to treat people “equally” in the colonial context? The abstract thinking involved in treating Aboriginal murder the same as that of a white settler ignores the difference in meaning and context of their actions. Even if the British government were strictly neutral as between the two deaths drawn by Frankland (which it was not), the rule of law would still sustain settler society and destroy Aboriginal society precisely *by* treating them “equally.” The claim in Frame A that whites and blacks are the same, for example, and that each can just as easily nurse the other’s baby, misses the underlying social and economic reality, which makes nonsense of the equivalence. A black woman nursing a white baby is a servant in a rich man’s house; a white woman nursing a black baby is probably a missionary who has taken the child from his mother. Equal treatment perpetuates inequality every time it purposely turns a blind eye to social and material difference. By ignoring the complexities of context, and by lying about actual legal practices that were going on at the time, the rule of law rhetoric systematically varnishes the injustices perpetrated by colonial power.

Such an analysis, powerful as it is, remains inadequate because it fails to take seriously the beliefs of the participants, particularly their ideology of the rule of law. Frankland, “innocent but misguided,”<sup>35</sup> believed in the *Proclamation*. Arthur himself consistently sought to justify the violence he unleashed in compassionate terms.

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31. REYNOLDS, *supra* note 17, at 112.

32. Arthur, *supra* note 28.

33. CLIVE TURNBULL, *BLACK WAR: THE EXTERMINATION OF THE TASMANIAN ABORIGINES* (1948); HOUSE OF COMMONS, *VAN DIEMEN’S LAND: COPIES OF ALL CORRESPONDENCE BETWEEN LIEUTENANT-GOVERNOR ARTHUR AND HIS MAJESTY’S SECRETARY OF STATE FOR THE COLONIES, ON THE SUBJECT OF THE MILITARY OPERATIONS LATELY CARRIED ON AGAINST THE ABORIGINAL INHABITANTS OF VAN DIEMEN’S LAND* (1831) PARL. PAPERS NO. 259 (U.K.).

34. The words come from Report of the Committee appointed by Sir George Arthur according to which Archdeacon Broughton had been instructed to inquire into “the origin of the hostility displayed by the Black Natives of this island against the settlers.” N.J.B. PLOMLEY ET AL., *THE ABORIGINAL/SETTLER CLASH IN VAN DIEMEN’S LAND, 1803–31* 9 (1992).

35. *THE DICTIONARY OF AUSTRALIAN ARTISTS*, *supra* note 11, at 273.

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There was this strange ambivalence in his gestures, which always seemed to sway in confusion between the violent actions he sets in motion and the desire to protect the Aborigines from those same forces. He insisted that “the Government puts forward its strength on this occasion by no means whatever with a view of seeking the destruction of the Aborigines.”<sup>36</sup> Even the *Proclamation* which instituted the Black Line concluded that

the Lieutenant Governor takes this opportunity of again enjoining the whole community to bear in mind, that the object in view is not to injure or destroy the unhappy Savages, against whom these movements will be directed, but to capture and raise them in the scale of civilization by placing them under the immediate control of a competent establishment, from whence they will not have it in their power to escape and molest the White Inhabitants of the Colony, and where they themselves will no longer be subject to the miseries of perpetual warfare, or to the privations which the extension of the Settlements would progressively entail upon them, were they to remain in their present unhappy state.<sup>37</sup>

The name of the place on Flinders Island where the last of the Tasmanian Aborigines were finally sequestered, and where they died, was Point Civilization. Their capture and control was seen as the necessary first step in raising them to a civilized state, an educative if coercive process that would also, presumably, serve to quench that savage spirit in them.

Frame A of the pictogram presents Rousseau’s vision of the state of nature. But Governor Arthur’s policy is bleaker and owes more to Thomas Hobbes. Hobbes had argued in the seventeenth century that without an all-powerful government to control our baser instincts, there would be nothing but warfare and misery, “and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.”<sup>38</sup> Arthur’s government embodies what Hobbes famously termed the Leviathan: a monster, a tyrant who is nevertheless necessary and whose violence and absolute power *saves* us—and more particularly in this case the Aboriginal people—from the “warfare” and “privations” of our hideous natural condition.

Accordingly, the pictorial *Proclamation* does not lie or conceal. It is meant seriously, but it is to be read in the *future* tense. In effect, Governor Arthur was saying to the first Tasmanians: “We do believe in your potential for equality and sameness. We look forward to that moment when you will consent peaceably to our governance. And we will then treat you as subject to the same laws and protections as the rest of us. But until the conditions of sameness and equality are attained, all bets are off.” Not “because A, then B, therefore C and D,” but “when A and B, then C and D.” *Governor Arthur’s Proclamation* paradoxically justifies the *un*-depicted

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36. REYNOLDS, *supra* note 17, at 109 (quoting a letter to the Brigade Major’s Office dated November 3, 1828).

37. *Government Order No. 11*, *supra* note 29.

38. HOBBS, *supra* note 21, at 78.

violence of the Black Wars, just as the Leviathan is justified, by asserting that it is only by such violence that the promised land can be attained.

Some contemporary writers on the rule of law have made a broadly similar point, and it is significantly different from the criticisms I noted above. They have resuscitated Hobbes, Schmitt, and others, arguing that the liberal promise of a society entirely governed by the constraints and protections of the rule of law suffers from a fatal flaw. In *Homo Sacer*<sup>39</sup> and *State of Exception*,<sup>40</sup> Giorgio Agamben argues that, increasingly in modern society, the very plenitude of the rule of law gives rise to these pockets of non-law, established by the ruler's power—a power that is not necessarily written down, but inheres in the nature of sovereignty to inaugurate or to suspend the legal order.

It is surely unarguable that in recent years we have seen not the disappearance, but rather the normalization, of the state of exception, such as in the treatment of refugees or stateless persons and in the creation of juristic black holes like Guantanamo Bay, wherein the U.S. President has precisely claimed the executive privilege to determine the extent to which national and international law apply.<sup>41</sup> The “war on terror” is the most obvious example of a “state of exception” that has been justified precisely as a way to protect the same ideals that are simultaneously scorned as “quaint” or “outmoded.”<sup>42</sup> Other examples abound; from Malaya to Pakistan, the language of “national emergency” has been used to suspend legal principles. As recently as 2007, Australia's international commitments concerning racial discrimination were specifically suspended when newly enacted laws profoundly changed the treatment of Aboriginal Australians in the Northern Territory.<sup>43</sup> This legislation was directly justified by reference to a so-called “national emergency” in those communities.<sup>44</sup> In each case, governments have excised persons, groups, or places from the protection of the rule of law. In each case, the creation of these black holes has been justified through the language of “exception,” “exclusion,” “crisis,” “martial law,” or “national emergency.” In each case, the values we stand for are held

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39. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Bd. of Tr. of the Leland Stanford Junior Univ. 1998).

40. AGAMBEN, *supra* note 30, at 129.

41. *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

42. *See generally* WASH. LEGISLATIVE OFFICE OF THE ACLU, THE CIVIL RIGHTS RECORD OF ATTORNEY GENERAL NOMINEE ALBERTO GONZALES (2005).

43. Manderson, *supra* note 1, at 219.

44. *Northern Territory National Emergency Response Act 2007* (NT) s 5 (Austl.); *see also* John Howard & Mal Brough, Joint Press Conference to Announce the Northern Territory Intervention (June 21, 2007), [163](http://australianpolitics.com/audio/2000-2009/2007-archive; Media Release, Mal Brough, Minister for Families, Community Services and Indigenous Affairs and the Minister Assisting the Prime Minister for Indigenous Affairs, National Emergency Response to Protect Aboriginal Children in the NT, AUSTRALIAN GOVERNMENT (June 21, 2007), http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/emergency_21june07.aspx. See generally Paul 't Hart, Crisis Exploitation: Reflections on the 'National Emergency' in Australia's Northern Territory, 26 DIALOGUE 51 (2007).</a></p></div><div data-bbox=)

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not to apply—they are suspended or deferred—but at the same time and with equal force, we are told that we need these exceptions, these pockets, if the rule of law is to emerge or to survive at all.

The great historian of nineteenth-century England, E.P. Thompson, famously described the rule of law as “an unqualified good.”<sup>45</sup> He acknowledged the criticisms of its partiality and hypocrisy, but insisted that the rule of law had a capacity to go beyond the limited contexts in which the ruling class deploys it, operating instead as an ideal with the power to hold those rulers to account. That remains true. Nevertheless, Thompson fails, I think, to reflect adequately on how the ideal of the rule of law itself might be used not merely to conceal oppression but to actively *incite* it, either against those that do not live up to its criteria or in the context of events that are imagined to require its suspension.

*Governor Arthur's Proclamation* shows us exactly how this paradox works. The annihilation of the rule of law is not subsidiary to its glorification but brought about by it. It is not that Aboriginal people did not deserve the rule of law. On the contrary, it was their own “savage spirit” that prevented their attaining it. And it was to quench this savage spirit that the rule of law *had* to be suspended in order that the Leviathan of the British Empire might first—literally and figuratively—bring them to Point Civilization. The very *belief* in the rule of law highlighted the apparent inadequacy of the Tasmanian Aborigines to benefit from it, and this in turn justified any and all measures to impose legal and social order on them. The more beautiful the ideal, the more inadequate the present state of the natives seemed. The more sincere the British commitment to our universal sameness, the more Aboriginal difference and resistance seemed a “wanton” “fierceness” to be subjugated or a “weakness” to be fixed.

The images of *Governor Arthur's Proclamation*, juxtaposed against the colonial government's actual policy, do not reveal lies or evasions. On the contrary, they are cause and effect. It was *because* Arthur and Frankland, and many like them, believed so fervently in the rule of law that Aboriginal people, on the one hand, were always disappointing them and, on the other, required emergency action or exceptional measures to drag them into civilization's embrace. *Governor Arthur's Proclamation* did not establish the rule of law in Tasmania; it justified the state of exception. Saint Augustine said, “Give me chastity and continence, but not yet.”<sup>46</sup> Sir George Arthur said, “Lord, give me the rule of law—but not yet.” The goals of the *Proclamation* remained, but making good on them was always deferred to some indefinite future when Aboriginal people would at last be deemed ready for it.

Meanwhile, the rule of law proved to be just another rod with which to chastise the first Tasmanians for their failure to live up to our expectations. With this idea of cause and effect in mind, we can return to Frame A of *Governor Arthur's Proclamation*. We might read it as a promise of actual equality. But we could just as easily—in fact, perhaps more easily—read the image literally, as insisting that Aboriginal people

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45. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 267 (1975).

46. SAINT AUGUSTINE, *Book Eight*, in *CONFESSIONS* 139, 152 (Hendricks Publishers Mtg. 2004) (c. 400 A.D.).

should not just be treated but should *be* the same, that they should wear the same clothes as us, bring up their children like us, even train their dogs like us. This is of course not a message of equality, but of assimilation. It demands that what changes is not our treatment of other races but their behaviour. Once again, it is not just that the work of art is ambiguous, but that it means *both* these things and helps us see the relationship between them. For centuries, one emergency after another, colonial and post-colonial regimes have *postponed* treating indigenous people with justice, deciding that they are not yet worthy of it or up to it. Now, as in 1830, this is the dark side of the glowing promises made by the rule of law—the insidious consequences of the righteousness it encourages.<sup>47</sup>

#### IV. ANOTHER ICON

The assimilationist undercurrent of *Governor Arthur's Proclamation*, together with the paradoxical consequences of its ideals, suggest that we ought to look elsewhere to find visions of justice in the context of the colonial and post-colonial world. The *Proclamation* is not the only instance of pictorial law from which we might learn. Almost two centuries earlier, another invading colonial power sought to communicate with another indigenous people, likewise in the absence of a shared language and across a cultural abyss. The *Two-Row Wampum* records a treaty, several versions of which are said to have organized relations between North American settlers and the Iroquois people (themselves a federation) in colonial times, going back as far as one made with the Dutch in New York in 1613 and another with William Penn in 1682.<sup>48</sup> As *Governor Arthur's Proclamation* drew on Aboriginal bark paintings, so these treaties drew on the indigenous practice of *wampum*, in which strings of purple and white mussel shells were woven into a belt by which oral traditions were recorded, recalled, and sanctified.<sup>49</sup> The *Two-Row Wampum* is a belt, a long string of such shells in parallel purple stripes set against a white background. According to Haudenosaunee tradition,

[y]ou say that you are our Father and I am your son. We say, we will not be like Father and Son, but like Brothers. This wampum belt confirms our words. These two rows will symbolize two paths or two vessels, traveling down the same river together. One, a birch bark canoe, will be for the Indian People, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our boat. Neither of us will try to steer the other's vessel.<sup>50</sup>

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47. See SHERENE H. RAZACK, *DARK THREATS & WHITE KNIGHTS* (2004).

48. Ann Uhry Abrams, *Benjamin West's Documentation of Colonial History: William Penn's Treaty with the Indians*, 64 *ART BULL.* 59 (1982); HEZEKIAH BUTTERWORTH, *THE WAMPUM BELT* (1897).

49. See W.J. Sidis, *THE TRIBES AND THE STATES*, chapter 3 (1935); *THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY* (Francis Jennings et al. eds., 1985).

50. *The Two Row Wampum*, GANONDAGON, <http://www.ganondagan.org/wampum.html> (last visited May 21, 2012).

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So the two art works are very different. In the seventeenth century, as we see in the empires of North and South America, God would act as the agent of civilization and unification, but communities would be allowed to keep their own laws. By the nineteenth century, as we see in the empires of Australasia, Asia, and Africa, law would act as the agent of civilization and unification, and communities would be allowed to keep their own gods. On the one hand, and perhaps with the arrogance of the British empire, Governor Arthur lays claims to a uniform ideal of justice which transcends and binds all peoples. On the other hand, and perhaps because it was drawn 200 years later, the *Two-Row Wampum* recognizes that the difference in power and technology between colonial master and subject peoples cannot be ignored. The *Proclamation* speaks vertically, from governors to the governed. The treaty speaks horizontally, an agreement *between* peoples.

There are surely elements of justice in our dealings with indigenous peoples that the *Two-Row Wampum* reveals and to which the *Proclamation* is blind. Researchers in Canada have increasingly over the last few years become interested in the *Two-Row Wampum* as an alternative social justice model. The *wampum* belt does not treat people as isolated and identical individuals, but recognizes instead that they live their lives in vessels, communities whose *difference* is valuable to them and worthy of respect, and whose trajectories may therefore not be identical. In this way, although the *wampum* belt is a more abstract art form than the *Proclamation*, it succeeds in describing a more concrete social reality. Indeed, the abstraction of the *Proclamation's* principle of sameness is what allows its noble idea to be converted into a force of homogenization. Instead, the beautiful image of “the birch bark canoe” and “the ship” afloat on the same river invites us to think of ways in which we can listen to and help those whose life-worlds may be very different from ours in their journey, without simply trying “to steer the other’s vessel.” As much as “equal treatment,” that is also a notion of justice: justice embedded in communities whose difference is itself a kind of collective equality worthy of respectful attention.<sup>51</sup>

There is a question here not just of practice or of principle, but of what, from an aesthetic point of view, we might call perspective. The Iroquois offered to *share* the river with the invaders, to live side by side with them and to move together with the currents that affect them both. There is something welcoming and generous in that gesture. The shared river does not only separate communities but suggests common interests and experiences too. The language of brotherhood, like the parallel lines of the belt itself, suggests neither sameness nor difference but closeness, and above all implies a willingness to make room for each other. The *Proclamation*, for its part, makes no such gesture. Frame B shows a scene of welcome. But it represents the ceding of authority from indigenous to colonial rulers—an authority that, as Frames C and D illustrate, is unitary, objective, and absolute. While the *Two-Row Wampum* starts from the principle of indigenous authority over the land and proceeds to make others welcome on it, *Governor Arthur's Proclamation* starts from the fact of colonial

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51. See WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

authority over the land and proceeds to take exclusive control of it. Of course, the reason for this difference is that the two images are written from different perspectives, the *wampum* by the indigenous people of the land and the *Proclamation* by the colonial power. That is precisely the point. While our understanding of justice and our commitment to the rule of law only pays attention to the latter voice, it will continue to perpetrate *injustice* in its name. The goal of this essay has been to show exactly how and why that can happen.

## V. CONCLUSION

The ability of art to encapsulate ideas and at the same time to expand or destabilize them is evident from this case study. Images have always been privileged media for the articulation, dissemination, and interrogation of social forms and practices, in largely pre-literate cultures such as early modern Europe, but no less in post-literate cultures of affect and spectacle, such as late modern Europe.<sup>52</sup> Art works offer a significant diagnostic tool in our understanding and interrogation of legal ideas.

There is a critical cultural opportunity here that has gone largely unremarked. Since European settlement in Australia, as in other colonial societies, indigenous groups have been required to translate their distinct legal visions into the one-size-fits-all language and structures of British law.<sup>53</sup> Yet in many cultures, art and literature are central elements to the performance and embodiment of law.<sup>54</sup> Traditional thinking about law in the West has explicitly rejected such an approach, even on occasion announcing that Aboriginal rites and dances *cannot* be law if they be art.<sup>55</sup> Such a constrained imagination has proven a genuine barrier to recognition of indigenous law.<sup>56</sup> We see some recognition of the need for a cross-cultural and aesthetic dialogue about law in the Canadian context in particular, which has been more sensitive to the relevance of languages of art and culture in the construction of law and politics.<sup>57</sup> But overall these forays have been limited and implicit. The grammar and vocabulary of images could inaugurate a new cross-cultural conversation, and provide a new vehicle of social engagement and discourse, on new and radically different terms.

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52. See RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000); Richard K. Sherwin, *Law in the Age of Images*, in *VISUAL LITERACY IN ACTION* 179, 179–84 (Jim Elkins ed. 2007).

53. Stewart Motha & Colin Perrin, *Deposing Sovereignty after Mabo*, 13 *LAW & CRITIQUE* 231 (2002); Paul Patton, *Mabo, Freedom and the Politics of Difference*, 30 *AUSTRAL. J. POL. SCI.* 108 (1995).

54. See HOWARD MORPHY, *BECOMING ART: EXPLORING CROSS-CULTURAL CATEGORIES* (2007); JOHN BURROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* (2002); KATHY LASTER, *LAW AS CULTURE* (2d ed. 2001).

55. See PETER FITZPATRICK, *The Mythology of Modern Law*, in *SOCIOLOGY OF LAW & CRIME* (Maureen Cain & Carol Smart eds., 1992); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

56. Kirsten Anker, *The Truth in Painting: Cultural Artefacts as Proof of Native Title*, 9 *LAW TEXT CULTURE* 91, 111 (2005).

57. See, for example, references to the work of Dorothy Reid in BURROWS, *supra* note 54, at 19, 178 n. 129, and references to the work of Bill Reid in JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (5th reprint 2004) (1995).

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The images that have formed the spine of this case study have given material form and aesthetic feeling to a subject that is frequently rendered bloodless. Separating legal ideas from cultural practices and lived experiences is an exercise in social alienation with serious consequences. For if the rule of law is to survive, however we understand its strengths and limitations, it will be because of the way it speaks to us and because of the feelings it is capable of arousing in us. Without these cultural narratives and these affective attachments, no one has any reason to care about it, to understand it, or to improve it. There is no more moving commentary on American ideals and history than Jimi Hendrix' improvisation on *The Star Spangled Banner* at Woodstock at the height of the Vietnam War.<sup>58</sup> There, the orthodox narrative of U.S. history is juxtaposed powerfully with multiple and conflicting voices: hope and respect, but also anger, frustration, and sarcasm. The aesthetic form allows a dialogue between ideals, myths, and reality to be expressed with remarkable power, emotion, and concision. Hendrix' art gives us a connection as vibrant and as physical as a guitar string through which these questions and associations feel like they *matter* to us. The depiction of law and of justice in the arts is a critical and desperately undervalued resource in understanding law's cultural resonances, in depicting and contesting its historical narratives, and in constituting its emotional place within a society or societies. One of the major tasks of twenty-first century research is to begin to make available and to study this forgotten common wealth of sounds and images.

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58. Jimi Hendrix, *Star Spangled Banner* (Jan. 9, 1969), available at [http://www.youtube.com/watch?v=u\\_k-6FLfDkM](http://www.youtube.com/watch?v=u_k-6FLfDkM).