
Not Yet: Aboriginal People and the Deferral of the Rule of Law

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2007 was a tumultuous year in Australian politics, culminating on 24 November with federal elections in which the conservative Liberal Party government led by John Howard was, after eleven years in government, decisively defeated at the polls.* Of particular note in that result was the defeat of the Prime Minister in his own electorate and the unexpected defeat of the Minister for Families and Indigenous Affairs, Mal Brough, in his. Both have now left politics. But their legacy lives on, and it is my contention that the most significant aspect of that legacy is legislation enacted with unseemly haste and in the dying days of the parliament, which profoundly alters the legal treatment of Australian Aboriginal people in the Northern Territory. One-third of the Territory's population is Aboriginal, far and away the most proportionally significant Indigenous population in the country.¹

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1. 67,000 Aboriginal people represents 32 per cent of the total population of the Northern Territory; the next most significant population in proportional terms is that of Western Australia, where just over 72,000 Aboriginal people amounts to 3.8 per cent of the total: Australian Bureau of Statistics, 4705.0, 2007.

Yet very little serious analysis of the sweeping and complex laws proclaimed in August 2007 has been attempted.² In advance of the review of their effects anticipated to take place later this year, such an analysis remains crucial not just because of the relationship between Indigenous and other people that it reflects but because the Labor Party, albeit reluctantly, voted in favour of the legislation when it was enacted. Now in government, it has shown a marked reluctance to re-open the issue. Indeed at times Jenny Macklin, the new Minister for Indigenous Affairs, has talked about extending aspects of the laws to other Australian jurisdictions. Furthermore, to the extent that the new government has mooted changes to the legislation, the Labor Party does not have a majority in the Senate and will consequently face considerable difficulty in getting its amendments through the parliament. Given the wave of emotion on which the legislative package was carried, and with which criticisms to its provisions are still fiercely met, the Labor Party may feel disinclined to try very hard. Unless a serious critique is mounted that demonstrates as clearly as possible the ways in which these laws undermine basic principles of the Australian legal system, the opportunity to amend them will soon be lost and the fate of many Aboriginal communities as soon sealed.

In bringing readers' attention to the implications of the laws pertaining to the 'intervention in the Northern Territory', and which ought to concern all who have an interest in upholding the traditions of common law legality, I propose in this article to set the contemporary issues against a broader theoretical debate, which I will engage with the assistance of two distinct perspectives.

The broader theoretical debate concerns the nature and limits of the 'rule of law'. Since 2001 we have heard a lot about it. It has become canonized as a 'core Western value', legislated into citizenship procedures, our front-line defence in the 'war on terror'.³ Admittedly, the rule of law is 'essentially imprecise',⁴ and

2. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129; *Family, Community Services, Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) No. 130.

3. Commonwealth, Parliamentary Debates, House of Representatives, 30 May 2007, Kevin Andrews (Minister for Immigration and Citizenship), p. 5. See also the Prime Minister's Australia Day Address, 26 January 2006; *Australian Citizenship Amendment (Citizenship Testing) Act 2007*.

4. I. Jennings, *The Law and the Constitution* (5th edn, 1959, p. 60), in C. Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law', *Macquarie Law Journal*, no. 4, 2004, p. 147.

is more a set of loosely related principles than substantive rules; yet there is no doubting either its place at the heart of the common law legal tradition or the long-standing body of legal decisions that give meaning to it. The rule of law clearly mandates certain ways of writing, enacting, interpreting and enforcing law; it clearly makes certain laws, practices and structures unacceptable. The rule of law is not merely a vague aspiration. It has meaning and content now. Nonetheless, for reasons that will become apparent, the rule of law has not been without its critics. In the course of the present article I wish to develop a specific criticism of the rule of law that has not, I think, been adequately articulated or reckoned with in the literature. My methodology is reflexive: by juxtaposing a discussion about general ideas against the specific effects of recent legislation, I wish each to illuminate, deepen and transform our understanding of the other. The ideas we commonly hold about the rule of law will shed light on the treatment of Aboriginal communities in the Northern Territory; and the treatment of Aboriginal people will bring to light a troubling paradox or double-think that is buried in the complacent rhetoric of the rule of law itself.

This argument unfolds with the aid of two distinct perspectives. The first is historical: in order to place the current laws in context, and more importantly to try and understand the way in which the rule of law has been both expressed and sidelined at particular times, I return to a much earlier instance of the abandonment of the rule of law in Australia. The historical comparison will help us see just how it is that governments and law-makers continue to hold simultaneously in their heads these two contradictory facts — the rule of law on the one hand, and the treatment of Aboriginal people on the other — without, apparently, exploding at the irony of it. The second, related to the first, is aesthetic: in trying to comprehend what it means to talk about the rule of law in relation to colonized peoples, this article focuses on two important artworks from that history. They ought in fact to be considered legal and jurisprudential documents of great significance. In particular, one of the earliest and most celebrated proclamations of the rule of law in all of Britain's imperial history is to be found in a series of pictures that had the relationship of the colonial government to Aboriginal people very much in mind. These images afford a remarkably complex, revealing and relevant representation of the rule of law. To read it will take half a minute. To interpret it will take the rest of this article.

An Australian Icon

The 'rule of law' is a phrase that seeks to encapsulate a body of principles that aim to prevent, through law, the arbitrary or tyrannical exercise of state power and to enhance thereby society's faith in government. One thinks immediately of Aristotle: 'A government of laws and not of men'.⁵ But in attempting to put some flesh on this idea, to work out what kind of law-making is impermissible in a government committed to legality, the traditional route is via Montesquieu, in the eighteenth century,⁶ and A. V. Dicey, the great figure of British constitutionalism, in the nineteenth.⁷ Both emphasized, at least to some extent, the notion of the separation of powers, a series of checks and balances that would protect, above all, the role of an independent judiciary in interpreting and supervising the application of laws written, in advance, by an established legislative process. The rule of law prevents governments or executives from exercising untrammelled discretion, from making the law up or changing it as they go along, or from excepting themselves, or any other group of privileged persons, from its operations; and it establishes the judiciary as the body that will ensure that this is so.

When we begin to unpack these ideas, however, it becomes unclear just how far they operate to prevent legal tyranny. If it is just a question of making sure that laws are known in advance, and that independent judges interpret and apply them equally to all persons — neutrally applying to all persons in the *Reich*, for example, a law that prevents Jews from owning property — then the protections offered by the separation of powers and by the subjection of all to the legal regime are purely formal, and say nothing about the morality or justice of the laws themselves. This is a point that has often been made, and there are many who believe that reference to the rule of law is merely rhetorical: worse than useless, indeed, because if 'when my side wins, the rule of law has prevailed', then 'whoever proposes an alternative is not a friend but an enemy of society'.⁸

Others have said, however, that rule of law must embody substantive guarantees as well as formal ones. Cameron Stewart

5. I. Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on "Separation of Powers" and "The Rule of Law"', *Macquarie Law Journal*, vol. 4, 2004, p. 194.

6. Montesquieu, *The Spirit of the Laws*, Cambridge, Cambridge University Press, 1989.

7. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1948.

8. I. Stewart, 'Men of Class', p. 223.

has neatly summarized the rule of law as promising ‘certainty, generality, and equality’.⁹ The law should be knowable in advance; the law should not single out individuals for special treatment; and everybody’s freedoms should be equally protected. Now clearly the last criterion in particular is not purely formal — it is a promise of equal protection from governmental interference. Dicey was a strong advocate of parliamentary sovereignty,¹⁰ and one might have thought that such an insistence on law-makers’ authority to make whatever laws they please ‘reduces the rule of law to a constitutional posture rather than a hard-edged legal principle’.¹¹ Nevertheless, ultimately he saw the judiciary not merely as an impartial interpreter of positive law, but as the bulwark of individual freedoms against the state. In keeping with the *laissez-faire* capitalism of the time, Dicey saw the rule of law as tied intimately to the protection of private autonomy, property and personal freedom. More recently, commentators like Ronald Dworkin have insisted on a ‘rights-based conception of the rule of law’:

The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.¹²

The question at the heart of the rule of law, then, is whether it embodies merely the separation of powers and judicial oversight of the interpretation and application of legislation, or whether it goes somewhat further in setting down how citizens may in fact be treated by their government. In particular, it seems to me, following Stewart and others, that the rule of law guarantees a ‘reciprocity’ between government and citizens and between citizens and citizens, without which the bond of respect for the legal order, which the legal system and the community rely upon, is broken.¹³ It is not intrinsic to that reciprocity that everyone should be treated in a strictly ‘equal’ fashion (after all, prisoners are deprived of their liberty and licensing laws apply only to licensees). But it *is* intrinsic

9. C. Stewart, ‘The Rule of Law and the Tinkerbell Effect’, p. 135.

10. I. Stewart, ‘Men of Class’, p. 209.

11. C. Stewart, ‘The Rule of Law and the Tinkerbell Effect’, p. 144.

12. R. Dworkin, *A Matter of Principle* (1985), in C. Stewart, ‘The Rule of Law and the Tinkerbell Effect’, p. 138.

13. C. Stewart, ‘The Rule of Law and the Tinkerbell Effect’, p. 158.

to the rule of law that we do not deprive people of entitlements or liberties on some collective or group basis, in ways that do not relate to their individual actions or choices. To do so is to relegate some group or another to the status of second-class citizens and that, surely, destroys any bond of reciprocity with them. A law that singled out Jews — or Palestinians for that matter — and deprived them of rights or liberties owed to others would be a scandal to the rule of law.

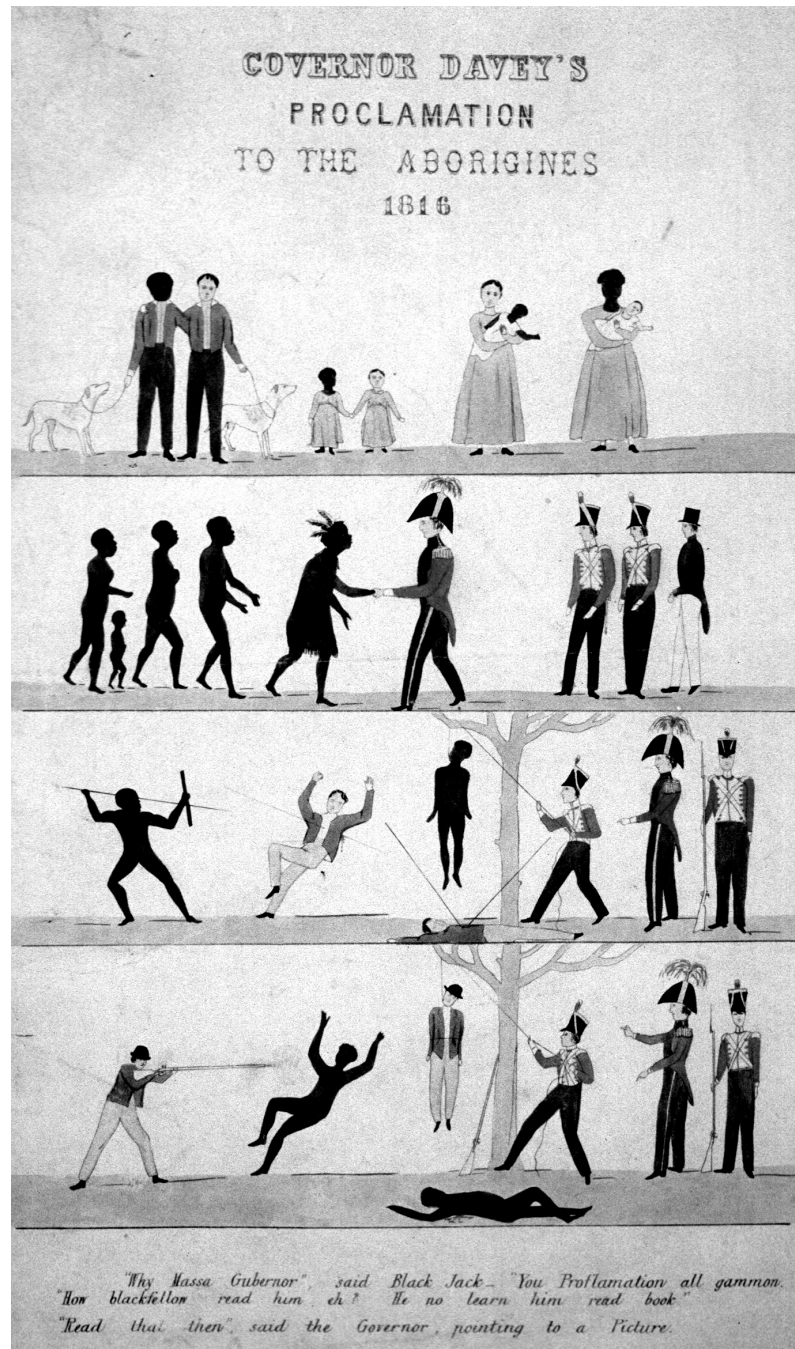
So far this is very schematic. If we want to better understand what it means to talk about the rule of law we need to be more specific about the culture and the time we are thinking about. And it is often in a legal system's treatment of minority or underprivileged groups that the rule of law is challenged and developed. With that in mind, I turn to the specific context of British colonial history, and to one of the earliest and greatest articulations of the rule of law in Australia. What is sometimes called *Governor Davey's Proclamation to the Aborigines 1816* is an iconic document in Australian history.¹⁴ A full fifty years before Dicey, it presents an argument about the rule of law under British governance intended to persuade Aboriginal people of its value through the language of pictures. It represents an idea of justice occasioned by the clash between colonial and Indigenous peoples. Confronted by the meeting of two radically different cultures and mutually incomprehensible languages, it does so without using words at all: it is a legal cartoon, a rare instance of pictorial legislation.

The *Proclamation* is regarded as a national treasure. First circulated in Van Diemen's Land in the early part of the 1800s, it was largely forgotten for many years until it turned up under the floorboards of Old Government House in Hobart and formed part of the Tasmanian display at the Melbourne Inter-colonial and the Paris Universal Exhibitions in the 1860s.¹⁵ For the rest of the nineteenth century reproductions of the image were a regular feature at imperial and colonial events, a proud statement of the benevolence and virtues of the imperial civilizing process.¹⁶ Yet it is quite remarkable how little has actually been said or written about

14. *Governor Davey's Proclamation to the Aborigines 1816*, n.d. (1830), print of oil on huon pine board, 36 x 22.8cm, State Library of Tasmania (Allport Library and Museum of Fine Arts). Permission to reproduce gratefully acknowledged.

15. J. Kerr, *Dictionary of Australian Artists*, Melbourne, Oxford University Press, 1992, p. 274.

16. P. Edmonds, 'Imperial Objects, Truth and Fictions: Reading 19th Century Australian Colonial Objects as Historical Sources', in P. Edmonds and S. Furphy (eds), *Rethinking Colonial Histories: New and Alternative Approaches*, Melbourne, RMIT Publishing, 2006, p. 83.



Governor Davey's Proclamation, n.d. [1830], print of oil on huon pine board, 36 x 22.8cm. Source: State Library of Tasmania (Allport Library and Museum of Fine Arts). Permission to reproduce gratefully acknowledged.

the *Proclamation*, and how little of that has been accurate. Contemporaneous descriptions of it routinely and wrongly 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'.¹⁷ Lyndall Ryan's pioneering history *The Aboriginal Tasmanians* erroneously interprets it as endorsing 'the separate and harmonious living of two cultures'¹⁸ whereas it clearly represents the coming together and indeed conformity of those cultures under British rule. Others who have sought to decipher the pictogram have gone so far as to assert that it should be read from the bottom up,¹⁹ the logic behind which is hard to fathom. The *Proclamation* is mythic: an object so often looked at that it has ceased to be seen.

Indeed, getting at the truth of this document is far from straightforward. *Governor Davey's Proclamation to the Aborigines 1816* had nothing to do with Governor Davey. It was not published in 1816. And it is not really a proclamation. It was in fact authorized by Lieutenant-Governor Sir George Arthur in 1830: somewhere around 100 copies were published by the government printer in Hobart, placed on wooden boards and distributed. The misattribution dates from its re-discovery in the 1860s and might be explained in two ways. Firstly, by setting the date back to the very early years of settlement, the notion that the British colony was *founded* on the principle of the rule of law is thereby promoted. Law always has need of such mythic retrospectivity to shore up its legitimacy — a penal colony established by dispossession and maintained by violence over whites and blacks alike especially. The stories that legitimize the law are told later, and fancied to have taken place earlier than we suppose. *Terra nullius* was an example of another such myth, a term by which later lawyers imagined and articulated a coherent basis for a legal order that had in fact been constructed higger-mugger and ad hoc. The US *Declaration of Independence* is another example, later generations identifying as the foundational moment of a new legal order a text that at the time looked like hubris, or sedition, or both.²⁰ In each case the violence and chaos that typically marks the birth of a new legal order later becomes shrouded in a myth that emphasizes instead its inevitability,

17. *The Tasmanian*, 26 November 1830, in J. Kerr, *Dictionary of Australian Artists*, p. 273.

18. L. Ryan, *The Aboriginal Tasmanians*, St Leonards, Allen and Unwin, 1996, p. 97.

19. <www.polybiblio.com/hordern/002_936.html>.

20. J. Derrida, 'Declarations of Independence', *New Political Science*, no. 15, 1986.

its order and its naturalness. By the 1860s it served the interests of Tasmania's settler society to project the rule of law as legitimizing the new legal order as early in the process of settlement as possible.

Secondly, Thomas Davey cuts a rather more attractive figure as author of the *Proclamation* than Sir George Arthur. As Governor, Davey had protested in 1814 his 'utter indignation and abhorrence' at the kidnapping of Aboriginal children.²¹ Here then is a promising candidate for the vacant post of Founding Father of the rule of law in Tasmania. 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 placing bounties on their heads and promising to protect them; between inciting white settlers to kill them and expressing outrage when they did. He was a man whose policy showed a peculiar mixture of extreme action accompanied by inconsistent direction and remorseful reflection.²² Above all, as the man behind the notorious Black Line, the dragnet which attempted to corral the whole Aboriginal population of the island like cattle, his government might be thought to symbolize a way of thinking about the original Tasmanians that 'would be laughable were it not so criminally tragic'.²³ Such a background surely taints and complicates the promise of the rule of law. It would be no surprise, then, if those who resuscitated his *Proclamation* fifty years later found it easier to place it in a more innocent historical context. Just a mistake, no doubt, but no less telling for that.

Before we further reflect on this background, let us look at the *Proclamation* itself. In form and in origin it was an effort to communicate across a great cultural abyss. The pictogram was suggested and apparently drawn by Surveyor-General George Frankland, and he in turn had been 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

21. H. Reynolds, *Fate of a Free People*, Camberwell, Penguin, 1995, p. 90.

22. Reynolds, *Fate of a Free People*, p. 107.

23. L. Robson, *History of Tasmania*, Melbourne, Oxford University Press, 1983, p. 225. For historical context see also Reynolds, *Fate of a Free People*, and Ryan, *The Aboriginal Tasmanians*.

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 ...²⁴

The real wishes of the government; the actual state of things. We shall have occasion to reflect on this shortly. Frankland's drawings were produced and published by the government in March the following year. Although we have a record of a formal presentation to 'Nunarrow' — Eumarrah or Umarra — an Aboriginal leader, in November,²⁵ it remains unclear how else the boards were circulated amongst the natives, or to what trees in a colony over half the size of England they were nailed.

The four panels of the pictogram reproduced above (which I will call here Frames A–D) trace a development, but not an historical one. There was of course no moment of first contact so equable, no society so peaceable, as frame A depicts. Instead, the pictures trace a movement from philosophy to politics to law. Frame A is a representation of our abstract equality: men and children are friends regardless of colour, and a white woman nurses a black baby as readily as a black woman nurses 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 a declaration of the underlying principle of justice that the rule of law acknowledges and draws upon. Two related features of what we might call this 'state of nature' stand out. The first is its relentless individualism: humans are presented here not as belonging to societies or cultures with distinct features to be recognized or preserved. The equality that matters is individual, not collective. Secondly, and this is probably the crucial philosophical step, this individualism does not lead to a world in which everybody is different from each other, but on the contrary, a world in which everybody is the *same*. In Frame A, this sameness is insisted upon to excess. 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

24. Letter to Governor Arthur, in Kerr, *Dictionary of Australian Artists*, p. 273.

25. The Tasmanian, 26 November 1830, in Kerr, *Dictionary of Australian Artists*, p. 273.

figures as naked as his black ones. Thus the principles upon which the rule of law are to be based: equality, individual not group identity, and our intrinsic sameness. By presenting these principles of justice outside of any history, Frame A insists upon their transcendent truth and their applicability to all societies.

Frame B marks a fall from nature into politics, history. We are now in a physical world and not just an abstract one. The Aborigines lose their clothes and gain membership in a community. Whites and blacks are no longer depicted as the same as one another; instead, they are representatives of *different* societies, reaching an agreement. But this is clearly not an agreement between equals. What we see here is the transfer of sovereignty from native to colonial rulers: a new political authority and hierarchy is acknowledged, reflected in the movement from the left to the right of the picture — from Aboriginal to British society, from naked to clothed, from subservient to dominant. Neither Frankland nor Arthur could have believed for a moment that this transfer was as consensual or as peaceful as Frame B pretends. Not only were they faced with the daily consequences of the guerilla war being waged by Aborigines against their rule across the isle, but as Arthur remarked on more than one occasion, 'I cannot divest myself of the consideration that all aggression originated with the white inhabitants ...'²⁶ But Frame B not only insists on the reality of British sovereignty over the colony. The ahistorical consent represented in the image looks both forward and back. Forward, to the day when the Tasmanian Aborigines might consent to the reality of that rule. Back, to the philosophical principles expressed in Frame A, according to which they are given a *reason* — an obligation, even — to consent to that rule. In other words, this picture does not just inform the Tasmanian Aborigines of a political *fait accompli* (though it does that). It is also the second part of a syllogism: because A, then B. Because of the promise of the rule of law depicted in Frame A, you should accept as legitimate the government, which is committed to uphold it.

Frames C and D now provide this syllogism with its conclusion: the concrete legal consequences of the application of the premises of the rule of law (A) when the British rule the premises (B). This is not eternal philosophy or hypothetical history but practical law: the application of both, together, to the problems and conflicts of the

26. Ryan, *The Aboriginal Tasmanians*, p. 94.

real world. Abstract principles are here brought very directly into the real world, where violent justice is meted out in response to violent crime. In the first place, 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 legal order of the British redcoats stands quite apart from the actors, and enforces the law indifferent to who has broken it and why. Governor Arthur had said as much in his very first proclamation as Governor, 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’.²⁷ Indeed, the rule of law does, as we have seen, reflect the idea of an impartial judiciary applying clearly expressed rules (though even Governor Arthur goes further than that here, indicating not only that judges will apply whatever laws are in place, but that those laws will protect the rights and liberties of ‘Natives’ and settlers alike). That is certainly a crucial aspect of these principles, and the depiction of British justice in the last two panels indicates as much.

But the pictorial Proclamation goes further than this. In one of this country’s earliest and most important efforts to articulate the values of justice that they — we — thought it essential to convey to the strangers with whom we were to share this continent, judicial neutrality is only part of the picture. Of prior importance were the 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. Frame A is about what we believe. Frame B is about what has happened. Frames C and D are about how we act. Together, that sense of a *reciprocal* relationship between rulers and ruled as the basis for law’s legitimacy is eloquently expressed. It is built on a promise to treat all persons, black or white, with equal respect for their individuality, and an assumption of their fundamental sameness —

27. A Proclamation, Government House Hobart, 23 June 1824, in Reynolds, *Fate of a Free People*, p. 91.

not only that the people of Australia would all be subject to the law, but to the same laws.

There is, meanwhile, a methodological point worth making, because it justifies the whole approach taken in this article. It is this: the fact that the most significant articulation of the rule of law in Australian colonial history was directed to Aboriginal people and in the medium of a picture tells us something. In the first place, it tells us that 'rule of law' is not merely a legal term. It is a social fact, and our sources must extend beyond the arid pages of textbooks into the social world, art, literature, children's books, movies and newspapers. To look for ideas of justice in a courtroom, to paraphrase Marc Galanter, is like looking for health in a hospital.²⁸ Secondly, the very compactness of a work of art gives readers an enormously valuable ability to actively participate in its analysis. By and large, one has to take my word for what Dicey or Dworkin says. But any reader can now see what Frankland drew and draw their own conclusions. In time, I think this reciprocity between writer and reader adds to the richness and power of the conversation that ensues, including the conversation about the rule of law itself. Thirdly, images have a particular role to play as we learn more about what communities think about law and justice. Images have a density to them, a complexity in their depiction of the *relationship* of ideas and forces, which makes them both quick to take in at a glance and slow to decipher. Furthermore, the non-linear aspect of images makes them a particularly appropriate means of communicating paradoxes and ambiguous or double-edged ideas. Writing, particularly academic or legal writing, values and perhaps even demands the communication of a single well-organized perspective. Art is more multiple and less conceptually disciplined than that.²⁹ The result, as we will continue to see as this article proceeds, is that there is a certain ambiguity to the British rule of law that the artist has, perhaps despite himself, captured. The image tells not one story but many. And the honesty of the image, its capacity to say to us more even than it intended to say, is part of what makes it such a genuinely revelatory source.

28. M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law', *Journal of Legal Pluralism and Unofficial Law*, vol. 19, 1981.

29. C. Douzinas and L. Nead (eds), *Law and the Image*, Chicago, University of Chicago Press, 1999.

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Essential to both the honesty and the paradox of the *Proclamation* is our difficulty in squaring 'the real wishes of the government', as Frankland depicts it here, with the 'the actual state of things' in Tasmania at the time. How *could* men like Arthur or Frankland have seriously believed in the beneficence of imperial legality when the reality of government policy on the ground was so disturbingly different? For at the very same time that Governor Arthur's so-called proclamation was elaborating his commitment to the rule of law, his actual proclamations instead extended martial law throughout Tasmania. Martial law had initially been declared in 1828 and the government had then made efforts to banish Aboriginal people from settled areas.³⁰ But in the face of rising Aboriginal attacks, in February 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 savages' consumed by 'revengeful feelings'.³¹ Faced by 'continued repetitions of the most wanton and sanguinary acts of violence and outrage', Arthur then extended martial law 'against the Black or Aboriginal Natives within every part of this Island' in October 1830.³² A further proclamation effectively deputized the whole white population of the island to act in their capture. Thus on 7 October 'the community ... en masse' was to spread out across the island like a human chain in order to surround the Aboriginal population, and herd them onto Tasman's Peninsula, where they could be corralled once and for all.³³

This was the so-called Black Line, a dismal and notorious folly that led to the capture of a grand total of two Aborigines and the shooting of two more, but which nevertheless marked the high point of Arthur's military campaign against them.³⁴ Martial law had always been understood by scholars of the common law to directly negate the commitments of the rule of law. What is

30. Reynolds, *Fate of a Free People*, p. 109.

31. Government Order No. 2, 25 February 1830, in *Hobart Town Gazette*, 27 February 1830, <www.law.mq.edu.au/sctas/html/1830cases/Notice1,1830.htm>.

32. A Proclamation, *Hobart Town Gazette*, 2 October 1830, <www.law.mq.edu.au/sctas/html/1830cases/Notice7,1830.htm>.

33. Government Order No. 11, 22 September 1830, in *Hobart Town Gazette*, 25 September, <www.law.mq.edu.au/sctas/html/1830cases/Notice6,1830.htm>.

34. C. Turnbull, *Black War*, Melbourne, 1948; House of Commons, Copies of All Correspondence ... on the Subject of the Military Operations ... Against the Aboriginal Inhabitants of Van Diemen's Land, *Parliamentary Papers*, No. 259, Great Britain, 1831.

particularly significant about Arthur's legal strategy in this period is that through the expedient of martial law he removed all Aboriginal people from the protection of the rule of law while actively co-opting the whole European population 'against' them, in the process authorizing the use of 'whatever means a severe and inevitable necessity may dictate'. Thus 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 under the very broad rubric of 'necessary operations against the enemies'.³⁵ Subject to 'an active and extended system of Military operations against the Natives generally' and until the 'cessation of hostilities', Aboriginal Tasmanians were *outside* the rule of law.³⁶

One might argue that in this light Frankland's pictogram is nothing but a fraud. The rule of law is not without its critics, and that is typically how they look at it: its noble sentiments draw our attention away from how those with power actually enforce the law.³⁷ So the purported equivalence between Frames C and D has two complementary effects. Firstly, it deceives. The *Proclamation's* reference to equal treatment distracts us from the nasty truth of 1828–30, which made white attacks on black people virtually *unpunishable*, whereas black attacks on white settlers were branded as the 'mischief and cruelty' of 'a wanton and savage spirit'.³⁸ Secondly, it conceals. The abstract thinking involved in treating Aboriginal murder 'the same as' that of a white settler ignores the difference in meaning and context of the two groups' actions, and does not allow that their claims of justice might differ. Even if the British government were neutral as between the two deaths drawn by Frankland (which clearly it was not), the rule of law would still sustain settler society and destroy Aboriginal society precisely *by* treating them 'the same' in some abstract sense. Similarly, the claim in Frame A that Whites and Blacks are 'the same', and that each can just as easily nurse the other's baby, merely conceals the underlying social and economic reality, which makes nonsense of the equivalence. A black woman nursing a white baby is a servant in a

35. Reynolds, *Fate of a Free People*, p. 112.

36. A Proclamation, *Hobart Town Gazette*, 2 October 1830, <www.law.mq.edu.au/sctas/html/1830cases/Notice7,1830.htm>.

37. C. Stewart, 'Men of Class', p. 136 (in relation to marxism, feminism).

38. The words come from the 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'. Quoted in N. Plomley, *The Aboriginal/Settler Clash in Van Diemen's Land*, Hobart, Queen Victoria Museum, 1992, p. 9.

rich man's house. A white woman nursing a black baby is a missionary who has taken children away from their mothers in order the better to assimilate them. Equal treatment perpetuates inequality every time it purposely turns a blind eye to social and material difference. So critics of the rule of law would re-read the pictogram as a crude deception. By ignoring the complexities of context, and by lying about the actual legal practices going on at the time, the British rule of law makes us both complacent and ignorant about the injustices perpetrated in its name.

That would be one way of understanding the pictogram: insincere, dishonest. But I do not think such an analysis is adequate. I think we need to take people's professed beliefs seriously if we can. It seems clear that Frankland, 'innocent but misguided',³⁹ believed in the Proclamation. And equally clearly, Arthur himself consistently sought to justify the violence he unleashed in compassionate terms. There is this strange doubleness in his gestures, which always seem to sway in confusion between the violent actions he sets in motion and a desire to protect the Aborigines from those same forces. In proclaiming martial law in 1828 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 ...'⁴⁰ Even the Proclamation instituting the Black Line concludes:

[T]he 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.⁴¹

39. Kerr, *Dictionary of Australian Artists*, p. 273.

40. From a letter to the Brigade Major's Office, 3 November 1828, in Reynolds, *Fate of a Free People*, p. 109.

41. Government Order No. 11, 22 September 1830, in the *Hobart Town Gazette*, 25 September 1830, <www.law.mq.edu.au/sctas/html/1830cases/Notice6,1830.htm>.

In that light Arthur's commitment to the rule of law is not so much denied as *deferred*. The 'savages' of Tasmania are not cast, as they admittedly are from time to time, as 'vengeful', 'proceeding from a wanton and savage spirit inherent in them, and impelling them to mischief and cruelty'.⁴² Instead, and more commonly, they are portrayed as unhappy and miserable. Their capture and control is 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 an optimistic vision of the state of nature — that we are born free and equal. Governor Arthur's policy presumes instead a pessimistic vision, which perhaps owes something to Thomas Hobbes. Hobbes had argued in the seventeenth century that in the 'state of nature', without an all-powerful government to repress and control our baser instincts, there would be nothing but warfare and misery.

In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.⁴³

The colonial government of Van Diemen's Land is Hobbes' *Leviathan*: a monster, a tyrant who is nevertheless necessary and whose violence and absolute power saves us — and more particularly in this case Aboriginal people — from the 'warfare' and 'privations' of this hideous state of nature.

So the promise of the pictorial Proclamation is meant seriously, but it is a promise exclusively in the future tense. 'We do believe in your potential for equality and sameness', it is as if Governor Arthur had said to the first Tasmanians. '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

42. Findings of the Archdeacon Broughton Committee, 1830, in Plomley, *The Aboriginal/Settler Clash in Van Diemen's Land*.

43. T. Hobbes, *Leviathan* (1651), Chapter 13.

and D' but 'when A and B, then C and D'; not 'thus, so', but 'if, then'. What *Governor Arthur's Proclamation* in fact argues is that the *un-*depicted violence of the Black Wars is justified, just as Leviathan's monstrous tyranny is justified, by the promise of the just legal order that will then and only then ensue.

Some contemporary writers on the rule of law have made a broadly similar point, and it is significantly different from the criticisms we have noted above. They have resuscitated Hobbes 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. When the rule of law applies, it constrains government action. But the sovereign decides when and where the rule of law operates and when and where it does not. This power is absolute, and no rules can determine it or prevent its exercise, since by definition it is, as it is in Hobbes, a power *prior* to law, a power to decide when legality applies and when it is suspended. In a series of influential books culminating in *State of Exception*, Giorgio Agamben develops this argument.⁴⁴ He 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 that 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 the resurgence of the state of exception: in the treatment of refugees or stateless persons and in the creation of juristic black holes such as Guantanamo Bay, wherein the US President has precisely claimed the executive privilege to determine where national and international law does and does not operate.⁴⁵ Even in Australia recent legislation has declared that parts of the Australian coastline are no longer to be counted as Australia for immigration purposes.⁴⁶ 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 no longer apply.

44. G. Agamben, *State of Exception*, Chicago, University of Chicago Press, 2005 and *Homo Sacer*, Stanford, Stanford University Press, 1998.

45. J. Dratel and K. Greenberg (eds), *The Torture Papers: The Road to Abu Ghraib*, New York, Cambridge University Press, 2005.

46. *Migration Amendment (Exclusion From Migration Zone) Act 2001* (Cth) No. 128.

The state of exception is not merely a blind spot to the rule of law. It is *justified* by it. We are told that we need these exceptions, these pockets, if the rule of law is to emerge or to survive. What is worrying is that as time goes on we seem to be finding that the pockets are only getting larger.

Governor Arthur's Proclamation illustrates how the ideology of the rule of law might *actively* bring about its own destruction; and this is a point that those who have focused on the hypocrisy or limits of the rule of law have not really understood. It is not that Aboriginal people did not 'deserve' the rule of law. Rather, their 'savage spirit' required its suspension in order that the Leviathan of the British Empire might first civilize them, might first bring them to that ideal state of equality and sameness in which the rule of law would, finally, be appropriate. Indeed, the very belief in the rule of law highlighted the apparent incapacity 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 promise, the more inadequate seemed the present state of the natives. The more sincere the British commitment to our inherent sameness, the more Aboriginal difference seemed a 'fierceness' to be subjugated or a 'weakness' to be fixed.

The images of *Governor Arthur's Proclamation*, juxtaposed against the government's actual policy, do not reflect either a contradiction or hypocrisy. On the contrary, they represent cause and effect. It was *because* Arthur and Frankland, and many like them, believed so fervently in the rule of law that Aboriginal people were, on the one hand, always disappointing them and, on the other, required emergency action, exceptional measures, to drag them from beyond the pale into civilization's embrace. Ironically, the Proclamation did not establish the rule of law in Tasmania; it justified its exception. As St Augustine said, 'Lord, give me chastity — but not yet'⁴⁷; so George Arthur said, 'Lord, give me the rule of law — but not yet'. The aspirations of the Proclamation remained, but making good on them was always deferred to some indefinite future when Aboriginal people would at last be ready for it. Meanwhile, the rule of law proved to be just another rod with which to chastise them for their failure to live up to our expectations.

47. St Augustine, *Confessions*, Book 8.

Another National Emergency

A Profound Change in the Treatment of Aboriginal Communities

The great historian of nineteenth-century England, E. P. Thompson, famously described the rule of law as 'an unqualified human good'.⁴⁸ 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 much remains true. Nevertheless, Thompson fails, I think, to reflect adequately on the way that the ideal itself, as we have just seen, might not merely conceal oppression but actively *inspire* it, either against those who do not live up to its criteria or in the context of events which are said to require its suspension. The 'war on terror' is the most obvious example of a state of exception that has been justified as a way of protecting the same ideals that are simultaneously scorned as 'quaint' or 'outmoded'.⁴⁹ Other examples abound; from Malaya to Pakistan the language of 'emergency' has been used to suspend legal principles.

But we need not look so far. Legislation enacted in August 2007 has profoundly changed the treatment of large numbers of Aboriginal people in the Northern Territory in Australia. The legislation is couched, just as Agamben might have predicted, as a 'National Emergency Response'.⁵⁰ In this case, the emergency in question is not terrorism but shocking levels of child sexual abuse and domestic violence in remote Aboriginal communities, where people live, by and large, in disparate and sparsely populated settlements under conditions of appalling poverty and sickness. Endemic problems and patterns of sexual abuse under these third world conditions have been the subject of many reports over the past several years,⁵¹ most recently in *Little Children are Sacred*, the

48. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, New York, Pantheon Books, 1975, p. 266.

49. *The Civil and Civil Rights Record of Attorney General Nominee Alberto Gonzales*, Washington Legislative Office of the American Civil Liberties Union (Laura W. Murphy, Director), January 2005.

50. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129. See also Joint Press Conference (Prime Minister John Howard and Minister for Indigenous Affairs Mal Brough), 21 June 2007, <www.pm.gov.au/media/Interview/2007/Interview24380.cfm> and Media Release, 'National Emergency Response to Protect Aboriginal Children in the NT', 21 June 2007. See P. 't Hart, 'Crisis Exploitation: Reflection on the "National Emergency" in Australia's Northern Territory', *Dialogue*, no. 26, 2007, pp. 51–8.

51. Crime Prevention Committee, Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model, First Report*, Melbourne, Government Printer, 1995; C. Cunneen and T.

report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse.⁵² It was this report that the federal government seized upon, adopting the language of exception and emergency so forcefully that opposition to the government's far-reaching proposals was stunningly muted. Over five hundred pages of legislation were produced and passed through the parliament in ten days, subject only to a short second reading debate and a one-day inquiry by the Senate Standing Committee on Legal and Constitutional Affairs. Remarkably, despite their evident reluctance, the opposition Labor Party voted in favour of the package without amendment, agreeing that the 'emergency plan' was necessary and should be 'give[n] a go'.⁵³ In the discourse of emergency that had been generated, it would have been political suicide to have demanded amendments and ultimately to have voted against the legislation.

There is no doubt that there are extraordinarily serious problems of domestic violence and sexual assault in many Aboriginal communities, and that women in particular confront these issues, and find themselves intimidated into silence, every day. The work of Alice Springs Crown Prosecutor Nanette Rogers, amongst others, leaves no doubt as to the horrifying and predatory nature of these attacks. What is tragic about the intervention, however, is how few of its far-reaching measures actually or in any serious way attempt to respond to these painful issues, let alone to their underlying causes. Professor Marcia Langton wrote recently,

This made me think about the everyday suffering of Aboriginal children and women, the men who assault and

Libesman, *A Review of International Models for Indigenous Child Protection*, A report prepared for the NSW Department of Community Services, 2002; Human Rights and Equal Opportunities Commission (HREOC), *Ending Violence and Abuse in Aboriginal and Torres Strait Islander Communities — Key Issues: An Overview Paper of Research and Findings by the Human Rights and Equal Opportunities Commission, 2001–2006*, Sydney, HREOC, 2006; NSW Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future, Addressing Child Sexual Assault in Aboriginal Communities in NSW*, Sydney, NSW Attorney General's Department, 2006; Queensland Crime Commission and Queensland Police Service, *Child Sexual Abuse in Queensland: The Nature and Extent: Volume 1. Project Axis*, Brisbane, Queensland Crime Commission, 2000; S. Gordon, K. Hallahan and D. Henry, *Putting the Picture Together, Inquiry into the Response by Government Agencies into Complaints of Family Violence and Child Abuse in Aboriginal Communities*, Western Australia, Department of the Premier and Cabinet, 2002; M. Rayner, *The Commonwealth's Role in Preventing Child Abuse: A Report to the Minister for Family Services*, Melbourne, Australian Institute of Family Studies, 1994.

52. R. Wild and P. Anderson, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Child Sexual Abuse*, Darwin, Northern Territory Government, 2007.

53. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, p. 72, Kevin Rudd (Leader of the Opposition).

abuse them, and the use of this suffering as a kind of visual and intellectual pornography in Australian media and public debates. The very public debate about child abuse is like Baudrillard's 'war porn'. It has parodied the horrible suffering of Aboriginal people. The crisis in Aboriginal society is now a public spectacle, played out in a vast 'reality show' through the media, parliaments, public service and the Aboriginal world. This obscene and pornographic spectacle shifts attention away from everyday lived crisis that many Aboriginal people endure — or do not, dying as they do at excessive rates.⁵⁴

Langton implies that critics of the intervention, under the influence of a 'powerful, wrong-headed Aboriginal male ideology', are guilty of this 'pornographic spectacle' in the course of which the reality of Aboriginal abuse and suffering is 'denied repeatedly ... in favour of pursuing theoretical definitions of rights'.⁵⁵ On the contrary, however, I think the form and content of last year's legislative action was entirely complicit in that spectacle and that parody.

Thus it is no longer controversial, I think, to remark, along with Australian Council of Social Services, the Human Rights and Equal Opportunities Commission, the Law Council of Australia, the Central and Northern Land Councils, Oxfam and numerous other organizations, that the measures contained in the *Northern Territory National Emergency Response Act 2007*,⁵⁶ the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*,⁵⁷ the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*⁵⁸ and their cognate Appropriation Acts,⁵⁹ go far beyond the question of child abuse in Aboriginal communities in the Northern Territory.

True enough, there are certainly measures dealing with health checks, alcohol and pornography,⁶⁰ which bear a genuine connection to the concern for child abuse. At the same time it is worth noting that the laws relating to alcohol do not appear to go much beyond

54. M. Langton, 'Trapped in the Aboriginal Reality Show', *Griffith Review*, no. 19, 2008.

55. Langton, 'Trapped in the Aboriginal Reality Show'.

56. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129.

57. *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) No. 130.

58. *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128.

59. *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007* (Cth) No. 126 and *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007* (Cth) No. 127.

controls already in place in some Aboriginal communities which might, with proper negotiation, have been extended or policed. The laws relating to pornography are certainly contrary to principles of freedom of expression and would not be tolerated or even arguable if they had been proposed for any other community in Australia. Perhaps the connection between child abuse and pornography is commonsensical, and it is of course difficult to stand up for something so lacking in redeeming features as pornography, but the extremely broad criminal offences of purchase, possession and supply within a 'prescribed area', which the legislation enacts,⁶¹ are based on a very small amount of anecdotal evidence. Such laws, in addition, suffer from the same problems that laws about addiction always do: they are often unenforceable, and treat as causes what are only symptoms of larger social problems. Above all, the implications of some kind of in-built incapacity or weakness amongst Aboriginal people might give one pause for thought that we are yet again adopting disturbingly simplistic causal explanations for behaviour that is surely better understood in terms of generations of neglect and social dislocation. As research has made very clear, the vast majority of the perpetrators of the sexual abuse of children have also been at one time victims of it.⁶²

Whatever the merits of treating pornography and alcohol in this way, the legislation singles out and affects the lives of Aboriginal Australians (in some cases those living in particular communities and in other cases throughout the Northern Territory) in far, far more widespread, though less immediately obvious ways; ways that appear to have at best a tenuous relationship to the prevention of child abuse.⁶³

Moreover if these laws were in truth an effort to address the chronic social problems that give rise to abuse, we might have expected the far-reaching interventions into families and communities they mandate to be supported by the literature and reports that sparked them. The contrary is the case. The *Little*

60. *Northern Territory National Emergency Response Act 2007* (Cth) No. 128 Parts 2-3; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128 Sched. Part 10 Div. 1-4.

61. *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128 Sched. 1 Part 10 Div. 2 ss.101-3.

62. Wild and Anderson, *Little Children are Sacred*, p. 12.

63. It is also worth noting that levels of the sexual abuse of children are in fact higher in several other Australian jurisdictions than in the Northern Territory: see Australian Institute for Health and Welfare, *Australia's Health*, No. 10, Canberra, Government Printer, 2006.

Children are Sacred report, specifically cited by the federal government as the justification for its intervention — not to mention the other inquiries and reports commissioned by State governments over the past few years and the extensive research which has studied the problem of child abuse around the world⁶⁴ — insist with virtual unanimity on consultation with members of affected communities themselves, to gain their trust and co-operation, and to develop social programs and interventions specifically tailored to them. As the Australian Council of Social Services succinctly put it:

In an emergency setting, the first thing any UN agency would do ... is to ensure proper consultation on the ground ... The international community is able to do things quite quickly in a refugee camp, and that is based on consultation and asking the population themselves what they need. The biggest lesson learnt from all interventions internationally is that they always fail when they do not involve and empower the local communities to take part ...⁶⁵

No doubt all these experts may be wrong. But it is clear that the motivation for this legislation must go beyond either specific knowledge about or a direct response to child sexual abuse. It is equally clear, just as Agamben has argued, that the language of 'emergency response' has not been the catalyst to inspire serious reflection on these grave problems, but on the contrary, has acted to *dull* our critical capacities: to assure us that no matter what legal principles are undermined in the process, the actions are temporarily necessary and necessarily temporary. Indeed, the language of emergency has been even more insidious: it has silenced dissent in ways not seen in Australia for many, many years. Sceptics and critics have been cowed into silence on the issue, and when a minister in the Northern Territory government, an Aboriginal woman herself, dared to express strong

64. R. J. Goldman and J. D. G. Goldman, 'The Prevalence and Nature of Child Sexual Abuse in Australia', *Australian Journal of Sex, Marriage & Family*, vol. 9, 1988, pp. 94–106; P. E. Mullen and J. Fleming, *Long Term Effects of Child Sexual Abuse*, National Child Protection Clearinghouse Issues Paper No. 9, Melbourne, Australian Institute of Family Studies, 1998; J. Pocock, *State of Denial: The Neglect and Abuse of Indigenous Children in the Northern Territory*, Victoria, SNAICC, 1998; P. Cawson, C. Wattam, S. Brooker and G. Kelly, *Child Maltreatment in the United Kingdom: A Study of the Prevalence of Child Abuse and Neglect*, London, National Society for the Prevention of Cruelty to Children (NSPCC), 2000. See also fn 51 above and fn. 164 below.

65. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Andrew Johnson (Executive Director, Australian Council of Social Service), p. 62.

disagreement with these laws, she was branded unfit to hold office and had an abject retraction bullied out of her. Ironically, one of the comments that got her into hot water was the suggestion that Australia was suffering under a 'new McCarthyism'.⁶⁶

In what ways, then, do these new laws impact as seriously and as broadly as I contend they do on our attitude towards and treatment of Aboriginal people? One point is so obvious that it needs hardly be touched upon. The legislation specifically excludes the operation of the Commonwealth's own *Racial Discrimination Act 1975*⁶⁷ and the international obligations that gave rise to it.⁶⁸ The legislation also declares that the arrangements put in place are 'special measures' for the benefit of Aboriginal people and, as such, authorized by these international laws and conventions.⁶⁹ But this is a question of fact that a court would eventually have had to decide upon, and the government was not prepared to take that chance. Accordingly, the legislation itself seems to be of the view that at least some of its measures are discriminatory and could not be justified as being for the benefit of Aboriginal people.

I am aware that this line of argument is both too general and too technical. To say that the Australian government has excluded its own Racial Discrimination Act in legislation specifically directed towards Aboriginal people is indeed worrying, but does not yet establish that the laws are in fact discriminatory. I am more interested in the effect of some of the detail of the legislation on the nation's commitment to the rule of law. *Governor Arthur's Proclamation* gives us an iconic Australian articulation of that commitment, although as we have seen in the previous section of this article, and will see again in the next, its consequences are by no means unambiguous. That image depicts all people as the same in the eyes of the law, subject to equal protection of and treatment by enacted laws. And it claims to treat all people as individuals and without singling them out for disadvantageous treatment because of their membership of racial or other groups. To treat them as

66. Comments made by Marion Scrymgour, Member for Arafura (NT), <www.abc.net.au/news/stories/2007/10/24/2069201.htm>. See C. Hamilton and S. Madison (eds), *Silencing Dissent*, Sydney, Allen and Unwin, 2007.

67. *Racial Discrimination Act 1975* (Cth) No. 52.

68. *Family, Community Services, Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128 s. 4 subs. 2; *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 8 s. 132 subs. 2.

69. *Family, Community Services, Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128 s. 4 subs. 1; *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 8 s. 132 subs. 1.

subject to collective constraints or disabilities that have no basis in their individual actions or circumstances undermines the notion of reciprocity at the heart of the rule of law. No doubt this is to place highly complex issues in an idealistic and simplistic framework. But by reminding ourselves of these very basic elements that we think always matter, though they are by no means conclusive or absolute, the extent to which the declared 'national emergency' has justified a wholesale abandonment of Australia's commitment to the rule of law is brought into sharp relief.

Specific Provisions

This abandonment can be seen in a number of quite specific provisions. When the Australian Crime Commission (ACC) was set up it was armed with special powers and the authority to investigate 'serious and organized crime [note: 'and' — both are required elements]'.⁷⁰ Now the Commission's powers have been extended to 'serious violence or child abuse [note: 'or' — either will suffice] committed by or against, or involving, an Indigenous person'.⁷¹ It is difficult to imagine how the expertise, approach or rationale of the Australian Crime Commission could be in any way appropriate to the problems and multigenerational causes of child abuse. Perhaps there is an assumption here that child abuse is mainly caused by organized paedophile rings, a facile piece of nonsense. But not only does this section radically divert the ACC from its original mandate (and the justification for the powers it exercises); it now places Indigenous violence and Indigenous child abuse in an entirely different category from the very same offences committed by any other person in Australia. One can only conclude that there is either something inherently Indigenous about child abuse; or something inherently organized about it; or something peculiarly threatening about Indigenous violence of any kind. In the days when bodies like the ACC were principally concerned about the Mafia, there were probably those who thought that there was something inherently Italian about organized crime too, or something inherently organized about Italian crime for that matter.⁷² But commitment to the rule of law prevented legislation

70. *Australian Crime Commission Establishment Act 2002* (Cth) No. 125 Sched. 1 subs. 4 (1).

71. *Family, Community Services, Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128 Sched. 2 Part 1 subs. 4 (1); *Australian Crime Commission Establishment Act 2002* (Cth) No. 125 s. 4.

72. New South Wales, *Royal Commission into Drug Trafficking*, 3 vols. (Philip Woodward, Commissioner), Sydney, Government Printer, 1980.

that singled out an ethnic group in such an overtly racist way. It has not prevented it this time.

We find a similar movement in the provisions concerning bail and sentencing. Part VI of the *Northern Territory National Emergency Response Act 2007* prevents any person charged or convicted under any Territory law from raising 'any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the offence'.⁷³ There have been several allegations concerning Aboriginal persons using 'traditional marriages' (which might involve the arranged marriage of a young girl to a much older man) as a justification for child abuse or rape. Firstly, it seems categorically the case that these traditions do not, properly understood, justify either rape or the abuse of children. Even if marriage in such cases has been solemnized, sexual relationships are not traditionally entered into until much later. Secondly, neither *Little Children are Sacred* nor the Western Australian Inquiry into Family Violence and Child Abuse in Aboriginal Communities⁷⁴ found a single case in which Aboriginal law had been accepted as a defence to any crime of violence. It remained true until this legislation that while not a legitimate *defence* to a criminal act, an offender during sentencing was entitled to explain to the Court their actions, their beliefs and their state of mind when the offence was committed. The principle of individualized sentencing has been a cornerstone of British justice for hundreds of years. It is fundamental to providing the judge with as much context and background as possible, both in order to understand the motivations of the offender and so as to ensure that the sentence handed down is appropriate to their punishment and rehabilitation. No more. In the Northern Territory relevant information regarding the background, beliefs and motivation of an offender will now be kept from the Courts.

A study by the Law Council of Australia went further, concluding that there was 'no evidence that courts have permitted manipulation of "cultural background" or "customary law"' in any circumstance.⁷⁵ I suspect that this is too complacent. Aboriginal women in particular have very real concerns as to how assertions

73. Northern Territory National Emergency Response Bill 2007 (Cth) No. 129 Part 6 s. 90.

74. J. Stanley, K. Kovacs, A. Tomison and K. Cripps, *Child Abuse and Family Violence in Aboriginal Communities — Exploring Child Sexual Abuse in Western Australia*, National Child Protection Clearinghouse, Australian Institute of Family Studies, May 2002.

75. Law Council of Australia, 'Recognition of Cultural Factors in Sentencing', submission to the Council of Australian Governments, 10 July 2006, p. 17.

about customary law have been used to justify leniency in the sentencing of violent assaults and sexual offences. The phrase that has been used by a number of Aboriginal women to describe this manipulation of traditional laws is 'bullshit law', and it is clear that claims about tradition and culture have profoundly gendered impacts in Indigenous communities.⁷⁶ The criminal justice system in northern Australia continues to trivialize the rape and assault of young Aboriginal women, as the appalling instance of the sentence recently handed down to nine offenders in the rape of a ten-year-old Wik girl exemplifies.⁷⁷ But the solution is surely to make better information available to the courts and not worse. The legal system in the Northern Territory needs to be a great deal more aware of these issues in the treatment of customary law, and of the intersection of gender and race more generally. What it does not need is to be prevented by law from ever obtaining such an awareness.

Neither does Part VI apply only to cases involving the sexual abuse of children. Cultural practices and customary law are no longer relevant in the sentencing of *any* crime, and although the amendment does not, on a surface reading, specifically single out Indigenous people, it is beyond doubt that they are both the intended target group and the most seriously affected in the Northern Territory. The contexts in which customary laws and practices might be relevant are exceptionally varied.⁷⁸ A killing or a spearing might take place in conformity with Aboriginal law; an insult may have a specific gravity or resonance within a particular culture that leads to a brawl or provokes violence; an initiation practice might go wrong and lead to injury or death; an Indigenous person might refuse to give evidence to an inquiry or in court because it relates to a prohibited relationship or a dead person. Culture and custom are not ways of excusing illegal behaviour, but in a wide range of circumstances they are necessary to fully understanding it.

76. I am very grateful to *Arena Journal's* anonymous reviewer for this important point; see also the powerful discussion in Langton, 'Trapped in the Aboriginal Reality Show'. I realize that this article is far from adequately responding to the intersectionality of gender and race in Aboriginal communities, and this is clearly an area of importance. I do not wish in any way to be taken as disparaging those questions, though they are not my focus here. The present article is intended to focus on precisely those aspects of the legislation that have been justified by but in reality have *little to do with* the issues of domestic violence and sexual assault in Indigenous communities; how gender in particular operates in the debates about and experiences of these endemic problems, and more broadly in the construction of 'customary law' in our legal systems, must wait for another day.

77. Langton, 'Trapped in the Aboriginal Reality Show'.

78. H. McRae, G. Nettheim and L. Beacroft (eds), *Indigenous Legal Issues: Commentary and Materials*, 2nd edn, Sydney, The Law Book Company, 1997.

So the *silencing* of offenders talking about their culture is a very broad legal change, antithetical to longstanding and fundamental common law principles. It also disproportionately affects Aboriginal people, while it does not affect white Australians at all. *Their* cultural practices are the very basis of the legal system, and courts need no instruction in order to understand what cultural forces may have led to a brawl, or provoked an assault, or led to a date-rape. Part VI of the Act will now require that Aboriginal offenders, and those from other minority cultures, are sentenced and bailed with less comprehension than that received by white offenders.

The 'national emergency response' singles out Aboriginal people and treats them collectively rather than as individuals. For example, the new laws amend the approach taken to welfare payments.⁷⁹ The government aims to identify, through child protection authorities and by examining the school attendance of children, families that are at risk of child neglect. Those families, which the second reading speech describes as 'relatively infrequent ... limited to a relatively small number',⁸⁰ may then be subject to 'income management': their welfare entitlements will be 'quarantined' and their spending supervised to make sure that adequate money is provided for their children's health and education. But in relation to 'some remote Indigenous communities where normal community standards and parenting behaviours have broken down', the government takes a very different approach. Zero effort is made to identify 'at risk' families. Half the welfare entitlements of between 30,000 and 40,000 Aboriginal people in seventy-three communities dispersed across the Northern Territory will be quarantined and their expenditures subjected to close surveillance and supervision by those charged with the administration of the Act.⁸¹ In relation to these communities and townships, the law applies to all persons living there, whatever their family arrangements — even if they do not have any children. The controls are applicable to 'all residents in a community', including 'any individuals who move into the communities' or, indeed, try to

79. *Social Security and Other Legislation Amendment (Welfare Payment Reforms) Act 2007* (Cth) No. 130.

80. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 1.

81. Media Release, 'National Emergency Response to Protect Aboriginal Children in the Northern Territory', 21 June 2007; Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Jon Altman (Director, Centre for Aboriginal Economic Policy Research, ANU), p. 84.

leave them.⁸² As Professor Jon Altman explained to the Senate Standing Committee, 'It is assumed that all Indigenous parents who are welfare recipients are feckless spenders whose incomes must be quarantined and controlled'.⁸³ In the process, many people who live in these communities — responsible, adult Australians — feel singled out, humiliated and *punished* by the government — not for what they have done, as the rule of law would require, but simply for where they live and, more profoundly and dangerously, for the colour of their skin.⁸⁴

It is true that one of the main reasons for income management is a mechanism to track and improve school attendance, and indeed the proportion of welfare payments 'quarantined' rises to 100 per cent in situations where children have been absent from school.⁸⁵ It is equally true that school attendance and retention rates in many outback Aboriginal communities are appalling. We could blame children; we could blame their parents. But there has been little recognition of the shocking levels of under-resourcing that Aboriginal schools have suffered for generations. Furthermore, most Aboriginal children in these communities speak English as a second or third language, yet they are overwhelmingly taught by teachers who cannot speak their languages. Bilingual education programs were abolished in 1998,⁸⁶ there are currently only eleven 'two-way' schools in the Northern Territory, and the curriculum taught to these children often bears little relationship to their realities, interests or expectations. While the Appropriation Acts for this intervention allocate around \$200 million in order to set in place the administrative arrangements and the bureaucracy to deal with new legal structures, not a single penny is provided to actually improve the quality of Aboriginal education. Instead, the legislation puts in place a structure of coercion and enforcement that differentiates starkly between the treatment of Indigenous and non-Indigenous people in relation to exactly the same problem; and subjects Indigenous people to these controls whether or not they

82. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 5.

83. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Jon Altman, p. 78.

84. *Four Corners*, 'Tracking The Intervention', M. Carney, broadcast 5 November 2007.

85. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 2.

86. C. Nicholls, 'The Closure of Bilingual Education Programs in Australia's Northern Territory — What is at Stake?' *TESOL Matters*, vol. 9, 2001, <www.deet.nt.gov.au/education/programmes_initiatives/bep/index.shtml>.

are in fact part of the problem. *Aboriginal communities* are themselves the problem.

A similar refusal to think of the problems, either of child abuse or of Aboriginal deprivation, as specific and requiring individualized solutions, can be seen in the legislation's treatment of the Community Development Employment Projects scheme (CDEP). CDEP provides full or partial funding enabling Aboriginal community organizations to employ previously unemployed Aboriginal people.⁸⁷ Since 1977 it has become the largest single Indigenous program supported by the Commonwealth, and currently involves around 30,000 participants across Australia. The legislation does not abolish the program. It does so only in the Northern Territory,⁸⁸ and because Indigenous people in the Northern Territory are identified as being essentially pathological. The link was made in the second reading speech to the legislation:

In the Northern Territory ... there is a national emergency confronting the welfare of Aboriginal children. In these cases, the provision of welfare has not had the desired outcome. It has become a trap instead of a pathway ... While CDEP has been a major source of funding for many Northern Territory communities, it has not provided a pathway to real employment, and has become another form of welfare dependency for many people.⁸⁹

It is difficult to understand why employment in community services, including of course schools, hospitals and arts centres, simply because it has been partially funded by the public sector (as of course are schools, hospitals and arts centres elsewhere in Australia) is somehow less of a 'real job' — to the employee or to the organization — than employment funded in any other way. Whether or not we accept the previous government's assumption that private enterprise work is 'real' in ways that public enterprise work is not, the consequences of the decision to simply terminate the program, virtually overnight and right across the whole Northern Territory, are already proving to be dramatic. There are certainly plenty of instances of CDEP programs that were little

87. <www.workplace.gov.au/workplace/Programmes/IndigenousProgs/Community+Development+Employment+Projects+%28CDEP%29+Programme/>.

88. Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth) No. 130.

89. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 4.

more than part-time boondoggles. But there are equally many examples where CDEP has been used successfully to fund community initiatives and to leverage additional funding from other sources.⁹⁰ The Aboriginal arts community is one instance of an economic sector that is, by any measure, vibrant, important and, indeed, a real international success story. Yet the sector clearly remains dependent on CDEP support. Although CDEP has clearly had many failures, it has also had its share of successes: CDEP-supported shops and clinics that have been well and enthusiastically run, services that would not otherwise be provided in remote settlements, enterprises that have managed to secure additional funding and even government contracts on the back of their CDEP support. In fact, at the time that this legislation was passed, 50 per cent of Indigenous employment in the Northern Territory involved some CDEP contribution.⁹¹

The abolition of CDEP now places a large number of Aboriginal businesses — particularly in remote parts of the Northern Territory — in dire jeopardy, probably irreparably. The immediate effect will be to ‘push the unemployment rate for Indigenous people in the Northern Territory from 15% to over 50%’.⁹² The Howard government envisaged a twelve-month transition in which CDEP ‘will progressively be replaced with real jobs, training and mainstream employment’.⁹³ But no plan has been developed as to how this might happen, and the government’s own estimates were that no more than 2,000 ‘proper jobs’ could be developed, even in the medium term.⁹⁴ This will leave 5,000–6,000 CDEP participants in the Northern Territory unemployed, the arts sector gutted, and a wide range of community services extraordinarily vulnerable to collapse. Many small communities are already being devastated by this change; many Aboriginal workers are no longer getting paid; many jobs have already gone under.⁹⁵ The lines at Centrelink are ever longer. The demographic effects alone of removing this support from remote, rural and regional

90. See F. Murphy and S. Sanders, *The Indigenous Welfare Economy and the CDEP Scheme*, Centre for Aboriginal Economic Policy Research Monograph No. 20, Canberra, ANU, 2001.

91. Australian Bureau of Statistics, 6287.0, 2007.

92. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Jon Altman, p. 79.

93. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 5.

94. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Jon Altman, p. 78.

95. *Four Corners*, ‘Tracking The Intervention’, M. Carney, broadcast 5 November 2007.

Aboriginal communities are likely to be enormous. In a year or two it is easy to see that they might be ghost towns. Perhaps that is the point. At the very time that, elsewhere in Australia, governments of all persuasions have been devoting a great deal of energy and funding to preserve the viability of what is known as 'rural and regional Australia' (a sector that in the face of global economic and climatic change is increasingly vulnerable), the destruction of CDEP, along with other measures contained in this legislation, appears to hasten the disappearance of many remote Aboriginal communities.

In terms of our analysis of the rule of law implications of this legislation, all Territorian Aborigines, and they alone, are to be denied access to the principal federal program that supports Aboriginal employment. This is the case in the absence of any evidence that failure rates for the scheme are worse in the Northern Territory than elsewhere, without distinguishing between successful and unsuccessful uses of the scheme, and indeed without any evaluation of the long-term economic implications of such a step. The discrimination in this case appears to be against residents of the whole Northern Territory, but if little outrage has ensued it is because only Aboriginal Territorians are affected and only Aboriginal communities are being skuppered. Could we imagine the federal government denying, say, Queensland, access to a major federal program, because it had determined that Queenslanders could not be trusted with it? Once again, the approach of the most radical reform of Aboriginal policy undertaken in many years is a dramatic instantiation of collective guilt.

The General Legislative Scheme

These instances reveal how Commonwealth legislation treats Indigenous Australians in the Northern Territory neither with respect to their individual circumstances nor in the same manner as it does other Australians. Of course, we might say something similar about a great deal of legislation. After all, any program that provides funding for a disadvantaged group might also be criticized in this way. But there is a clear difference between laws that seek to provide opportunities to disadvantaged groups and laws that place them under disabilities relative to what the government refers to many times as 'mainstream' or 'normal' Australians — by removing funding that is available to others, or curtailing how they can spend it, or subjecting them to more

invasive investigations, or preventing them from making relevant legal arguments. There is a pervasive sense that Aboriginal Australians — living throughout the Northern Territory or in isolated communities — are not, and ought not be, subject to the legal protections that Australians of European descent take for granted.

Where the language of equality and sameness is marshalled, it is to a directly contrary end. Aboriginal land ownership in the Northern Territory was achieved largely by the *Aboriginal Land Rights (Northern Territory) Act 1976*.⁹⁶ This land is controlled by the communities that live there, and non-Aboriginal people who wish to enter it typically require a permit to do so. One of the most criticized measures of the ‘national emergency response’, and one in which the connection to child abuse is least convincing, is the abolition of the permit system in relation to fifty-two townships on Aboriginal land, plus roads and airstrips.⁹⁷ Although the measure was said to be a means of creating ‘more open communities’⁹⁸ in which child abuse could no longer be hidden behind a veil of secrecy — as if secrecy and shame around child abuse is either peculiar to Aboriginal communities or a product of the permit system — most Indigenous groups have reacted very strongly to these imputations, and insisted that the loss of the permit system would only leave their communities more vulnerable to further exploitation.⁹⁹ How, one might ask, will alcohol be prevented from getting into these communities by making access to outsiders easier?

Whether or not this is the case, the Howard government defended the legislation by insisting that these areas ‘are in effect country towns’¹⁰⁰; the permits were accordingly treated as an anomaly. As the Member for Solomon put it in the second reading debate: ‘Why should people need a permit or, in other words, a visa to visit Aboriginal land? ... The land which they occupy is part of

96. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) No. 191.

97. *Family, Community Services, Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128 Sched. 4; roads outside (providing access to communities) 70B; aerodromes 70C; roads inside communities 70E; common areas within communities 70F. Provisions also apply to landing points for vessels 70D.

98. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 14.

99. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Mr Tilmouth (Executive Director, Tangentyere Council), p. 13.

100. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 14.

Australia'.¹⁰¹ This is an eloquent statement that appeals to fundamental principles of equality. But it is based on an egregious error. As the Law Council of Australia explained to the Senate Standing Committee, Aboriginal communities are merely applying the laws of property: 'one of the underlying elements of freehold is that the owner of the freehold can exclude, at common law, whoever goes onto it. So the permit system is in fact something that allows people to go onto Aboriginal land where they would otherwise not be able to do so'.¹⁰² The permit system does not detract from the law of Australia. It applies it. Aboriginal communities are not public spaces any more than is your home or mine. One has no more right to enter and remain on Aboriginal land without permission than on a pastoral property, which in the Northern Territory might be just as large.

The common sense behind the legislative argument depends on the assumption that these areas 'are in effect country towns'.¹⁰³ It might be confusing to think of a settlement or a township as in some respects private property rather than as public space. But is it really so strange when in every town and suburb around the country shopping malls and megaplexes dominate the economy and are becoming the new focal points of communities? Yet regardless of the public and social roles they perform, and increasingly they do, these complexes are categorically treated as private property: the laws of trespass apply, and security personnel hired by the shopping centre may exclude you for disruptive behaviour, or bad dress, or for attempting to hand out political leaflets or organize a rally.¹⁰⁴ The permit system on Aboriginal land exercises rather less restrictive, rather more public and accountable, and rather more socially desirable powers than this.

The underlying difficulty, I think, is that Aboriginal property is considered not quite real, not even the freehold title granted by the Commonwealth under the *Aboriginal Land Rights Act 1976* (from which derives most of the Aboriginal land held in the Territory), and still less the limited version of native title administered by the

101. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, David Tollner (Member for Solomon), p. 62.

102. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Ms Webb (QC, Member, Advisory Committee on Indigenous Legal Issues, Law Council of Australia), p. 65.

103. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mr Katter (Member for Kennedy), p. 76.

104. *Harrison v Carswell* [1976] 2 SCR 200 (Supreme Court of Canada).

Native Title Act 1993 following the High Court's decision in *Mabo*.¹⁰⁵ Accordingly, a cavalier approach to Aboriginal land runs like a refrain through the whole legislative scheme. What is the gist of the 'national emergency response'? The provisions we have looked at all impose increased levels of supervision on individuals in Aboriginal communities. In relation to what are called 'town camps' — land held under 'special purpose leases' issued by the Northern Territory government to Aboriginal associations on the edges of the largest towns — the Commonwealth is authorized to resume or forfeit those leases and take over the management of those camps, including by the acquisition of freehold title to them.¹⁰⁶ Meanwhile, the federal government is empowered to take away the control and administration of land currently held by Indigenous people in at least sixty-five communities and townships. By compulsorily acquiring leases for a period of five years over that property,¹⁰⁷ now to be known a little perversely as 'business management areas',¹⁰⁸ the Minister or his delegate is given the power to direct any 'community service entity' in the performance of its functions.¹⁰⁹ These include all local councils, incorporated associations, Aboriginal associations, and indeed any other person 'that performs functions or provides services' in the area.¹¹⁰ The management of a very wide range of organizations and businesses is therefore subject to the day-to-day control and intervention of government officials. In addition, and subject to only notional limitations, government business managers are given the power to order any such body to manage any asset in their possession as directed, and to sell it or transfer it to any organization or person that the government sees fit.¹¹¹ Those assets — buildings, equipment, vehicles, boats, merchandise, stores or whatever, in some cases amounting to many millions of dollars and built up in communities over many years — are of course not just transferred for five years but permanently. In short, the legislation creates a five-year window during which these

105. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (High Court of Australia); *Native Title Act 1993* (Cth) No. 110.

106. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 4 Div. 2.

107. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 4 Div. 1 subdiv. A s. 31.

108. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 5.

109. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 5 Div. 2 subdiv. A s. 67 subs. (2).

110. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 5 Div. 2.

111. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 5 Div. 2 subdiv. B s. 68 subs. (2).

communities and all the people who live in them and all the buildings on them and all the activities that take place there, will be taken over by the Commonwealth and controlled, managed and restructured as its managers see fit.

Paragraph 51(xxxi) of the Constitution requires the payment of compensation on 'just terms' when the Commonwealth takes property away from someone.¹¹² Again, this is a bedrock legal principle. The legislation clearly authorizes both the expropriation of land owned by Aboriginal communities, broadly speaking for a period of five years, and the acquisition of their assets, permanently. The Minister's second reading speech insists that 'this is no land grab, as some have tried to portray the emergency response. It is only a temporary lease and just compensation will be paid for that period'.¹¹³ Over and over again, Mal Brough, then Minister for Indigenous Affairs, assured questioners that those who have suggested otherwise were just plain wrong.

Unfortunately, on this point the Minister's remarks were grossly misleading: whether by accident or design, the legislation is much less clear than this. Section 134 of the Act reads: 'However, if the operation of this Act ... would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person'.¹¹⁴ The section does not accept any responsibility at all nor establish any procedure for compensating property-holders. It only says that compensation will be paid *if*, hypothetically, it would be unconstitutional not to, which is hardly an earth-shattering revelation. Furthermore, and a matter about which the Howard government was strangely quiet, under s.122 of the Constitution the Commonwealth has plenary law-making powers over the Northern Territory that probably override the 'just terms' provision.¹¹⁵ Accordingly, it remains unclear whether paragraph 51(xxxi) applies to these laws at all, in which case no compensation will ever be paid to any Aboriginal land-owners.

Section 134 is stranger still. Although the Constitution requires 'just' compensation, the Act merely authorizes the payment of

112. Australian Constitution s. 51 (xxxi).

113. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 9.

114. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 8 s. 134.

115. Australia Constitution s. 122.

'reasonable' compensation. There is a highly suspect slippage here from justice to reasonableness. Now the Courts have previously upheld such provisions, reading the two terms as equivalent in order to save the laws.¹¹⁶ But in this case the legislation has gone further, actually purporting to instruct courts that for the purposes of determining 'reasonableness', the court must take into account 'any improvements to the land that are funded by the Commonwealth ... including the construction of, or improvements to, any buildings or infrastructure on the land'.¹¹⁷ Firstly, this would appear to be an exercise in teaching the courts how to suck eggs, since it is not up to the parliament but the courts themselves to determine the definition of 'just terms' under the Constitution. Perhaps the Commonwealth is right in thinking that it is reasonable to deduct from the compensation due to land-owners the improvements that they are planning to make to the land: the schools or hospitals or housing that they are going to build on it. But justice is not a balancing act, a case of costs and benefits. 'Just terms' — both under the Constitution and as a matter of principle — requires the payment of compensation at the moment of acquisition, when the use and possession of the land is taken from its owners, and not at the end of the day. The injustice that is done is the way in which the land is not able to be used by its owners as *they* see fit for the period of its expropriation and not whether, overall, they are better off as a result. It is surely questionable whether such a constraint on courts' interpretive responsibilities will pass Constitutional muster.¹¹⁸ But the section remains in force until the High Court says otherwise, and until that day officers and bureaucrats, whose responsibility is only to fulfil the terms of the Act as written (and not to second guess its Constitutional implications), are only permitted to pay 'reasonable' compensation, and that only to as few people as possible. If the injustice done by this imprecise law is rectified, it will only be in some situations and after many years' dispute, litigation and expense.

Again, it is impossible to imagine a similar process in relation to any other group of people. Elsewhere in the Northern Territory — recalling that paragraph 51(xxxi) may not apply — the

116. *Western Australia v Commonwealth (The Mining Act Case)* (1999) 196 CLR 392; *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 5 VR 61.

117. *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 Part 4 Div. 4 s. 61.

118. *Wurridjal and Anor v Commonwealth*, High Court of Australia (M122 of 2007).

*Commonwealth Land Acquisition Act 1989*¹¹⁹ and the *Northern Territory Self-Government Act 1978*¹²⁰ guarantee that 'just terms' compensation must be paid for the acquisition of land. But these laws are excluded by the current legislation too. Can we imagine the Commonwealth acquiring a farmer's land to build a railroad, and then deducting from the amount paid the value to the farmer of the trains in getting his crops to market? Can we imagine the Commonwealth leasing land for a military exercise, and then deducting the buildings constructed by the army for running it from the rent due? Can we imagine, for that matter, the Commonwealth providing essential services such as public housing or schools or stores and then charging the community itself for doing so? As Jennifer Clarke wrote in her submission to the Senate Standing Committee, 'I wouldn't be a Northern Territory traditional landowner for quids'.¹²¹

Now the legislation does not ignore these issues for no reason. It identifies the poverty, the 'poor living conditions', the 'despair and tragedy' of these living areas. According to the second reading speech, '[t]hese communities are not thriving; some are in desperate circumstances that have led to the tragedy of widespread child abuse. The leases will give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure'.¹²² No one would deny the awful poverty and violence of some of these communities, nor indeed should we excuse the failure of the NT government over decades to either accept or make good on their responsibilities: the exasperation of the federal government with that of the Northern Territory is perhaps understandable. The 'town camps' resemble the so-called 'townships' of apartheid South Africa, and many remote Aboriginal communities live in third world conditions unknown in — and indeed, unknown to — the rest of the country. To provide only one example, Australian Aborigines are the only community living in the developed world that still suffers from significant levels of trachoma, a debilitating disease causing

119. *Land Acquisition Act 1989* (Cth) No. 15 s. 52 (entitlement to compensation), s. 93 (compensation must be on just terms).

120. *Northern Territory Self Government Act 1978* (Cth) No. 58 s. 50.

121. J. Clarke, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, <www.aph.gov.au/senate/committee/lecom-ctte/nt_emergency/submissions/sub54_attachment.pdf>.

122. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 9.

blindness. It is eminently treatable. For \$20 million Australia could wipe it out, as has every other country in the developed world, not to mention India, Vietnam and Morocco, to name a few. Instead, rates of this disease amongst Aboriginal people are amongst the highest in the world.¹²³

But the emergency response does not provide any extra funds for housing, health, education or infrastructure. On the contrary, as we have seen, in some ways funding to Aboriginal people in the Northern Territory has been diminished. Neither does the legislation institute the kind of consultation and collaboration with local communities recommended in *Little Children are Sacred*. Still less does it address the intersection of gender and race in the experience of inequality, or the issues of discrimination and intergenerational poverty that underlie the problems so graphically illustrated in that report and others. Again, to the contrary, this legislation appears to offer a hierarchical model of intervention, an impression that the plan reported in *The Australian* 'for teams of bureaucrats to door-knock Aboriginal people to win their confidence before the police and military arrive' hardly corrects.¹²⁴

The whole legislative framework sees the *management and decisions of Aboriginal people*, both individually and collectively — particularly as it has been made possible through land ownership — as the principal problem to be overcome. Their ownership is identified with 'closed towns [that] have made it easier for abuse and dysfunction to stay hidden' and that 'prevent the free flow of visitors and tourists that can help to stimulate economic opportunities'.¹²⁵ Their ownership places layers of Aboriginal decision making between governments and the provision of services, and the government is of the view that this (and not governments' own indifference) is the reason that infrastructure such as roads and housing has not been properly provided. Their ownership reflects principles of collective rather than individual control of land, and as a result 'land tenure arrangements work against developing a real economy ... Banks will not lend money to

123. H. R. Taylor, 'Trachoma in Australia', *Medical Journal of Australia*, no. 371, 2001, p. 175; 7.30 Report, M. McLaughlin, 'Fight To Eradicate Trachoma', broadcast 10 September 2007; R. Edwards and R. Madden, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Canberra, Australian Institute of Health and Welfare and the Australian Bureau of Statistics, 2001.

124. P. Karvelas, 'Aboriginal Taskforce Sets Hit List', *The Australian*, 25 June 2007.

125. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 8.

start up small businesses because a committee decides what tenure arrangements will apply. People cannot even borrow to buy their own home because they cannot own or lease a block of land'.¹²⁶

It is easy to see that one of the central aims of the legislative package is to give the federal government unfettered power over a five-year period in which to significantly change attitudes and policies to land amongst Aboriginal Territorians. In the town camps this will be done directly by resuming the leases and re-issuing them, if at all, on terms of the federal government's choosing; and in the business management areas this will be done indirectly. In fact, on several occasions the previous government had already used its extraordinary powers as manager and leaseholder under these laws to place pressure on Aboriginal owners of freehold title to issue ninety-nine year leases over very large tracts of their land to individuals, developers or government agencies.¹²⁷ What will the result be after ninety-nine years of such land management? Current structures of the control of land and decision making will be nothing but a distant memory; the autonomous communities now in place will have disappeared, never to return. In that sense, while the current legislation might not be viewed as a land grab, it drastically changes the balance of power in relation to Aboriginal land and sets in place the means by which native title could indeed be undermined in the Northern Territory once and for all.

So the pattern of the legislation is, over the next five years, simply to take over the whole running of these communities: not to fund them or support them or to seek their advice, but to control those who live in them, to manage their lives, redistribute their assets and re-direct their development.¹²⁸ We may see in this both a judgement that their ownership of land is not a right to be respected but a barrier to be overcome, and a broader judgement that these are 'failed societies'¹²⁹ that must be rescued from the catastrophe of their own governance.

126. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 8.

127. Personal Communication with Northern Land Council.

128. A Memorandum of Understanding signed between the Commonwealth and NT governments on 16 September 2007 promised additional resources for housing and other such amenities, but it did so under significant conditions and is not embedded in the legislative schema.

129. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 7.

Normalization and the Deferral of the Rule of Law

Whatever this approach might achieve, what is not at issue is its insensitivity to Aboriginal people and to the basic principles of the rule of law that have been cast aside at each point: the purpose of this article has been to demonstrate just how far and how wide these derogations have gone. The language of emergency and crisis has been used to denigrate such criticism as merely 'constitutional niceties'¹³⁰ or 'the niceties of mainstream law and order'.¹³¹ Indeed, John Howard, then Prime Minister and himself a lawyer, remarked that he was not interested in 'slavishly following some philosophy or doctrine'.¹³² So much, it seems, for 'our commitment to the rule of law'.¹³³ Yet there is a paradox here that will take us back to our previous analysis. At the same time and throughout the second reading debates, the 'national emergency response' was justified with reference to ideas of equality and sameness that drew on the tradition and promises of *Governor Arthur's Proclamation*. Such language notably minimized the distinctness, and at times the value, of Aboriginal culture, emphasizing in familiar terms the sameness of Aborigines as individual Australians. 'Aboriginal people may look different and many may speak a different language but they are Australian',¹³⁴ said the Member for Solomon before going on to criticize land rights legislation itself as creating a division in Australia: 'within our community there are some people, the Aborigines, who live by a unique and distinct system of customary law ... The purpose of the land rights act was to establish a sanctuary, a preserve of living prehistory within modern Australia'.¹³⁵ Similarly the Member for Page asserted that 'Most Australians believe that Aboriginals in this country have the same rights as other Australians. They are Australians like everyone else and they have the same rights'.¹³⁶ The Minister likewise concluded by recalling 'a man in Wadeye' who

130. B. Nicholson, 'Northern Territory Grog Ban', *Brisbane Times*, 21 June 2007.

131. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Barry Haase (Member for Kalgoorlie), p. 54.

132. M. Devine 'Pearson Sparked Revolution that Emboldened the PM to Act', *Sydney Morning Herald*, 24 June 2007.

133. Prime Minister's Australia Day Address, 26 January 2006.

134. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, David Tollner (Member for Solomon), p. 62.

135. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, David Tollner, p. 64.

136. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Ian Causley (Member for Page), p. 69.

told him, 'Treat us like whitefellas and not like separate citizens'.¹³⁷

Our question is similar to the one we imagined asking Governor Arthur. How is it possible to sincerely believe in this rhetoric and yet to use it to justify exceptional legislation that specifically treats Aboriginal people very differently from 'whitefellas', and that most emphatically does not accord them 'the same rights as other Australians'?¹³⁸ How is it possible to invoke the rule of law and yet to discard it? The answer, I think, lies in the essential theme of the National Emergency Response Acts: 'normalization'. This word was used repeatedly by the Minister for Indigenous Affairs in the lead-up to and passage of the legislation last year. The government proposed to use its special powers to ensure 'normalised tenancy requirements'¹³⁹ in Aboriginal townships; town camps would be treated as 'normal suburbs'¹⁴⁰; amendments to the permit system aimed to 'normalise access arrangements for Aboriginal land'¹⁴¹; the welfare reforms enforced 'normal community standards'¹⁴² until such time as Aboriginal communities were 'stabilised and normalised'¹⁴³; the government professed itself committed to longer term action 'required to normalise arrangements in these communities'.¹⁴⁴ In a celebrated phrase first uttered by the then Minister on 21 June 2007, the day the emergency response measures were announced, the government envisaged a 'three-phase strategy of "stabilisation", "normalisation", and "exit"'.¹⁴⁵

Normalization clearly does not involve treating Aboriginal communities normally. It does not involve providing them with normal services, facilities or legal rights. In that sense they are not 'the same as' 'mainstream Australians'. One does not have to be well-versed in the work of Michel Foucault, who wrote several

137. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 78.

138. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Ian Causley, p. 69.

139. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Jenny Macklin (Member for Jagajaga), p. 46.

140. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 10.

141. <www.aph.gov.au/Library/pubs/bd/2007-08/08bd018.pdf>.

142. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 2.

143. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 5.

144. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 11.

145. T. Colebatch, 'Learning a Purpose in Life', *The Age*, 26 June 2007; see J. Altman and M. Hinkson, *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia*, Melbourne, Arena Publications, 2007.

books about it, to see that to normalise is to *make* normal.¹⁴⁶ Declarations about the sameness of Aboriginal people do not recognize an equality to be acted upon. They are normative. They express a desire that Aborigines should be the same as us, and to the extent that they are not — to the extent that their laws and communities are different from the ‘mainstream’, that their attitudes to land, its use and productivity differ from ours — they ought to be changed until they become normal. I do not for a moment mean to suggest that Aboriginal approaches to child abuse might be somehow culturally different to ours. That is nonsense. But as I have been at pains to demonstrate, the legislation obviously takes a much broader target than that. The idea that Aborigines deserve equal treatment or ‘the same rights’ in fact hides a frustration that they are not the same as us, a difference that requires radical transformation. As John Daly, Chair of the Northern Land Council, said in evidence before the Senate Standing Committee, ‘Does every Aboriginal person necessarily want to be like you guys?’¹⁴⁷

We see the same slippage if we return to Frame A of *Governor Arthur’s Proclamation*. We might read it as a promise of equality, a purely symbolic articulation of the right of all individuals to be treated the same. But we could just as easily — in fact, perhaps rather more easily — read the image literally, as insisting that Aboriginal people 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, train their dogs like us. This is of course not a message of equality but of assimilation; not about the alteration of our treatment of other races but the alteration of their behaviour. Once again, it is not just that the image of Frame A is ambiguous, but that it means *both* these things, and that accordingly the failure of Aboriginal people in Tasmania to live up to the measure of normality that promised the application of the rule of law in Frames C and D, justified the emergency measures adopted by Governor Arthur to compel them to that normality. The rule of law is a promise, but one made according to conditions that justify its indefinite suspension. Nothing much has changed. The rule of law

146. M. Foucault, *Discipline and Punish; The Birth of the Prison*, London, Allen Lane, 1977; *Power/Knowledge*, New York, Pantheon Books, 1980; *History of Sexuality*, trans. R. Hurley, New York, Vintage Books, 1998.

147. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August, John Daly (former Chair, Northern Land Council), p. 47.

still holds out a promise of equality to be looked forward to once Aboriginal people become normal, and live in normal suburbs with normal jobs and a normal economy. But since those conditions do not obtain, equality is postponed and a state of exception is invoked to justify measures of extraordinary severity and far-reaching implications through which they will be bloody well *made* normal.

In 2007, the Minister's second reading speech to the Northern Territory National Emergency Response Bill described a 'failed society where basic standards of law and order and behaviour have broken down'.¹⁴⁸ In that light, the climax of the speech is enormously telling: 'The Government's response will allow Indigenous communities in the Northern Territory to advance and enjoy the same human rights as other communities in Australia'.¹⁴⁹ It seems to me that this sentence implies a two-step process. In the first phase, the government proposed to intervene to direct the advancement of Aboriginal communities. In the second phase, they would — at last — be in a position then to enjoy the same human rights and the same 'control over their lives' as others. Like those 'wanton' and 'unhappy Savages, against whom these movements will be directed', the Minister's goal was 'to capture and raise them in the scale of civilization by placing them under the immediate control of a competent establishment'. Such correction is based on Aboriginal peoples' 'failure', and justifies the intervention of a Leviathan *before* and so that the rule of law, or human rights for that matter, can eventually apply, but not yet.

The paradoxical legacy of 'our commitment to the rule of law' both highlights the 'non-sameness' of Aboriginal people and at the same time *justifies* — perhaps even causes — the exceptional violence that will cure them of it. The effect is a double demotion of Aboriginal people. Since sameness is measured by comparison with 'the mainstream', they are not yet entitled to its protections. But their differences and their own understanding of the vast problems they face are not treated with any respect; governments (and many people in the wider community) do not acknowledge their independence — or diversity — of thought or perspective, and instead choose to impose external policies and ideologies upon

148. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 7.

149. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 15.

them. Where sameness would give Aboriginal people a claim in justice, they are treated as different: thus the aspects of the legislative package dealing with the ACC, or pornography, or welfare reform, or the control of land, or the just terms provisions, or the exclusion of race discrimination provisions. That is the main theme, the major key of these laws. But there is a counterpoint, a minor key echo. Where difference might give Aboriginal people a claim on our respect, they are treated, or rather said to be treated, as the same: thus the aspects of the legislative package dealing with sentencing laws, or land permits, or applying 'market rents' to public housing, or abolishing CDEP, or imposing ninety-nine year leases in Aboriginal towns. Whichever strategy is adopted, whether the language of sameness or of difference is invoked, Aboriginal people lose out every time. Their difference is discounted, their sameness ignored.

The same double-think is exemplified in the rhetoric of independence that we hear from time to time from both major political parties in Australia. The whole thrust of the Liberal Party's Aboriginal policy was avowedly to destroy the 'intergenerational cycle of dependency'¹⁵⁰ on welfare and to transform their lives and economies. 'The government wants individuals to take control over their lives',¹⁵¹ we were told. Indeed, on the occasion of the 40th anniversary of the 1967 referendum, which ostensibly made Aboriginal people at last equal partners in this country and in their own lives, the former Prime Minister John Howard spoke passionately of demanding more from 'the little platoons' of civil society that mediate between the individual and the state:

[from] the family, the school community, the elders, the voluntary sector and Indigenous leadership. Only then will we be able to genuinely marry the best of government intentions and resources with the wisdom of local knowledge. I come from a political tradition that values such knowledge; that values independence and personal responsibility, as well as freedom, equality and civic duty.¹⁵²

Yet scarcely a month later, in the climate of emergency that then

150. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 4.

151. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 2.

152. Prime Minister's Speech commemorating the 40th anniversary of the 1967 referendum, 27 May 2007, <www.pm.gov.au/media/Speech/2007/Speech24341.cfm>.

prevailed, the cumulative effect of the legislation we have been examining was exactly the opposite — communities and land taken over, intensively managed by externally appointed bureaucrats, assets directed or transferred, welfare payments subject to radically extended surveillance, funding projects abolished and large numbers of Aboriginal people driven onto unemployment programs. In all these ways the legislation offers much less scope for independence, invites much less personal responsibility, and shows much less respect for 'local knowledge' than previously.

Governor Arthur's Proclamation illustrates and foreshadows the continuing relevance of this paradox, and points us to the dangers to which it gives rise. Professor Langton, in her powerful contribution to this debate, contrasts 'theoretical definitions of rights' with an intention 'to safeguard the weak and the vulnerable'.¹⁵³ The purpose of this article has been three-fold: to demonstrate exactly the extent to which this legislation undermines basic — yes, theoretical — principles underpinning the rule of law; to question how many of its measures really do safeguard the weak; and to insist that theory and practice are not inevitably opposed in this way. Is it too much to ask that an unwavering commitment to the rule of law might instead form *part* of the 'normalization' of Aboriginal people, *part* of 'raising them in the scale of civilization', rather than being entirely suspended until they have been somehow moulded into suitable subjects for it? Might not individual autonomy be understood as part of the process of Aboriginal development rather than a privilege with which they cannot yet be entrusted? Finally, is it not possible to imagine ways in which our governments might continue to be 'hell bent on doing everything it can to protect these innocent children'¹⁵⁴ without sending the basic principles of the rule of law to hell as well?

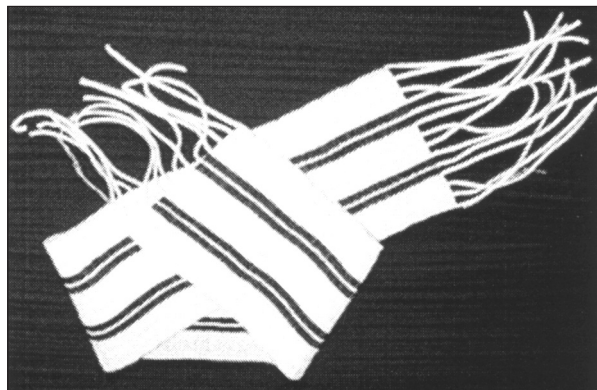
Another Icon

Yet faced with Indigenous communities whose situation and culture are so very different from others within Australia, I cannot help feeling that the individualism and sameness of *Governor Arthur's Proclamation*, ambiguous as it is, is an incomplete

153. Langton, 'Trapped in the Aboriginal Reality Show'.

154. Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, Mal Brough, p. 12.

expression of justice. Neither is it the only instance of pictorial legislation from which we might learn. Over two centuries earlier, another invading colonial power sought to communicate with another indigenous people, in the absence of a shared language and across a cultural abyss. The *Two-Row Wampum* records a treaty several versions of which may have been used to formalize relations between North American settlers and the Iroquois people (themselves a federation) in colonial times, going back, it has been said, as far as one made with the Dutch in New York in the first part of the seventeenth century.¹⁵⁵



Replica of Two-Row Wampum

As *Governor Arthur's Proclamation* drew on Aboriginal bark paintings, so these treaties also drew on an Indigenous practice, in this case that of *wampum*, in which strings of purple and white mollusc shells were woven into a belt whose design recorded, recalled and sanctified oral tradition. The *Two-Row Wampum* is one such belt — a long string of shells in parallel stripes. It memorializes a justice between peoples, and does so with extraordinary concision and poetry. According to Haudenosaunee tradition:

You 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

155. <www.law.syr.edu/academics/centers/ilgc/>. Good faith efforts to obtain permission to reproduce this image failed, and permission to reproduce is taken to be implied and acknowledged here.

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 each in our own boat. Neither of us will try to steer the other's vessel.¹⁵⁶

So the two artworks are very different. In the seventeenth century, as we see in the empires of North and South America, God was to civilize and bring together peoples, but communities were allowed to keep their own laws. By the nineteenth century, as we see in the empires of Australasia, Asia and Africa, Law was the force that would civilize and bring peoples together, while communities were allowed to keep to 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 that transcends all nations and binds them equally. On the other hand, and perhaps because it was drawn 200 years later, it recognizes that the difference in power and technology between colonial master and subject peoples cannot be ignored. The Proclamation, as its name suggests, speaks vertically, from governors to the governed. The treaty, as *its* name suggests, speaks horizontally, an agreement *between* peoples.

Of course it would be madness to suggest for a moment that there is, could or should be a complete severing of relationship between Indigenous and non-Indigenous people in Australia. At all those crucial points of contact, and they are of course both necessary and desirable, we stand in enduring need of the aspirations that *Governor Arthur's Proclamation* expresses. At the same time, there are surely elements of justice in our dealings with indigenous peoples that the *Two-Row Wampum* sees, to which the *Proclamation* is blind. Indeed researchers in Canada, in particular, have over the last few years become increasingly interested in the two-row wampum as an alternative social justice model. The wampum belt does not treat people as isolated and commensurable 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 abstract art and the *Governor Arthur's Proclamation* is figurative, the wampum describes a more concrete social world and the *Proclamation* a more abstract one. Moreover, the abstraction of the *Proclamation's*

156. <www.Degiyagoh.net/guwentu_two_row.htm; sixnations.org>.

principle of sameness is what allows its noble idea to be converted into a force of homogenization and even, as we have seen throughout Australian history, a justification for continuing oppression. Instead, the beautiful image of 'the birch bark canoe' and 'the ship' on the same river invites us to think of ways in which we can listen to and engage with those whose life-worlds may be very different from ours, without simply trying 'to steer the other's vessel'. That, as much as 'equal treatment', is also a notion of justice: justice embedded in communities whose difference is itself a kind of collective equality worthy of respectful attention.¹⁵⁷

If anything came out of the testimony given to the Australian Senate Standing Committee in August 2007, both from witnesses with an expertise in dealing with the specific problems that give rise to child abuse and from those who live in and represent the Aboriginal communities most affected by the new legislative regime, it was a cry for consultation and participation between equals: for a 'full engagement with Indigenous people on the ground there'¹⁵⁸ in the development of 'long-term solutions for long-term problems'.¹⁵⁹ 'Time and again', said the Executive Director of Tangentyere Council, 'the government has attempted to lay down what it wants, meaning Aboriginal people have to give up control over land on which they live, the way in which they live, and how they will manage their communities'.¹⁶⁰ So too Raymattja Marika, from the Combined Aboriginal Organizations of the Northern Territory, tells us:

We Yolngu parents desperately want our children to grow up healthy and well educated. We expect the government to treat us with respect. That is the only way: to listen to us, to talk with us and work with us. That has not happened with this legislation. This legislation feels like a return to the old protection system under which the government decided everything about our lives.¹⁶¹

157. W. Kymlicka, *Liberalism and Community and Culture*, Oxford, Clarendon Press, 1989 and *Justice and Minority Rights*, Oxford, Clarendon Press, 1995.

158. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, John Daly, p. 52.

159. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, David Ross (Director, Central Land Council), p. 51.

160. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, William Tilmouth, p. 13.

161. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, R. Marika (Member, Combined Aboriginal Organisations of the Northern Territory), p. 18.

Perhaps the 'national emergency response' enshrined in these laws was the only way to proceed and all these people are wrong. But whether or not this is so, it cannot be denied that the passage of this legislation has intensified the deep sense of injustice and authoritarian imposition felt in many Aboriginal communities. The idea of justice at stake here seems to owe more to the sensibility of the *Two-Row Wampum* than to *Governor Arthur's Proclamation*. The non-hierarchical nature of the wampum belt, and the equality it proposes *between* different self-determining groups — between peoples rather than between persons — is missing from the *Proclamation*. The *Proclamation*, like the National Emergency Response Acts, has no interest in 'local knowledge',¹⁶² or in different approaches, or in a dialogue that listens as well as instructs: it imposes one law and one solution like a jealous God, a Leviathan.

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 affected them both. There is something welcoming and generous in that gesture. The shared river does not only separate but brings together, too. The language of brotherhood, like the parallel lines of the belt itself, suggests closeness no less than difference, and above all implies a making-room, each for the other. The *Proclamation*, for its part, makes no equivalent 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 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 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 colonizing power. That is precisely the point. For as long as our understanding of justice and our commitment to the rule of law only pays attention to the latter voice, we will continue to perpetrate *injustice* in its name; the goal of this article has been to show exactly how and why.

Politically, an awareness of the justice depicted by the *Two-Row Wampum* might at least allow non-Indigenous Australians to

162. See C. Geertz, *Local Knowledge; Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983.

appreciate what has been given to us by Aboriginal hospitality. We have heard a lot about saying 'sorry' in recent years: it was one of the more enduring political sagas of the past decade that the former Australian Prime Minister refused to say 'sorry' to Aboriginal people for the harms that white settlement has wrought, on the grounds that he, personally, was not responsible for what had happened. In February 2008 the new Prime Minister, Kevin Rudd, moved swiftly to reverse that policy, and parliament's unanimous apology to the stolen generations was welcome, sincere and overdue. On that day, it is said that many Aboriginal people wore T-shirts which said 'thanks'. But it is white Australians who ought to say thanks to Aboriginal people; not just for their forbearance and forgiveness but also for the sharing of the land and the sharing of the river. If we could find it in our hearts to discern and appreciate that initial gesture of hospitality and of giving, which derived (as hospitality always does) from Indigenous strength and authority rather than from weakness; in such a case, the way might be found to begin a relationship based on the singular position of Indigenous communities in Australian society, and on the necessity of a dialogue with them, not about them.

Practically, I can do no better than endorse the prescriptions of Jon Altman, Director of the Centre for Aboriginal Economic Policy Research:

There is another way possible: empower and work with communities, support what is working and build on it, address the deep backlogs that are a result of past policy and not Indigenous failure, and learn from international experience where there has been much more success than in Australia ... [P]hilosophies of sustainability and community enterprise, ownership and governance, as distinct from external control of communities, are all unfortunately absent from what is being proposed.¹⁶³

There is already a great deal of evidence that has examined profoundly traumatized and impoverished societies and has evaluated international humanitarian interventions, and there is a wealth of reports, research and inquiries into the treatment of child abuse.¹⁶⁴ All these studies indicate that the vision of collective

163. Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, 10 August 2007, Jon Altman, p. 79.

equality and negotiation represented by the *Two-Row Wampum* works, and that without it, nothing will. Certainly it is one of the great tragedies of these laws that they treat the horrific problems of domestic violence and sexual assault in Indigenous communities so ham-fistedly, in such a cavalier fashion, and so inadequately, while pursuing broader and less clearly defensible goals so relentlessly.

One alternative, then, would be to work with communities rather than against them — to develop specific approaches rather than overarching solutions, to listen to the complex and interrelated concerns facing each community, particularly as they are experienced by women and children, and not just in the mouths of a few authorized or self-proclaimed leaders. That would bring greater understanding in relation to the endemic catastrophe of child abuse, and far more broadly. It would mean following through right now on the admirable ambition to ‘genuinely marry the best of government intentions and resources with the wisdom of local knowledge’.¹⁶⁵ Such a marriage would require thinking of Indigenous people as agents already capable of ‘control over their lives’, rather than as wanton incompetents looking for a Leviathan to save them. It would mean recognizing that desperately needed infrastructure such as housing and schooling must be much more effectively tailored to the realities and experiences of Aboriginal life, rather than trying to do it the other way around and then wondering, with some irritation, why Aborigines ‘fail’ to be properly housed and ‘fail’ to attend school. To provide just one very small example, the ‘welfare cards’ provided by the authorities under the legislation’s ‘income management’ scheme must all be spent at once; loaded down with goods, Aboriginal people return to communities that still do not have electricity or fridges.¹⁶⁶ Not only does this tell us something about the state of resources in remote Australia, it tells us something about our governments’

164. A. Cox, ‘Preventing Child Abuse: A Review of Community-based Projects I: Intervening on Processes and Outcomes of Reviews’, *Child Abuse Review*, vol. 6, 1997, pp. 243–56; D. Finkelhor, ‘New Ideas in Child Sexual Abuse Prevention’, in R. K. Oates (ed.), *Understanding and Managing Child Sexual Abuse*, Sydney, Harcourt Brace Jovanovich, 1990; D. Harrington and H. Dubowitz, ‘What Can be Done to Prevent Child Maltreatment?’, in R. L. Hampton (ed.), *Family Violence: Prevention and Treatment, Issues in Children’s and Families’ Lives*, Vol. 1, Newbury Park, Sage Publications, 1993; R. K. Wortley and S. W. Smallbone, ‘Applying Situational Principles to Sexual Offenses against Children’, in R. K. Wortley and S. W. Smallbone (eds), *Situational Prevention of Child Sexual Abuse, Crime Prevention Studies*, vol. 19, Monsey, Criminal Justice Press, 2006. See also fn. 51 and fn. 64 above.

165. Prime Minister’s Speech commemorating the 40th anniversary of the 1967 referendum, 27 May 2007, <www.pm.gov.au/media/Speech/2007/Speech24341.cfm>.

166. I am grateful to *Arena Journal*’s anonymous reviewer for this very helpful example.

continuing incapacity to properly comprehend the lives and problems of those communities. Indeed, if we were to stop thinking of those who live in remote Aboriginal communities as people whose every difference from us is an abnormality that needed to be rectified before they were entitled to enjoy the protections of the rule of law, we might even be forced to think of the economies in those places as ways of sustaining their communities, rather than (again) the other way around. Those communities would not be the only sector of Australian life that required genuine commitment from governments in order to remain viable.

Finally, legally, an awareness of the justice depicted by the *Two-Row Wampum* can supplement our understanding of the rule of law with a different set of equally significant commitments. We should not be forced to choose between our ideals of justice, as if a belief in rights was somehow incompatible with a commitment to consultation and specific solutions to multiple problems. Fundamental legal principles are not mere 'ideology', in the sense of some luxury we cannot afford. Our governments ought to learn more about local communities' needs and problems, and those communities' own understanding of them. The actual day-to-day independence and autonomy of all Indigenous people ought to be promoted immediately rather than waiting for some moment in the future when they might prove themselves 'ready' for it. The ideals of justice in the *Two-Row Wampum* respect and indeed insist upon such an approach. Perhaps in due course those ideals might even form a new segment of that string of beads, worn smooth with repetition, called 'Australian values'. But at the same time, our legal system ought to take seriously principles of equality before the law and in the provision of services right now rather than, in the words of St Augustine, 'not yet'. For centuries, one emergency after another, we have *postponed* treating Aboriginal people with justice, deciding that they are not yet worthy of it. In 2008 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.