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HISTORY DECAYS INTO IMAGES, NOT INTO STORIES.

GUEST EDITED BY DESMOND MANDERSON AND IAN MCLEAN

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This issue is dedicated to the memory of Aubrey Chayson

FASHION DESIGNER–WRITER–LAW STUDENT

EDITORS' INTRODUCTION

by Desmond Manderson
and
Ian McLean

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The movement formally known as "law and literature" has evolved from a relatively benign interest, almost a hobby really, into a dynamic interdisciplinary project which draws on humanities scholarship—not just in literary studies but in and about art, music, history, and philosophy—to think about legal issues in the contemporary world.[1] These cultural perspectives offer novel insights into our legal ideas and legal history, sometimes more or less directly, and sometimes via a sideways glimpse. Aesthetic curiosity has been accompanied by a strong interest in theoretical frameworks, also drawn from the humanities, whether in terms of literary theory, social theory, critical theory, post-colonial studies, or continental philosophy. Much more recently, and with a truly propulsive energy, this broad focus has found new life and energy in what is often called "the visual turn." After an initial foray,[2] a flurry of recent activity has seen the methods and theories of art history, criticism, and theory drawn on to understand, critique, and engage with law.

Political discourse, as Chiara Bottici pointedly argues,[3] is not particularly imaginative nowadays, and it's certainly not imaginary. But it is fought out increasingly in the realm of, and through, visual media. The same could be said of legal discourse. Accounting for law's material and visual manifestations, its living presence, invites the kind of rich case studies around the relationship between legal and visual discourses at the heart of this collection.

The so-called visual turn reflects broader developments across the humanities. Judith Butler,[4] Giorgio Agamben,[5] Jacques Rancière,[6] Mieke Bal,[7] and many others insist that aesthetic forms, disciplines, and genres are central to political, cultural, and social discourse. Whether we are talking about political liberalisms, economic rationalisms, or legal theories of social justice and human rights narrowly conceived, orthodox conceptual epistemologies seem incapable of grasping the discursive crisis of our current predicament. Still less do they seem capable of finding new ways of imagining and instigating the future. For that, we need new vocabularies of law and social justice, and new communicative forms. That is precisely where the connection between law and aesthetics is both illuminating and promising.

There is nothing remotely new about any of this. If we accept that visual studies concerns the relationship between images and the discourses they realise, legitimate, or set in motion, then this collection's claim for their importance to law is, if not as old as the hills, then at least as old as *Hammurabi's Code*.

1 Austin Sarat, Matthew Andrson, and Cathrine Frank, eds., *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2010).
2 Costas Douzinas and Lynda Nead, eds., *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago: The University of Chicago Press, 1999).
3 Chiara Bottici, *Imaginal Politics: Images Beyond Imagination and the Imaginary* (New York: Columbia University Press, 2014).
4 Judith Butler, *Frames of War* (New York: Verso, 2009).
5 Giorgio Agamben, *Stasis* (Cambridge: Cambridge University Press, 2015).
6 Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, trans. Gabriel Rockhill (London: Continuum, 2004); Jacques Rancière, *The Future of the Image*, trans. Gregory Elliott (London: Verso, 2009); Jacques Rancière, *Aisthesis: Scenes from the Aesthetic Regime of Art*, trans. Zakir Paul (London: Verso, 2013).
7 Mieke Bal, *Quoting Caravaggio: Contemporary Art, Preposterous History* (Chicago: Chicago University Press, 2001).

FIG. 1
Code of Hammurabi, ca. 1754 BCE, bas relief, stele detail, basalt, 225 x 79 x 47 cm, Musée du Louvre, Paris.

That great basalt plinth marked, in the detail and specificity of the written laws it set down, an important milestone in law's textual presence. But equally important is the image of legality that crowns the stele and materialises out of its black-headed stone (fig. 1). Here we see the shining Babylonian sun god, the god of justice Shamash, flames sprouting from his shoulders, giving Hammurabi a ring and a staff as signs of his authority. The connection is made explicit in the Prologue:

> Then Anu and Bel delighted the flesh of mankind by calling me, the renowned prince, the god-fearing Hammurabi, to establish justice in the earth, to destroy the base and the wicked, and to hold back the strong from oppressing the feeble: to shine like the sun-god upon the black-headed men and to illuminate the land.

Clearly, then, law is making a claim to authority not just through the medium of images but *about* images, about the legal system's relationship to light and vision, the coming together of its power to illuminate and the illumination of its power. The language of light is not just a metaphor for the law; it is its origin and its justification.

Indeed, this law *of* and *in* the image, is a great deal more venerable than Hammurabi. On the opposite wall in the Louvre where it now stands, there is an almost identical image dated hundreds, maybe a thousand years earlier. The temporal distance is staggering. What we might naively have supposed to be an image of Hammurabi was nothing of the sort. By his time the picture of the king and the god was already an ancient, conventional, even ritual evocation of a familiar trope. It probably seemed old-fashioned even then. And perhaps that was the point. The iconography of the image was an enduring

stamp of legitimation and authority; Hammurabi's insight lay in appropriating the *magic of the image of authority* in order to justify specific legal obligations. An eye for an eye.

The emergence of visual studies of law reflects an intensified interest in the ancient compact between aesthetics, politics, and law. It also echoes a long tradition of using visual materials to understand legal ideas—think of Michel Foucault's use of the Panopticon;[8] Ernst Kantorowicz's focus on the origin of modern sovereignty in "the king's two bodies";[9] Louis Marin's book on the Sun King as the creature and creation of his own portrait (fig. 2).[10] Do not think of the representation of power, Marin instructs us; think instead of the power of representation, of the power that representation makes possible and to which it is indispensable.

Consider our most famous constitutional artwork (fig. 3). Perhaps the legitimacy and authority of the *Commonwealth of Australia Constitution Act 1900* (UK) seemed self-evident in 1901, when we still spoke of "the mother of Parliaments" and "the mother country." Australia's Constitution was enacted in London according to old traditions, themselves largely "invisible." *The Big Picture* (1903), by Tom Roberts, Australia's most famous and biggest turn of the century painting, depicts the ceremonial opening of the first Parliament of Australia in Melbourne that year. The future King George V reads the official proclamation. His authority is burnished by the pageantry of the official party. An over-sized crown looms over them like the trappings of some modern Leviathan. To this day, Roberts' painting does not belong to the Australian people. It may be on display in Parliament House, but it still remains part of the British Royal Family's private collection. But even in 1901, legitimacy was not simply conferred by the Imperial origins of Australia's constitutional arrangements. The painting stages a dramatic contrast between dark and light. The official guests are still in mourning for the old Queen, who had died just a few months previous. They are all dressed in black. The choir, on the other hand, is all in white, bathed in a glorious light that pours in from the window high above. They stand for the Australian people, for the future, not the past. And the proclamation being read by the Duke catches a shaft of the same light. It is the light of God, the guarantor of all promises and contracts. It binds the official document to the people, who are on the one hand subject to Parliament's laws and on the other the very body to whom those laws must themselves answer. The multitude of spectators becomes a *people* in that moment. Intriguingly, Tom Roberts did not sign *The Big Picture*; we may rightly say that its true signatories are the nation and the divine. Thus the artist creates here a vision of the Constitution which exceeds the words of the text and founds the Australian legal order on something more enduring and transcendent, which binds its people together. Indeed, the town planners of the nation's capital, Canberra, unconsciously—or was it consciously—recognised this by placing the National Gallery and the High Court beside each other, connected by a bridge, each of the same brutalist architecture: law, art,

8 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977).

9 Ernst Kantorowicz, *The King's Two Bodies* (Princeton, NJ: Princeton University Press, 1957).

10 Louis Marin, *Portrait of the King*, trans. Martha House (Minneapolis: University of Minnesota Press, 1988).

FIG. 2
Hyacinthe Rigaud, *Portrait of Louis XIV*, 1702, oil on canvas, 313 x 205 cm, Musée du Louvre, Paris.

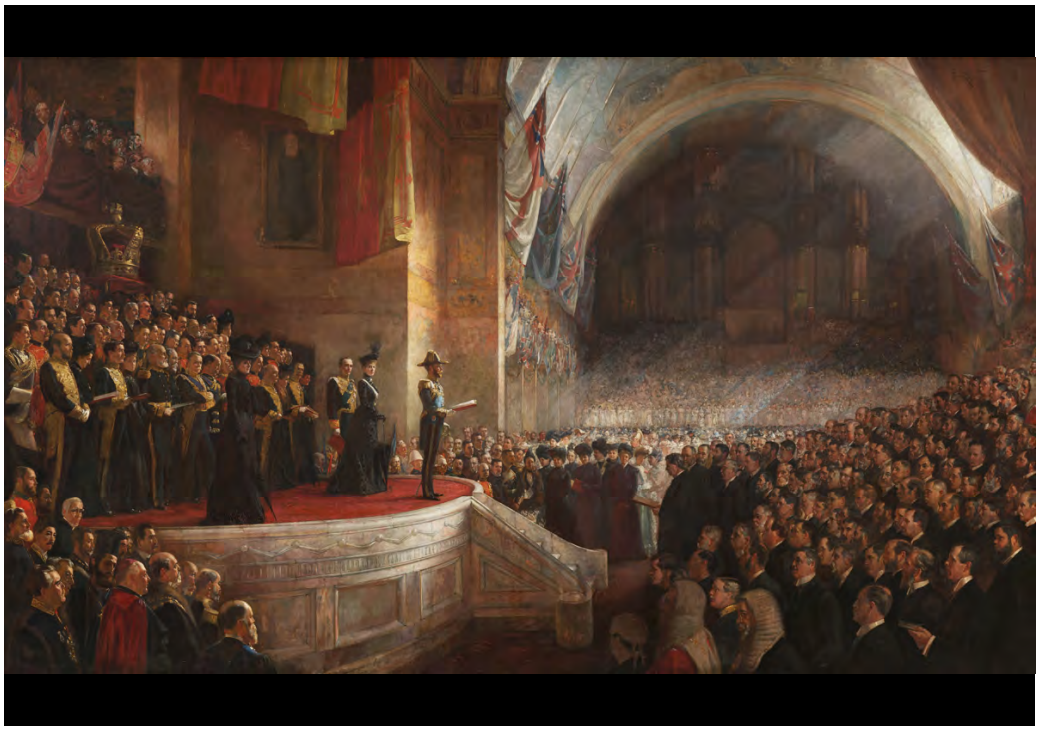

FIG. 3
Tom Roberts, *The Opening of the First Parliament of the Commonwealth of Australia by H.R.H. The Duke of Cornwall and York (later H.M. King George V), May 9, 1901* (known as *The Big Picture*), 1903, oil on canvas, 304 x 509 cm, Royal Collection, Parliament House Canberra.

and nation entwined and imprinted on the soft curvilinear forms of the lake and surrounding hills. What remains utterly remarkable about this juxtaposition is their subtle difference. The gallery welcomes visitors while the court stays aloof. The brutalist forms of the National Gallery have blended into the bush landscape that envelops it, permeating and softening its edges, while next door at the High Court the same style and forms have not. Australian art has achieved a reconciliation with its place; Australian law, it seems, hasn't.

It would be a mistake to think of scholarly work on the nexus of art and law as the discovery of some hitherto hidden trace of legal ideology in the interstices of art. While art historians and critics are yet to return the favour with the same conscious attention, the nexus of art and law is an unconscious assumption of artworld discourse, whether it be in the analysis of church and state patronage or avant-garde transgressions. This nexus has always been implicit if not explicit, which is to say ancestral, to art. Originally the law was in the land and the heavens, manifest in the footprint of ancestral creator lawmakers (the Indigenous concept of Country is a law-full or ancestral-full land) and also in kin relations and clan designs. Art and law are the twin doubles of the transcendental blinding light of Shamash or the more ancient Mesopotamian Utu.

If the modern world is characterised by the separation of disciplines into autonomous sovereign fields, the continuing force of iconoclasm reminds us how fragile the separation between art and law is. Artists have long understood this. The work of Gordon Bennett comes immediately to mind, an artist for whom the imposition of colonial law and British sovereignty was precisely a matter of images shaping the Australian subconscious or social imaginary. Almost any work by Bennett makes the point, from his retelling of Captain Cook taking possession of Australia, *Possession Island* (1991), to his painting of the mutual hegemony of Western art, space, and law, in the aptly legally titled *Terra Nullius* (1993).[11] More recently, Julie Gough (e.g., *Hunting Grounds,* 2017), for example, presses on the visual fantasies of Australian colonial law and the legal fantasies of colonial Australian art, like a finger worrying an open wound. Questions of legal power, legal history, and legal justice are absolutely central to the work of many major Indigenous artists; likewise, questions about law and justice for Indigenous peoples are being confronted more bravely, more directly, and more coherently in the arts than in the discourse of politics or law itself.[12]

In compiling this issue of *Index,* we imagined a disciplinary field that doesn't yet exist in any institutional sense but which we believed to be out there, long at work, largely unknown even to some of its participants. To give this field a semblance of form, submissions needed to tick a number of boxes: scholars who range from emerging to experienced, and whose essays crossed enough topics and approaches to be rich, interesting, and informative. We received contributions from scholars working in many different ways across the apparently irreconcilable disciplines of law and art history. Their work makes the case for their indispensable relation with coruscating eloquence,

11 See Manderson, *Danse Macabre,* 162–6, 189–90.

12 See Jennifer Biddle, *Remote Avant Garde* (Durham: Duke University Press, 2016).

convincing even a casual reader that they have much to talk about and to learn from each other.

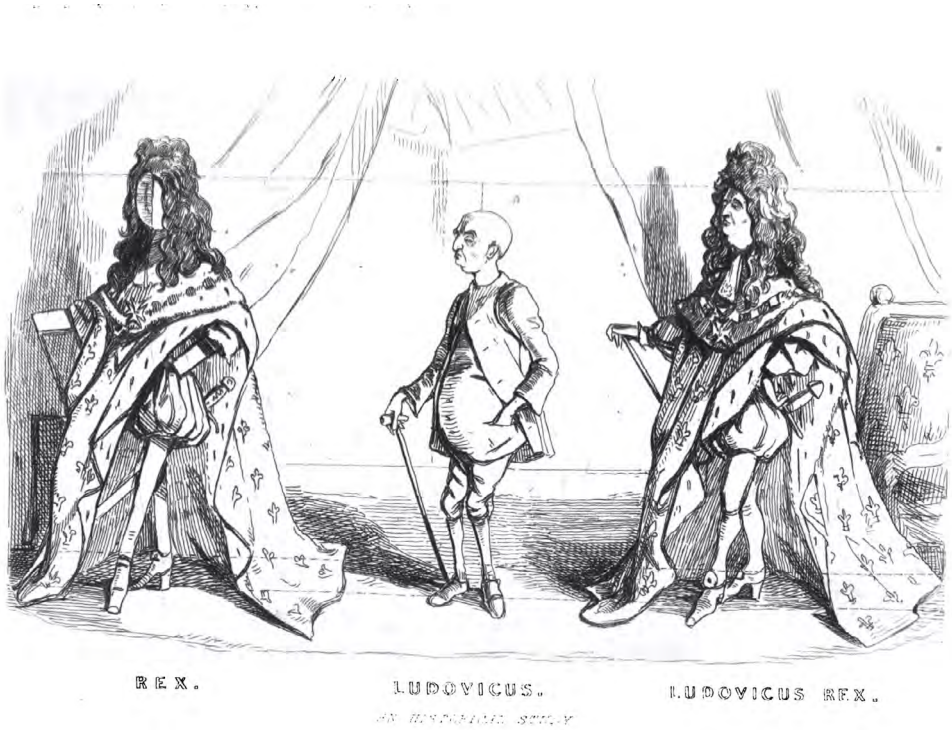

FIG. 4
William Makepeace Thackeray, *What Makes the King?*, 1840, reproduced from *The Paris Sketch Book* (Smith, Elder and Company, 1870), facing p. 434.

We are delighted with what eventuated: ten essays that relate art and law through the lenses of power, ideology, and critique across a wide range of areas and subjects from the early modern to the contemporary. The approaches are equally wide-ranging, including philosophical, semiological, sociological, historical, and iconographical. However, what each writer shares is more important than these differences: a commitment to interrogating art as an image that creates knowledge, and so requires a careful consideration of the limits of what it can know—or of what it conceals in its revealing. This scrutiny of the image is, in each essay, accompanied by an acute awareness that it is not simply an illustration but a double, and that its power as an image lies in its structure of the double, which is the structure of language. For many of the essays, it was a short step to the law being equally a doubled figure which, ghost-like, is more powerful in its apparent absence, in its silence and invisibility, than in its presence. Hence, there is a strong agreement in these essays of an inherent complicity between the image and the law—of the image as law and law as image, and the law in the image (a definition of aesthetics) and the image in the law (a definition of power). This sense of law and image being two sides of the same coin provided the necessary leverage for many of the authors' insights. It lent a philosophical edge to many of the essays and suggested that the law is not so much an emperor without clothes but—as in Thackeray's engraving *What Makes the King?*—an excess of robes without an emperor (fig. 4).

Organising ten essays that represent new work in a new field proved more challenging than selecting them, a problem with which many a curator could surely sympathise. Part 1, "Lawscapes," features essays by Desmond Manderson, Helen Hughes, David Caudill, and Shane Chalmers. The term itself we took from Hughes's essay, which in turn gestures to Andreas Philippopoulos-Mihalopoulos and Nicole Graham.[13] Like them, we mean a materially and historically grounded space of law, which these essays approach through the analysis of characteristic visual signifiers. In stark contrast, the essays by Clare Fuery-Jones, Keith Broadfoot, and James Parker in Part 2 of this collection take a metaphysical turn. "Lacunae" suggests that the power of law rests not so much in what it says but what it does not say, what it prohibits from being said, what remains unspoken or invisible. Through this aesthetic of silence and the unseen, veils, and shadows, our authors illuminate or discover law's ineffable force and the force of its ineffability. With a nod to Erwin Panofsky,[14] Part 3, "Icons," features essays which are political rather than philosophical in tone, and contemporary rather than historical in perspective. What after all is an icon but the most political and ideological—the most strictly speaking *lawful*—form of the image? An icon is a political sign that seeks to position itself above the play of interpretation or contention or dissent. An icon is an image that, as Hans Belting argues, strives to achieve not likeness but presence.[15] The icon does not aspire to represent the law (as in Part 1) or its absence (Part 2), but to *be* the law. It is a level of ideological control of the image that these essays seek to unveil and more importantly to challenge.

For all of the writers here assembled, the questions this interdisciplinary field raises are not merely curious or interesting or intriguing or amusing. This was brought home to us in the short life of this editorial project. As we face the unprecedented crises of the twenty-first century—more to the point, the unprecedented crises of 2020—we need more than business as usual. What we need are new ways of thinking about the world that connect political and social critique to visions of the future. In making those connections, cultural resources and aesthetic forms will be crucial—crucial to how they are, following Elaine Scarry, "made up," but equally crucial to how they are "made real": given an emotional existence that breathes life and meaning into them.[16]

Facing an existential challenge to our species' stewardship of the planet, we urgently need an outpouring of critical insight into the origin and contours of our current predicament. It will take a fresh commitment to normative ideals related to justice, equality, and sustainability. And it will take imagination—narrative vision, aesthetic force—if these critiques and commitments are to be carried into a public sphere that has been

13 Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (London: Routledge, 2014); Nicole Graham, *Lawscape: Property, Environment, Law* (London: Routledge, 2010).
14 Erwin Panofsky, *Studies in Iconology* (Oxford: Oxford University Press, 1939).
15 Hans Belting, *Likeness and Presence* (Chicago: University of Chicago Press, 1994).
16 Elaine Scarry, "The Made Up and the Made Real," *Yale Journal of Criticism* 5 (1992): 239.

systematically unravelled by neoliberalism and yet[17]—to quote Carol Gilligan—must be, can only be, "mended with its own thread."[18] Is anything *other* than law and art up to the task?

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17 Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge, MA: MIT Press, 2015).

18 Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982), 31.

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Part 1
LAWSCAPES

THE DANCER FROM THE DANCE

Images and Imaginaries by Desmond Manderson

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> O chestnut tree, great rooted blossomer, Are you the leaf, the blossom or the bole? O body swayed to music, O brightening glance, How can we know the dancer from the dance?
> – WB Yeats, "Among School Children"[1]

THE REALITY OF PUBLIC SPACE

Public space is not a metaphor. The long history of writing about it has always had a strikingly material dimension. This is obviously true when it comes to the ancient Greeks. For Socrates and then for Aristotle, the *agora* was not merely a metaphor for public life but the very moment and condition of its exercise. The same is true of the Roman forum. For Hannah Arendt, public space maintains this crucial connection to the embodied presence of public life. One might even say that the space itself summons and gathers a public as much as publics demand and institute spaces.[2] When Arendt emphasises the political importance of "the space of appearance" she means a real space and the actual corporeal appearance of human beings in it.[3]

> Politics . . . is a matter of people sharing a common world and a common space of appearance in which public concerns can emerge and be articulated from different perspectives. For politics to occur it is not enough to have a collection of private individuals voting separately and anonymously according to their private opinions. Rather these individuals must be able to see and talk to one another in public, to meet in a public space so that their differences as well as their commonalities can emerge and become the subject of democratic debate.[4]

Arendt's work never loses its specifity, its almost literal evocation of the Greek marketplace or assembly—in short, her geographical and aesthetic imagination.

Undoubtedly, in the work of Jürgen Habermas public space becomes a public "sphere" and, in the process, public discourse is abstracted.[5] *The Structural Transformation of the Public Sphere* traces the rise and decline of "a *category* of bourgeois society" through an analysis anchored in philosophy and political economy.[6] But it is striking how closely the first part of the book cleaves to the fundamental role played, in the explosion of media, discourse

1 WB Yeats, "Among School Children," in *Collected Poems,* ed. Richard Finneran (New York: Scribner, 1996) #222.
2 James Mensch, *Embodiments: From the body to the body politic* (Evanston: Northwestern University Press, 2009); Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 2013).
3 Philip Howell, "Public space and the public sphere: political theory and the historical geography of modernity," *Environment and Planning D: Society and Space* 11, no. 3 (1993): 303-322, 314.
4 Maurizio d'Entrèves, *The Political Philosophy of Hannah Arendt* (London: Routledge, 1994), p. 146.
5 See Seyla Benhabib, "Models of public space: Hannah Arendt, the liberal tradition and Jiirgen Habermas," in *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics,* ed. Seyla Benhabib (Cambridge: Polity Press, 1992), 89–120.
6 Jürgen Habermas, *The Structural Transformation of the Public Sphere* [1963] (Cambridge, MA: MIT Press, 1991).

and intellectual life, by specific urban European geographies such as the salon and the coffee house. In the words of perhaps the earliest extant description we have, from sixteenth century Istanbul–

> They look'd upon [coffee houses] as very proper to make acquaintances in, as well as to refresh and entertain themselves . . . Young people near the end of their publick Studies: such as were ready to enter upon publick Posts: Cadhis [magistrates] out of place, . . . the Muderis, or Professors of Law, and other Sciences; and, in fine, Persons of all Ranks flocked to them.[7]

For Habermas, public spaces were physically necessary to the development of the "public sphere."[8] There is no doubt that in his later work the model of discursive rationality is sublimated from its material roots, but they remain, as he says, both the "genesis" and the "basic blueprint" of the fundamental institutions of modern liberal democratic life.[9]

The language of metaphor hardly does justice to the connection between embodied space and political life. Neither does the notion of a metonym or synecdoche seem adequate when attempting to establish a relationship which is causal, constitutive, deeply rooted in people's experience and agency. We would be better to follow Cornelius Castoriadis in insisting on the role of "the imaginary" in instituting social structures.[10] The imaginary, in his influential telling, is to be distinguished from standard definitions of ideology through the role played by images, scenes, symbols and myths, and by the imaginary's connection not to ideas but to human embodiment.[11] In this sense, it is not "real" forces, in a Marxist sense, that shape institutional structures, but "imaginary ones"—God, the nation, the market, or public space.

All the same, I would take my leave from Castoriadis in treating the imaginary simply as a set of floating signifiers or transcendental ideations. On the contrary, the images that institute social structures and sustain what passes as common sense in a particular community are never experienced as a set of abstractions or claims. They are imbibed in and through the warp and weft of everyday life,[12] or "the massive background of an intersubjectively shared lifeworld."[13] This vital connection between an image, on the one hand,

7 Markman Ellis, *Introduction to the Coffee-House. A discursive model,* http://www.kahve–house.com/coffeebook.pdf, quoted in Desmond Manderson and Sarah Turner, "Coffee House: Habitus and Performance Among Law Students," *Law and Social Inquiry* 31 (2006): 649–76, 650. See also Markman Ellis, *The Coffee House: A Cultural History* (London: Weidenfeld and Nicholson, 2004).

8 Chris Philo, "Of Public Spheres & Coffee Houses" [2004] Department of Geography & Geomatics http://finbar.geog.gla.ac.uk/E_Laurier/cafesite/texts/cphilo016.pdf.

9 Habermas, *Structural Transformation,* 32, and see chapters 3 and 4; Craig Calhoun, *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1992).

10 Cornelius Castoriadis, *The Imaginary Institution of Society* [1975] (Cambridge, MA: MIT Press, 1997).

11 John Thompson, "Ideology and the Social Imaginary: An Appraisal of Castoriadis and Lefort," *Theory and Society* 11, no. 5 (1985): 659–681; Leif Dahlberg, "Factoring Out Justice. Imaginaries of Community, Law, and the Political in Ambrogio Lorenzetti and Niccolò Machiavelli," *Lychnos* (2013): 35–73, 64.

12 This is precisely the argument made by Claude Lefort: Thompson, "Ideology and the Social Imaginary," 665–7.

13 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (London: John Wiley & Sons, 2015), 322.

and an embodied and material experience, on the other hand,[14] is what drives the commitment to a specific idea of public space that we find in writers as diverse as Arendt and Habermas. Again, in Walter Benjamin's unfinished work on the Arcades Project,[15] both the fantasy of the *flâneur* and his embodied experience of Paris street life begin to point us towards a specific politics of recognition, a specific transformation of public space and public life under conditions of modernity.[16] In other words, the powerful relationship between image and a specific and embodied geography is mutually constitutive. Images of public space provide, then, the raw material of the imaginary, evidence for its historical form or development, and a window on lived experience. They have one foot in ideological make-believe and the other in everyday life, each producing and reproducing the other.

PICTURING GOOD GOVERNMENT

Let us take an example. Not, this time, the representation of the *agora* in Raphael's *School of Athens*. Nor even the gruesome representation of the criminal body *as* public space, the equation of medical and legal knowledge, in Gerard David's *The Flaying of Sisamnes*.[17] For the sake of insisting on this connection between images, bodies, and public spaces, let us consider instead Ambrogio Lorenzetti's remarkable frescos in Siena's main hall of governance in the Palazzo Pubblico: nothing less than the visual constitution of the Republic of Siena, completed in 1339.

The intricate *Allegory of Good Government* at the front of the hall is flanked by two vast representations of civic life, now called *The Allegory and Effects of Bad Government* and *The Effects of Good Government*. The political theory expounded in the Allegory has been subject to much analysis.[18] But of more interest for present purposes is the detailed portrayal of public life in the *Effects of Good Government* (fig. 1). As John White argued in a highly influential essay on "pictorial space" way back in 1957, Lorenzetti's masterpiece marks a breakthrough in the representation of public space in Western art, and a crucial milestone on the road towards the adoption of a systematic approach to perspective a century or more later. It is not just the multitude of details that build such a compelling picture of vibrant civic life. The sense of space itself has been enlarged and made realistic in a new way. "Full rein is given to the new sense of space apparent in the structure of the town. A panoramic vision of the countryside unfolds for the first time,

14 I think this is part of what Chiara Bottici is attempting to express in *Imaginal Politics: Images Beyond Imagination and the Imaginary* (New York: Columbia University Press, 2014) although the argument here has a different emphasis.

15 Walter Benjamin, *The Arcades Project* (Cambridge, MA: Belknap Press, 1999).

16 David Frisby, "The Flâneur in Social Theory," in *The Flaneur (RLE Social Theory)* (London: Routledge, 2014), 81–110.

17 Ronnie Lippens, "Gerard David's Cambyses [1498] and Early Modern Governance: The Butchery of Law and the Tactile Geology of Skin," *Law and Humanities* 1 (2009): 1–24.

18 Nicolai Rubinstein, "Political Ideas in Sienese Art: The Frescoes by Ambrogio Lorenzetti and Taddeo di Bartolo in the Palazzo Pubblico," *Journal of the Warburg and Courtauld Institutes* 21 (1958): 179–207; Quentin Skinner, "Ambrogio Lorenzetti: The Artist as Political Philosopher," *Proceedings of the British Academy* 72 (1986); Quentin Skinner, "Ambrogio Lorenzetti's Buon Governo Frescoes: Two Old Questions, Two New Answers," *Journal of the Warburg and Courtauld Institutes* 62 (1999): 1–28.

dimishing into the distance with the continuity of natural space."[19] This sense of three-dimensional space, and public participation in it—trade, family life, pleasure and public discourse are to be found in every corner of the happy town—are not merely represented. They form the argument of the triptych as a whole: "good government" is not merely a moral obligation or spiritual virtue. It is valued precisely for its *effects*, principal amongst which are the flourishing public spaces which Lorenzetti depicts. The figure of *Securitas* stands guard over the city. Her purpose is not to safeguard the established order or to empty the public square. On the contrary, it is to protect and ensure their operation. On the facing wall, the effects of "bad government" are the opposite. Under the figure of *Timor* (fear), the city is surrendered to frenzied violence and division: shuttered windows, dilapidated buildings, and a city emptied of all life, save soldiers and brigands.

FIG. 1
Ambrogio Lorenzetti, *Effects of Good Government in the City*, 1338–39, fresco, Palazzo Pubblico, Siena.

Public space itself, and not just the figures that fill it, are the star of the show. It is Lorenzetti's sophisticated use of perspective that gives that space a three-dimensional effect that invites the viewer into it. Yet as White points out, Lorenzetti's use of perspective is at first unsettling. The group of dancers in the middle of the fresco seem weirdly outsized. Figures recede not just as our eyes move into the background, but also from left to right. This is not linear perspective presented from the position of the viewer, as we have come to know it.[20] Rather, the painting's perspective is designed from a point of view *inside* the image, specifically from the point of view of the dancing group. The members of the dancing group are the central figures of the whole narrative. The fresco has been organised as it might be perceived from their point of view. They are larger than figures on the same plane, and everything recedes

19 John White, *The Birth and Rebirth of Pictorial Space* (London: Faber & Faber, 1957).
20 Erwin Panofsky, *Perspective as Symbolic Form* (New York: Zone Books, 1991); Margaret Iversen, "The Discourse of Perspective in the Twentieth Century: Panofsky, Damisch, Lacan," *Oxford Art Journal* 28, no. 2 (2005): 191–202; Hubert Damisch, *L'origine de la Perspective* (Cambridge, MA: MIT Press, 1994).

into the distance according to its distance from them; hence the strange fact that figures on the far right are much smaller than those on the far left, in a manner that could never, for example, be countenanced by the painters of the Italian Renaissance or the Dutch golden age.[21] And so too the source of light in the image is not natural. It pours out from the dancers themselves, illuminating the right-hand side of those to their left and the left-hand side of those to their right.[22] All the "effects of good government," all the benefits of public life, the very light by which we see them—come from the dancers and the dance (fig. 2).

FIG. 2
Detail of Ambrogio Lorenzetti, *Effects of Good Government in the City*, 1338–39, fresco, Palazzo Pubblico, Siena.

The meaning of the dancers has been hotly contested. The figures have often been called "maidens," but this has been convincingly disproved by Quentin Skinner, who identifies them as young men performing the stately *tripudium* as a sign of dignified or ceremonial joy.[23] There are nine of them (the tenth figure in the group is not a dancer; she is disciplining the dancers movements by singing and banging a tambourine: rhythm, we might hazard, is the law of the dance). The number nine is repeated throughout the frescoes with almost kabbalistic mysticism. Lorenzetti's frescos are in the *Sala dei Nove,* the hall of the Nine, the elected body responsible for Siena's executive and judicial

21 On the distinctive use of perspective by the Dutch masters, see Svetlana Alpers, *The Art of Describing* (Chicago: University of Chicago Press, 1983).
22 C. Jean Campbell, "The City's New Clothes: Ambrogio Lorenzetti and the Poetics of Peace," *The Art Bulletin* 83, no. 2 (2001): 240–258; White, *Birth and Rebirth*.
23 Skinner, "Two Old Questions," 16–19, 26.

government. Their responsibilities and their relationship to the people of Siena, to justice and to God, is expressed in the *Allegory*. But the "effects of good government" is not an allegory. Dancing becomes here a kind of affective pedagogy in public life: it demands personal touch, engagement and connection, but it also requires co-operation, harmony, and the transcendence of individual interest for the benefit of some greater and collective good. The dance is not a *metaphor* for the republican virtues but a social practice that instils them. The image of the dancers in Lorenzetti's masterpiece helps constitute the imaginary of Republican Siena; but at the same time, the act of dancing itself affirms the reality of that imaginary. The picture connects the image of public space and public life—plenary, diverse, and embodied—to everyday life in a way that continually reinforces the links between them.

Nine is not just the sign of government, but the sign of art—the number of the muses, a reminder of the value of feeling and creativity in public life: of poetry, and music, tragedy and comedy, and of Terpsichore, the muse of the dance. In the corporeal and affective character he gives the *Effects of Good Government,* Lorenzetti entwines government and art, and embodies them both in a dance. Look at the movements the dances are making. The rulers and the ruled are weaving together a complex tapestry of public life. Light emanates from them, filling the wall, the hall, and the city. O body swayed to music, O brightening glance—civic life performed in public space becomes a model of the unification of free will and necessity. The effects of good government, it seems, fuse together pleasure and duty, until we cannot tell them apart.

SCENES FROM THE NEOLIBERAL IMAGINARY

If we turn now, with alarming abruptness, to the modern world, it is worth asking about what kinds of images of public space populate our own imaginary, or to put it another way, what sorts of images reflect and constitute contemporary visions of public space? For it is fair to say that neoliberalism loathes and distrusts public space. Neoliberal thought was always antipathetic to democracy, and indeed sought to shield market freedom, property rights, and economic management from its pernicious effects. Thinkers like Friedich Hayek and Ludwig von Mises thought that public discourse and democratic politics, left unchecked, would inevitably lean towards policies of redistribution, welfare, and social security—precisely inimical to the individual and market-based freedoms that they thought essential to a true liberalism.[24] In a startlingly candid interview in defence of Pinochet's Chile, Hayek frankly avowed that he would prefer a "liberal dictator" to a "democratic government lacking in liberalism."[25] Wendy Brown,

24 See Jessica Whyte, *The Morals of the Market* (London: Verso, 2019); Wendy Brown, *Undoing the demos: Neoliberalism's Stealth Revolution* (Cambridge, MA: MIT Press, 2015); Philip Mirowski, "Defining Neoliberalism," in Philip Mirowski and Dieter Pluhwe, eds., *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge, MA: Harvard University Press, 2015): 417–450, 446.

25 Quoted in Philip Mirowski and Dieter Pluhwe, eds., *The Road from Mont Pelerin* (Cambridge, MA: Harvard University Press, 2015), 328; Friedrich Hayek, *Studies in Philosophy, Politics and Economics,* 161 in Mirowski, *Defining Neoliberalism* (Chicago: University of Chicago Press, 1967), 446. See also Loïc

following Michel Foucault, accuses neoliberal policies of weakening democratic institutions and narrowing public space around the world.[26] By creating a hegemonic discourse of "neoliberal reason," wherein all human and social interactions must be understood exclusively in terms of individual and economic goals, the basis of social and collective action is removed. The language of "society" and of public life becomes unthinkable.

The neoliberal imaginary has converted public life into private life, and public space into private space. It is right in front of our eyes. In a series of works, Richard Sennett has traced the demise of the city and its replacement by suburban existence. Public space in the modern city, he argues, has become something to be feared, not embraced, an "empty space, a space of abstract freedom but no enduring human connection."[27] Against this pessimistic reading, several scholars have developed a more pluralistic account, emphasizing the flexible and adaptive elements of urban living. Sharon Zukin defends the capacity of citizens to appropriate and repurpose spaces creatively, claiming for example that "the public regards the theme park as public space."[28] Good for them—but try and hold an anti-war demonstration in Disneyland and see how far it gets you. Such an approach profoundly underestimates the extent to which legal (and economic) frameworks constrain this civic dynamism. The classic example is the shopping mall.[29] The shopping mall, as we know, has been the graveyard of main streets and public squares all over the world. But the mall gives only a simulcrum of public space. People's behaviour and actions are vigorously regulated by the corporations that own them and the security guards that police them, with greater powers than actual police on actual streets. There are very real limits on the kinds of political and social activities that are tolerated including, most obviously, where they might interfere with the mall's economic imperative.[30] Shopping malls have replaced public spaces with their neoliberal *doppelganger*.

Consider another kind of familiar image—the brochure proposing or promoting a new apartment complex, museum, or institution. Invariably these designs provide an enticing *mise-en-scène:* open spaces, trees and plazas full of

Wacquant, "Crafting the Neoliberal State," *Sociological Forum* 25 (2010): 197–220, 202.

26 Brown, *Undoing the Demos*; Wendy Brown, "Neoliberalism's Scorpion Tail," in Étienne Balibar et al, *Mutant Neoliberalism: Market Rule and Political Rupture* (New York: Fordham University Press, 2019), 39–60; Wendy Brown, *In the Ruins of Neoliberalism* (New York: Columbia University Press, 2019). See Michel Foucault, *The Birth of Biopolitics* (New York: Palgrave Macmillan 2008); Stephen Sawyer and Daniel Steinmetz-Jenkins, *Foucault, Neoliberalism and Beyond* (Rowman and Littlefield International, 2019).

27 Richard Sennett, *Flesh and stone: The Body and the City in Western Civilization* (New York: WW Norton & Company, 1996); see Peter Goheen, "Public Space and the Geography of the Modern City," *Progress in Human Geography* 22, no. 4 (1998): 479-496, 482–3.

28 Sharon Zukin, *Cultures of Cities* (Oxford: Blackwell, 1995), in Goohen, "Public Space and the Geography of the Modern City," 486; Philip Ethington, *The Public City: The Political Construction of Urban Life in San Francisco, 1850–1900* (Cambridge: Cambridge University Press, 1994).

29 Denis Brion, "The Shopping Mall: Signs of Power," in *Law and Semiotics,* ed. Roberta Kevelsen (Boston: Springer, 1987), 65–108; Nancy Cohen, *America's Marketplace: The History of Shopping centers* (Lyme, CT: Greenwich Publishing Group, 2002); Mona Abaza, "Shopping Malls, Consumer Culture and the Reshaping of Public Space in Egypt," *Theory, Culture & Society* 18, no. 5 (2001): 97–122; Malcolm Voyce, "Shopping Malls in Australia: The end of public space and the rise of "consumerist citizenship"?" *Journal of sociology* 42, no. 3 (2006): 269–286.

30 Mark Button, "Private Security and the Policing of Quasi-Public Space," *International Journal of the Sociology of Law* 31, no. 3 (2003): 227–237.

people. But with few exceptions there is something generic about these images. The images have a pallid palette and a high-gloss finish. Their computer-generated superficiality repels a deeper engagement. The people they show—strikingly white and middle class, at least on my limited sampling—are not in public space but move through it. At best they may pause and sip a coffee *en route* between appointments. In this it is quite different from the Parisian boulevard of the nineteenth century, where to see and be seen was the whole point. On the contrary, the plaza or the promenade in the twenty-first century is liminal not central. It is a means not an ends: a thoroughfare for pedestrians; a space that connects destinations, not a destination itself. As if complicit in laws against public assembly, there are rarely more than two or three people in a grouping. We are not to imagine a meeting or a protest or an assembly or a street march, still less a "riot," which English law traditionally defined as a gathering of twelve or more.[31] The activities that take place here are not social, let alone political. They are personal, corporate, or at best domestic. In representing public space in this fashion, images do their dual work, encouraging their reproduction by bodies in the world, and embedding an ideological understanding of space, belonging, and relationships as common sense.

A good example as to what is at stake is provided by a recent dispute involving the Sydney Opera House. Racing NSW wanted to advertise a million dollar horse race. It sought to "rent" the sails of the iconic building to project the horses" names, numbers, and colours onto it during a live stream of the barrier draw (fig. 3). Not surprisingly, Louise Herron, CEO of the Opera House, demurred. This created *furor e divisio*[32] in various media outlets in Sydney. Alan Jones, the country's most influential shock-jock, fulminated from his bully pulpit. Facing considerable pressure, the CEO agreed to screen the colours but not commercial text or company logos. But even that was not good enough. In a live interview with Herron which demonstrated the levels of animus and abuse for which Jones is well known, he shouted "We own the Opera House. Do you get that message? You don't. You manage it." Herron reminded Jones of the Opera House's world heritage status. "It's not a billboard," she said. He replied: "Who said? You. Who the hell do you think . . . who do you think you are?"[33]

Yet Jones' rant provoked a widespread backlash from members of the public. They angrily defended the CEO's judgment. Jones was forced to apologise for his behaviour. On the night of the event, thousands of Australians gathered in front of the Opera House and shone the lights on their phones onto the sails. Feeble individually, their collective action effectively spoiled the effect of the projection and drove Racing NSW to radically curtail the event. The public reaction demonstrated the depth of feeling that a building like the

31 *Riot Act 1714* UK 1 Geo 1, c 5, s 2.

32 The reference is to the labels attached to tyrannical government in Ambrogio Lorenzetti, *Allegory of Bad Government*.

33 Transcript of interview in Jacob Saulwick and Rachel Clun, "Alan Jones calls on Berejiklian to sack Opera House boss over racing dispute," *Sydney Morning Herald,* October 5, 2018, https://www.smh.com.au/national/nsw/alan-jones-calls-on-berejiklian-to-sack-opera-house-boss-over-racing-dispute-20181005-p507x8.html.

Opera House can still inspire. For what was at play in the image of the Opera House were two opposed understandings of public space. For Jones, precisely because the Opera House was a public space, it *must* be for sale; commercial value was the only way that return on public investment could be measured and maximised. We own it, you manage it, he said. As Brown puts it, in the logic of neoliberal reason, "common good" and "non-economic value" are oxymorons. But for Herron and others, because the Opera House was a public space, it must not be for sale; its non-economic value as a public good had to be protected *from* commercial exploitation. Both sides thought that they were defending the public interest, but in contradictory ways.

FIG. 3
Reproduced from Ben Westcott, "Sydney Opera House Protesters Disrupt Horse Racing Advertisement," CNN, September 10, 2018, https://www.cnn.com/2018/10/09/australia/sydney-opera-house-advertisement-protests-intl/index.html.

This conflict generated intense passion on both sides. Aesthetic experience was, as it often is, a lightning rod for very different ways of understanding public life. Image, body, and space collided, and not just metaphorically or symbolically. Like Lorenzetti's dancers, the public responded by putting their bodies (and, yes, their smartphones) on the line in a collective and co-ordinated action that transcended their individual capacity and, for a moment, brought them together as and for a *res publica,* a public thing. Thus were Hayek's anxieties about anti-liberal and democratic social power confirmed.

TOWARDS THE DESTRUCTION OF THE PUBLIC SPHERE

Brown's emphasis on the ideological power of the neoliberal imaginary is important, but it does not go far enough. The destruction of the public sphere is not a side effect but a deliberate aim of neoliberal politics. If the public square will not empty itself, strong government action is called for. In Australia, a neoliberal government has been steadily doing just that since it

came to power in 2013. The government has established new offences of "advocating terrorism" and modified the definition of a terrorist organisation to include any organisation that "counsels, promotes, encourages or urges" or "praises" a terrorist act.[34] Unsurprisingly, the "terrorist organisations" blacklisted by the government have been, with one exception, Muslim organisations. The ongoing threat of prosecution or proscription has undoubtedly chilled public activism by Muslims in Australia.[35] But, of course, what is or is not terrorism as opposed to political struggle is a partisan judgment. Australia's terrorism laws are certainly wide enough to have prohibited, for example, organisations that supported the African National Congress when it was outlawed in South Africa. They could certainly be used to prohibit organisations calling for a new *intifada* in the occupied territories. Meanwhile, expansion of the discourse of terrorism to encompass other forms of domestic political dissent is well underway. Queensland legislation aimed at breaking up "bikie gangs" made liberal use of the language of emergency and did not hesitate to describe their targets as domestic terrorists. Laws directed against environmental activists have already been passed in Queensland and proposed in Tasmania, after previous legislation was struck down by the High Court of Australia.[36]

The language of "eco-terrorism" is gaining currency, particularly in the hands and mouths of a government whose climate denial credentials are impeccable. A school climate strike seems a harmless enough use of public space. But the day is not far off when children and young people holding placards in support of Extinction Rebellion will be considered guilty of advocating, or praising, or encouraging terrorism. Admittedly, the legislative definition of terrorist acts does not extend to "advocacy, protest, dissent, or industrial action" where there is no intention "to create a serious risk to the health or safety of the public or a section of the public."[37] But who will determine what constitutes a serious risk to the safety of a section of the public? At what point will the Australian Security Intelligence Organisation (ASIO) undertake "special intelligence operations"[38] in the course of which the brothers and sisters of environmental activists might have "important" information, be detained without charge and coerced into providing intelligence to be used in secret trials in which the Minister determines whether "national security" is at risk, and a "fair trial" is not a

34 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Commonwealth of Australia), ss 60–67, amending *Criminal Code Act 1995* (Commonwealth of Australia), ss 80.2C, 102.1 (1A), 102.1AA.

35 Tufyal Choudhury and Helen Fenwick, "The Impact of Counter-Terrorism Measures on Muslim Communities," International Review of Law, Computers & Technology 25 (2011): 151–81.

36 *Summary Offences and Other Legislation Amendment Act 2019* (Queensland), ss2–6, amending *Police Powers and Responsibilities Act 2000* (Queensland), ss 30 and 32 and inserting s 53AA; *Workplaces (Protection from Protesters) Amendment Bill 2019* (Tasmania); *Workplaces (Protection from Protesters) Act* 2014 (Tas); *Brown v Tasmania,* [2017] HCA 43 (High Court of Australia).

37 *Criminal Code 1995* (Commonwealth of Australia), s 100.1(3).

38 *Australian Security Intelligence Organisation Act 1979* (Commonwealth of Australia) ss 4, 35K, 35P, s 34ZS(2); *National Security Legislation Amendment Act (No. 1) 2014* (Commonwealth of Australia); George Williams, "The Legal Assault on Australian Democracy," *Queensland University of Technology Law Review* (2016) 16: 19, 28–29; Kieran Hardy and George Williams, "Special Intelligence Operations and Freedom of the Press," *Alternative Law Journal* 41, no. 3 (2016): 160–164.

consideration?[39] Under what circumstances will environmental activists be convicted of terrorist acts or advocating terrorism? At which point young Australians can now be stripped of their citizenship and deported if the Minister for Home Affairs forms the view that they are opposed to "Australia's interests, values, democratic beliefs, rights or liberties"?[40]This is what Jenny Hocking meant by the "criminalisation of politics."[41] A legal web is slowly strangling the public life of more and more people. The *Espionage and Foreign Interference Act* requires the registration of activists and human rights groups involved with international organisations and prevents donations from non-Australian citizens. Revised offences of "espionage" and "foreign interference" cover any conduct "on behalf of, or in collaboration with, a foreign principal"—not just a government but equally "foreign political organisations" and "public international organisations"—intended to "influence a political or governmental process" or "influence the exercise" of an "Australian democratic or political right or duty."[42] Such conduct must be "covert" or "deceptive" but this includes "any conduct that is hidden or secret, or lacking transparency," for example "if a person takes steps to conceal their communications with the foreign principal." [43] The consequences for public activism will be far-reaching. International campaigns and boycotts may become almost impossible.[44] Even reporting information to the United Nations or Amnesty International, for example concerning the Australian government's violation of its international obligations, might be illegal. Campaigns by Greenpeace or Sea Shepherd Conservation Society or Extinction Rebellion risk prosecution. Former Prime Minister Malcolm Turnbull characterised the Act as directed at political interference by China and Russia, but its real effects will largely fall on environmentalists and human rights activists.

Neoliberal governance marginalises these concerns, reducing the capacity of civil society to make its voice felt, and turning critics into criminals or indeed terrorists. Legitimate public space is shrinking. In a similar vein, Prime Minister Scott Morrison recently sounded the possibility of using the government's construction code to prevent consumers from engaging in

39 *Criminal Code 1995* (Commonwealth of Australia), ss 104 & 105; *ASIO Legislation Amendment Act 2003* (Commonwealth of Australia); Lisa Burton, Nicola McGarrity, and George Williams, "The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation," *Melbourne University Law Review* 36 (2007): 415; George Williams, "A Decade of Australian Anti-Terror Laws," *Melbourne University Law Review* 35 (2011): 1136; Michael McHugh, "Constitutional Implications of Terrorism Legislation," *Judicial Review 8* (2007): 189.

40 *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Commonwealth of Australia); *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (Commonwealth of Australia) Schedule 1, s 9, proposed s 36B–D; Leslie Esbrook, "Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool," *University of Pennsylvania Journal of International Law* 37 (2015): 1273.

41 Jenny Hocking, "Counter-Terrorism and the Criminalisation of Politics: Australia"s New Security Powers of Detention, Proscription and Control," *Australian Journal of Politics & History* 49, no. 3 (2003): 355–371, 371.

42 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Commonwealth of Australia), Schedule 5 *(Foreign Influence Transparency Scheme);* Schedule 1 amending *Criminal Code 1995* (Commonwealth of Australia), ss 80, 90.1 (1), Subdivision B—Foreign interference, ss 92.2, 92.3.

43 *National Security Legislation Amendment (Espionage and Foreign Interference) Bill, Explanatory Memorandum* (Commonwealth of Australia), p. 174.

44 The examples mentioned here are drawn from Michael Head, "Australia's Anti-Democratic 'Foreign Interference' Bills," *Alternative Law Journal* (2018) 43: 160–5, 161–63.

"secondary boycotts" of Australian companies on environmental or ethical grounds.[45] The neoliberal distinction between economic and political concerns insists that the Australian consumer, as *homo economicus,* cares about nothing but profit. At stake is the very idea of "neoliberal reason," and the stunningly limited role the citizen is to be allowed in its operation.

CONTAMINATION AND CONTROL

As I write this paragraph, we are all locked down: assemblies or gatherings banned, schools and universities closed, public events cancelled, infected persons dragged by violence and force to hospitals and detention centres. This might be a once in a lifetime event, but it is more likely that it's the new normal. As global networks of information become more and more sophisticated, warnings, viruses, and lockdowns will only intensify from here. Knowledge and power, like one hand washing the other.[46] It is not so much that there is no call for drastic measures, but how neatly the fear of public space advances a broader neoliberal agenda. In the short term, government funding to ease the pain that the coronavirus depression is causing, are to be welcomed. But one is sceptical that any attempt will be made to confront the long term effects of the pandemic. Who will bear the brunt of these effects? The usual suspects. Aboriginal people, the poor, homeless and disadvantaged, a vast new army of unemployed, students. How much support will the government give to the university sector whose business model has been comprehensively broken? It's not the only possible outcome, but it is not unreasonable to imagine that the pandemic will, in the final analysis, turn out to be neoliberalism on speed.

The right-wing newspaper the *Sunday Telegraph* has a front page story headlined "Army Enters Virus Wars," illustrated by a photo of two, presumably Australian but nonetheless recognisably Chinese, women in face masks. The language of fear and the rhetoric of war justify important public health measures. But they also legitimate a more generalised fear and anxiety, including the undoubtedly racist sub-text of this image. The traditional right has always found "law and order" a useful platform from which to launch anti-progressive and racist policies; the new right will find the "law and bio-security" platform equally fertile ground. As Rahm Emanuel, political fixer par excellence, said: "You never let a serious crisis go to waste. And what I mean by that it's an opportunity to do things you think you could not do before."[47] It is increasingly apparent that the public health emergency of the COVID-19 epidemic is also a way of instituting more comprehensive controls over public space, sidestepping democratic controls over executive power, and ensuring that controversial economic projects can be pushed through as "essential services." In Hungary the pandemic has served to further tighten State

45 See David Crowe, "Morrison's Boycott Plan Sparks Free Speech Furore," *Sydney Morning Herald,* November 2, 2019, https://www.smh.com.au/politics/federal/morrison-s-boycott-plan-sparks-free-speech-furore-20191101-p536o1.html.

46 Michel Foucault, *Power/knowledge: Selected Interviews and Other Writings, 1972–1977* (New York: Vintage, 1980).

47 See Philip Mirowski, *Never Let a Serious Crisis Go To Waste* (London: Verso, 2013).

controls over democratic and social life. In the United States, the Keystone oil pipeline can finally be rushed through without the meddlesome activism of environmental protesters.[48]

This is the nature and disciplinary reach of contemporary bio-politics, in which human beings are increasingly imagined not as citizens with rights but as bodies to be herded.[49] In such a world, public space is not the heart of the body politic, but a breeding ground for illicit contamination.[50] The contrast with Lorenzetti's image is profound. The *Effects of Good Government* celebrates a city at the height of its powers—open, optimistic, and confident. To the freedom of public space corresponds a free and constant intercourse with the surrounding countryside on which Siena's prosperity depended. A scant nine years later, in 1348, the black death arrived, dramatically curtailing the city's public and political freedoms, killing up to half the population, and dealing its economy and status a hammer blow from which it never recovered.[51] Art too was transformed under the experience of the plague.[52] Lorenzetti's frescoes rhapsodise an ideal of public space and political life, caught at the very moment of its passing. Perhaps they are not so much the visual constitution of Siena as its memorial.

By the time Thomas Hobbes came to write *Leviathan* in 1651, London had been ravaged by the plague, on multiple occasions, for 300 years. The generally accepted figure is that it lead to the deaths of 20 percent of the population every twenty or thirty years. Indeed, it was to return one last time in 1665, killing over 100,000 people. No doubt Hobbes' theory of sovereignty and violence owes more to the dreadful catastrophe of the Civil War, from which England was still reeling. But memories of the plague were not entirely absent, if you look closely enough. Indeed, questions of embodiment, health and disease in and of the state are Hobbes' recurrent metaphor. The Frontispiece to the first edition (fig. 4) depicts the sovereign precisely as a body politic. In the shadow of this giant figure, an ordered town lies sheltering. Only soldiers and plague doctors patrol the empty city streets—waiting to stamp out the next outbreak, be it medical or political, disease or unrest.[53] Where *securitas*

48 Bill McKubbin, "Big Oil is Using the Coronavirus Pandemic to Push through the Keystone Pipeline," *The Guardian,* April 5, 2020, https://www.theguardian.com/commentisfree/2020/apr/05/climate-crisis-villains-oil-industry-big-banks-pipelines; Peter Kreko, "The World Must not let Viktor Orban get Away with his Pandemic Power Grab," *The Guardian,* April 1, 2020, https://www.theguardian.com/commentisfree/2020/apr/1/viktor-orban-pandemic-power-grab-hungary.

49 Katia Genel, "The question of biopower: Foucault and Agamben," *Rethinking Marxism* 18, no. 1 (2006): 43–62.

50 Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979,* ed. Arnold I. Davidson, and Graham Burchel (Springer, 2008); Giorgio Agamben, *Stasis: Civil War as a Political Paradigm* (Stanford: Stanford University, 2015). The distinction between *bios* and *zoe*—the human animal and the political animal—has been central to political theory since Aristotle: see Arendt, *The Human Condition*; Hannah Arendt, *Between Past and Future. Eight Exercises in Political Thought* (New York: Penguin Books, 1977).

51 John Adams, "Economic Change in Italy in the Fourteenth Century: The Case of Siena," *Journal of Economic Issues* 26 (1992): 125; William Bowsky, "The Impact of the Black Death upon Sienese Government and Society," *Speculum* 39 (1964):1–34; William Caferro, "City and Countryside in Siena in the Second Half of the Fourteenth Century," *The Journal of Economic History* 54 (1994):85–103.

52 Millar Meiss, *Painting in Florence and Siena after the Black Death: The Arts, Religion, and Society in the Mid-Fourteenth Century* (Princeton, NJ: Princeton University Press, 1978); Henk Van Os, *The Black Death and Sienese Painting: A Problem of Interpretation* (London: Routledge & Kegan Paul, 1981).

53 Giorgio Agamben, "Leviathan and Behemoth," in *Stasis,* chapter 2, 272, 278.

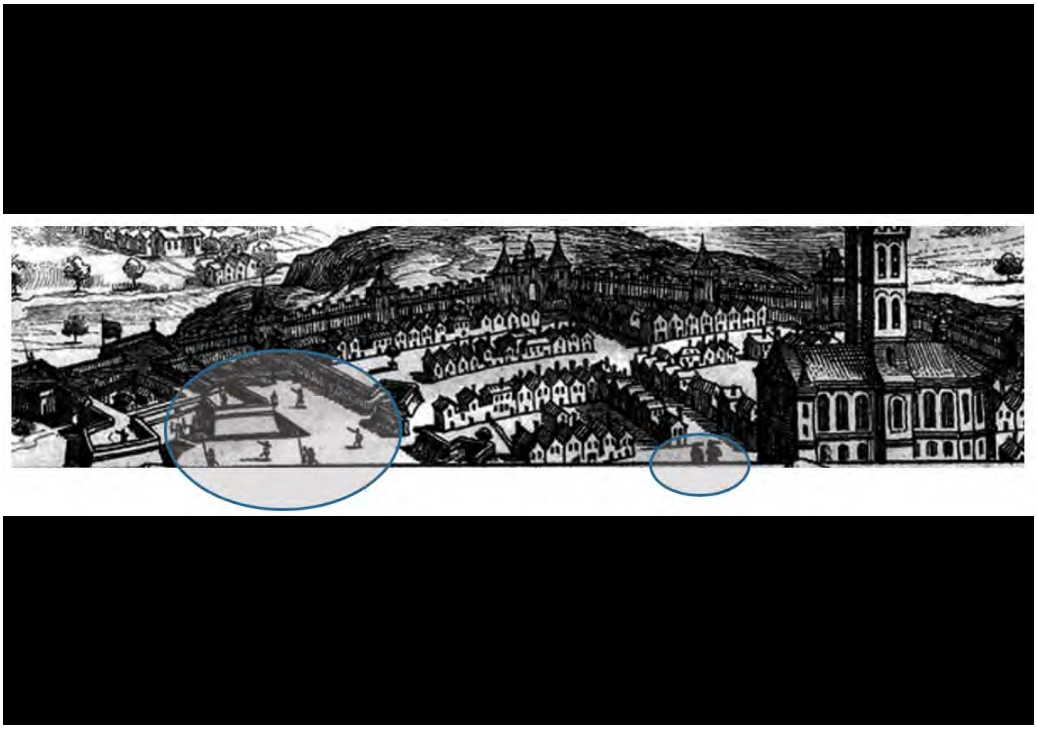

FIG. 4
Detail of Abraham Bosse, frontispiece to Thomas Hobbes, *Leviathan, Or, The Matter, Form, and Power of a Common-Wealth Ecclesiastical and Civil* (Andrew Crooke, 1651).

ends and *timor* begins is hard to say. But this much is certain: dancing is strictly prohibited.

EMPTYING THE PUBLIC SQUARE

We don't have to turn to history in order to appreciate the extent to which the reiminaging of public space has permeated our recreations and our imagination as much as our work and our everyday life. *Push 'em all* (fig. 5) provides a telling instance. Many video games are now multi-million dollar spectaculars that cost as much as a blockbuster movie to produce. *Push 'em all* is not one of them. It is cheaply made, of the sort that you can get free online and that make their pennies from the ads they force you to watch. It is owned by the game developer Voodoo, the number one publisher on App Store by downloads, which specialises in such low-end games, and has been accused of stealing or copying content from independent creators.[54] *Push 'em all* is currently one of their biggest sellers.[55] It was downloaded six million times in late 2019, and was briefly ranked the fourth most popular free app across all categories.[56] It features a single figure pushing a large log. There are masses of other figures in front of them, all the same colour and indistinguishable from one another. By pushing them with its log the player can clear the site of these contaminants, scattering them and sending them plunging over the edge of the play area to their doom.

Public gatherings in Hong Kong, Beijing, Brisbane: push 'em all. Rab'a Square 2013; Tienanmen Square 1989; Tlatelolco 1968; Amritsar 1919. "Push them hard" adds the App Store encouragingly. It is hard not to see the game as a legitimation of authoritarian violence. This is what neoliberal governance looks like: the cleansing of the public space of dissent, of all populations, by violent police action. The game embodies some kind of fantasy of the perfect placid emptiness of public space and of the nihilistic satisfactions of the will to power. "Zone cleaned," as the game intones in its electronically anodyne voice after you have completed a level. A zone not a space or a place with a history or function; it is an abstract administrative field. "Cleaned" implies an aesthetic and medical value—an act of public health—quite different from words like evacuated or emptied. The language is that of a computer game but it is equally the language of governance. The game encourages us to see the world this way, to accept its constraints and its violence, and to take pleasure in its cleanliness and discipline; to imagine ourselves as street cleaners committed to sweeping aside political detritus. The public, in public space, is a kind of dirt.

A video game seems eerily fitting. The result of the neoliberal ascendancy, says Brown, is the "desublimation of the will to power,"[57] sending

54 Jess Conditt, "Mobile Gaming Titans Keep Ripping Off Indies," *Engaget*, November 7, 2018: https://www.engadget.com/2018/07/11/mobile-clones-app-store-google-play-indie-voodoo/ .

55 Voodoo Games, *Push "em all* v. 1.10, © 2019 OHM Games SAS: see https://apps.apple.com/au/app/pushem-all/id1479551182 .

56 For download and revenue data, see https://sensortower.com/ios/au/voodoo/app/push-em-all/1479551182/overview.

57 Brown, *In the Ruins of Neoliberalism,* chapter 5, esp. 164–69; see also the seminal work on repressive

FIG. 5
Screenshots of Voodoo Games, *Push 'em all*, v. 1.10 © 2019 OHM Games SAS.

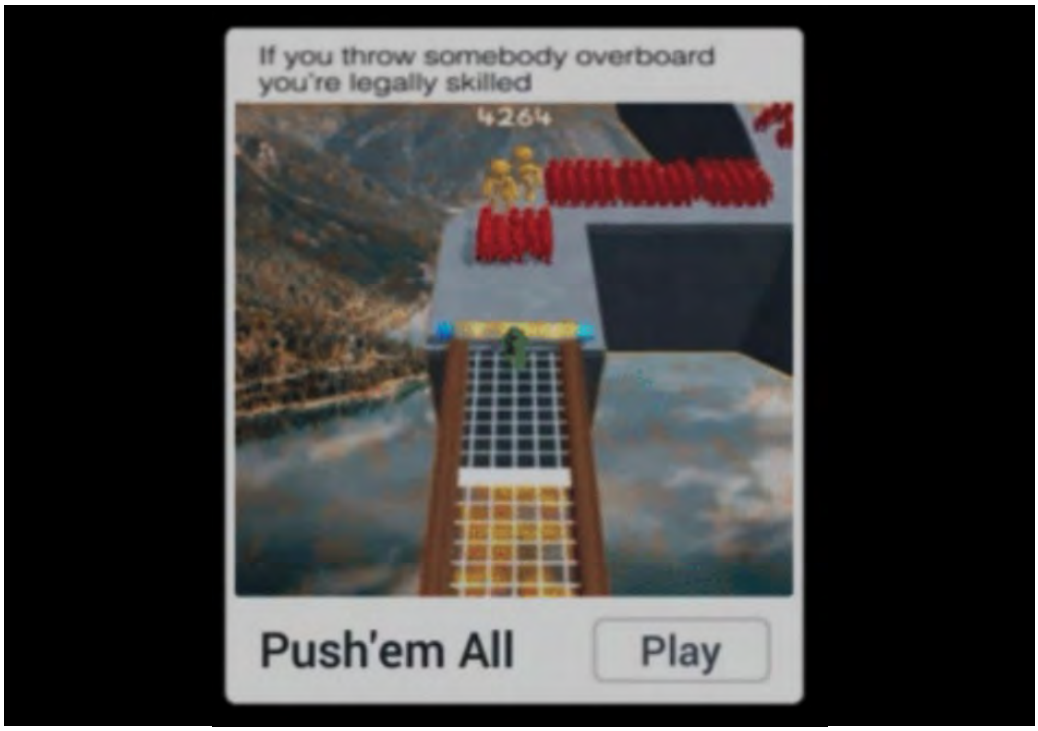

FIG. 6
Screenshot of Voodoo Games, *Push 'em all*, v. 1.10, © 2019 OHM Games SAS.

pulses of nihilism and destruction unchecked through a crippled and delegitimised public sphere. This desublimation turns political discourse itself into a game.[58] The will to power manifests itself not only in the release of nihilistic and destructive energies but also in an unbridled sense of entitlement. Play, power, and right become indistinguishable.[59] Some figures seem to be gathering together; some look like they're minding their own business. Some hold up their hands in supplication. Some try and run away. Too bad. The game speaks clearly to the need to repress political dissent in the name of political order. But at the same time, and just as importantly, it illuminates the role of contemporary media as a mode of imaginary reproduction. These images that turn the assault on public space into a game both illustrate ideological assumptions and shape them. As Louis Marin put it, they "valorise" and "modalise" power—give it a legitimacy and put it to work in our lives.[60]

The game offers up this pearl of wisdom (fig. 6): "If you throw somebody overboard, you're legally skilled."[61] At the risk of overthinking it, the word "overboard" is surely no accident. We are sending refugees or protesters to their death, whether off Lampadusa or Christmas Island.[62] We should push 'em all—away, away, driving them back into the sea. Even more, we should not just push them but "*throw* somebody," in other words, actively expel human beings from our territory. In taking these actions, the game does not merely encourage us to enjoy our power. It insists that it is *right* to do so. The law is on our side. Violent acts by riot police or by border security do not simply demonstrate a technological mastery. They are a tribute to our "legal skill."

These legal skills the Australian government is honing to perfection, in anticipation of the need to "push 'em all" in the not too distant future. The government is setting in place legal structures that will enable it to win the neoliberal game. Welfare laws, terrorism laws and border security are vivid manifestations of its desublimated nihilism, and simultaneously the measures needed to smash any resistance to it. It is the perfect ideology, which we might define as the fusion of pleasure and duty. What in Lorenzetti looked like the harmonious coming together of co-operative and public action, in our modern era seems more like its willing surrender. The strength of ideology lies in its capacity to generate motivated action in accordance with its beliefs. But its danger lies in the inscription of blindness and conformity into the everyday lives of citizens. Dancer and dance, violence and game, we are both neoliberalism's script and its embodiment.[63] The task, in neoliberal art as in

desublimation in Herbert Marcus, *One Dimensional Man* (Boston: Beacon Press, 1964), 75–78.

58 Brown, *In the Ruins of Neoliberalism,* 167.

59 Brown, 180.

60 Tom Conley, "Foreword," in Louis Marin, *Portrait of the King,* trans. Martha House (Minneapolis: University of Minnesota Press, 1988), vi, and Brown, *In the Ruins of Neoliberalism,* 6–7.

61 *Push 'em all,* screenshot of in-game ad, December 2019.

62 Amongst many discussions, see Nick Dines, Nicola Montagna and Vincenzo Ruggiero, "Thinking Lampedusa: Border Construction, the Spectacle of Bare Life and the Productivity of Migrants," *Ethnic and Racial Studies* 38, no. 3 (2015): 430–445; Dougal Phillips, "The Asphyxia of the Image: Terror, Surveillance and the Children Overboard Affair," *Arena Journal* 27 (2006): 81; Mary Macken-Horarik, "A Telling Symbiosis in the Discourse of Hatred: Multimodal News Texts About the 'Children Overboard' Affair," *Australian Review of Applied Linguistics* 26, no. 2 (2003): 1–16.

63 The connection here is surely to the ideological and political meaning of *jouissance.* See Slavoj Žižek,

life, is *zone cleaned*. O body swayed to music, O brightening glance; our bodies shape to the task and embrace it as our duty and our pleasure.

If there is a glimmer of hope to be found in any of this, it is the apparent reliance on state and law to impose these terms. It suggests that neoliberal ideology is not adequate to maintain its economic and social power. Increasing force and the shrillness of political rhetoric suggest growing resistance.[64] That public square won't empty itself. I cannot help but think that the game, in real life or on the screen, would be more challenging—and far more interesting—if played from the other side of the log. What opportunities for resistance would present themselves? For collaboration? For transformation? This would be a much harder game to play. But it would be more rewarding too. When all is said and done, "push 'em all" is a tedious and futile exercise. It's not a dream, it's a nightmare. Cleaning the zones just takes you deeper and deeper into a game you never win, level after level after level. It may yet be urgently necessary to reject these enticements, once and for all to prise apart the dancer from the dance.

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The Sublime Object of Ideology (London: Verso, 1989), 79–84; see also Martin Müller, "Lack and Jouissance in Hegemonic Discourse of Identification with the State," *Organization* 20, no. 2 (2013): 279-298; Paul Kingsbury, "Did Someboy say *Jouissance*? On Slavoj Žižek, Consumption, and Nationalism," *Emotion, space and society* 1, no. 1 (2008): 48–55.

64 Howard Caygill, *On Resistance (London: Bloomsbury, 2013);* Alessandro Bonnano, *The Legitimation Crisis of Neoliberalism* (New York: Palgrave Macmillan, 2017); Ugo Mattei, "Emergency-Based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development," in Didier Fassin & Mariella Pandolfi, eds., *Contemporary States of Emergency* (New York: Zone Books, 2009), 24–25.

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FIGURING FOLK JUSTICE

Francis Howard Greenway's Prison Scenes from Newgate, Bristol, 1812

by Helen Hughes

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INTRODUCTION

Francis Howard Greenway's pair of oil paintings, *The Mock Trial* and *Untitled [Scene inside Newgate]*, 1812, are sometimes celebrated as the only known artworks made by an Australian convict to depict imprisonment in a British gaol prior to transportation. Whether or not this claim is true, the paintings undoubtedly offer valuable insight. In the first instance, they depict in detail English prison life at the tail end of the long eighteenth century, just prior to nation-wide reform based on the recommendations of figures like John Howard, Jeremy Bentham, Thomas Fowell Buxton, James Neild, and Elizabeth Fry. Secondly, by capturing the proceedings of a mock trial, Greenway's paintings distil into an image the coexistence of different modalities of law and justice during a transitional moment in English legal history. Greenway executed the paintings in the decades following the publication of William Blackstone's landmark *Commentaries on the Laws of England* in 1765, which synthesised a range of material, legal, mythical, historical, and ideological precedents to present a picture of the common law as a principled and coherent legal structure—one to which all Englishmen were equally subject. Put another way, Greenway painted these images while English law was undergoing a formative shift: from a decentralised, localised, often unwritten, and customary practice, to a centralised, bureaucratised, written, and formal structure. By contextualising these paintings within the changing lawscape of England at this time, we may consider how, where, and why forms of folk justice were applied alongside or in spite of the dictates of the common law courts. British social historians, including most famously E.P. Thompson, have argued that folk justice vigorously defended local traditions against the profound legal, economic, and political transformations of English society of the eighteenth and nineteenth centuries. Those transformations effectively disenfranchised poor and working-class communities, both through the widespread enclosure of public land, and by the repudiation of a range of customary and informal rights (that is, established norms or traditions specific to a location, like a parish or town). A more detailed understanding of folk justice is necessary for a fuller interpretation of Greenway's prison scenes, and the tensions between the two ideals of the law—formal and informal—that his paintings captured.

Despite the rich narratives that course through Greenway's paintings, very little has been written about them for two main reasons. First, Greenway is best known as Australia's first official architect. Appointed in March 1816, Greenway worked closely with Governor Lachlan Macquarie in the early decades of the Colony of New South Wales to design and oversee the building or completion of a number of major public works. These commissions included the General "Rum" Hospital, Macquarie Lighthouse, the Obelisk in Macquarie Place, the Military Barracks, the Convict Barracks at Hyde Park, and St Matthew's Church. While Greenway regarded himself as an "architect *and* painter," the 1812 paintings are normally considered footnotes to his vastly more significant architectural career.[1] His transparency of Governor Arthur

Phillip hung prominently in Government House for the thirtieth-anniversary celebrations of the establishment of the Colony at Sydney Cove on 26 January 1818, but is no longer extant.[2] Indeed, such transparency paintings—made from delicate materials like gauze, cotton or linen and displayed "perilously close to the naked flame that illuminated them"—were not intended to last.[3] Nor have the seven hand-painted aprons that he produced as part of an ill-fated commission for members of the Sydney Masonic Lodge of Social and Military Virtues, No. 227, in 1816, been preserved.[4]

Secondly, while being valuable in a circumstantial or illustrative sense, Greenway's Newgate paintings have a decidedly amateurish air about them. Like many naïve artworks made within carceral institutions, their attention to detail comes at the expense of the overall composition: each hand and facial gesture, like each stone in the wall and iron-grated window, is articulated with an equal amount of detail. Whereas the faces appear wooden and mask-like, Greenway's treatment of architecture and perspective is, perhaps not surprisingly, vibrant and skilful, thereby drawing the inert background unexpectedly into the activity of the foreground. Moreover, Greenway's scenario is artificial and theatrical. Too many convicts face us, transforming the prison courtyard into a spot-lit stage. Thus, in the range of studies dedicated to Greenway, the paintings have been afforded little attention.

Yet as evidence as much as art, they offer the viewer two valuable documents of Newgate Prison just prior to its demolition in 1820. Their naïve quality notwithstanding, they capture a complex set of legal relations with a certain clarity. And, in spite of Greenway's much vaunted self-interestedness and subsequent disidentification with the convict class upon his arrival in the Colony of New South Wales in February 1814, the paintings provide significant evidence of collective convict action. Thompson highlights the resilience of working-class and rural practices of self-determination and self-governance at a time when new practices of law and economy sought to deny their value and indeed their existence. Greenway's paintings suggest the same character and strength, no matter how constrained and impoverished the circumstance.[5]

The author acknowledges the extremely valuable editorial feedback from the peer reviewers, and the journal's editors.

1 Greenway is described as an "architect and painter" in the New South Wales Governor's Despatches (Macquarie). ML A 1192, 898. State Library of New South Wales, Sydney.

2 For an analysis of the role of transparencies in early colonial Australian painting, see Anita Callaway's chapter "Clarifying Australian Painting," in *Visual Ephemera: Theatrical Art in Nineteenth-Century Australia* (Sydney: UNSW Press, 2000), 9–21. Greenway's "likeness" of Governor Phillip is discussed on 13.

3 See Callaway, 4. Callaway explains that eighteenth – and nineteenth-century transparencies were often used as outdoor decorations for night-time celebrations and displayed everything from heraldic designs to complex pictorial narratives.

4 While in prison, Greenway also copied twenty-six pages from Robert Fabyan's *The Chronical of Fabian, whiche he nameth the concordaunce of histories, newly perused and continued from the beginnyng of Kyng Henry the seventh, to thends of Queens Mary*, 1559, to replace the missing pages of a copy owned by the wealthy Bristol merchant Charles Harford. This copy is now held in the collection of the National Library of Australia, Canberra.

5 Greenway's individualism and self-interestedness is emphasised in all the key texts on him. At one point, he even demanded a government wage that was higher than the Governor's own. It is unlikely that Greenway forged any meaningful solidarity with the convict class, who, once in Sydney, became the labour force that constructed his buildings. Greenway biographer Alasdair McGregor notes that he frequently "fought with his convict labour force whose skills were patchy at best, but managed to

FIG. 1
Francis Howard Greenway, *The Mock Trial*, 1812, oil on canvas, 42.2 x 68.2 cm, Mitchell Library, State Library of New South Wales, Sydney, ML 1002.

Painted in August and July 1812 respectively, *The Mock Trial* and *Untitled [Scene inside Newgate Prison]* are identically scaled companion paintings (56.5 x 82.5 cm each). Convention has it that they are to be read sequentially, as in the manner of Hogarth's earlier, moralistic narrative series like *A Harlot's Progress* (1732) or *A Rake's Progress* (1733–35), or William Powell Frith's later *The Race for Wealth* (1878–80), which also includes courtroom and prison-yard scenes. Though painted second, *The Mock Trial* is typically understood to be the first image in the sequence, and so is where we shall begin. But we shall return to the question of their order in more detail later.

THE MOCK TRIAL

The Mock Trial is a modestly sized painting—but, as we have seen, it is compact, loaded with visual information. Executed in an anaemic palette of pale browns and greens, it depicts an interior courtyard of Newgate Prison, also known as Bristol City and County Gaol, formerly located in the centre of the old port city of Bristol in England's southwest. Inmates are shown variously sitting and standing in a line around the perimeter of a courtyard, known colloquially as the "tennis court," with their backs up against a distinctively green-hued stonewall. This was a grimy wall, "scraped and white-washed" just once a year, echoing the deeply unhygienic conditions to which inmates were subjected.[6] While Newgate, like its more infamous namesake in London, divided its inmates into debtors and felons, then further subdivided them into male and female, the tennis court was the only large open-air courtyard in the entire complex, and was thus shared by all the inmates who were admitted entry, per subdivision, at different times of the day.[7] Here we see male felons.

It is no longer possible to identify accurately each of the men depicted in *The Mock Trial*, assuming that Greenway depicted individuals as opposed to types.[8] However, surviving Gaol Delivery Fiats and Calendars of Prisoners from Newgate in the year of 1812 allow us to familiarise ourselves with some of the people incarcerated alongside Greenway and the grounds for their conviction.[9]

cajole acceptable work from their unwilling bodies." Alasdair McGregor, *A Forger's Progress: The Life of Francis Greenway* (Sydney: NewSouth, 2014), 3. On Greenway's reputed self-interestedness, see Robert Hughes, *The Fatal Shore: The Epic of Australia's Founding* (New York: Alfred A. Kopf, 1986), where he describes Greenway as "a touchy, arrogant, painstaking and uncompromising man" (341). His earlier biographer, M. H. Ellis, describes him as "vain beyond his generation." He also writes that one of Greenway's "main traits was that he could not bear to lose a battle, even if his hopeless resistance must take such form as to bring him ruin." M. H. Ellis, *Francis Greenway: His Life and Times* (Sydney and London: Angus and Robertson, 1949), 11, 10.

6 James Neild, *State of the Prisons in England, Scotland, and Wales, Extending to Various Places therein Assigned, not for the Debtor Only, but for Felons also, and Other Less Criminal Offenders. Together with Some Useful Documents, Observations, and Remarks, Adopted to Explain and Improve the Condition of Prisoners in General* (London: John Nichols and Son, Red Lion Passage, 1812), 79.

7 Neild, 78.

8 Later, in the Victorian era, we might expect a gaol scene like this to present a catalogue of criminal types based on the popularity of physiognomy at the time. For a comprehensive analysis of this phenomenon as it related to artists and caricaturists, see Mary Cowling, *The Artist as Anthropologist: The Representation of Type and Character in Victorian Art* (New York: Cambridge University Press, 1989).

9 As Georges Lamoine has explained, "Gaol Delivery Fiats were the product of a court sitting under the

A large number of the prisoners listed in the March 1812 Calendar of all the Prisoners in His Majesty's Gaol of Newgate were children. Michael Leonard, aged twelve, was sentenced to seven years' transportation for stealing a pair of worsted stockings. The thirteen-year-olds Joseph Miller and Charles Moody were also sentenced to transportation, having stolen two silver-plated spoons between them.[10] Six men were imprisoned on charges of assault, three in total for "buggery," four for murder or manslaughter, five for embezzlement, four on counterfeiting and forgery-related charges (including Greenway, who was convicted of forgery), and four for unlawful assembly.[11] Unsurprisingly, the most numerous amongst Greenway's fellow inmates were the sixty men charged with larceny. One man was charged with stealing two pounds of tallow, another for twelve bushels of malt, another for two quarts oats, and one for a leg of pork. John Llewellin and Thomas Ledger were charged with stealing an entire pig. A few men were imprisoned for stealing metal (one William Cooper for iron, one Dennis Cramer for copper), while William Henry, fourteen, was imprisoned for stealing twenty-one pounds of tobacco. But the most popular stolen good by far was sugar—a substance called "sand" in convict slang.[12] Over the course of 1812, at least nine men were imprisoned in Newgate for stealing sugar, reminding us, alongside the import of tobacco (both of which came from Caribbean plantations), of the direct and indirect presence of the slave trade in the port city of Bristol.

Sugar played a vital role in the diets of the poor in eighteenth-century England. Addictive yet non-nutritious, it was an ingredient that, as Peter Linebaugh has noted, sweetened the bitterness of the industrial diet of coffee and tea, providing important though unsustainable bursts of energy throughout the work day.[13] Meanwhile, the long eighteenth century saw the diminishing privileges of workers in the sugar trade—from the river workers who transported it, to the coopers who opened and sealed the hogsheads—to customary samples of the substance itself. It was a story repeated across many English industries and customs, from coal heaving to wood gathering:

king's commission of Assize, Oyer and Terminer and General Gaol Delivery. They are orders issued by the court and signed by the Judges." Georges Lamoine, *Introduction to Gaol Delivery Fiats* (Bristol: Bristol Records Society, 1989), ix.

10 See: Gaol Delivery Fiats, JQS/GD/43: 17 April 1811; JQS/GD/44: 23 March 1812; and Quarter Sessions papers: JQS/P/286: Calendar of prisoners; informations: general release of actions October 1811 – January 1812; JQS/P/288: Calendar of prisoners; informations; notice of surrender January – March 1812; JQS/P/297: Calendars of prisoners April 1812 – April 1813. Bristol Archives, Bristol.

11 If we include women, not pictured in Greenway's paintings, these figures rise to ten for assault, six for murder or manslaughter, nine for counterfeiting or forgery-related charges and an extra two for keeping and maintaining a disorderly house. For larceny, the figure rises to seventy-two. Ibid.

12 Sugar is defined as such in James Hardy Vaux's *New and Comprehensive Vocabulary of the Flash Language*, published in 1819 by John Murray in London, which is also, incidentally, Australia's first dictionary. Throughout this essay, I include these terms in an effort to conjure the soundscape of the image, as well as point to the rich vocabulary shared by the English convict class—one so complete that lawyers and judges in the criminal courts often required interpreters. See Simon Barnard, *James Hardy Vaux's 1819 Dictionary of Criminal Slang: And Other Impolite Terms as Used by the Convicts of the British Colonies of Australia with Additional True Stories, Remarkable Facts and Illustrations* (Melbourne: Text Publishing, 2019).

13 For a discussion of workers' rights in all aspects of the eighteenth-century British sugar trade, see Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth-Century* (London: Verso, 2003), 410–411, and 416–417. For a more expansive history, see Sidney W. Mintz, *Sweetness and Power: The Place of Sugar in Modern History* (New York: Viking, 1985), 214.

what was once a perquisite or customary right had, by the end of the eighteenth century, become a crime. And this transition from a customary to capitalist economy led, accordingly, to the incarceration or execution of large sections of the British poor and working classes. Along with the population boom and overcrowding in major cities, this economic transition was one of the key factors leading to England's so-called crime wave of the eighteenth century, and forms, along with the transition from localised customary to centralised common law, an important historical backdrop to Greenway's paintings.[14]

As the tennis court was open-air, the light source of the painting is distinctly vertical. Sunlight enters the scene from above, producing the dramatic plane of shadow that bisects the canvas diagonally. Greenway's windows, on the other hand, appear more as black holes than as channels for light and air. Like many of its contemporaries, Newgate was characterised by an unrelenting darkness. The prison reformist James Neild observed of its most notorious room, known as "the condemned room," in 1812: "This dreary place is close and offensive; with only a very small window, whose light is merely sufficient to make darkness visible."[15] Indeed, Newgate's windows were double and treble iron-grated, blocking out the sun rather than letting it in. All this contributed to the oft-remarked miasma surrounding its inmates, and the spread of illness and disease between them.[16]

While the cast of inmates in *The Mock Trial* is ostensibly entirely white and male, within this group there is some diversity. The line-up is flanked by youths (possibly the twelve-year-old Leonard, or either of the thirteen-year-olds, Moody and Miller), while the oldest character's blue-grey face and wispy, white hair lurks in the shadows of the archway like a ghost (the oldest-known man imprisoned at this time was the fifty-year-old Thomas Carter, charged with sodomy). Greenway depicts a spectrum of financial status, from utter impoverishment to relative affluence: one man is shoeless, another's clothes torn, whereas the apparently wealthier inmates wear frock coats, waistcoats, stockings, and cravats. A better indication of status, however, is the amount of iron manacles worn by each inmate, each of whom was shackled upon arrival to easily distinguish them from visitors to the gaol, and who entered freely and often in hoards each day. The manacles—or "darbies"—were also intended to extract profit from the prisoners for the privately-run prison. In a process known as "easement of irons," fees could be paid to the gaol keeper to lighten their weight. Thus, the two men in ragged clothes standing in the doorway are "slanged" from ankle to waist, while the better-dressed inmates sport just a few interlocking rings around one ankle.

The prevalence of alcohol in this picture—indicated by the ceramic flagons grasped by three of the men to the right of the composition—is not

14 The Waltham Black Act of 1723, which was not repealed until a century later in 1823, was perhaps the legal code most responsible for the legitimation of the processes of enclosure or land privatisation, and thus the criminalisation of numerous customary practices associated with common land. For a comprehensive account of this code, see E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London: Allen Lane, 1975).

15 Neild, *State of the Prisons in England, Scotland, and Wales*, 78.

16 Neild, 78.

unrelated to the habit of prison keepers profiteering from prisoner discomfort. Most prisons in England at this time ran a taphouse or cellar. Beer, sometimes wine, and even, on occasion, gin were sold to inmates, who could drink as much as they could afford to. All revenue was for the profit of the prison.

Crucially, within the picture we note the depiction of more crimes being committed inside the gaol. A prominent prison reformer of the time, Thomas Fowell Buxton, wrote of Bristol's tennis court: "In this yard is to be seen vice in all its stages; boys intermingle with men; the accused with the convicted; the venial offender with the veteran and atrocious criminal."[17] His observation is a common enough trope of criticism of the British prison estate at this time: criminals beget criminals. Arthur Griffiths, a late nineteenth-century chronicler of London's Newgate Prison, put it memorably thus: "The prison was still and long continued a school of depravity, to which came tyros, some already viciously inclined, some still innocent, to be quickly taught all manner of iniquity, and to graduate and take honours in crime."[18] Accordingly, Greenway inflects the sociality of his prison scene with a kind of fatalism pivoting on the act of pickpocketing.[19] In *The Mock Trial*, the hand is "the visual voice" of painting.[20] Hands thieve, drink, smoke, point, scratch, tickle, clutch, pat and gesticulate. Above all, as they reach into neighbours' pockets, around shoulders, form a handshake, or a subtle distraction, hands bind the inmates to one another, locking them, like their iron manacles, into a single criminal body.[21]

THE CONTEXT AND HISTORY OF MOCK TRIALS

Mock trials and courts were a common practice of convict folk law. They were staged when a prisoner—often one who considered himself to be morally upright (a "square-cove"), perhaps claiming to be wrongfully convicted in the first place and refusing to concede to the prison's internal code of conduct—was perceived to have committed an offence against the dominant prison community. The offender was then tried by a jury of his convict peers. Griffiths suggests that offences were typically trivial, for instance coughing too loudly, leaving a door open, or moving an object that was "not to be touched." Speaking of the mock trial of a lawyer (the very definition of a "square-cove")

17 Thomas Fowell Buxton, *An Inquiry, whether Crime and Misery are Produced or Prevented, by our Present System of Prison Discipline. Illustrated by Descriptions of the Borough Compter; Tothill Fields Prison; the Jail at St. Albans; the Jail at Guildford; the Jail at Bristol; the Jails at Bury and Ilchester; the Maison de Force at Ghent; the Philadelphia Prison; the Penitentiary at Millbank; and the Proceedings of the Ladies' Committee at Newgate* (London: J. and A. Arch, 1818), 133.

18 Arthur Griffiths, *The Chronicles of Newgate* (London: Chapman and Hall, 1896), 281.

19 This interpretation owes somewhat to the following description, from the article "The Hidden History of Banking," published by the Reserve Bank of Australia, museum.rba.gov.au/exhibitions/hidden-history-banking/, accessed September 12, 2019. "The convicts' hands form gestures like the links of a chain as they indicate varying incidents."

20 Mary D. Garrard, "Artemesia's Hand," *The Artemesia Files*, ed. Mieke Bal (Chicago: University of Chicago, 2006), 19.

21 Throughout his book, Linebaugh emphasises the causal relationship between "criminality" and the working-class experience, commenting that "economists have been hard put to explain how the labouring people could actually live given the wage rates that prevailed," thereby raising the question of the "relationship between thievery and survival." Linebaugh, *The London Hanged*, 8.

who had been locked-up in London's Newgate, he writes:

> A prisoner, generally the oldest and most dexterous thief, was appointed judge, and a towel tied in knots was hung on each side in imitation of a wig. The judge sat in proper form; he was punctiliously styled "my lord." A jury having been selected and duly sworn, the culprit was then arraigned. [. . .] Various punishments were inflicted, the heaviest of which was standing in the pillory. This was carried out by putting the criminal's head through the legs of a chair, and stretching out his arms and tying them to the legs. The culprit was then compelled to carry the chair about with him. But all punishments might readily be commuted into a fine to be spent in gin for judge and jury.[22]

Such mock trials, therefore, participated in the pageantry and symbolic rituals of English common law—the majesty, which, as Douglas Hay argued, was central to its ideological legitimation.[23] But Greenway may not so much suggest emulation as parody. In the painting's topsy-turvy world of justice, the trial is presided over by a thief-judge while further crimes are committed during—perhaps even as part of—"official" judicial procedure. The man with his eyebrow raised and sporting a brown coat in the centre-right of the composition brandishes the "judge's wig" in his left hand, while his right hand picks the pocket of his neighbour. The upright board-like object held by the blue-coated man in the left of the painting is an appropriated pillory (a wooden bench, like that depicted in painting's lower right), and the leather strap a means of securing the accused to it. The judge himself is most probably the man in the middle of the composition, wearing a brown cocked or tricorne hat, and to whom a number of the prisoners gesture. If, as legal emblem scholars like Peter Goodrich have suggested, the allegorical figure of Justice is traditionally raised on a pedestal, a mediator of law from a heavenly as opposed to earthly provenance, such celestial codification most certainly does not apply to this Newgate judge, who is depicted as decidedly of and with the people over whom he would preside.[24] Where Justice is traditionally pictured blindfolded to indicate her impartiality, this Newgate judge is locked in eye contact with a man to his right, who addresses him with a familiar, open hand.[25] Even raised on a stool, the judge is still below the eyeline of at least four of the other inmates surrounding him, and on a par with seven more. Not only does his head not reside in the celestial court above, there is no sky to be had at all. Nevertheless, the sword of justice is present here: the figure positioned to the judge's right casually rests a broken shovel over his right

22 Griffiths, *The Chronicles of Newgate*, 357.

23 Douglas Hay, "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975), 17–63.

24 See for instance Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance* (London: Cambridge University Press, 2014), 130.

25 In the chapter "Visibilities," Goodrich elaborates on the meaning of the hand in law (what he terms "legal chirosophy"), explaining that hand gestures, along with facial expressions, and tone and volume of voice, were all crucial aspects of the lawyer's rhetorical devices in the courtroom. Goodrich, *Legal Emblems and the Art of Law*, 207–245.

arm. He is the enforcer, and his elevated position over the judge suggests not the transcendence of justice, but the immanence of violence.[26]

But such a reading is at least open to query. Indeed, there exist other, less patronising accounts of the purpose of mock trials amongst the convict classes. In *A Picture of England: Containing a Description of the Laws, Customs and Manners of England* (1791), for instance, the visiting Prussian officer and historian Johann Wilhelm von Archenholz described mock trials held by inmates of the London prisons The King's Bench and The Fleet—two "republics," he writes, "existing in the bosom of the metropolis, and entirely independent of it."[27] Here, he writes, somewhat approvingly: "Every prisoner, whether man or woman, is a member of this commonwealth, and participates in all its privileges. They choose a lord chief justice, and a certain number of judges, who assemble once a week and decide controversies."[28] In addition, "Twelve jurymen [are] impanelled, as in the national courts."[29] Before these mock courts, inmates were tried for the very same kinds of crimes that would have landed them in The King's Bench or The Fleet in the first place—larceny, breach of the peace, or debt. On such occasions, von Archenholz explains that:

> the culprit, with a paper stuck on his breast describing his crime, is obliged to walk through every street, preceded by a herald, who with a loud voice assigns the reason of the punishment, and tells the inhabitants to beware of the delinquent. This inspires everyone with hatred to the crime; and as the criminal cannot escape out of the narrow circle in which he may be said to vegetate, rather than to live, it happens very rarely that any one exposes himself to a humiliation so terrible in its consequences.[30]

The trial may be mock in the way that a turtle soup may be mock: not as satire but as substitute. Those that von Archenholz describes evidently not only meted out actual punishment, but also served to deter future offences, serving a quasi-legal purpose. As Thompson observed, such modes of informal justice are better understood as ambivalent—oscillating "between the mockery of authority and its endorsement."[31] These expressions of authority were, as Martin Ingram put it, precarious, temporary and "exceedingly fragile."[32]

Timothy Millett offers yet another explanation for mock trials in prisons, this time emphasising their utilitarian function as a kind of legal aid for those awaiting trial. Millet suggests that detainees in London's Newgate in the

26 Thanks to my colleague Alex Brown for this insight and to the rest of the Orbital reading group at MADA, Monash University, for reading an earlier draft of this paper.

27 Johann Wilhelm von Archenholz, *A Picture of England: Containing a Description of the Laws, Customs and Manners of England. Interspersed with Curious and Interesting Anecdote* (Dublin: P. Byrne, 1791), 164.

28 Wilhelm von Archenholz, 169–170.

29 Wilhelm von Archenholz, 170.

30 Wilhelm von Archenholz, 171.

31 E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1990), 482.

32 Martin Ingram, "Ridings, Rough Music, and the "Reform of Popular Culture" in Early Modern England," *Past & Present* 105 (November 1984): 97.

eighteenth and early nineteenth centuries "tried" each other in their cells, the court more moot than mock.[33] This would also account for why, from Griffith's perspective, the most hardened criminal would direct proceedings as judge, for he would have had the most experience in real courts and assizes. Indeed, as the thrice-transported English convict James Hardy Vaux explained in 1819, "judge" is a flash term (convict slang) for : "A *family-man*, whose talents and experience have rendered him a complete adept in his profession, and who acts with a systematic prudence on all occasions, is allowed to be, and called by his friends, a fine *judge*."[34] ("Family" refers to fraternity amongst the criminal class.)

Outside the context of the prison, but only just, the Irish poor and working classes living in London in the eighteenth century performed mock courts as a kind of cathartic theatre. As Linebaugh argued in *The London Hanged*, in such contexts mock trials were played along with other games such as "Coining the Money," "Hiding the Robber," and "Hearing Confessions"—all of which served as "inversions of class-based justice," parodies of the English legal system against which Irish subjects stood barely a chance. These games were played principally at night-time wakes, which were a common occurrence—required to mourn the increasing number of Irish dead sacrificed on the Tyburn gallows. On this note, Linebaugh recalls an Old Bailey proverb of the time: "The name of an Irishman is enough to hang him."[35] So too, the therapeutic aspect of mock trials staged within prisons, in which prisoners acted out the very rituals so intimately entwined with their own suffering and oppression, cannot be ignored. In prison, "new chums" are ready bait for "old chums"—and mock trials a means for prisoners to transfer the scorn heaped upon them by the criminal justice system onto new victims. The therapeutic angle of mock trials may thus be read in two opposing ways: on the one hand, as a form of class-based ridicule; and on the other, as a means of internalising and assimilating authoritarian culture in order to mitigate its traumatic impact.

Based on Greenway's stylistic treatment of the scene, which is largely devoid of caricature (slave as it is to a kind of realism), Greenway's treatment of the mock trial seems ultimately to affirm its legal authority, rather than ridicule it. This reading becomes more persuasive when we consider the relationship of mock trials to broader practices of folk justice in England at the time, as well as the complex relationship of folk justice to common law. Greenway's affirmation of the mock trial custom also comes into sharper focus when we read *The Mock Trial* in relation to its companion painting, *Untitled [Scene inside Newgate]*.

33 Timothy Millett, "Leaden Hearts," in *Convict Love Tokens: The Leaden hearts the Convicts Left Behind*, ed. Michele Field and Timothy Millett (Kent Town, South Australia: Wakefield Press, 1998), 11.

34 Hardy Vaux, in Barnard, *James Hardy Vaux's 1819 Dictionary of Criminal* Slang, 125.

35 See Linebaugh, *The London Hanged*, 318. For a more detailed account of these games, see Seán Ó Súilleabháin, *Irish Wake Games* (Cork: Mercier Press, 1969).

FOLK JUSTICE

In his book *Informal Justice in England and Wales 1760–1914*, Stephen Banks locates mock trials within an expansive repertoire of folk justice that included effigy-burning, rough music or charivari, skimmington or "skivetty" rides, riding the stang, ducking or "cucking," and bridling.[36] Folk justice existed outside common law and was predicated on highly specific local communal and customary jurisdictions tied to parishes and towns. A malleable concept, folk justice is a term that encompasses a range of practices, from extrajudicial vigilantism to communal pageantry to political struggle. Banks—like Thompson and Ingram before him—demonstrates the different ways in which folk justice related to that of the common law courts, sometimes meted out in spite of its protections, and sometimes in accordance with them. For instance, Banks describes how, in the 1840s, duelling culture was rampant amongst the officers' mess in the army and navy. At common law, participating in a duel was a misdemeanour, and killing another person in the course of a duel was a felony. Despite this, military tribunals continued to "incite or compel their members to commit these offenses."[37] As it were, such tribunals would punish officers for refusing to break English common law. To make the opposite point, that folk justice and common law sometimes formed an alliance, Banks cites a renowned charivari from 1618 in which a night-time raid was effected upon an unmarried couple cohabiting in Burton-on-Trent.[38] The leader of the raid, which resulted in the couple being placed in the stocks, was the town's constable himself, who "alleged that his actions had been *ex post facto* approved by the justices in quarter sessions."[39]

The distinctive community values of the folk justice tradition need also be recalled. First, rough justice was essentially patriarchal and misogynist. Charivari (a noisy procession through town including the banging of pots and pans, rattling of kettles filled with stones, and singing of ballads) was often used as a punishment for women: for scolds, shrews, prostitutes, and wives who were adulterous or who beat or "henpecked" their husbands, along with

36 Some of these terms may require brief definition. Very broadly speaking, rough music or charivari describes public processions designed to shame the malefactor; attention is drawn to him or her through the banging of pots and pans, and by shaking kettles filled with stones, often accompanied by the singing of rhymes or ballads. Skimmington rides are also processional, involving the malefactor being placed backwards on a horse or donkey (the latter is slower, thus protracting the shame ritual) and drawn through the centre of the village. Skimmingtons sometimes involved wearing animal horns or antlers, white shirts, and carrying a white distaff. Sometimes the next-door neighbour of the offending person would ride in his or her place, or an effigy. Riding the stang is related to a skimmington, except a long pole or a wooden horse is used instead of a live animal. Ducking or "cucking" involved tethering the offender either to a chair (a ducking or cucking stool) or enclosing them in a cage, which is then "ducked" under water in a kind of purification ritual that sometimes led to death by drowning. Bridling—a specifically female punishment that would bind the victim's mouth shut with a head brace fitted with sharp metal teeth that may puncture her tongue—was a less common though extremely sadistic form of punishment, producing some of the most frightening images of folk justice. The bridle was often referred to as a "scold's bridle." See Stephen Banks, *Informal Justice in England and Wales 1760–1914* (Suffolk: Boydell and Brewer, 2014).

37 Banks, *Informal Justice*, 55.

38 Banks, *Informal Justice*, 28. For more detail on the Burton-on-Trent case study, see the earlier text Banks cites by Joan Kent, A. O. Q/SI West Kent Mich. 1708 ff. 9, 12.

39 Ingram, "Ridings, Rough Music, and the "Reform of Popular Culture," 105.

the husbands who "allowed" themselves to be henpecked (and were hence feminised). Such women were perceived as a threat to the deeply patriarchal order of village or parish life, thereby necessitating a highly public shaming ritual, which was often administered during festival times thus guaranteeing the largest possible audience.[40]

Yet secondly, folk or rough justice also served an important function protecting and upholding common and workers' rights. As Thompson shows, many of these rights were long-standing traditional perquisites or entitlements, while other customs were invented in order to establish new protections.[41] Riding skimmington (mounting an offender backwards upon a horse or donkey, dressed in a white shirt and sometimes adorned with animal horns, then parading them through the centre of town) was a punishment often meted out against known enclosers of common forest land, and also against malefactors who "abused patents of monopoly" (often one and the same person).[42] This fact led Ingram to venture that such forms of popular justice were not just quasi-legal but political. Ontologically, folk justice was a collective enterprise that would have been difficult (though not impossible) to instrumentalise in the self-interest of an individual.[43] Its application required the participation of a large part of the community. Punishment was administered "in a spirit of solidarity" against individuals who violated the rights or values of the community as a whole, rights and values which had built up over centuries and were upheld by inhabitants of a particular town or parish.[44]

The proto-unionist aspect of folk justice as collective action is central to Thompson's analysis in *Customs in Common: Studies in Traditional Popular Culture*. Thompson notes that ritualised punishment was employed to reprobate "unfaithfulness of workmen to their fellows when on strike, and dishonest tricks in trade."[45] Citing Brockett's 1829 glossary definition of "riding

40 For a more detailed account of patriarchal misogyny in folk justice, see David Underdown, "The Taming of the Scold: The Enforcement of Patriarchal Authority in Early Modern England," in *Order and Disorder in Early Modern England*, ed. Anthony Fletcher and John Stevenson (London: Cambridge University Press, 1985).

41 Thompson, *Customs in Common*.

42 Martin Ingram, "Judicial Folklore in England Illustrated by Rough Music," in *Communities and Courts in Britain 1150–1900*, ed. Christopher Brooks and Michael Lobban (London and Rio Grande: The Hambledon Press, 1997), 74–75.

43 For a detailed account of what seems to have been a highly self-interested staging of folk justice, see David Rollison's analysis of a "mock groaning" (mock birth) instigated by Isaac Humphries in Westonbirt in 1716. David Rollison, "Property, Ideology, and Popular Culture in a Gloucestershire Village 1660–1740," *Past and Present* 93 (1981): 70–97.

44 Banks, *Informal Justice*, 7. On this point, Ingram explains that charivaris "asserted the validity of a system of collective values which was stronger than the vagaries of individuals." Ingram, "Ridings, Rough Music, and the 'Reform of Popular Culture'," 99.

45 William Henderson, *Notes of the Folk-lore of the Northern Counties of England and the Borders* (London: Published for the Folk-lore Society by W. Satchell, 1879), 29, cited in Thompson, *Customs in Common*, 493. Thomson further notes: In Woking, rough music was deployed against tithe-protectors, enclosers, and overzealous landlords, alongside those who "overstocked the common or cut excessive turfs and faggots." Further West, in the so-called heartland of the skimmington, it was "employed in actions against workhouses and turnpikes"—and nowhere more famously than in South Wales during the Rebecca riots against the turnpike tolls in the 1840s, where the *ceffyl pren* (Welsh for wooden horse—a wooden pole or frame to which the offender was tethered) played a major role in the demonstrations. Thompson, *Customs in Common*, 519–520.

the stang" (a punishment related to a skimmington ride, more common in Scotland and the north of England), the ritual is described as being inflicted on "such persons as follow their occupations during particular festivals or holidays, or at prohibited times, where there is a stand or combination among workmen."[46]

Such accounts provide further insight into Greenway's depiction of a mock trial. Greenway's *Mock Trial* is insistently horizontal, rather than vertically hierarchical, in its composition. Like Hogarth's *Hudibras and the Skimmington* of 1725–26, or Thomas Rowlandson's 1820 copperplate engraving of *Dr Syntax with the Skimmington Riders*, Greenway's convict crowd is a level, unified, collective body, sutured together not only by their hands and manacles, but also by the intense matrix of eye contact and finger-pointing that overlays the entire scene. Toward the end of *Customs in Common*, Thompson reflected that folk justice is "enacted by and within the community"—a form of law that "belongs still to the community and is theirs to enforce."[47] In *The Mock Trial*, Greenway provides a surprising and under-appreciated context for this collective, self-determining, and self-governing aspect of English folk justice—that of the convict class.

UNTITLED [SCENE INSIDE NEWGATE]

The Mock Trial is thought to include a self-portrait.[48] Greenway sits in the lower left-hand corner of the canvas, in navy frockcoat, pipe in left hand. He looks beyond the left edge of the canvas, out of the scene while pointing back to the centre of it with his right index finger. Meanwhile, a man to Greenway's left tickles his ear with a clay pipe, while a young inmate to his right picks his pocket. James Broadbent suggests that Greenway places "himself as a distinguished figure among, but not of, the mob."[49] To my eyes he appears very well integrated: shoulder to shoulder and knee to knee with his chums. The extent to which Greenway identified with the convict body may be determined by comparing *The Mock Trial* to its companion, *Untitled [Scene inside Newgate]*, where Greenway depicts himself uselessly protesting a perceived injustice rather than capitulating to the internal law of the prison. If Greenway can be seen to be an insider of sorts in the former painting, he appears a hapless outsider in the latter.

The narrative transition that seems to occur between the two paintings is contingent on the order in which we read them. As mentioned, *The Mock Trial* is typically read first and *Untitled [Scene inside Newgate]* second. Some commentators have been inclined to understand the narrative as showing

46 J. T. Brockett, entry for "Riding the Stang," in *A Glossary of North Country Words in Use* (Newcastle-on-Tyne; E. Charnley, 1829), cited in Thompson, *Customs in Common*, 492.

47 Brockett, "Riding the Stang," 530–531.

48 The self-portrait in *The Mock Trial* seems to be corroborated by the only other known surviving artwork attributed to Greenway, an undated self-portrait on paper held in the Mitchell Collection of the State Library of New South Wales. The two oils paintings have been understood to be self-portraits, according to the generations of Greenways to have inherited them. Provenance record for Francis Howard Greenway, ML1002 and ML 1003. State Library of New South Wales, Sydney.

49 James Broadbent, "Francis Greenway 1777–1837," in James Broadbent and Joy Hughes, *Francis Greenway: Architect* (Sydney: Historic Houses Trust of New South Wales, 1997), 10.

FIG 2.
Francis Howard Greenway, *Untitled [Scene inside Newgate Prison]*, 1812, oil on canvas, 42.2 x 68.2 cm, Mitchell Library, State Library of New South Wales, Sydney, ML 1003.

Greenway being pickpocketed in the first scene, and reporting the theft of his silver pocket watch (dangled above a card game in the background) to the redcoat in the second.[50] But *Untitled* was painted first, in July 1812, and *The Mock Trial* second, in August. Read in this order, a different narrative emerges. We might understand Greenway the inmate to have graduated—from new to old chum. In the first painting, he is affronted by and subjected to the seemingly alien logic of convict folk justice, and accordingly stands apart from it. By the time of *The Mock Trial* a month later, he is assimilated into the convict body at large and participates in its customary law.[51]

In *Untitled [Scene inside Newgate]*, the sun beats down on the court from the opposite side of the canvas, indicating a different time of day to that depicted in *The Mock Trial*. From the uppermost window, heads of garlic and a ceramic vessel, presumably filled with vinegar, hang from a rope, placed there as a useless precaution against the "gaol fever" (typhus) that ravaged the overcrowded English prisons of the time. A few scraps of garments hang from iron spikes in the upper right segment of the painting, possibly remnants of a dramatic escape attempt, but more likely laundry hanging out to dry—sunlight was in short supply, after all.[52] Meanwhile, a cat darts across the courtyard with something in its mouth. In eighteenth-century England, cats—long associated with the devil and witchcraft and tolerated only when employed in the service of catching vermin—were often cruelly treated.[53] Prisoners of the Bristol Gaol and Bridewell had good use for them, however, purportedly having cats placed in their cells overnight to "stop the rats gnawing their feet."[54]

Greenway depicts many of the same men from *The Mock Trial*. We see, for instance, the same pot-bellied beer drinker and red-capped smoker, this time on the opposite side of the court. In the right-hand side of the composition, Greenway appears to be complaining about something to a redcoat—a conspicuously new character, absent in *The Mock Trial*. Broadbent identifies the redcoat as the prison keeper, though he is just another inmate, for his partially obscured right ankle is fettered. Moreover, the military was rarely involved with the administration of English gaols at this time.[55] Perhaps the redcoat was a deserter—a handful of whom were incarcerated in Newgate during the Napoleonic Wars (1803–15) when the crime of desertion was rife.[56]

50 For instance, Greenway biographer Alasdair McGregor identifies the watch in *Untitled [Scene inside Newgate]* as belonging to Greenway, supposing he had been stolen by the urchin in *The Mock Trial*, and thereby placing *The Mock Trial* temporally before *Untitled [Scene inside Newgate]*. McGregor also speculates that Greenway depicts himself reporting the theft of his pocket watch to the redcoat in *Untitled [Scene inside Newgate]*. See McGregor, *A Forger's Progress*, 54.

51 Though the fact that Greenway's torn jacket in *Untitled [Scene inside Newgate]* is intact in *The Mock Trial* gives some weight to the conventional sequencing.

52 Neild notes that the tennis court was used to hang laundry. Neild, *State of the Prisons in England, Scotland, and Wales*, 78.

53 Piers Beirne, "Hogarth's Animals," *Journal of Animal Ethics* 3, no. 2 (Fall 2013): 137.

54 Harry Potter, *Shades of the Prison House: A History of Incarceration in the British Isles* (Woodbridge: Boydell and Brewer, 2019), note on 113.

55 Newgate was then overseen by private gaoler William Humphries

56 Neild records that two deserters were incarcerated in Newgate during his visit on October 4, 1803. See Neild, *State of the Prisons in England, Scotland, and Wales*, 77. No deserters, however, are discernible in the 1812 judicial records or prison calendars.

A swatch of blue fabric lies at Greenway's feet, seemingly torn off the right elbow of his coat in a recent scuffle. The swatch on the floor has taken the shape of a flower, a form echoed in the navy flower appended to the top hat of the man standing between Greenway and the redcoat. His face cast in a deep frown, this man raises one hand, which is either bandaged or gloved. Perhaps this other fellow was a pugilist, and Greenway was complaining to the redcoat of an altercation between the two of them. After all, Greenway's hair appears much dishevelled here when contrasted with *The Mock Trial*. Indeed, it is tempting to interpret the blue flowers as tokens of the pugilist's victory over Greenway, the hapless new chum.

Greenway's depiction of the redcoat adds complexity to his image of folk justice. Speaking of the legal art of heraldry and armoury, which codified aspects of one's identity (like office, rank, and family), Peter Goodrich has argued that, under the weight of such symbolism, a "person was publicly an image."[57] The British redcoat certainly conjured a powerful image of military law and order. But imprisoned and shackled, it is an image that cannot wholly be trusted.[58] Greenway's treatment of the redcoat as a duplicitous public image contributes to the sense, in both paintings, of a world turned upside down.[59] Indeed, tropes of inversion and levelling were central to the English comic tradition established in the 1600s and 1700s, and were, in turn, wed closely to English festival activities such as transvestism.[60] The "discomfiture of the judge" was a particularly popular theme of such comedies—and a theme that would strangely manifest its own kind of reality in the penal colonies of Australia, where, upon decarceration, convicts could take up positions as field police and judges.[61]

The central animating object of the composition is indisputably the script held in the left hand of the redcoat, which he points at declaratively with his right index finger. This microcosm of activity is framed by Greenway's open hands—fingers outstretched in exasperation, his eyes raised heavenward—perhaps challenging the legitimacy of the document. What is this document? Magnification only yields dotted black lines in lieu of words. Given the paucity of information regarding Greenway's experience in prison, its content must

57 Goodrich, *Legal Emblems and the Art of Law*, 19.

58 This untrustworthy image has a *nachleben*—appearing like a premonition of Greenway's later experience at the hands of senior members of the 46th Regiment once in the penal colony. On December 20, 1816, Captain Edward Sanderson violently horse-whipped him for failing to complete an artistic commission on time, then for sending the Captain an insolent letter in defence of his tardiness. Greenway took Sanderson to the Criminal Court on charges of assault and battery, and won. And this despite the fact that all the other members of the 46th who witnessed the assault and were party to its premeditation not only refused to testify against their superior, but openly—and brazenly—criticised the judge for asking them to. For a more detailed account, see chapter eight of Ellis, *Francis Greenway*, 62–71; or the chapter "Pain and Humiliation: The Barrack Square Incident," in McGregor, *A Forger's Progress*, 135–150.

59 I borrow Christopher Hill's phrase, used to describe both the social custom of foolery, where social customs were temporarily inverted on festival days, and the sense in the seventeenth century that the world, through revolution, might permanently be turned upside down. See Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* [1972] (London: Penguin, 1991).

60 Ian Donaldson, *The World Upside-Down: Comedy from Jonson to Fielding* (Oxford: Clarendon Press, 1970), 6–7.

61 For a lengthier analysis of this theme, see Donaldson's first chapter "Justice in Stocks," in *The World Upside-Down*, 1–23.

remain opaque to us for now. But his allusion to text—to a paper document in general—is significant in itself. Despite high levels of illiteracy, if not in part because of it, the written word held enormous symbolic value in the administration of justice in eighteenth-century England. Even though customary law was still called *lex non scripta*, writing had long been central to its symbolic imaginary—as evidenced by the appending of a written description of a crime to the breast of the criminal in the mock courts of The Fleet and The King's Bench.[62]

In Greenway's painting, the redcoat defers to the authority of the written word. He points at the paper and, simultaneously, away from his person to suggest that he is himself personally divested of responsibility for whatever it is that the paper dictates. It is tempting to suppose that the document is a list of rules—laws—that govern convict society in Newgate, the textual accompaniment to the performative mock trial. Such formalised codes of conduct were not uncommon. Following the example of prisoner autonomy set by Ludgate Prison, London's Newgate Prison was ordered by the Court of Alderman in 1633 to establish a prisoners' government. Prisoners elected officers amongst their rank who enforced discipline and established "codes of conduct," then "[sat] as a tribunal to punish those who had violated the rules."[63] Such codes of conduct were then also common amongst seasonal companies in England, in which workers would elect an authority whom they called "my lord," and to whose judgment they would defer. This "Lord of the Mowers," "King of the Harvest," or "Captain of the Shearers," as they were sometimes called, would negotiate working conditions on behalf of the company and, at the beginning of each season, write down the company's rules of behaviour and read them aloud to the workers as insurance against illiteracy.[64] Perhaps, then, the fallen redcoat was presenting Greenway with Bristol Newgate's "constitution," in which case the reading of *Untitled [Scene inside Newgate]* followed chronologically by *The Mock Trial* may hold. We may understand the "constitution" as a key component of the induction of new inmates into the gaol. It is the constitution in the first scene that authorises the trial in the second. In this way, *Untitled* figures forth the tension inherent to law's letter versus its spirit. In his self-portrait, Greenway recoils from the law as text but nevertheless appeals to a sense of justice by gazing heavenward, eyes raised seeking the ultimate judge. The particular combination of Greenway's exasperated facial expression and hand gesture at once upholds a sense of law and justice but rejects its crude application in the hands of Newgate's convicts.

The question remains whether Greenway's visual treatment of convict folk justice is parodic and undermining of English common law, or whether it is, by contrast, ultimately affirming of that institution. It is sometimes argued that eighteenth-century English criminal law served primarily to legitimate

62 In this respect, it is telling that the only legible text in either painting, inscribed above the doorway to the left, is deeply authoritative and legalistic in purpose: "By Order of the Sheriffs/Room for Refractory Debtors."

63 W. J. Sheehan, "Finding Solace in Eighteenth-Century Newgate," in *Crime in England 1550–1800*, ed. J. S. Cockburn (Princeton, NJ: Princeton University Press, 1977), 234.

64 Banks, *Informal Justice*, 48–50.

and expand the powers of the ruling class, principally through means of property, which was most forcefully protected through the introduction in 1723 of the Waltham Black Act. Such law, the argument runs, was wielded by the ruling class to further dispossess and disenfranchise the property-less poor and working classes.[65] But, as Thompson argued in the conclusion to *Whigs and Hunters: The Origin of the Black Act*, English common law was not merely the weapon of the ruling class, though the Black Act undoubtedly served both its material and its ideological interests. Rather, common law was the battleground on and through which class relations were fought. "[T]he ruled," he writes, "would actually fight for their rights by means of law," and when it "ceased to be possible to continue the fight at law, men still felt a sense of legal moral wrong: the propertied had obtained their power by illegitimate means."[66] Greenway's apparent transition from alienation in *Untitled [Scene inside Newgate]* to assimilation in *The Mock Trial* figures the law as such a battleground—a site of dispute and struggle. In *Untitled [Scene inside Newgate]*, Greenway shows the "spirit of the law" to transcend its written constitution held in the redcoat's hand; whereas in *The Mock Painting*, he figures convict folk justice—informal, social, collectivised—as transcending the law of the ruling classes. The narrative that develops across the two paintings may be understood to chart Greenway's dawning appreciation that, to paraphrase Thompson, it was not the folk justice of convicts that was estranged from common law, as such, but rather inmates' rights that were alienated and which required defence.[67]

CONCLUSION

Greenway's visual nesting of a convicts' mock court within a city and county gaol illuminates the coexistence of different legal systems in turn-of-the-century England—both written and unwritten, formal and informal. The coexistence of these different legal systems is significant for, as our brief foray into mock courts and related forms of folk justice has demonstrated, traditions of localised, community-based justice ensured alternative and additional means of accountability to that of the common law courts in the eighteenth and nineteenth centuries. Whilst by no means exclusive to the poor and working classes, folk justice was particularly important for upholding industrial and customary rights, which were central to their livelihood. Accordingly, such forms of justice became increasingly crucial modes of resistance as the rights and privileges of workers and the poor were whittled-down over the course of the long eighteenth century. As opposed to traditional images and emblems of justice as impartial, divine, transcendent, and, importantly, centralised in the singular female figure of Justitia or Themis, Greenway's *Mock Trial* pictures folk justice as imperfect, improvisational, and

65 This argument is put most famously in Hay, "Property, Authority, and the Criminal Law."

66 Thompson, *Whigs and Hunters*, 261.

67 Thompson reasons: "What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights: for the landowner, enclosure—for the cottager, common rights; for the forest officialdom, "preserved grounds" for the deer; for the foresters, the right to take turfs." Thompson, *Whigs and Hunters*, 261.

social—decentred and distributed amongst the hands of a collective. Though the two forms of law and justice, formal and informal, were decidedly different from one another, they were not mutually exclusive. In some respects, they may be seen to be continuous—as Greenway's mise-en-abyme-like staging of a court within a prison infers.

Awaiting transportation to the Colony of New South Wales in 1812, Greenway's world was about to be turned upside down—he was, as a popular saying of the time went, quite literally preparing to "act the antipodes." These paintings are a document of this acutely transitional moment in his life, and in the life of English prisons too. Eight years later, in 1820, Newgate was knocked down in recognition of its squalid and inhumane conditions, then replaced by the New Gaol. The New Gaol reflected aspects of the agendas set by a number of aspiring prison reformists working in this period, including Jeremy Bentham, Elizabeth Fry, Thomas Fowell Buxton, and James Neild, as well as the official recommendations made by John Howard to the House of Commons decades earlier in 1774, but which were then only partially applied. In 1823, Home Secretary Robert Peel implemented the Gaols Act, which mandated wages for prison keepers (as opposed to their relying on fees extracted from inmates), the banishment of manacles, and a stronger religious presence in prisons by way of rostered chaplains, amongst other items.

Bristol's New Gaol moved towards adopting the "separate and silent" system of punishment—advocated by hopefuls like Bentham—by placing inmates in single cells whose footprints measured just 6 by 9 feet. The separate and silent system had a range of well-documented intentions, one of which was to delimit communication between prisoners as a means of halting the transmission of criminality, as well as impeding fraternity and solidarity that may lead to mutinous acts. Another of its intentions was to transform previously idle prisoners—seen smoking, drinking, and playing cards in Greenway's paintings—into industrious, indentured workers. As the eighteenth century rolled into the nineteenth, British prisoners' bodies (like common woodlands and, as Silvia Federici has argued with respect to the witch-hunt, women's bodies subsequently) were subject to further enclosure.[68] Inmates like Greenway, who were transported on the convict hulk the *General Hewitt* in 1813, were transported to the fledgling penal colonies in Australia to meet with the almost immediate expropriation of their labour through assignment as servants on public works or to private individuals. Thus, the convicts' enclosure was both physical and mental. Greenway's prison scenes capture in remarkable visual detail not necessarily solidarity between convicts—for, as we have seen, there existed forceful hierarchies between inmates, especially old and new, monied and poor, male and female—but a shared expression, however limited, of a culture of resistance to this creeping enclosure, through processes of convict self-determination, self-governance, and autonomy.

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68 Silvia Federici, *Caliban and the Witch: Women, The Body, and Primitive Accumulation* (New York: Autonomedia, 2004).

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EMANUEL DE WITTE'S *INTERIOR OF THE OUDE KERK, DELFT*

Images of Life as Religion, Individualism, and the Critique of Legal Ideology

by David S. Caudill

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I. INTRODUCTION

> For Latour the critic pretends to an enlightened knowledge that allows him to demystify the fetishistic belief of naïve others . . . [T]he fatal mistake of the critic is not to turn this anti-fetishistic gaze on his own belief . . . a mistake that renders him the most naïve of all.[1]
>
> This is why you can be at once and without even sensing any contradiction . . . an antifetishist for everything you don't believe in . . . and . . . a perfectly healthy sturdy realist for what you really cherish[2]

My focus in this article is on the representation of two important features of Dutch Calvinism in *Interior of the Oude Kerk, Delft* (probably 1650), a painting by Emanuel de Witte (1616–1692). First, the Calvinist idea that *all* people (not only the clergy) are called by God to hold an "office" suggests that all of life is religious, even business or farming (and not only Sunday worship). Second, the Calvinist notion that all individuals have access to the scriptures and therefore to God—without mediation by clergy—likewise takes religion outside the church and into the world. Those two features are suggested by the iconoclastic cleansing of the church that preceded the painting, the adult and youthful figures evoking a possible everyday scene in the church (exemplifying a genre painting), and the omission of the pulpit which, together with the civic banners that decorate the space, transform the church into a different kind of meeting place. Far from secularising the church, these latter images suggest an attempt by Calvinists to expand their religion beyond the church to all of life. In the late nineteenth and early twentieth centuries, those two features of Calvinism engendered, on the part of Dutch Reformed politicians, theologians, and legal philosophers, a theory of "religious" worldviews (*grondmotieven*), or ideologies, in conflict. As with any ideology critique, they saw no neutral ground, no Enlightenment common sense, to which everyone can appeal. Religion—some religion (not necessarily deistic or even consciously held)—is inevitable in each person's life as a set of values and commitments. Moreover, the Calvinist theory of worldviews in conflict parallels two contemporary critiques in the fields of law and of science. First, the effort to disclose law's belief-structures by scholars in critical legal studies—their critique of legal ideology and rejection of legal positivism—reflects the same suspicion of Enlightenment rationality we find in Dutch Calvinism. Secondly, and related to law insofar as scientific expertise is regularly appropriated in courtrooms and governmental contexts, Bruno Latour's disclosure of the inevitable social and discursive foundations of scientific knowledge mirrors the Dutch Calvinist notion that pre-theoretical commitments play a role in all of the sciences.

1 Hal Foster, "Post-critical," *The Brooklyn Rail: Critical Perspective on Arts, Politics, and Culture* (December 12, 2012–January 13, 2013), accessed August 24, 2020, https://brooklynrail.org/2012/12/artseen/post-critical, citing Bruno Latour, "Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern," *Critical Inquiry* 30 (Winter 2004): 237.

2 Latour, "Why Has Critique," 241.

Exploring the images and their meanings in *Interior of the Oude Kerk, Delft* as representations of the contours of Dutch Calvinism should not be understood primarily as an iconographic effort to decode moralising messages[3] (there is an open grave, conventionally thought to warn of mortality, but that is not my focus).[4] De Witte likely is not intentionally instructing us on Calvinist notions of individualism or promoting the view that all of life is religious.[5] I am not, however, arguing *against* iconographic symbolism by claiming that the painting is merely descriptive,[6] reflecting a visual culture,[7] or that it represents ordinary life,[8] or simply shows off de Witte's mastery of perspective.[9] Rather, in a sort of combination of those duelling approaches, I argue that the images reveal a set of meanings that are implicit in Dutch Calvinism,[10] which is by its own admission an ideology. In other words, the description *is* the moralising–

3 Westermann recounts this effort: "In the late 1960s and 1970s, an iconographic mode of analyzing Dutch realist paintings as structures of meaning had gained a powerful hold on the discipline . . . [I]t replaced the stale habit of considering such paintings mirrors of contemporary life with a view of them as repositories of culturally determined meaning." Mariët Westermann, "After Iconography and Iconoclasm: Current Research in Netherlandish Art, 1566–1700," *The Art Bulletin* 84, no. 2 (June 2002): 352.

4 The New York Metropolitan Museum's iconographic viewer's guide to *Interior of the Oude Kerk, Delft* notes, "a newly dug grave in the foreground provides a sobering reminder of mortality." "Browse the Collection," New York Metropolitan Museum of Art, accessed June 15, 2020. https://www.metmuseum.org/art/collection/search/438490.

5 Vanhaelen notes that de Witte was "anything but an orthodox Christian," a warning to iconologists concerning biblical messaging. Angela Vanhaelen, "Iconoclasm and the Creation of Images in Emanuel de Witte's Old Church in Amsterdam," *The Art Bulletin* 87, no. 2 (June 2005): 254, 258.

6 Svetlana Alpers' *The Art of Describing* (1983) seems to argue that "the meaning and the essence of a painting must be sought exclusively in the visual means and their applications, and not in abstract ideas." Eddy de Jongh, "Painted Words in Dutch Art of the Seventeenth Century," in *History of Concepts: Comparative Perspectives*, ed. Iain Hami'siier-Monk, Kaiun Tilmans, and Frank van Vree (Amsterdam: Amsterdam University Press, 1998), 168. Defending Alpers, Westermann states that "no claim is made that all Dutch art describes according to her model," Mariët Westermann, "Svetlana Alpers's 'The Art of Describing: Dutch Art in the Seventeenth Century,'" *The Burlington Magazine* 153, no. 1301 (August 2011): 536.

7 In contrast to the view that Golden Age Dutch paintings were intended *tot lering en vermaak* ("to instruct and delight"), they alternatively might be seen as "products of a culture for which visual representation was the preferred way of seeing the world." Westermann, "After Iconography," 352–353.

8 Indeed, Hecht alludes to the "irrefutable observation that Dutch genre painting" never did "faithfully render slices of daily life." Peter Hecht, "Dutch Seventeenth-Century Genre Painting: A Reassessment of Some Current Hypotheses," in *Looking at Seventeenth-Century Dutch Art: Realism Reconsidered*, ed. Wayne Franits (Cambridge: Cambridge University Press, 1997), 89. And De Jongh confirms that such scenes may appear "as depictions of situations as they might have been, but in fact they were composed in the artist's studio." Eddy de Jong, *Questions of Meaning: Theme and Motif in Dutch Seventeenth-Century painting*, trans. Michael Hoyle (Leiden: Primavera Press, 2000), 85. Even paintings of church interiors might move the pulpit "for a smoother layout." Matthew Scribner, "Illusion and Iconoclasm in Emmanuel de Witte's *A Sermon in the Old Church in Delft*," *Shift: Queen's Journal of Visual & Material Culture* 2 (2009): 4. http://shiftjournal.org/wp-content/uploads/2014/11/scribner.pdf.

9 According to Vanhaelen: "Houbraken stated in his early-eighteenth-century biography of Netherlandish artists that Emanuel de Witte was "renowned for his mastery of perspective" and that he used to brag of his geometry . . . Since the artist's ability to fool and please the art lover's eye was considered the consummate pictorial achievement, the mastery of illusionism and the status of the painter became intertwined." Vanhaelen, "Iconoclasm," 258.

10 De Jongh, notwithstanding his influential iconological approach, concedes that: "certain objects or motifs in seventeenth-century paintings often serve a dual function. They operate as concrete, observable things while at the same time doing something totally different, namely expressing an idea, a moral, an intention, a joke or a situation." De Jongh, *Questions of meaning*, 16.

FIG. 1
Emanuel de Witte, *Interior of the Oude Kerk, Delft,* ca. 1650, oil on wood, 48.3 x 34.6 cm, Metropolitan Museum of Art, New York. Purchased Lila Acheson Wallace, Virgilia and Walter C. Klein, The Walter C. Klein Foundation, Edwin Weisl Jr., and Frank E. Richardson Gifts, and Bequest of Theodore Rousseau and Gift of Lincoln Kirstein, by exchange, 2001.

they are not separate.

In the next section II, I discuss those aspects of Dutch Calvinism that are relevant both to understanding de Witte's painting of the Old Church in Delft and to an understanding of the role of belief in both contemporary critiques of legal theory and scientific expertise in government and in the courtroom. In section III, I show how de Witte represents certain features of Dutch Calvinism that became important over the next several centuries in Dutch history, discussed in section IV. In section V, I suggest that Latour's sociology of science reflects those same features of Calvinism. I conclude in section VI that both analytical frameworks (Dutch Calvinism and Latourian theory) parallel the critique of legal ideology, and both have implications for the appropriation of scientific expertise in law and in governmental contexts.

II. SOME ASPECTS OF DUTCH CALVINISM

> The whitewashed walls of . . . Calvinist churches vividly call up the historical re-formation of religious space . . . This type of space has been purified; as past visual practices were redefined as idolatry or superstition, it has been emptied of images, circumscribed by Calvinist prohibitions against the para-aesthetic reception, or veneration, of imagery.[11]

My discussion of John Calvin (1509–1564) will be narrowly focused on the aspects of Dutch Calvinism that are represented in de Witte's painting of the Old Church in Delft. I am particularly interested in Calvin's condemnation of the images historically associated with Christianity and present in Roman Catholic churches and cathedrals (including the cathedral Calvin used in Geneva, St. Peter's). According to Vanhaelen, Calvin "found all image veneration misguided, as God's divine power could not be harnessed through visual representations."[12] In his magnum opus, the four-volume *Institutes of the Christian Religion* (1559), Calvin quoted the fourth-century Council of Elvira ("It is decreed that there shall be no pictures in churches, that what is reverenced or adored be not depicted on the walls"); referred to Augustine's declaration that it is wrong to worship images; and scolded the papists for their monstrous idols ("brothels show harlots clad more virtuously and modestly than the churches show these objects which they wish to be thought images of virgins").[13] Hence the purging "of icons and religious imagery," as well as the hiring of "painters to cover the wall and vault paintings in order to accommodate the new worship practices of the Reformed congregations"—a century before de Witte's 1650 painting of the Old Church.

Two aspects of Calvinism are suggested in this effort to take over and cleanse the Catholic churches in northern Holland. First, there is the arguably distinctive concept of office, vocation, or calling. According to Georgia Harkness, "neither Catholic peoples nor those of classical antiquity . . .

11 Vanhaelen, "Iconoclasm," 251.

12 Vanhaelen, 253.

13 John Calvin, *Institutes of The Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battles (Louisville, KY: Westminster John Knox Press, 2006), Book 1, ch. XI, §§ 5–6.

possessed a word for calling in the sense of a life-task, while all the predominantly Protestant peoples have had one."[14] Luther's conception that daily tasks had religious significance was also new, but "to serve God *within* one's calling is not the same as to serve God *by* one's calling, . . . [a] step Luther was too much of a traditionalist to take."[15] In Dutch Calvinism, this conception leads to an emphasis on John Calvin's legal training and political acumen—one need not be in the clergy to be in a spiritual profession.[16] Hence, Harkness writes, "differences between Calvinism and Lutheranism can be accounted for in no small measure by the fact that Calvin began his career as a lawyer and Luther as a monk."[17] All aspects of life, and not just those conventionally "religious" matters like church attendance or prayer, are for Calvin equally and significantly "spiritual."

That assessment may seem unfair to Luther, who famously said that a "cobbler, a smith, a peasant, every man has the office and function of his calling, and yet all alike are consecrated priests and bishops, and every man in his office must be useful and beneficial to the rest."[18] Moreover, a Catholic scholar might disagree that Calvin's notion of office or calling was new—the idea that daily tasks have religious significance does not begin with the Reformation, given Jesus' own perspective in Matthew 25:40 ("Whatever you do to the least of my brethren, you do to me"), St. Paul's admonitions in I Corinthians 10:31 ("whether you eat, drink, or whatsoever you do, do all to the glory of God") and Colossians 3:17 ("whatever you do, whether in speech or action, do it in the name of God"), or Thomas Aquinas' commentary on Colossians 3:17 ("some virtues are appropriate to soldiers, others to priests, but all are works of charity").[19] I agree that these sources suggest a certain "spiritual mission" in everyday life, but such conceptions do not fully anticipate the sense of a "religious" office for each individual as it developed in Dutch Calvinism.

There is a reason that Dutch Calvinism could countenance the idea of a Christian merchant, for instance[20]—there is no division between the world (Nature) and the divine (Grace) in Dutch Calvinism. One does not enter the spiritual realm of church and prayer and worship, only to return to the "real" world of work and family or even art—Christians can be "lovers of art and good Calvinists."[21] Even though the young Calvin advanced the Lutheran two-

14 Georgia Harkness, *John Calvin: The Man and His Ethics* (Nashville, TN: Abingdon Press, 1958), 181.
15 Harkness, 181–182 (emphasis added).
16 James Skillen, *The Good of Politics: A Biblical, Historical, and Contemporary Introduction* (Grand Rapids, MI: Baker Academic, 2014), 92.
17 Harkness, "John Calvin," 5.
18 Martin Luther, *Address to The Nobility of the German Nation* (*An den christlichen Adel deutscher Nation*), trans. C.A. Buchheim (New York: Fordham University History Sourcebooks Project, 1520), accessed June 9, 2020, http://www.sjsu.edu/people/andrew.fleck/courses/Hum1bSpr15/Lecture_25%20Luther_Lotzer_Calvin.pdf.
19 Thomas Aquinas, *Commentary on Colossians*, ed. D.A. Keating, trans. F. Larcher (Ave Maria, FL: Sapientia Press of Ave Maria University, 2006). I am grateful for Professor Robert Miller at the University of Iowa School of Law for pointing out this text.
20 Simon Schama, *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age* (New York, NY: Vintage Books, 1987), 330.
21 Vanhaelen, "Iconoclasm," 259. Calvinists did not love the Roman Catholic images that adorned cathedrals, but wealthy patrons commissioned portraits and decorated their homes with

kingdoms theory, his mature formulations "blurred the lines between the earthly kingdom and the heavenly kingdom, between spiritual and political life, law, and liberty."[22] And despite some totalitarian tendencies,[23] numerous contemporary constitutional structures reflect the influence of Calvinism, including "liberty of the individual conscience from canon laws and clerical controls, liberty of political officials from ecclesiastical power and privilege, liberty of the local clergy from central papal rule."[24] Calvin wrote presciently about the "common rights of mankind," "natural rights," "rights to land," a "right to recover" stolen property, and freedom of worship and association.[25]

The seemingly iconoclastic "reduction" in the sanctity of the church should therefore be seen as a leveling or equalising of everyday life with conventionally religious matters—all of life is religious, and all of life is religion, in Dutch Calvinism. The binaries of Nature and Grace, the Real World and Church, are firmly rejected. One still goes to church for a sermon on Sundays, but one might also "go to church" during the week, as that building, more "than just a Calvinist place of worship . . . was also a central civic space" for all sorts of everyday activities, including catching up with neighbours and striking business deals.[26] This phenomenon goes beyond the mere sense that we should do works of charity in God's name; rather, it suggests that visiting neighbours, negotiating, and even flirting all harbour the potential to be regarded as *religious* activities, alongside singing hymns or taking Holy Communion.

Second, and closely related to the idea of office, Calvinism stresses the isolation of each individual. Harkness writes: "Each . . . must travel [his or her] way of life alone. No preacher, no sacrament, no church can alter the inevitable destiny ordained of God."[27] The authority of the Church of Rome has here given way to individuals who have direct interpretational access to the

contemporary paintings. The Old Church in Delft was an "embodiment of an ideology that was suspicious of any creative product of the human mind (even when such products were permitted by doctrine, as with secular painting)." Scribner, "Illusion and Iconoclasm," 2.

22 John Witte, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2008), 43, 56. "Despite his early flirtations with [the] radical political implications of the two kingdoms theory, Calvin ultimately did not contemplate a 'secular society' [or] a neutral state . . . " Witte, *The Reformation of Rights*, 76.

23 Witte, 1. Moreover, Skillen sees a danger even nowadays in: "the historical conjunction of the rise of the modern state, on the one hand, and the Calvinist identification of some of those states with ancient Israel, on the other. The most powerful example of this identification is the American founding, which was deeply influenced by Puritan thought." James Skillen, "Calvin, Calvinism, and Politics," *Root & Branch: The Religion and Society Debate* 18, April 9, 2009, accessed June 11, 2020, https://www.cpjustice.org/uploads/Calvin,_Calvinism,_and_Politics.pdf.

24 Witte, *The Reformation of Rights*, 3. On the other hand, the victims of Calvin's religious fervor would agree with Bainton's sarcasm: "If Calvin ever wrote anything in favor of religious liberty . . . it was a typographical error." Roland Bainton, *Concerning Heretics: An Anonymous Work Attributed to Sebasitan Castillio* (New York: Columbia University Press, 1935), 74, quoted in Witte, *The Reformation of Rights*, 40.

25 Witte, *The Reformation of Rights*, 2, 56.

26 Adam Eaker, audio guide for the exhibition "In Praise of Painting: Rethinking Art of the Dutch Golden Age," New York Metropolitan Museum of Art, 2018, accessed June 8, 2020, https://www.metmuseum.org/exhibitions/listings/2018/in-praise-of-painting-dutch-masterpieces#Audio-Guide.

27 Harkness, "John Calvin," 182.

scriptures, the final authority (for the Reformers) on all issues.[28] But this freedom is a lonely burden. And as Simon Schama explains: "the abolition of traditional ritual and the intercession of the clergy and the preference for direct forms of communion [among Calvinists] further enhanced the importance of scripture in worship."[29] The iconoclasm can therefore be seen as the conversion of, in Walter Melion's words, each "formerly Roman Catholic cathedral into a purified Temple of the Word," evidenced by the removal (by civic authorities) of Catholic images and replacing them with "biblical citations and paraphrases."[30] Vanhaelen suggests that the conversing figures in de Witte's painting reflect that "privileging of the Calvinist religion of the Word over images."[31] Again, the seeming reduction in the significance of the church and the clergy as the gateways to God should be seen as equalising access to, and understanding God through, his Word.

These two features of Dutch Calvinism, the notion that all believers have a calling and the related notion that all believers have independent access to God, are represented in Dutch Golden Age paintings of church interiors, irrespective of the intention of the artist to do anything other than, for example, demonstrate dazzling realism for a patron, or construct a typical albeit fictional scene.[32] Sometimes moralising or allegorical intentions are obvious (e.g., in Hendrik Pot's *Vanitas*, which depicts an old woman showing a pretty young girl a skull),[33] but one must always query the extent to which moralising was important to both the Dutch painters and their audiences.[34]

In the case of de Witte's painting of the Old Church in Delft, there are indications that there is more going on than simply the skill of a renowned architectural painter, a genre painting of everyday life, or a picture of the actual church. I am not arguing for disguised messages that need to be deciphered, but rather that the painting shows the results of Calvinism as a collective ideology. I need not speculate as to who might have commissioned the painting (these "perspectives," Vanhaelen notes, "were highly prized . . . by wealthy and distinguished collectors, many of them Calvinist"),[35] or whether de Witte favoured Calvinism[36] (not likely; Vanhaelen even suggests, based on another church painting in which previously purged icons re-appear, "against the efforts of the whitewasher," that de Witte is himself paradoxically an

28 Witte identifies in the Reformation a "fight for freedom" on the part of the individual against ecclesiastical powers. Witte, *The Reformation of Rights*, 77.

29 Schama, *The Embarrassment of Riches*, 94.

30 Walter S. Melion, "The Netherlandish Image after Iconoclasm, 1566–1672: Material Religion in the Dutch Golden Age (review)," *The Catholic Historical Review* 96, no. 3 (July 2010): 568.

31 Vanhaelen, "Iconoclasm," 257–258.

32 Hecht, "Dutch Seventeenth-Century Genre Painting," 89.

33 Hecht, 93.

34 Eric Jan Sluijter, "Didactic and Disguised Meanings? Several Seventeenth-Century Texts on Painting and the Iconological Approach to Dutch Paintings of This Period," in *Looking at Seventeenth-Century Dutch Art: Realism Reconsidered*, ed. Wayne Franits (Cambridge: Cambridge University Press, 1997), 85.

35 Vanhaelen, "Iconoclasm," 258-259. ("A significant body of visual evidence links de Witte's paintings to this audience of elite connoisseurs.")

36 We rarely know a seventeenth-century artist's intentions, and even if we did, "Continental philosophers and literary critics" have taught us that meaning is not limited to authorial intent. Westermann, "After Iconography," 352.

iconoclast!),[37] because I am using the *Interior of the Oude Kerk, Delft* as an historical document, notwithstanding its inevitable fictive character, concerning the effects of Calvinism in the north of Holland in the seventeenth century and thereafter. The description is itself the "moralising."

III. CALVINISM AS A SUBJECT OF DE WITTE'S CHURCH INTERIORS

The *Interior of the Oude Kerk, Delft* is a detailed study of an eleventh-century, formerly Catholic church, with whitewashed walls and no images of Christ, or of Mary or any other saint. And yet a significant detail has been omitted by de Witte—there is no pulpit, the very identifier of a church; and that is just the beginning of de Witte's representations of how the Calvinists seemingly degraded the sanctity of "God's house." There is a civic banner hanging from the ceiling, two children scribbling on one column, and two dogs, one urinating on another column. Finally, there are two merchants who appear to be transacting business, and a man talking to a woman and child, perhaps a husband and father, or just a friend. This human (and canine) scene could belong to a park or town market, but I believe that these figures imply neither disrespect of Christianity nor secularism overtaking a religious space. Quite the contrary—the disrespect is reserved for the Papacy; and far from any triumph of secularism, Dutch Calvinism is an argument for the religious character, in Abraham Kuyper's words, of *everything*: "There is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry: 'Mine!'"[38] Merchants doing business, children playing, even a dog urinating are not relegated to an arena that is secondary to some holy space. There is no division between a spiritual realm and a natural world—there is just a world in which believers live. And while there is no doubt that Catholics are believers as well, they are indirectly treated as simply wrong about what Christianity entails. The very same ideas that are depicted in de Witte's painting continued to influence Dutch Calvinism. The notion that all of life is religious for Christians, since each believer's faith influences and directs everything they do, became the basis for the notion that *un*believers (or Catholic *mistaken* believers) must also have a worldview, an ideology with a religious (i.e., belief-based) character, that influences their respective public and private lives. The contrary notion that human beings live on the basis of reason, whether based in Greek philosophy (especially Aristotelean), Catholic doctrines of faith and reason (especially Thomistic), or Enlightenment rationality, is rejected as a failure to see the inevitability of belief-structures. Note especially that while Dutch Calvinism certainly had its *doctrinal* disagreements with Rome, it also engenders a critique of the Catholic Church as a humanist ideology which separated Faith from, and thereby elevated, Reason. For example, Aquinas's definition of natural law, "which allows human reason a certain amount of autonomy in the moral

37 Vanhaelen, "Iconoclasm," 260–261.

38 Abraham Kuyper, "Sphere Sovereignty (Inaugural Address at the Dedication of the Free University Amsterdam, 1880)," in *Abraham Kuyper: A Centennial Reader*, ed. James D. Bratt (Grand Rapids, MI: Eerdmans, 1998), 488.

realm, is absent from Calvin's work."[39] Where for Aquinas the term natural law refers "to the precepts that [a person's] reason enunciates as a result of . . . reflection," Calvin sees natural law as "a standard placed in man's conscience by God."[40]

IV. CALVINISM AS AN IDEOLOGY CRITIQUE

> In 1789, the turning point was reached: "We no more need a God" . . . heralded the liberation . . . from all Divine Authority . . . There is no doubt then that Christianity is imperilled by . . . serious dangers. Two life systems [Modernism and Christianity] are wrestling with one another . . . This is the . . . struggle for principles in which my own country is engaged.[41]

Neo-Calvinist Guillaume Groen van Prinsterer (1801–1876), eventually the leader of Holland's Anti-Revolutionary Party, was a critic of the Enlightenment ideas that led to the French Revolution (he called it a "Reformation in reverse").[42] Groen's argument that a "religion of unbelief" was at war with Christianity leads to an ideological conception of religion—it is not belief in or worship of a divinity that makes a religion, but a framework of foundational beliefs that guide the lives of believers.[43] "Religion" is therefore more like an ideology.

Abraham Kuyper (1837–1920), Prime Minister of Holland (1901–1905) and a Dutch Reformed Church pastor, was Groen's successor both in parliament and as leader of the Anti-Revolutionary Party. In his 1898 Stone Lectures at Princeton, Kuyper described Calvinism as a *Weltanschauung* or "worldview"—a religion for all of life (alongside the competing "religion" of Modernism)—affecting one's perspective on all matters. Calvinism embraces not only theology and worship but also politics, science, and art. Inheriting Calvin's emphasis on individual rights (e.g., freedom of association, liberty of conscience), Kuyper also developed a theory of "sphere sovereignty" whereby under God's sovereignty, church and state were sovereign within each's sphere of competence, and neither had authority over the other.[44]

39 Ireana Backus, "Calvin's Concept of Natural and Roman Law," *Calvin Theological Journal* 38 (2003): 12.

40 Backus, "Calvin's Concept of Natural and Roman Law," 11–12, citing St. Thomas Aquinas, *Summa Theologica*, 1–2 q. 91 a 3. "Aquinas' and Calvin's concepts of natural law turn out not to have a great deal in common. Aquinas assigns to natural law an objective status of a set of precepts given by God that man can enunciate and apply to individual actions as a result of reflection." Backus, "Calvin's Concept of Natural and Roman Law," 12.

41 Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids, MI: Eerdmans, 1943), 7–8.

42 After studying and practicing law, Groen became active in politics—he was a member for years (1849–57, 1862–66) of the Second Chamber of Parliament. Gerri J. Schutte, *Groen van Prinsterer: His Life and Work*, trans. Harry van Dijk (Neerlandia, Alberta: Inheritance Publications, 2005), 38.

43 Harry van Dijk, "Foreword," in Guillaume Groen van Prinsterer, *Unbelief and Revolution: A Series of Lectures in History, Lectures VIII & IX*, ed. and trans. Harry van Dijk (Amsterdam: Groen van Prinsterer Fund, 1975), vii. This use of the word "religion" is not unheard of: "The word *religion* is a word of forced application when used with respect to the worship of God. The root of the word is the Latin verb *ligo*, comes *religo*, to tie or bind over again, to make more fast . . . ." Thomas Paine, "Of the Word Religion, and Other Words of Uncertain Signification," *The Prospect* (March 3, 1804), https://www.thomaspaine.org/essays/religion/prospect-papers.html.

44 "Sphere sovereignty is Kuyper's idea that from God's sovereignty there derives more discrete sovereign

Kuyper's disciple, Herman Dooyeweerd (1894–1977), who was trained in law and was later the Chair in Jurisprudence at the Vrije Universiteit Amsterdam (founded by Kuyper), expanded the notion of *two* conflicting belief-systems (which he called *grondmotieven*) to *four*, roughly Greek, Catholic, Enlightenment, and Biblical. The first three, as explained in Dooyeweerd's magnum opus *De wijsbegeerte der wetsidee* (1935–1937, translated as *A New Critique of Theoretical Thought*, 1969), share a commitment to the autonomy of human reason (respectively, e.g., developed by Aristotle, Aquinas, and Descartes), seemingly rational and therefore neutral. Dooyeweerd, on the other hand, in a "transcendental" critique that echoed neo-Kantianism, discerned pre-theoretical, conscious or unconscious, ideological commitments on the part of all of these "believers." As to the Biblical worldview, Dooyeweerd confirmed his Dutch Calvinist heritage by arguing that "a radical Christian philosophy can only develop in the line of Calvin's religious starting-point."[45] Dooyeweerd therefore concedes his own ideological commitments, but he does so within a philosophical tradition in which we are all, inevitably, believers. He explained:

> I do not pretend that my transcendental investigations should be unprejudiced. On the contrary, I have demonstrated that an unprejudiced theory is excluded by the true nature of theoretic thought itself.[46]

This rejection of the rational, Enlightenment subject sounds postmodern and is not unlike the ideology critique developed in the Critical Legal Studies movement, although that project relied on French and German Critical Theory, not on a religious tradition. Critical legal theorists identified—in traditional, formalistic legal theory and practice—a belief in the neutrality and objectivity of law. Legal reasoning, however, in the view of ideology critics, cannot alone account for the results of judicial decision. David Kairys elaborates: "The results come from those same political, social, moral, and religious value judgments from which the law purports to be independent."[47] Moreover, there are parallels between Dooyeweerd's critique of ideology and the contemporary identification of social influences on, even social construction of, the natural sciences.

Dooyeweerd was both a critic and a promoter of the natural sciences—he used the term "science" (*Wetenschap*) in the broad Continental sense of knowledge and learning, including legal science, and was only a critic of any "science" or disciplinary field to the extent that it became reductive, i.e., that

'spheres' such as the state, business, the family, and the church." Vincent E. Bacote, "Introduction," in Abraham Kuyper, *Wisdom and Wonder: Common Grace in Science and Art*, ed. Jordan J. Ballor and Stephen J. Grabill, trans. Nelson D. Klossterman (Grand Rapids, MI: Christian's Library Press, 2011), 24.

45 Bernard Zylstra, "Introduction," in L. Kalsbeek, *Contours of A Christian Philosophy: An Introduction to Herman Dooyeweerd's Thought*, ed. Bernard Zylstra and Josina Zylstra (Toronto: Wedge Publishing Foundation, 1975), 15–16.

46 Herman Dooyeweerd, *Transcendental Problems of Philosophic Thought* (Grand Rapids, MI: Eerdmans, 1948), v.

47 David Kairys, "Law and Politics," *George Washington Law Review* 52, no. 2 (1984): 247.

it claimed to be the central or foundational discipline among all fields of study. According to Hendrik Hart, Dooyeweerd insisted that "science is not the final arbiter on questions of truth, the nature of reality, or even understanding matters of fact . . . [Nevertheless,] science has a special and relative character of its own that should be respected and developed."[48] Thus, Dooyeweerd was not only critical, for example, of economists who saw economic structures as determinative (as in Marxism), but also critical of natural scientists who became *scientistic*, i.e., reductively viewing the natural sciences as the preeminent or sole source of stable knowledge. Otherwise, the natural sciences do indeed provide stable knowledge, but not because they escape or rise above ideology. For Dooyeweerd, all the "sciences" reflect pre-theoretical commitments or belief-structures like those variously identified by many scholars in twentieth-century history, philosophy, and sociology of the natural sciences. Scientists should avoid religious interference with their research, but they cannot avoid the theoretical, social, linguistic, and economic structures that make science possible. For Dooyeweerd, the fact that any "critical investigation is necessarily dependent upon a [supra-] theoretic starting point does not derogate from its inner scientific nature. The latter would only be true if the thinker should eliminate a . . . scientific problem by a dogmatic authoritative dictum, dictated by his religious prejudice."[49] Note that Dooyeweerd, after having named his four belief-systems (*Religieuse Grondmotieven*), was interested in the nature, scope, and limitations of each discipline.

In *De wijsbegerte der wetsidee* (1935–1937), Dooyeweerd ambitiously attempted a comprehensive account of, well, nearly everything—a Christian "grand theory," as it were. In order to "give the Christian worldview a place in the modern world,"[50] Dooyeweerd identified fifteen "modal aspects of being," from the most basic aspects of our existence (numbers, space) to increasingly complex categories like economics, art, or law. Thus, starting from the lowest, the "modes of being" are the Quantitative, Spatial, Kinematic, Physical, Biotic, Psychical, Logical, Historical, Linguistic, Social, Economic, Aesthetic, Legal, Ethical, and (the highest aspect, faith) Pistical. Importantly, every object or idea in the world is *characterised* by one of these aspects (e.g., a contract is a legal phenomenon) but nevertheless *shares* in all the others (e.g., a contract involves language, economics, etc.).[51] Thus the faith aspect is inevitable—everything in the world involves some religious dimension. One can see how the early Calvinist conception that everything in one's life is driven by faith (and has religious significance) grew into the philosophical proposition that

48 Hendrik Hart, "Dooyeweerd's Gegenstand Theory of Theory," in *The Legacy of Herman Dooyeweerd: Reflections on Critical Philosophy in the Christian Tradition*, ed. C.T. McIntire (Lanham, MD: University Press of America, 1985), 144–145.

49 Dooyeweerd, *Transcendental Problems*, v.

50 Steven Dorrestijn, "Hoe techniek kruist met ethiek, politiek en religie: Bij Latour en Dooyeweerd (The Crossings of Technology with Ethics, Politics, and Religion: On Latour and Dooyeweerd)," *Denkwijzer* 15, no. 2 (July 2015): 14. ("Een belangrijk doel was voor hem om een levenswijze vanuit een christelijk grondmotief opnieuw te bevestigen en uit te bouwen in een tijd dat een liberale en seculiere levensvisie ging overheersen.")

51 Herman Dooyeweerd, *Encyclopedia of the Science of Law, Vol 1*, ed. Alan Cameron, trans. Robert D. Knudsen (Lewiston, NY: Edwin Mellen Press, 2002), 17-29.

everyone is living by faith in some identifiable ideology.

This leads to the question whether there is a distinctly Christian mathematics or science, to which the Calvinist would reply, "If it is flawless math or productive science, then it is Christian math or science." That reply might seem to adopt a version of natural reason from Greek, Thomistic, or Enlightenment philosophy, since non-Christians are capable of producing good math and science, but that is to misunderstand Dooyeweerd—he is arguing that "religious" (not necessarily deistic) faith in the form of pre-theoretical commitments play a role on the way to any stable knowledge. In this regard, Dooyeweerd can be accused of wanting it both ways. On the one hand, he wanted to be an ideological critic of modernity, insisting on the inevitability of belief-structures;[52] on the other hand, Dooyeweerd cheerfully accepted the progress of science. In those regards, Dooyeweerd's conceptions resemble those of Bruno Latour.

V. LATOUR, SCIENCE, AND SCIENCE IN LAW

> The ozone hole is too social and too narrated to be truly natural; the strategy of industrial firms and heads of state is too full of chemical reactions to be reduced to power and interest; the discourse of the exosphere is too real and too social to boil down to meaning effects. Is it our fault if the networks are simultaneously real, like nature, narrated, like discourse, and collective, like society?[53]

French (and Catholic) sociologist of science and technology Bruno Latour, in a move similar to Dooyeweerd's, is a famous critic of the scientific community's claim that its enterprise can somehow rise above cultural, linguistic, economic, ethical, and other social determinants. Latour, however, would *not* conclude that overt political interference with research (he references President Trump) is *proper*, and he has even recently acknowledged the reliability and necessity of the sciences for human progress and flourishing. This parallel with Dooyeweerd is not a mere coincidence—Latour's social constructivism (and later actor network theory) remains as a challenge to scientism, likewise a target of neo-Calvinist criticism. And yet modern science was revered (some would say facilitated) in the Reformation, just as Latour reveres climate science in his recent *Down to Earth: Politics in the New Climatic Regime* (2018).

When Bruno Latour published his own magnum opus *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (2013)—identifying fifteen such modes—students and disciples of Dooyeweerd must have noticed. Like Dooyeweerd, Latour was offering another "grand theory," this time with the goal of understanding modernity. Latour's fifteen "ways of being" in the world

52 This view prefigured Polanyi's "framework of commitment" in which scientists work, Radnitsky's "steering fields" internal to science, and Kuhn's paradigm theory in the natural sciences. Hart, "Dooyeweerd's Gegenstand Theory," 145, 150.

53 Bruno Latour, *We Have Never Been Modern*, trans. Catherine Porter (Cambridge, MA: Harvard University Press, 1993), 6.

are Reproduction, Metamorphose, Habit, Technics, Fiction, Reference, Politics, Right, Religion, Attachment, Organisation, Morality, Network, Preposition, and Double-click. The parallels with Dooyeweerd's fifteen "modal aspects of being" are striking.

Dooyeweerd insisted that belief structures were inevitable, and yet he promoted consensus science. Latour is regularly accused of making exactly the same inconsistent move, that is, demonstrating that science relies on social, economic, and linguistic structures for its success, then introducing material nature (the "nonhuman") as the focus of and a limitation on scientific knowledge. Of the former claim, scientists accused him of social constructivism, a postmodern threat to modern science, while the latter made him vulnerable to critique from his colleagues in the sociology of science and technology, who thought he was returning to a traditional idealisation of science.[54] For Latour, however, science is a co-production of human actors and nonhuman *actants* in a network; and since science cannot "stand on its own," he writes: "Facts remain robust only when they are supported by a common culture, by institutions that can be trusted, by a more or less decent public life, by more or less reliable media."[55]

For Latour, even *artists* potentially provide support to the scientific enterprise, because they are sensitive to and can represent the hard-to-capture complexities, novelties, and mysteries of science.[56] Art (including theatre, graphic novels, and painting) is one of Latour's three "aesthetics" (alongside science and politics) that can be mobilised to reveal the contours of the new climatic regime—not in the senses of simplistic, message-based ecological art, but, for example, to "dramatise and de-dramatise" the contradictions and divisions in our culture.[57] The primary "division" to which Latour refers is on the question of climate change. Its denial has resulted in the loss of a shared, *common* world—"there are now several worlds . . . and they are mutually incompatible."[58] Recall here Kuyper's identification of two worldviews in conflict—Calvinism and Modernism, both ideological—which is traceable back to Calvin's break from Catholicism, the division of which is represented in de Witte's painting of the Old Church in Delft.

Latour shows that the traditional, idealistic image of a scientific fact as obviously true to everyone relied upon a framework of philosophical assumptions, experimental conventions, ethical beliefs, social interactions, heuristic metaphors, and financial resources. Science never was a matter of simply listening to Nature speak and recording the results, but it worked

54 Gerard de Vries, *Bruno Latour* (Cambridge: Polity Press, 2016), 15.

55 Bruno Latour, *Down to Earth: Politics in the New Climatic Regime*, trans. Catherine Porter (Cambridge: Polity Press, 2018), 24.

56 Bruno Latour, "On Sensitivity: Arts, Science, and Politics in the New Climatic Regime," keynote lecture at the University of Melbourne for the opening of the Performance Studies International, July 5, 2016, accessed June 17, 2020, http://www.bruno-latour.fr/node/692. ("Aesthetics" is "defined as what makes us sensitive to hitherto unknown phenomena.")

57 Bruno Latour, "On Sensitivity." Latour refers elsewhere to the importance of novelists in eighteenth- and nineteenth-century "inventions" of democracy, class, and citizenship. Bruno Latour, "What Are the Optimal Interrelations of Art, Science, and Politics in the Anthropocene?" *Bifrost Insights*, November 30, 2017, accessed June 17, 2020, https://bifrostonline.org/bruno-latour-what-are-the-optimal-interrelations-of-art-science-and-politics-in-the-anthropocene/.

58 Latour, *Down to Earth*, 26.

because of our common world. Now, however, as Latour observes, "we have people who no longer share the idea that there is a common world. And that of course changes everything."[59] This two-worlds framework (obvious in the anti-science bias revealed in the coronavirus pandemic in the US) has implications for expertise in legal settings, whether in policy controversies or in the courtroom. Latour is quite clear that the Trump administration ignores the consensus science of government experts, particularly in the field of environmental regulation, where scientific decision making has become politicised. And while Latour does not address expertise in the courtroom, the same problem persists when forensic science laboratories, idealised as "science," are on the side of, and controlled by, the police and prosecutors. Indeed, the US National Academy of Science recently condemned the contextual bias in the supposedly scientific procedures of forensic scientists and called for independent forensic laboratories.[60]

There has been a turn in the sociology of science and technology in recent years, exemplified in Latour's work, toward defining and supporting consensus expertise in governmental and courtroom settings, notwithstanding the former emphasis in that discipline on identifying the social determinants in the scientific enterprise. In response to the criticism that sociologists of science and technology are now idealising science, or that their previous constructivist *relativism* caused the politicisation of science in policy contexts or the prosecutorial bias of forensic science, they would reply as Latour does: the sociology of science and technology was never a rejection of good science, and far from causing the loss of expertise, the current distortions of expertise demonstrate the validity of the concerns over social influences, some of which are inevitable, but some are problematic, like the influence of politics or prosecutorial bias on scientific findings.

Nearly a century ago, Dooyeweerd was caught up in a similar controversy, not because he was a sociologist of science like Latour, visiting a laboratory to catalogue the social construction of facts, but because he was a devout Calvinist who would have appeared biased to secular scholars—he not only (audaciously) allowed his faith to influence his theorising but also claimed that such a framework of commitment was inevitable, whether acknowledged or not. Dooyeweerd made the argument, familiar in cultural studies and literary theory nowadays, that the autonomous Cartesian subject is a myth—the human subject is socially constructed in its early loyalties and dependence upon others, their images and their language, and their beliefs, for its identity, for its very *self*. Rawlsian public reason or common sense is therefore problematic, but that is not to say that everyone is robotic and predetermined. There is a middle ground, claimed by Dooyeweerd and Latour, where one need not decide between autonomous subjects producing neutral science, and people with no choices who are irrational and doubt everything. Just as Latour

59 Ava Kofman, "Bruno Latour, the Post-Truth Philosopher, Mounts a Defense of Science," *New York Times Magazine*, October 25, 2018 (quoting Latour), accessed June 20, 2020, https://www.nytimes.com/2018/10/25/magazine/bruno-latour-post-truth-philosopher-science.html.

60 Report: "Committee on Identifying the Needs of the Forensic Sciences Community," *Strengthening Forensic Science in the United States: A Path Forward* (Washington, D.C.: National Research Council, 2009), 183–191.

fears the loss of a common culture, in the post-truth era, dividing our society into two camps who do not live in the same world, Dutch neo-Calvinists like Dooyeweerd feared the marginalisation of religion in the face of modern science, dividing our society into two camps, one of which saw religion (including scientism) as inevitable and the other who lived in a different world of presumably rational, Enlightenment subjects.

VI. CONCLUSION

> [Calvinism is] not just a theology but a total view of all of life and the world which had direct implications for every area of human affairs.[61]

Emanuel de Witte's *Interior of the Oude Kerk, Delft* confirms that the sixteenth-century iconoclasm in the north of Holland was not just about theology—for example, about Calvin's doctrinal critique of Catholicism (e.g., only faith, not works; only Scripture, not churches; only Christ, not priests). Calvin's rejection of Catholicism, obvious from the removal of images by whitewashing the walls, actually went further to claim a new worldview, a new ideology, and in Latourian terms, a new world in competition with that of the Papacy. The twin features of Calvinism identified in this article—first, the notion of an "office" for all believers, such that all of life is religious (not merely the church), and second, individualism insofar as one does not need church or its imagery—are variously represented in the painting: First, the merchants are doing business, the children are playing, and the couple with the child are talking—all are engaged in the ordinary activities of life (but they are spiritual activities whether within or without the walls of the church, now almost a civic space with no pulpit). Second, the church is not very special (since it is not the way to salvation, which is found in the Scriptures)—the dog is urinating on a column, the children are scribbling on another column. Any museum patron would easily identify the rejection of Catholicism in the painting, but I have argued that there is more going on.

The Calvinist emphases on *office* and individualism also combine to become a critique of the Nature/Grace dualism in Catholicism, including its secularisation of natural reason as adapted from Aristotle (also a target of Calvinist criticism). In later Dutch neo-Calvinism, these features become a critique of Enlightenment rationality as a "religious" ideology, a worldview in competition with Calvinism. That critique of reason prefigures postmodern critiques of legal ideology, a *theoretical* project aimed at disclosing the politics of legal reasoning. It also prefigures the very *practical* analyses of natural science as crucially important though always in need of the support of, say, pre-theoretical commitments, for Dooyeweerd, and of social, rhetorical, and even artistic, as well as material, determinants, for Latour.

61 Albert Wolters, "The Intellectual Milieu of Herman Dooyeweerd," in *The Legacy of Herman Dooyeweerd: Reflections on Critical Philosophy in the Christian Tradition*, ed. C.T. McIntire (Lanham, MD: University Press of America, 1985), 29.

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CLOTHES MAKETH THE MAN

Mimesis, Laughter, and the Colonial Rule of Law

by Shane Chalmers

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When the Anglo-Australian artist, Samuel Thomas Gill, died in Melbourne in 1880, he left behind one of the most telling archives of nineteenth century Australia, a body of work—watercolours, sketches, lithographs—that bears witness to the everyday life of settler-colonialism in the country.[1] Left behind in stone, in print, in sheet after sheet, are the traces of a social history of Australia's south-eastern colonies, mediated by an artist who wandered these southern landscapes, urban and outback, observing their smallest details with a sensitivity to the violent contradictions of colonisation. Part of the aim of this article is to draw out one of those contradictions in Gill's painting, *Native Dignity* (1860)—a contradiction that exposes the racialised violence of the colonial "rule of law." But more than just how that contradiction is registered in Gill's painting, the article is concerned with how the contradiction is innervated by the artwork—how *Native Dignity* confronted its European audiences in the Australian colonies with nerve-force, unsettling the conception of equality that both promises and is the promise of the rule of law.

In this, the aim is to understand how Gill's painting is not only historically produced, but also histrionically productive. By this I mean two things. For one, "histrionic production" suggests a public performance, and more specifically, the performance of a *histrio*, or pantomime, whose role it is, traditionally, to represent society's mythologies through burlesque or a related mimetic form. But there is also a physical meaning at play here, for a "histrionic spasm," in medical terms, refers to the way in which a body convulses against itself when innervated; to wit: "The contortion of features and the furious expression of face presented by maniacs is the uncontrollable play of the histrionic muscles."[2] What these two meanings suggest is that, to read a painting histrionically is to examine how it performs mimetically for an audience, in a way that causes the audience a great deal of discomfort, stimulating spasms in the social body by revealing its immanent contradictions.

Before proceeding with this dual historical-histrionic reading, it is perhaps helpful to take a preliminary look at *Native Dignity* (fig. 1). This painting was part of a series of satirical pieces that Gill created in the late 1850s, based on his time in Melbourne and Sydney, which he apparently intended to publish together as a book titled "Colonial Comicalities."[3] It depicts an Aboriginal couple walking along the pavement of a city street dressed in European clothes in a manner that would have appeared highly

1 This article is based on a longer study published as Shane Chalmers, "Native Dignity," *Grif th Law Review* (2020): https://doi.org/10.1080/10383441.2020.1748833. It has benefited from the careful reading of two anonymous reviewers—to one I am indebted for suggesting the title, and to both for suggesting many important revisions. I also thank the editors of this special edition, Desmond Manderson and Ian McLean, for including the article in this wonderful volume of *Index Journal*, and to the general editors for creating the opportunity.

2 John Thompson Dickson, *The Science and Practice of Medicine in Relation to Mind: The Pathology of Nerve Centres and the Jurisprudence of Insanity* (New York: Appleton, 1874), 86.

3 See Keith Macrae Bowden, *Samuel Thomas Gill: Artist* (Hedges & Bell, 1971), 97. *The Australasian* noted in 1866, in a review of several of Gill's "Colonial Comicalities," including *Native Dignity*: "Mr S T Gill is a humourist as well as an artist, and has contributed sketches of considerable merit to the list of those which colonial art possesses. [. . .] His latest productions are perhaps the best he has yet produced." Cited in Sasha Grishin, *S T Gill and His Audiences* (National Library of Australia, 2015), 212–216.

improper to a European eye. In the background a European couple can be seen walking up a side street, their path about to cross the path of the Aboriginal couple, who are only a few steps away. The European couple have noticed the Aboriginal couple; they watch them uncomfortably out of the corner of their eye, obviously unsettled by the scene but seemingly unsure how to respond. The Aboriginal couple are not looking their way, however. Their heads are turned so as to face the audience; and as they look out of the painting, their faces, and especially their eyes, appear to be laughing, mocking, ridiculing, as if they are playing a joke on the European couple in the scene—as if they are burlesquing them, mimicking their fashion, mimicking their movements, mimicking their very presence there. In this, the Aboriginal couple appear centre-stage; they walk tall, proud; they look their audience in the eye defiantly, a defiance that not only conveys resistance to European domination, but also asserts their own power and authority. This couple are not "mimic men"—they are not mimicking the colonists in order to *become* European.[4] They *are* mimicking the colonists in almost every aspect: their clothes almost mirror those of the European couple in the painting, the parasols and walking sticks almost reflect each other, their postures too—the feet of the two men are almost synchronised. But *not quite*.

If this article has a dominant refrain, it is this act of mimicry, which, as we shall see, ultimately poses the critical response to the "not yet" aspect of the rule of law, to its ever-deferred promise of equality before the law.[5] Indeed mimesis, of both imperial and critical kinds, appears at every turn to be at work here, in the art as much as in the law. Or to put that another way, both art and law appear to work mimetically, not just in the simple sense of being representational of the world, but also, and much more interestingly, in the sense of making the world through its representation (which is also to say, its misrepresentation).[6]

What might be of interest in this to art historians is the new reading it offers of Gill's artwork. Of interest to scholars of law might be what this reading reveals about the concept of dignity, a core legal concept in the field of human rights,[7] but also one that is implicated in the modern concept of the rule of law. The main contribution, however, is to the interdisciplinary field of "law and the humanities," as a study of modern law's social and cultural archive, and of its everyday life in a settler-colony. Thus, on one hand, the article contributes to an understanding of how social history and art history are *legal* history, insofar as the discourse of dignity that is layered in *Native Dignity* is deeply implicated in a civilising mission that involves the transformation of Australia's Indigenous peoples. And, on the other hand, as a study of the everyday life of law, the article adds to an understanding of how modern law works, not only through official institutions such as police and

4 Cf. Homi Bhabha, "Of Mimicry and Man: The Ambivalence of Colonial Discourse," *October* 28 (Spring, 1984): 125–33.

5 On this colonial-utopian promise of the ("not yet") rule of law, see Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge: Cambridge University Press, 2019), ch. 3.

6 See also Manderson, *Danse Macabre*, 179–182.

7 See, e.g., Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012).

FIG. 1
S. T. Gill, *Native Dignity*, 1860, watercolour, 30.7 x 23.6 cm, State Library of New South Wales, Sydney.

courts, but also through public discourses, practices, and other cultural forms of expression, including artwork—and how art in turn can work against that law.[8]

AN EXHIBITION

The following scene played out a little over a year before the 21-year-old Samuel Thomas Gill arrived in the colony of South Australia from England, and a little less than two years after the Proclamation of the colony was read out on Kaurna Country (making it, on the colonists' calendar, late 1838). The occasion has been described variously by the colonists as a "festival" and a "feast" for the "Adelaide tribes," hosted by the newly-arrived British Governor, George Gawler. Following "three hearty cheers" for the some 200 gathered Kaurna people, the Governor addressed them with a speech:

> Black men! We wish to make you happy. But you cannot be happy unless you imitate good white men, build huts, wear clothes, work, and be useful. Above all things, you cannot be happy unless you love God, who made heaven and earth and men and all things. Love white men. Love other tribes of black men. Do not quarrel together. Tell other tribes to love white men, and to build good huts and to wear clothes.[9]

Another colonist simply recalls the Governor telling the Kaurna "to become good British subjects—give up eating each other—dress in proper clothing (for they generally went about stark naked), and love all white people, &c, &c,"[10] to which the shouted response was heard, "*Varey goodey, cockatoo Gubner,*"[11] in reference to the plume of white feathers that crested the Governor's hat (a reference that "was always afterwards used by the natives when speaking of him").[12]

The final event of the day was a spear-throwing exhibition, and it was here, according to one of the colonists, that the Kaurna "completely out-generalled Colonel Gawler."[13] The exhibition was led by the famous Kaurna elder and warrior, known to his peers as Mullawirraburka, meaning, in contemporary terms, the "senior custodian of the Willunga area."[14] Known to

8 In this I take inspiration and instruction in particular from Desmond Manderson's work on law and art, including most recently Manderson's *Danse Macabre* and his edited collection, *Law and the Visual: Representations, Technologies, and Critique* (Toronto: University of Toronto Press, 2018). On the everyday life of law, see Roderick A Macdonald, "Custom Made – for a Non-Chirographic Critical Legal Pluralism," *Canadian Journal of Law and Society*, vol 26, no 2 (2011).

9 Cited in John Blacket, *History of South Australia: A Romantic and Successful Experiment in Colonization* (Adelaide: Hussey & Gillingham, 1911), 145–146.

10 James C. H.awker, *Early Experiences in South Australia* (Adelaide: E S Wigg & Son, 1899), 8.

11 John Wrathall Bull, *Early Experiences of Life in South Australia and an Extrended Colonial History* (Adelaide: E S Wigg & Son, 1884), 81–82 (italics added); see also Hawker, Early Experiences, 8.

12 Hawker, *Early Experiences*, 8.

13 Bull, *Early Experiences*, 84; see also Hawker, *Early Experiences*, 8–9; Blacket, *History of South Australia*, 145–146.

14 Tom Gara, "The Life and Times of Mullawirraburka ('King John') of the Adelaide Tribe," in *History in Portraits: Biographies of Nineteenth Century South Australian Aboriginal People*, ed Jane Simpson

the colonists as "King John," Mullawirraburka was invited to inspect the targets that had been set out "at suitable and fair distances" for the exhibition.[15]

> King John first made a grave and dignified inspection of the target at the farther end, and returning half-way towards the attacking position paused, measuring the distance with his eyes, and returned, shaking his head, to the starting-point where his men and the company were standing. He then said: "No, no, too much long way." The distance was not 100 yards. [. . .] [A]t or about sixty yards he consented to try their skill, though he with admirable acting expressed his doubts. Now fixing his womera (a casting agent for long distances), amidst the objecting grunts of his tribe, he discharged his spear so as to strike the rim of the target with the middle of the spear instead of the point, and then came the ejaculations of his men, implying, "Ah! ah! we told you so!" Then came up in turn the warriors of the tribe, but with well-expressed reluctance, some just missing the target, others following the example of King John; and now they pretended shame under the derisive cheers of the lubras. The boomerangs were then thrown high, and so as, in their eccentric flight, to return towards those who cast them, and appeared more calculated to endanger the thrower than an opponent. On this many of the ladies exclaimed, "Poor fellows, you see they cannot hit anybody even at that short distance," and many of the spectators were convinced of the harmless character of the warriors amongst whom we had arrived.[16]

The joke, however, was not missed on this writer:

> If they laughed at us on the sly before us, it was internally and well disguised. No doubt the joke circulated far and wide amongst the surrounding tribes, and most likely formed the subject of one of their corroborees, their custom being to rehearse with musical accompaniment any striking occurrence, the accompaniment being performed by women beating sticks together, and uttering "Ah, ah, ah, ah," continually during the dancing of the males.[17]

And yet, if we are to believe another account, the writer missed the punchline:

> The targets were fixed at last, at about forty paces distant. Captain Jack, King John, and several other aboriginals now tried their prowess at the targets, but not a spear touched them. Many

and Luise Hercus (Canberra: Aboriginal History Inc, 1998), 92-93.

15 Bull, *Early Experiences*, 84.

16 Bull, 84-85.

17 Bull, 84-85.

> fell short of the distance, and this elicited much derisive laughter amongst the bystanders, and made King John very excited. He suddenly stripped off his red woollen shirt and moleskin pants, appeared in full Adamite costume, and before any one could interfere he gave a tremendous yell and dashed two of his spears right through the centre of the target. Then turning quickly round to the spectators, many of whom were making a rapid departure, with His Excellency and party leading, he pointed to the target and shouted, "Varey goodey," and then, shaking his fist at his clothes thrown on the ground, "no goodey."[18]

At the outset of the festival, the Kaurna had been given European shirts, trousers, frocks, and blankets to wear. Now, having clowned around in the colonists' clothing like the carnival buffoon, acting harmless, impotent, pathetic, eliciting mirth and derision in equal measure, Mullawirraburka made his point—stripping away the colonisers' clothes before dashing with "a tremendous yell" not one but *two* of his spears "right through the centre of the target," followed by that same shout, this time stripped of its irony—*varey goodey!*—which had earlier answered the Governor's speech. And finally, in case the European audience was left in any doubt about the source of his power, and the source of his earlier impotence, Mullawirraburka ended the exhibition by effectively pissing on their Civilisation, represented in the crumpled figure of the shirt and pants discarded in the dust. Who, you can almost hear him calling out to the rapidly departing party, is the real clown here, me or the Cockatoo Governor?

MORAL FIBRES

Clothing, as a medium that both expresses an identity and impresses on the body that wears it an identity—and here you might think of how uniforms create certain subjects—was understood by the colonists to be an effective tool for transforming Aboriginal people into "good British subjects."[19] For example, at a "Public Meeting in Aid of the German Mission to the Aborigines," held in South Australia in 1843, the colonist Anthony Forster reportedly rose to address the work that was being done "to rescue the hapless natives of this country from the degradation in which they were found."[20] After admonishing the colonial government for "permitt[ing] the natives to go about the streets in a state of nudity," Forster suggested a way to redeem the South Australian colonisation project: if the colonists "could give them [Aboriginal people] a nearer approach to humanity by clothing them," he pronounced, "if they could make them look like men—they would then, perhaps, begin to think like men."[21] In similar fashion, the British man Robert Harrison, in his book *Colonial Sketches*, which draws on Harrison's experiences living in South Australia from 1856 to 1861, reflected on "the influence of dress as an agent of civilisation"

18 Hawker, *Early Experiences*, 9.
19 Hawker, 8, citing Gawler's speech to the "natives."
20 *Adelaide Observer* (Adelaide), 16 September 1843, 6.
21 *Adelaide Observer* (Adelaide), 6.

before cautioning his readers that "the disregard of the decencies of clothing and a neglect of cleanliness generally tend to the utter demoralisation of the subject" (and so, by implication, a proper regard for clothing leads to the moralisation of the subject).[22]

What these British men seemed to have understood is that clothes are not just a physical form for covering the body, but—like Aboriginal body paint—also a normative force for constituting subjects; that clothing the body might work well to keep the frost from biting, but can work just as well to "moralise" or to "humanise," which was to say the same thing. And they surely were not the only colonists to understand, at least intuitively, what Michel Foucault would later theorise in terms of disciplinary power.[23] What Forster got wrong, however, was that the colonial government had been complacent in "permitting" Aboriginal people "to go about the streets in a state of nudity."[24] Governor Gawler's administration, like the colonial administrations before and after, required Aboriginal people to wear European clothes. If they would not do so voluntarily, then "there existed an admirable and efficient town police, formed by officers from, and on the model of the London Police"—as Gawler reminded the South Australian colonists in a public response to Forster—with "express orders to prevent the natives from entering the town without decent covering."[25]

And yet, to the colonists' enduring frustration, Aboriginal people were anything but docile recipients of the gifts of Civilisation. As Governor Gawler discovered at his (un)welcome ceremony, Mullawirraburka's response to the British assertion of sovereign authority was to play a joke on the colonists that involved a kind of burlesque. The colonists' stories about that day create the impression of a histrionic performance put on by the Kaurna, which first used parody to subvert the colonial overture (a word, it should be highlighted, that has both legal and theatrical meanings, as the act that seeks to set the terms of a new relationship, and the act that precedes the main performance), before ultimately casting the imperial-mimetic framework aside altogether. That is, after appearing to play (with) the colonists by counter-posing the figures of "copy" and "original" and complicating the relation between them to critical effect, in the end the Kaurna were seen to counter-pose their own originality to that of the Europeans. Especially telling is the colonists' anxiety that the Kaurna would then repeat their performance at a corrobboree, re-enacting the exhibition for other tribes through song and dance, thereby immortalising the humiliation of the Europeans and the power of the Kaurna in a mythology that would spread like wildfire through the bush.[26]

This is not the only time that the colonists expressed anxiety about being laughed at by Aboriginal people. As one colonist recalls, shortly after the

22 Robert Harrison, *Colonial Sketches: or, Five Years in South Australia, with Hints to Capitalists and Emigrants* (London: Hall, Virtue & Co, 1862), 76.

23 See, e.g., Michel Foucault, *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan (New York: Vintage Books, 1979), 135–138.

24 *Adelaide Observer* (Adelaide), 16 September 1843, 6.

25 *Geelong Advertiser* (Geelong), 23 May 1846, 4.

26 For a similar account of a "dramatisation of indigeneity before the law," see the discussion of Kim Scott's novel, *That Deadman Dance*, in Kathleen Birrell, *Indigeneity: Before and Beyond the Law* (London: Routledge, 2016), 207-209.

arrival of their ship from England, the initial band of South Australians had their introductory encounter with a riot of kookaburras, whose laughter they mistook for an act of war. "The new arrivals early in the morning had been greatly astonished by the clamour of a number of laughing jackasses, as those birds (a variety of the kingfisher) are called. At first some of the people believed the blacks were laughing at them, and had arrived to make an attack."[27] Many other references in the colonial archive suggest the colonists were highly sensitive about being "ridiculed," or "jeered at," by Aboriginal people.[28] Harrison, in his *Colonial Sketches*, commented directly on this, remarking that the "so-called savages" would use their "dry sense of humour" to counter the attempts of European missionaries to "civilise" them.[29] So great was Harrison's belief in the power of laughter that he included on the title-page of his book the phrase *castigat ridendo mores*—laughter corrects mores, which is to say, *ridicule disciplines*—which, for Harrison, appeared to cut both ways. To the extent that humour worked to assimilate (to change manners, morals, laws—the very ways of life), it also worked to counter assimilation.

If the colonists saw mimesis as the battleground on which colonisation was fought at Governor Gawler's festival, then clothing was the weapon chosen by both sides. However, 1838 in South Australia was a very different time and place to 1860 in New South Wales. By the time Gill added the last touches to *Native Dignity* in Sydney, Aboriginal peoples on the east coast had been hammered by close to a century of genocidal colonisation. For an Aboriginal man or woman to strip away their European clothes in Sydney at this time would have been to face severe punishment at the hands of the colonists. For very many Aboriginal people in mid-nineteenth century colonial Australia, wearing European clothes had become a matter of survival.[30] And yet, even still, Aboriginal people resisted this mode of assimilation. Throughout the nineteenth century, colonists expressed constant concern with what they saw as the failure of Aboriginal people to dress in European clothes properly. As the Reverend George Taplin wrote in 1873, in recalling his time as a Christian missionary in South Australia: "Our congregations at first were often strangely dressed."

> Some of the men would wear nothing but a double-blanket gathered on a stout string and hung round the neck cloakwise, others with nothing but a blue shirt on, others again with a woman's skirt or petticoat, the waist fastened round their necks and one arm out of a hole at the side; as to trousers, they were a luxury not often met with.[31]

27 Bull, *Early Experiences*, 8; see also Hawker, *Early Experiences*, 36.

28 See, e.g., Hawker, *Early Experiences*, 5.

29 Harrison, *Colonial Sketches*, 140.

30 See Irene Watson, *Looking at You, Looking at Me . . . Aboriginal Culture and History of the South-East* (Burton: Irene Watson, 2002), 83-86; Irene Watson, "Naked Peoples: Rules and Regulations," *Law Text Culture*, vol 4, no 1 (1998); Christobel Mattingley and Ken Hampton, eds, *Survival in Our Own Land: "Aboriginal" Experiences in "South Australia" Since 1836, Told by Nungas and Others* (Adelaide: Wakefield Press, 1988), 13–14.

31 Cited in Mattingley and Hampton, *Survival*, 14.

Taplin ends his reminiscence by recalling one especially shocking Sunday sermon. "To our horror and dismay one Sunday a tall savage stalked in and gravely sat down to worship with only a waistcoat and a high-crowned hat as his entire costume."[32] Even more than stark-nakedness, it was *this*—the "combination of dress and undress," the "tatterdemalion upending of every expectation"—that seemed to disturb the Europeans most.[33] Half-dressed, cross-dressed, dressed-up in tattered clothes, Aboriginal people appeared to the Europeans neither Savage nor Civilised, exhibiting traits of both at once.

In her study of "Aboriginal Men and Clothing in Early New South Wales," Grace Karskens documents the outrageous ways in which Aboriginal men would customise European clothes.[34] One image in particular recurs in this archive: the Aboriginal man wearing a blue shirt and jacket, without trousers.[35] As early as 1819, a group of French men "noted with some shock that this was the usual manner of dress for the Aboriginal men in Sydney," and it was apparently a fashion that persisted, at least in the mind of the colonist, well into the nineteenth century.[36] Another image that clearly left an impression was that of the Aboriginal man and woman walking the streets in European "finery." In one account, a German man who spent ten months in South Australia between 1849 and 1850 wrote of his encounter with "a young beauty whose long cotton dress swept the dust for half an ell behind her and a 'black dandy' [who] seemed to enjoy his appearance in his finery consisting of white shirt, vest, cravat with collar and once-white gloves."[37] In this man's eyes, the result was a "comical appearance."[38] And he was not the only European to say so. Laughing at Aboriginal people was one of the main ways in which the colonists' anxiety manifested—a laughter mixed with "horror and dismay" (in Reverend Taplin's words).[39] As Karskens also notes, "ridicule, sometimes mingled with horror and disgust," was an especially prominent response to Aboriginal people's customisation of European clothes.[40] Karskens cites as an example a European man who, on seeing an Aboriginal man with an old Russian greatcoat "flapping around his chest," described him as "bowing and scraping, his grotesque way of dressing ma[king] him look even more ridiculous."[41] One can imagine the contortion of features and furious expression of face as he laughed maniacally at the image. *Castigat ridendo mores*. The colonists might have feared the power of Aboriginal peoples' humour to counter assimilation, but they also understood the power of humiliation to force assimilation.

32 Mattingley and Hampton, *Survival,* 14.
33 Grace Karskens, "Red Coat, Blue Jacket, Black Skin: Aboriginal Men and Clothing in Early New South Wales," *Aboriginal History*, Vol. 35 (2011): 29.
34 Karskens, "Red Coat, Blue Jacket, Black Skin, 29.
35 Karskens, 5-6.
36 Karskens, 1.
37 B Arnold, "Three New Translations of German Settlers' Accounts of the Australian Aborigines," *Torrens Valley Historical Journal,* vol 33 (1988): 51.
38 Arnold, "Three New Translations," 51.
39 Taplin cited in Mattingley and Hampton, *Survival,* 14.
40 Karskens, "Red Coat," 29. See also Watson, *Looking at You, Looking at Me*, 84.
41 Cited in Karskens, "Red Coat," 28.

NATIVE DIGNITY AS REPRESENTATION

All of this—the attempt to ridicule the uppity pretensions of the natives, while reinforcing the relation between clothing them and civilising them—is represented in Gill's painting of *Native Dignity*. The image of Aboriginal people dressed-up in a state of undress, to a European eye the epitome of the grotesque, is once more on display. Again one sees foregrounded the stock-image of the Aboriginal man wearing a blue shirt and jacket without trousers, the Black Dandy, walking alongside a Young Beauty whose crinoline dress (wildly fashionable among Europeans in the late 1850s) is hitched half way up the hooped cage; while in the background the colonists' anxiety is apparent. But if this is a representation of that worn colonial discourse, then what is the connection with the two words that make up the title, "native dignity"?

As it turns out, they are not just two words, but a concept, and a concept that would have had a very specific meaning for Gill and his European audiences in both Europe and the Australian colonies. At the time, in its immediate, common-sense usage, "native dignity" was synonymous with "natural dignity," signifying a quality possessed equally by all humans on the basis of being human, in contrast with what was sometimes called "artificial dignity," a quality possessed unequally by a few on the basis of social status.[42] An 1845 edition of Sydney's *Sentinel* newspaper offers an especially poetic example:

> Frank possessed that native dignity which poverty cannot slide, nor wealth bestow, and which, when the heart beats proudly, although beneath a thread-bare coat, will still reveal the aspect of a gentleman.[43]

Or as another New South Wales newspaper wrote in 1881, of the "titled loafers" in the British House of Lords, whose "native dignity" had been "strangled" by "an artificial dignity thrown over [them] like a newly-washed garment thrown over a dirty skin. It covers the man, but forms no part of his nature, like true inherent dignity."[44] Humans were not alone in possessing native dignity. Beasts were also understood to have a native dignity that is proper to their taxonomic class.[45] Savages too.[46] What distinguished the native dignity of humans from that of beasts and savages, however, is that, in the words of one colonial newspaper, it is a property that "belongs to a man created in the image of God."[47]

42 Having searched the Australian colonial newspaper archive from the 1830s to the 1880s, I found the term used frequently, and exclusively, in this way.

43 *Sentinel* (Sydney), 15 October 1845, 4.

44 *Southern Argus* (Goulburn), 25 November 1881, 2; see also *Southern Argus* (Goulburn), 20 June 1881, 2.

45 See, e.g., *Evening Journal* (Adelaide), 1 May 1882, 3.

46 See, e.g., *Adelaide Observer* (Adelaide), 5 July 1884, 46.

47 *Illawarra Mercury* (Wollongong), 27 February 1880, 2. See also *People's Advocate and New South Wales Vindicator* (Sydney), 28 February 1852, 6. This distinction, between the dignity of humans and the dignity of beasts, and the grounding of the former in the Biblical understanding that humans are made in the image of God, follows a long Christian tradition in Europe: see Brian Copenhaver, "Dignity, Vile Bodies, and Nakedness: Giovanni Pico and Giannozzo Manetti," in *Dignity: A History*, ed

While the term was used throughout the nineteenth century in everyday Anglophone parlance in this way, to refer to an intrinsic property that is most apparent when the human form is in its God-given, native-born state, uncovered by society's finery, the term's popular meaning was forged at the end of the eighteenth century in the heat that radiated out from the American and French revolutions. Mary Wollstonecraft in particular helped to popularise the term in her defence of the revolution in France.[48] In her widely-read polemic, *A Vindication of the Rights of Men*, published in 1790, Wollstonecraft argued for what she called the "native dignity of man,"[49] which she conceptualised as a potential that all humans possessed by virtue of being human.[50] Wollstonecraft's human-based concept of dignity was a direct response to Edmund Burke's attack on the French Revolution, in which he defended a longer tradition of thinking about dignity as status-based.[51] Dignity in this tradition is a property of position, of rank or office, and not a property of the human.[52] As an influential English dictionary from the early eighteenth century noted: "dignity" is a matter of "rank of elevation" that is "properly represented by a lady richly clothed, and adorned"—connecting it simultaneously to the title of lady and the manner of dress that is proper to such an elevated position.[53] Because of this, as Michael Meyer writes, "not only is dignity not an apt mark of the common man" or woman for thinkers like Burke, but "any such illicit usurpation of dignity is an occasion for ridicule."[54] To use one of Burke's own terms, any commoner who tried to exhibit dignity, for example by wearing the dress of a lady without possessing the title of lady, would look like a "clown";[55] or as Meyer puts it, summarising Burke's position: "Since common men and women are not born into the position in society that is granted the training necessary for ranking members of society, they can have dignity only in a foolish or grotesque way."[56]

Looking again at Gill's painting, one can see reflected in it this Burkeian understanding of dignity. At first sight, *Native Dignity* appears to ridicule the Aboriginal people who could be seen walking the streets of Sydney and Melbourne, castigating them for illicitly usurping dignity by dressing in the fashion of high-class Europeans. *Castigat ridendo mores*. And yet this is clearly not an image that simply affirms a Burkeian concept of status-based dignity by drawing satirical attention to the clownish figure of the dressed-up

Remy Debes (Oxford: Oxford University Press, 2017); Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law*, vol 19, no 4 (2008): 657-660.

48 See Mika LaVaque-Manty, "Universalizing Dignity in the Nineteenth Century," in *Dignity: A History*, ed Remy Debes (Oxford: Oxford University Press, 2017), 314-315; Michael J Meyer, "Kant's Concept of Dignity and Modern Political Thought," *History of European Ideas*, vol 8, no 3 (1987): 324-325.

49 Mary Wollstonecraft, *A Vindication of the Rights of Men, Second Edition* (London: J Johnson, 1790), 24.

50 See also LaVaque-Manty, "Universalizing Dignity," 314–315.

51 See Edmund Burke, "Reflections on the Revolution in France," in *Reflections on the Revolution in France*, ed Frank M Turner (New Haven: Yale University Press, 2003 [1790]).

52 See also Meyer, "Dignity," 320–321.

53 Cited in Meyer, 326.

54 Meyer, 322.

55 Burke, "Reflections," 37.

56 Meyer, "Dignity," 322.

native. Against such a reading, the painting gives the distinct impression that the Aboriginal couple, who for Burke could have dignity "only in a foolish or grotesque way,"[57] *have dignity*, and have it precisely in a foolish or grotesque way. They act the clown with a knowing nod to their audience, and in doing so, like Mullawirraburka, are seen to be dignified; while the European couple in the painting, who act dignified, appear, like the Cockatoo Governor and his party, the tragic characters of the piece, remaining "totally oblivious," as Sasha Grishin writes, "to the ridiculous nature of their own outfits."[58]

This is clearly not a simple affirmation of Burkeian status-based dignity—but nor is it simply an affirmation of that native dignity "which poverty cannot slide, nor wealth bestow," that natural human-based dignity that is most apparent when the body is covered by only "a thread-bare coat."[59] To see this, it helps to look at the painting alongside another of Gill's pictures, *Homeward Bound* (fig. 2).

This colour lithograph was published in Melbourne in 1864, four years after *Native Dignity*, in one of Gill's Australian myth-making masterpieces, *The Australian Sketchbook*. It depicts a European man of apparently modest means herding sheep through a country landscape towards their night paddock. Dressed in a thread-bare coat, the man makes the final familiar paces of the day without need for his walking stick, which he holds behind his back. From the rise he gazes down into the valley, hat pulled low to shade his eyes from the setting sun; and as he contemplates the scene, a soft wisp of smoke rises from his pipe as if to the meandering rhythm of the sheep. Now look again at *Native Dignity*. It does not take a keen eye to see the similarities, and more importantly, the differences. The figures of the two men, one white, one black, are almost identical; dressed in similar tattered coats, walking sticks held at similar angles behind their backs, pipes in mouth, hats on, they walk in almost perfect synchrony. Almost, but *not quite*. The white man walks in a private rural setting all-but alone with his dog; the black man walks in a public urban street with his female companion, about to collide with two pedestrians. The white man is dressed in trousers and shoes; the black man wears neither. The white man's pipe smolders; the black man's is propped, askew and unlit, between his lips. The white man's head is turned away, his eyes looking off into the distance; the black man's head is turned to his audience, chin up defiantly, his eyes simultaneously commanding and demanding a response. Above all, the white man is white, the black man, black.

The juxtaposition of these two images (fig. 3) illuminates a contradiction in the concept of native dignity that arrived in the Australian colonies along with the colonists. On one side, *Homeward Bound* registers the ease with which Europeans could speak of the native dignity of the human as a universal concept that means the same for everyone at all times and places, when facing a European man. Looking at the image of this man—call him Frank—another European man could easily say: despite his thread-bare coat, he still possesses

57 Meyer, 322.
58 Grishin, *S T Gill*, 216.
59 *Sentinel* (Sydney), 15 October 1845, 4.

FIG. 2
S. T. Gill, *Homeward Bound*, 1864, colour lithograph, 17.8 x 42.6 cm, National Gallery of Victoria, Melbourne.

FIG. 3
Details: S. T. Gill, *Homeward Bound*, 1864 and *Native Dignity*, 1860.

that native dignity which poverty cannot slide, nor wealth bestow. In contrast, *Native Dignity* registers the unease that a European would have felt in speaking of the native dignity of the human as a universal concept when face-to-face—indeed *eye-to-eye*—with Aboriginal people. The native dignity of the human was supposed to be most apparent when the body is covered by only a thread-bare coat, and least apparent when covered by fine garments—but the opposite was considered to be true for Aboriginal people. While Frank's native dignity would be "strangled" by a newly-washed garment,[60] an Aboriginal man had to wear that newly-washed garment in order to exhibit the same native dignity. For an Aboriginal man to be dressed in only a thread-bare coat, or for an Aboriginal woman to be dressed in a scandalously-worn dress, legs and feet exposed, would have signified, not native dignity, but abject degradation. In brief, to possess the native dignity that Europeans naturally possessed, by virtue of being human, Aboriginal people had to first look the part. Naked, Aboriginal people had the native dignity of the Savage; dressed properly in European clothes, they would at least exhibit the native dignity of the human; but dressed-up in a state of undress, Aboriginal people exhibited neither the native dignity of the one nor of the other. To appear in such a state, half-dressed, was to remain half-human, the most degraded of forms.

Native Dignity displays this unsettling truth—that "native dignity," that revolutionary human-based concept, was actually a retrograde status-based one. For Europeans, native dignity was supposed to be a radical, egalitarian, emancipatory concept, set against a long tradition of thinking about dignity as a matter of "rank of elevation" that "is properly represented by a lady richly clothed, and adorned."[61] And yet for Aboriginal people, it was exactly that: a matter of rank of elevation that was properly represented—*and brought about*—by wearing European clothes. For Aboriginal people, the concept either arrested their dynamism as peoples by tying them to a scientistic image of the Noble Savage, or else totally dynamited their existence as peoples by trying to transform them in the image of the Dignified Human. Failing to conform to either image meant not having a native dignity at all—the birth right of all animate life; while conforming to either image meant being sub-human or else being remade in the image of European Man, that "rational" being made in the image of God.[62] The result, on full display in *Native Dignity*, was a concept of dignity even more dominating than the Burkeian status-based one that it was supposed to overcome. For the antipodal Savage, the consequence was that their only hope for having "human dignity" was to undergo a dramatic transformation, beginning with the first rite of every day: getting dressed. In the words of the South Australian colonist, Robert Forster, the only hope was to "give them a nearer approach to humanity by clothing them," for "if they could make them look like men—they would then, perhaps, begin to think like men."[63] From moral fibre to moral fibre.

60 *Southern Argus* (Goulburn), 25 November 1881, 2; see also *Southern Argus* (Goulburn), 20 June 1881, 2.

61 Meyer, "Dignity," 326.

62 On the connection between the racist concept of "rationality" and the concept of human dignity, see Charles W Mills, "A Time for Dignity," in *Dignity: A History*, ed Remy Debes (Oxford: Oxford University Press, 2017); Meyer, "Dignity," 327–328.

63 *Adelaide Observer* (Adelaide), 16 September 1843, 6.

RE-PRESENTATION

If one had to identify the genre of *Native Dignity*, it would be a visual paronomasia—a pun. The title of the painting, inscribed on the sidewalk at the bottom-right of the image, evokes the concept of "native dignity," the immediate meaning of which, for Gill and his European audiences, was "natural dignity." But by drawing these words together with an image of Aboriginal people, the picture suggests a second meaning: "native dignity" as "dignity of the natives." Now, if the natives in the painting were naked, or if they were dressed properly in European clothes, then *Native Dignity* would be merely a sympathetic illustration of the concept, and not a pun; it would have the mimetic effect of creating identity between concept and image, rather than non-identity, which is crucial to the pun form. Instead, *Native Dignity* illustrates a contradiction in the concept, by representing natives without native dignity—natives who, in order to possess that natural property of every species, would have to exhibit either the artifice of the European, or the artifice of the Savage. The result is a painting titled *Native Dignity* that shows what the two words obscure, the concept's conceit, the artificial nature of "native dignity." At the same time, the painting presents a critique of Burkeian status-based dignity, by drawing attention to the ridiculousness of the "dignified" Europeans, and the dignity of the "ridiculous" Aboriginal people. In this way, *Native Dignity* neither illustrates native dignity (per Frank), nor ridicules natives' dignity (per Burke). But the opposite: the painting ridicules native dignity by showing Frank to be a myth, while illustrating natives' dignity by showing Burke to be a clown.

But as Desmond Manderson reminds us, representation is only half the story. Art is never merely produced historically, to be read artefactually for the social discourses that have been layered in it. Art is itself productive. In Manderson's terms, it has "presence," and not just "meaning."[64] Paintings, like other works of art, might interact with audiences in ways that are affirmative, producing and reproducing the mythologies that enable a society to cohere, but a painting might also be critical—and arguably this is the way that art truly works, as art—by *unsettling* a society, by confronting it with its contradictions. As Manderson puts it, artworks are never "simply signs that mimic or represent other, specifically linguistic, things. Instead, they constitute, incarnate, or open up a *space* in which the spectator experiences a disturbance in their equilibrium. The encounter that takes place is not with a narrative or history, but with an event that cuts through time." In this, an artwork is not just "the mimetic representation of the past," but "the space of an event made present"—an "annunciation."[65] Exemplary here is the dramatic performance of Mullawirraburka and his fellow Kaurna, who turned mimesis into an event that shattered the colonists' equilibrium. In response to Governor Gawler's command—for the Kaurna to "imitate good white people," to "become good British subjects"—the Kaurna did exactly that, but with a twist,

64 On this debate in art history, see Manderson, *Danse Macabre*, 179–182.

65 Manderson, 181 (italics in original). On the "annunciative" work of art, see also "Foreword," Manderson.

turning the Governor's official annunciation on its head with their own annunciation of sovereign authority. But to leave it at that would be to miss the point in Manderson's argument, which is the temporal aspect of *re*-presentation, its repetition through time. It was this that the colonists feared most in the Kaurna's performance: its repetition at corroborees across the country, causing the original performance to metastasise mythologically.[66]

The suggestion here is not that *Native Dignity* is somehow a re-presentation of the Kaurna performance, although it is very likely that Gill would have heard the stories of that day.[67] The suggestion is simply that *Native Dignity* was touching the same colonial nerve. Just as *Native Dignity* uses the mimetic form of the pun to critical effect, creating non-identity between its title and its image in a way that denaturalises the concept of native dignity, Gill's painting also uses mimesis in a way that creates non-identity between itself and its audience. Rather than word-play, it is distance that makes the difference here. Viewing *Native Dignity* alongside *Homeward Bound* again helps to see this. Looking first at *Homeward Bound*, one can see how it uses distance to uncritical effect. As a physical matter, the rural setting was fast becoming a distant experience for the urban European in the colonies who could afford to purchase a copy of *The Australian Sketchbook*; but even for those who lived rurally, the pastoral scene that *Homeward Bound* depicts would have operated more as a metonym for Mother Country than as a synonym for Indigenous Country, drawing the colonists who saw it "homeward" to Europe even as they gazed out over the yellow-flowering wattle. In this way, the picture distances its colonial audience from the singularities of the place in which they lived. At the same time, *Homeward Bound* creates a metaphysical distance by drawing its colonial audience, through the figure of the white pastoralist, into its tranquil golden valley, where, in a dreamy stupor, they might forget life in the colony and just imagine a gentle breeze, a muffled bleat, the soothing warmth of the setting sun. Both ways—physically, and metaphysically—the effect is *settling*: it settles colonisation by settling Europe in Australia, laying a European mythology of country over Indigenous country; and it settles the colonists' mind by setting them at ease. As a result, not only is the country stolen twice-over, first in fact, second in myth, but the concept of native dignity—beautifully illustrated by the white pastoralist in his thread-bare coat—is left untroubled.

If *Homeward Bound* presents its colonial audience with a pacifying myth, then *Native Dignity* jolts them out of their stupor. It breaks down both physical and metaphysical distances: you are back on the colony's city streets; and you are once more face-to-face with two Aboriginal people who not only refuse to just die away, but whose ongoing presence there puts lie to your own presence there. At the same time, *Native Dignity* uses humour to break down the distance between its colonial audience and their understanding of native dignity. Not only is the painting itself in the genre of a pun, but it also casts the Aboriginal couple as *histrios*, whose role, it will be remembered, is to

66 Desmond Manderson, "The Metastases of Myth: Legal Images as Transitional Phenomena," *Law and Critique*, Vol. 26 (2015).

67 He also likely would have seen the painting of the event by Martha Berkeley, who was also present at the festival, titled *The First Dinner Given to the Aborigines 1838* (1838).

represent society's mythologies through burlesque. Gill's European audiences in the Australian colonies are thus confronted with a truly grotesque scene—native dignity, performed in a public square—and the effect is *unsettling*. As Mikhail Bakhtin, scholar of the grotesque, has shown: "Everything that makes us laugh is close at hand, all comical creativity works in a zone of maximal proximity. Laughter has the remarkable power of making an object come up close, of drawing it into a zone of crude contact."[68] The metaphor Bakhtin uses is the stripping of sovereign authority: "Basically this is uncrowning, that is, removal of an object from the distanced plane."[69] On this new plane created by laughter, the object ("its hierarchical ornamentation removed") is left exposed, vulnerable, ridiculous.[70] If the object of *Native Dignity* is the European concept of "native dignity," then the painting exposes it to ridicule before the very eyes of its colonial audience. See their contortion of features, their furious expression of face? It is the uncontrollable play of the social body's histrionic muscles, innervated by the image.

EXHIBITION, AGAIN

Native Dignity confronts its colonial audience with the contradictions that *Homeward Bound* paints over, unsettling the Pacific myth of Australia as a European home, along with the discourse of the universality of human dignity. But to see the painting's unsettling effect in a more concrete way, let us turn to one last scene: the 1866 Intercolonial Exhibition in Melbourne. *Native Dignity* was not part of that Exhibition, although a dozen of Gill's other watercolours were.[71] Down the road from the Exhibition building, however, a lithographed version of *Native Dignity* would likely have been found on display in some shop-front.[72] What was on display at the Intercolonial Exhibition was another, much more famous picture, *Governor Arthur's Proclamation to the Aboriginal People* (fig. 4),[73] a picture that, according to Manderson's reading, is "one of the most significant statements of the rule of law in Australian colonial history."[74] Before it was rediscovered and put on display in lithographic form at the Intercolonial Exhibition,[75] a hundred copies of the *Proclamation* had supposedly been circulated by the colonial government in early 1830s Tasmania, to instruct the Aboriginal people on the principles that constitute a so-called rule-of-law society.[76]

68 Mikhail M Bakhtin, *The Dialogic Imagination: Four Essays* (Austin: University of Texas Press, 1981), 23.
69 Bakhtin, *The Dialogic Imagination*, 23.
70 Bakhtin, 24.
71 *Intercolonial Exhibition: Of cial Catalogue*, 107.
72 A black and white lithograph of *Native Dignity* was printed in 1866 for sale in Melbourne by "DeGruchy & Leigh, 43, Elizabeth St."
73 *Intercolonial Exhibition: Of cial Catalogue*, 79.
74 Desmond Manderson, "The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law," *New York Law School Law Review*, vol 57 (2012).
75 Penelope Edmonds, "Imperial Objects, Truths and Fictions: Reading Nineteenth-Century Australian Colonial Objects as Historical Sources," in Penelope Edmonds and Samuel Furphy (eds), *Rethinking Colonial Histories: New and Alternative Approaches* (Melbourne: RMIT Publishing, 2006), 74.
76 Manderson, "Colonial Representations," 157.

FIG. 4
Governor Arthur's Proclamation to the Aboriginal People, ca. 1828–1830, Mitchell Library, State Library of New South Wales, Sydney.

The *Proclamation* consists of four panels or frames, with the principle of "abstract equality" represented in the top frame.[77] Here, eight European and Aboriginal people are coupled together—man and man, child and child, woman and woman, baby and baby—in such a way that the Aboriginal people appear to be perfect copies of their European counterparts, an appearance that is achieved by clothing the four pairs in identical European outfits and positioning them in mirrored postures.[78] The effect is an imperial-mimetic work *par excellence*, a pictorial projection of the mythological "as if" identity that both drove the European civilising mission in the nineteenth century, and represented its end-point, its promise. This is the vision of colonists such as Gawler and Forster realised—the achievement of Civilisation down-under. As Manderson's reading makes clear, this rule-of-law society, and the equality before the law that it promises, is not now, is "not yet." It is a state that is to come once Aboriginal peoples become "civilised," which is to say, once they have been remade in the image of European Man.[79]

> In *Governor Arthur's Proclamation*, the rule of law appears as a promise held in suspension until Aboriginal people reshape themselves to fit it. Nothing much has changed. The rule of law still holds out a promise of equality to be paid out only at that time when Aboriginal people become normal, and live in normal suburbs with normal jobs in a normal economy. Until those conditions obtain, equality is postponed and a state of exception invoked to justify measures of extraordinary severity and far-reaching implications, through which they will be bloody well *made* normal, and like it.[80]

Or as Governor Gawler put it in his own proclamation: "Black men! We wish to make you happy. But you cannot be happy unless you imitate good white men, build huts, wear clothes, work, and be useful."[81] To this official *Proclamation*, the picture of *Native Dignity* responds, like the legend of Mullawirraburka to the Cockatoo Governor, by drawing into focus its dehumanising work, its genocidal work. Both pictures—one seen from a dusty public square, the other from inside the imposing imperial Exhibition—represent the dignity of equality, but they could hardly have confronted their audiences with more opposed visions of it: on one side, equality as, and through, assimilation; on the other side, equality as, and through, an encounter of difference.[82] And just as the colonial proclamations, whether oral or pictorial, were legal acts, directed at constituting the colonial-social order, so too were the responses, whether dramatised, narrated, or painted. Art and law are here "entwined and

77 Manderson, 158.
78 See Manderson, 158–159.
79 See Manderson, *Danse Macabre*, ch. 3.
80 Manderson, 100.
81 Blacket, *History of South Australia*, 145–146.
82 See also Manderson's discussion of Benjamin Duterrau's *The Conciliation* (1840) in *Danse Macabre*, 101–103.

inseparable,"[83] with the force of law dependent on the force of representation, and acts of representation being acts of law, colonial and otherwise.

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83 Manderson, 84.

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Part 2
LACUNAE

LAW-*LESS* SILENCE

Extraordinary Rendition, the Law, and Silence in Edmund Clark's Negative Publicity

by Clare Fuery-Jones

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Haven-like, an indoor pool is bathed in gentle natural light. All is still: we observe an undisturbed tableau of leisure, ease. The outside greenery beyond the glass walls reiterates a sense of rightfulness that only nature (ancient, constant, removed) has the capacity to invoke. Yet, what this photograph bears witness to is shocking, discomfiting, extreme. Created by British artist Edmund Clark,[1] *Swimming Pool in the Hotel Gran Meliá, Palma de Mallorca*, (2011–2015) (fig. 1) (*Pool*) is part of his body of work titled *Negative Publicity*.[2] An investigative "dossier" on extraordinary rendition, Clark produced *Negative Publicity* in collaboration with counter-terrorism researcher Crofton Black.[3] "Extraordinary rendition" is the term for Western government-sponsored secret (or invisible and silent) abduction and extrajudicial transfer of people to circumvent laws on interrogation, detention and torture.[4]

Pool, like all images in *Negative Publicity*, depicts a site of extraordinary rendition.[5] Its benign banality is deceptive; this space has stood context to legal malpractice. The only clue the photograph gives of this is its potent sense of silence. Silence reigns here. Its pervasive atmosphere overdetermines our experience, or visual sensations, of what we see. Silence is Clark's primary *aesthetic* tool. Significantly, it is also the metaphor, indeed, the entire lens through which he considers his subject. Extraordinary rendition is carried out hidden from public view and standard legal process—it is a silent act which utilises everyday processes and contexts as, paradoxically, a means of maintaining its invisibility. In evoking scenes that emphasise the critical link between silence and extraordinary rendition, Clark enjoins his viewers to consider also, and more broadly, the relationship between silence and the law; and why the rule and rationality of the latter is challenged and exploited in contexts which privilege the former.

At issue, I argue, in this series of photographs, is not only extraordinary rendition as particular and problematic event, but the broader metaphysical contexts of the law and silence in which it functions. In this sense, Clark, a

1 Known for his work on the War on Terror and incarceration, photographer Edmund Clark investigates systems of control which impact upon how we consider and relate to others, and the status of our society as a whole. His projects include *Guantanamo: If the Light Goes Out* (2010), *Control Order House* (2012) and *My Shadow's Reflection* (2018).

2 Though exhibited in a variety of exhibition formats, *Negative Publicity* was first realised as a publication. I use *Negative Publicity* to refer to its publication. Included within the publication alongside Clark's photographs are a series of explanatory essays by Black, found imagery and documents. Edmund Clark, *Swimming Pool in the Hotel Gran Meliá, Palma de Mallorca,* 2011–2015, photograph (digital print), 28.0 x 35.0 cm (in publication), in Crofton Black and Edmund Clark, *Negative Publicity: Artefacts of Extraordinary Rendition* (London: Aperture, 2015), 117. *Pool* is my own shorthand title for this image.

3 Crofton Black and Edmund Clark, "The Long Read: Edmund Clark and Crofton Black on the War on Terror," interview by Nils-Hennes Stear, *British Journal of Photography*, August 1, 2016, http://www.bjp-online.com/2016/08/long-read-edmund-clark-and-crofton-black-on-the-war-on-terror/.

4 "Rendition" stands in contrast to the legal process of extradition. It is the process governments use to detain and transport people they suspect of terrorist activity against whom they have insufficient evidence to lay charges. "Extraordinary" rendition occurs when illegally-detained prisoners are at risk of serious harm because of their treatment incurred as part of this process. Many countries (including the United States and the United Kingdom) have revealed themselves to be, if not actively involved, then complicit in rendition since September 2001; Black and Clark, *Negative Publicity*.

5 *Negative Publicity* focuses specifically on sites, channels, and spaces used by or acquisitioned for US-led extraordinary renditions. *Pool* depicts a resort in Spain where crew members who flew rendition flights stayed between operations; Black and Clark, *Negative Publicity*, 117.

FIG. 1
Edmund Clark, *Swimming Pool in the Hotel Gran Meliá, Palma de Mallorca*, 2011–2015, photograph (digital print), 28.0 x 35.0 cm (in publication).

visual artist, tackles what is notionally an unrepresentable subject—extraordinary rendition, secretive and untraceable—by alluding to the further-abstract terms contextualising its existence: the metaphysic of silence destabilising the sovereignty of the metaphysic, law. Exploring not just the theory, but the grounded reality of these terms and this relation, Clark's photographs are catalysts for considering how the law and silence interact to shape our seeing and thinking about the world.

In tracing the sites, logistics and bureaucratic obfuscation which define how extraordinary rendition operates, *Negative Publicity* reveals the powerful effect of this process' appropriation of the mundane:[6] why would something that appears to be superficially routine lie beyond legal remit? Silence-as-banality is what "gentrifies" extraordinary rendition by disappearing it into the plethora of generic procedures we assume are governed by—constitutive of, in fact—the law (that overarching construct to which we defer, and assume, holds us safe). Yet, what Clark's photographs bear witness to is the law put on hold as it were, and despite superficial appearances of normality, inhibited from functioning justly. In *Negative Publicity* we observe scenes apparently mundane, without legal breach. The invisibility of extraordinary rendition—its *silent* operation—enables this double-status: its ability, that is to function at once both in and outside of the law. The law is therefore both undermined and appropriated by extraordinary rendition. Silence is the means of this deception. Or, put differently, silence is the defining feature of the "state of exception" extraordinary rendition occupies in relation to the law.[7]

Through giving silence an image, a visibility, Clark's photographs act as fora which call us, as viewers, to account; urging us, as witnesses, to care. It is in this regard that Clark's *Negative Publicity* series resonates with Michel Foucault's notion of "*parrēsia*"[8]—an attitude dedicated to truth in the sense that one remains aware, assertive and in control of how one sees, acts, and responds to the world and others in it.[9] Opposite to its role in relation to extraordinary rendition, silence in *Negative Publicity* ultimately initiates a dedicated parrhesiastic awareness, enabling us to reassess processes and spaces we take for granted, to reclaim both environment and metaphysic.

Towards this conclusion, I will first explore the law and silence as metaphysical operations generative of effect, discussing the law's relationship to silence, and, how extraordinary rendition relates to both. Analyses of two further works in *Negative Publicity*—representative of aesthetic visual structures that I will term "trace" and "strikeout" image types[10]—will show *how* Clark's photographs function as images of silence that propose his alternative envisioning of extraordinary rendition, and our response to it.

6 Clark's *Negative Publicity* photographs depict the ordinary boardrooms, recognisable airports and familiar suburbia in which extraordinary rendition has taken place. Gathered as well are copies of email chains, banal third-party agreements and other bureaucratic paraphernalia which underpin its functioning.

7 See Giorgio Agamben's *State of Exception*, translated by Kevin Attell Chicago: The University of Chicago Press, 2005.

8 Michel Foucault, "Parrēsia," trans. Graham Burchell, *Critical Inquiry* 41, no.2 (2015): 222.

9 Martha Cooper and Carole Blair, "Foucault's Ethics," *Qualitative Enquiry* 8, no. 4 (2002): 519.

10 Eyal Weizman, "Strikeout: The Material Infrastructure of the Secret," in *Negative Publicity: Artefacts of Extraordinary Rendition*, Crofton Black and Edmund Clark (London: Aperture, 2015), 287.

Finally, I will examine these images' invocation of parrēsia as their ultimate achievement.

Philosophical in origin, the term "metaphysic" denotes a fundamental and enigmatic transcendental structure which shapes the world as we physically experience it.[11] By virtue of their intangibility, that is, their lack of physical iteration, metaphysical constructs are both hard to define and broadly associative. The laws of society are manifestations of a metaphysical "Law" or sovereign rule[12]—built upon the paradigmatic epistemology of time and place—which determines the limits of how we act, and gives some shape, also, to how we think. The Law alludes to many things other than itself (morality, justice, authority, control; the list stretches on).[13] Though Silence does not represent an ideological structure, it does underpin (or is the name for) aspects of our experience, acting as an opening through which we think about and connect to definitive areas of our lives (such as self-reflection, religion, nature, art).[14] Along with other metaphysical frameworks (like Love and Mortality) we interpret our reality by considering it in terms of, or perceiving it via, these non-embodied standards which define human existence.

Law and Silence are clearly not only metaphysical: they also manifest as particular events or actions which realise tangible effects. "The Law" becomes "a law" when, for example, basic principles underpinning it (perhaps "rightness," perhaps "fairness," perhaps only "maintenance of authority") are enacted, as in a judicial proceeding.[15] "Silence" becomes "a silence" when its metaphysical presence presents as a particular reflection—of perhaps "clarity" or "void"—thereby giving specific colour to an experience. Or, when it is actioned towards a specific end, as in the case of its "disappearing" extraordinary rendition. The transcendental power and authority of both the metaphysics of Law and Silence lies, though, in them maintaining an abstract status; it relies, that is, on such transposition (from metaphysic to effect) being left unacknowledged, on their remaining detached from the everyday, and thus irreproachable for failures or alterations in their standards and functioning.

Representative of the metaphysical standards by which we interpret, judge and know our world, the Law and Silence are evidently not removed, latent mechanisms, but speak of and to the nature of our societies—are

11 Metaphysics is a complex, wide-ranging and highly contested field, originating in its Western philosophical iteration with the pre-Socratics. Its subjects of study, and the possibility, even, of studying them, have been debated since this time. See D.W. Hamlyn, John Finnis, "metaphysics, history of" in *The Oxford Companion to Philosophy*, ed. Tom Honderich (Oxford: Oxford University Press, 2005), https://www.oxfordreference.com/view/10.1093/acref/9780199264797.001.0001/acref-9780199264797-e-1586

12 From this point, capitalisation of "Law" and "Silence" will denote each in their metaphysical capacity, assuming also the potential of this capacity to generate tangible effect. Without capitalisation ("law" or "a law," "silence" or "a silence"), these terms will be understood to refer to (particular) instances, events or processes functional (and visible) within the everyday.

13 See John Finnis, "law, history of the philosophy of," in *The Oxford Companion to Philosophy*, ed. Tom Honderich (Oxford: Oxford University Press, 2005), 497–500.

14 Steven L. Bindeman, *Silence in Philosophy, Literature, and Art*, Leiden (Leiden: Brill | Rodopi, 2017), 2.

15 These basic principles are themselves strongly contested. See John Finnis, "law, problems of the philosophy of," in *The Oxford Companion to Philosophy*, ed. Tom Honderich (Oxford: Oxford University Press, 2005), 500–504.

reflective of who we are. Failing to acknowledge them as such problematically allows us the possibility to overlook our own responsibility in relation to how and what the Law, and Silence, may effect or act as context to. Clark's photographs draw us to attend to their under-considered nuances: to the *real-life effects* that can stem from a metaphysic, to the metaphysical context which broadens or deepens the significance of particular actions, events or processes and ultimately, to our inherent responsibilities to both.

Throughout this essay, the Law will be considered as a compilation of its metaphysical content and effective function, inclusive of the official principles upon which our societies are built, the authoritative framework under which they function, and, the (judicial) processes that carry out these principles and insure this framework. Considering the Law holistically, in terms of both its content and function, requires also establishing a sense of its boundaries, or encapsulation. This is difficult, for as Giorgio Agamben asserts, the Law's boundaries (between "legality" and "illegality") do not mark the Law's end, or a point at which it becomes irrelevant.[16] Rather, its entwinement with our world, lives and philosophies that means it stands as point of reference for, and is therefore implicated in, things that it is not.

Importantly, the Law's sphere of interest is not limited to elements which abide by it and positively advance its motives, but encompasses processes with like points of interest, like means of force—as extraordinary rendition is about order and control[17]—and yet run counter to the *laws* of that society (the principles and best practice enacted in its legislation).[18] As all things depend on contrast to reassert their own definition, so the Law is constituted in its content by what stand as non-legal actions.[19] In turn, non-legal actions are not defined by what they are, but by their status in relation to the Law.Paradoxically, the Law hence stands authority to its own "states of exception"– contexts in which the Law is both active and inactive, sovereign and outcast.[20] States of exception are not merely spaces of non-legal action (defined as such by virtue of their relation—as contrast– to the law), but also spaces in which such actions may posit a law-like force (superficially resembling legal action or status), yet be void of principles and value

16 Jessica Whyte, "*'Its Silent Working was a Delusion',*" in *The Work of Giorgio Agamben : Law, Literature, Life*, eds. Justin Clemens, Nicholas Herron and Alex Murray (Edinburgh: Edinburgh University Press, 2008), 69.

17 See John T. Parry, "The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees," *Melbourne Journal of International Law* 6, 2 (2005): 522–525 for his discussion under heading "Modern Torture as an Exception," exploring why and in what circumstances practices like extraordinary rendition are implemented; how legal loopholes are exploited in order to justify this. As well, under "Beyond Interrogation and Punishment: Torture as Total Domination" (525–226), on how torture (for example, extraordinary rendition) represents a (twisted) drive to impose order and control.

18 The very possibility of this occurring is a basic paradox (or "problem") at the heart of the Law and its implementation; Finnis, "law, history of the philosophy of," 497. For examples of legal frameworks which are intended to prevent the practice of extraordinary rendition, but which (paradoxically) *provide* the legal context for its functioning, see Parry, "The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees," 520–521.

19 Andrew Norris, "The Exemplary Exception: Philosophical and Political Decisions in Giorgio Agamben's *Homo Sacer*," in *Politics, Metaphysics, and Death : Essays on Giorgio Agamben's Homo Sacer*, ed. Andrew Norris (Durham: Duke University Press, 2005), 268–9.

20 Stephen Humphreys, "Legalizing Lawlessness: On Giorgio Agamben's *State of Exception*," *European Journal of International Law* 17, no.3 (2005): 681.

pertaining to the Law.[21] The danger of this, as Agamben iterates, is that "in extreme situations "force of law" floats as an indeterminate element that can be claimed both by the state authority… and by a revolutionary organisation."[22] Such instances in which co-opting of the Law's power over principle occurs Agamben identifies as manifesting a "force-of-~~law~~."[23]

Extraordinary rendition is such an action. Occupying a state of exception, it functions with reference, but not adherence, to the Law. Carried out under the guise of normal operating procedure, its lack of lawful principle or value is rendered invisible. Its occurrence within the everyday is significant: this is not a context normally considered as existing beyond the bounds of conventional legal remit, but one that should be firmly subject to legal standards.

Silence is what transforms this otherwise "normal" arena: an obfuscating zone of non-accountability, silence manifests as classified documents and disappeared persons, yet also, as banal email confirmations, recognisable airport hubs, soulless boardrooms. It is the officially enforced, and casually apparent "nothing to see here" which creates a state of exception—or sub-strata—of legal ambivalence within our legally-abiding everyday in which extraordinary rendition operates.

Consequently, the Law is held in a constitutive bind: reliant on that which it is not to define what it itself is, it also posits, and therefore stands authority to, these very actions it does not condone. Such ambivalence is exploited by actions like extraordinary rendition which effect law-like force, without the Law's principles. Its silence—formulated as a mask of mundanity and a deliberate suppression of anything extraordinary—defines, or marks, its operational context as a state of exception in relation to the Law, and that which allows extraordinary rendition to play out as a "force-of-~~law~~." Silence is thus what the Law must grapple with—what Clark emphasises must be recognised—in redressing the ambivalent space surrounding its standard remit.

The means by which the Law and Silence generate their effects, along with particular aspects (or capabilities) of their natures are what determine how the former relates to the latter; how the latter can define a state of exception to the former. Firstly, it is through language that Law, as metaphysic, manifests; it is through language that Law begets laws—the functional matter which guides judicial process or other legal procedure. Language hence stands as the conduit via which the Law's ideological existence can transform into effective action.[24] In another sense, the Law is both binding and bound; it is the determining lens through which we consider what stands as appropriate action and the right ways to live, yet the expression of its power is itself reliant on (bound to) language as the mechanism by which to effect its own authority.[25] Though we are held, used

21 Giorgio Agamben, *The State of Exception,* trans. Kevin Attell (Chicago: The University of Chicago Press, 2005), 38.
22 Agamben, *The State of Exception,* 38–39.
23 Agamben, 39.
24 Remedios Regina de Vela-Santos, "Verging on divine: The matter of Benedictine silence and the justification of law and language," *Journal of Pragmatics* 43, 2011: 2349–2350.
25 de Vela-Santos, "Verging on divine," 2350.

and protected by it, rarely, as part of daily life, do we take time to consider and question the ways in which the Law—through laws, using language—saturates our structures of experience and being. (And, as outlined above, this is even to the extent of it remaining *at issue* in relation to non-legal matter.)

Like the Law, Silence is a metaphysic in that it gives shape to a range of human experience and existential conundrums, existing as a physical context, or metaphorical or emotional means of expression and understanding. It is, however, much harder to codify or divorce from how we experience it because, unlike the Law, Silence has no use for language. For instance: on a still, moonless night, with only the stars for company; in a medieval cloister, ensconced by ancient stone and ancient meditation; or, in communion with a work of art to which we ascribe a particular resonance, we experience something deeper, more spiritual, less structured or articulable than when we observe patterns of law-bound behaviour, or consider the rights or wrongs of an action in light of the law's (many-stated, enmeshed) principles. Silence is more instinctual, sublime, felt than is the law. Put another way, whereas the Law is positively defined by language, in the sense that language is the means by which the Law manifests itself as seen and understood (into laws),[26] Silence is negatively defined by language, standing as its limit point, its absence.[27]

Despite this relation, Silence must be understood (as implied above) to be infinitely more than language's "other half"—commonly given as silence's literal definition.[28] It consequently differs from the Law in this fundamental sense: the basic constitution of Silence (as multiple and difficult to assert as this is) is founded upon unstructure, air (space), boundlessness and paradox, whereas the L/law proposes rule, certainty and rational process. It is by virtue of this difference that silence functions so effectively as a challenge and obfuscation to legal process; how it can be the constitutive context to a state of exception, "filling up" the ambivalent space of non-definition the Law surrounds itself with.

A particular paradoxical capacity of Silence is its ability to both reveal and hide. As will be made clear, the Law is unable to "deal with" Silence in either capacity. It is this dynamic that *Negative Publicity* mobilises as a means of exploring extraordinary rendition in terms of S/silence (as a state of exception) and the Law. Through Silence (expressed particularly in circumstances outside of everyday routine, such as art), things previously obscured can be *made visible*, become clear. Silence creates spatial, visual, aural, felt openness in which to concentrate, absorb and analyse. In this way, Silence acts as a condition (or setting) for revelation and allows for issues or objects usually obstructed by the noise and clutter of daily life to come to the fore.[29] On the other hand, Silence can hide and obstruct. This is a mute silence, a secretive, furtive silence which can cause frustration and anxiety, which can

26 de Vela-Santos, 2349.

27 Paul Goodman, "Not Speaking and Speaking," in *Speaking and Language: Defence of Poetry* (New York: Random House, 1971) pp.16–17.

28 Bernard P. Dauenhauer, *Silence: The Phenomenon and its Ontological Signi cance* (Bloomington: Indiana University Press, 1980), 4–5.

29 Bindeman, *Silence in Philosophy, Literature, and Art*, 21.

do violence.[30] In such instances, Silence functions as a screen, impeding any attempt to access what it may conceal.[31] It is in this sense that silence functions in relation to extraordinary rendition—forging its state of exception in respect to the Law.

Revelatory silence exists as lacunae—as *open gaps*. Obstructive silence exists as blankness—as *closed gaps*. Whereas the former is limitless in its evocative potential, the latter gives nothing away, and is therefore equally undefinable, uncontrollable. In *Negative Publicity*, Clark creates two types of images which correspond to these alternative effects of silence. The notions "trace" and "strikeout" encapsulate, respectively, the complexity of aesthetic, metaphoric and emotional effect these types of silences generate when evoked visually by Clark. Dealing, as it professes to, in evidence, rationality, fact, revelatory silence presents an excess of material for the Law to manage; obstructive silence, a dearth, giving nothing from which to work. The Law can only ask: what could become from this, or, what might there be, already, behind this? These gaps that Silence exists in and as, equate to, for the Law, absences in understanding and control.[32] Silence thereby represents a challenge to the Law's authority, occupying the space beyond its sure, standard sovereignty.[33] It is ultimately because Silence runs counter to language, non-participant in the structural framework which instantiates the Law's functional capacity, that it remains always outside the Law's remit.

Negative Publicity explores extraordinary rendition as representative of a "real-life" consequence of the Law's inability to handle or negotiate Silence in either form (despite its ambivalent boundaries providing the very means—or vacancy—for silence to occupy). Employed as a means of hiding its presence, obstructive silence, in the form of banality, acts for extraordinary rendition as the blank, non-referential screen the Law is unable to work with or from. Masking its presence using *what we know*, no alarm bells are sounded: there is "nothing to see here." For ourselves, in everyday life, there is little occasion to notice what is, on the other hand, very odd about this dynamic: familiar processes and spaces *should* generate avenues of connection and relation, rather than closure. The fact that some of Clark's photographs manifest this sense of obstruction give us the opportunity to recognise that *something is not right*. As an artistic forum, and thus operating as part of an alternative context to everyday routine, *Negative Publicity* provides us the opportunity to take note.

In sum, extraordinary rendition in its "real-life" occurrence evidences what is at stake, and what is at risk, because of the Law's ambivalent boundaries, and the resultant space it is surrounded by. In this space, non-legal actions occur from which the Law seeks to differentiate and absolve itself. Yet, at the same time, the Law acts as the primary touchstone, or term,

30 Langdon Gilkey, "The Political Meaning of Silence," *American Journal of Theology & Philosophy* 28, no. 1 (2007): 22.

31 Roumen Dimitrov, "Silence and invisibility in public relations," *Public Relations Review* 41 (2015): 638; Silence equates to hiding, when, for example, governments refuse to provide the public with information.

32 de Vela-Santos, "Verging on divine," 2349.

33 de Vela-Santos, 2349-2350.

in relation to which such actions are defined. While the Law relies on the contrast with these non-legal activities to ensure its own sense of self, this ambivalent space can manifest states of exception– vacancies which posit "force-of-~~law~~," which maintain the Law's power, yet purge it of its value. In the case of extraordinary rendition, S/silence defines its state of exception, shrouding it in banality and inconsequence. The incompatibility between Silence and Law impedes the latter's ability to face the former. Ultimately, the Law is both responsible for, yet paralysed by, its own exploitation, and the means by which such instances are iterated and maintained.

What *Negative Publicity* describes is an ambivalent triangular relationship at play here: extraordinary rendition, manifesting as a "force-of-~~law~~," uses Silence—a metaphysic oppositely structured to the Law—as a means to "blend in" to "normal" context, and as a result adopt a "lawful" façade. At the same time, this "disappearance" of extraordinary rendition through obstructive silence—its creation for extraordinary rendition of a state of exception in relation to the Law—allows the Law (and thereby, allows us) to blindside itself (ourselves)—to ignore procedures which, because of their problematic means, do damage to the integrity of shared ends. When revelatory silence could provide a conduit for the Law to reflect and face contradictions of process and principle, it is not sought, the Law instead succumbing to the obstructive silence which masks, deceives, exploits. It is with the aim of evoking such complexity that Clark chooses the content and crafts the aesthetic of his photographs.

My argument rests on the possibility that visual art can embody something—a concept, sensation, feeling—other than itself; that art can mean and *be more* than what its physical constitution, or subject, seemingly mean. And, that our response to an artwork of this kind is based not only on our aesthetic appreciation of the artist's handling of a medium, or of the narrative the image describes, but on how we think and feel in relation to that (other being) which the artwork evokes. Metaphor and symbol, communicated through visual signs, and the way such content is arranged (via form, structure, style) are often catalysts for this surplus meaning of art; these are the tools by which an artwork signals or manifests its being something other. Think, for example, of particular renditions of the mother and child: Raphael's *Tempi Madonna* (1508)[34] may be one, or Jan van Eyck's *Madonna at the Fountain* (1439).[35] Both are iterations of supreme tenderness—the glance from the mother to child, how she holds her hands, gently gathering the weight of her baby, the spirit, or quality, which exudes from the delicate line and soft glow created by the artists. We do not merely see the tenderness; we *feel* it too.[36]

These instances typify what is a "synesthetic endeavour," in which, as

34 Raphael, *Tempi Madonna*, 1508, oil on wood, 75 x 51 cm, Alte Pinakothek, Munich, accessed April 6, 2020, https://library.artstor.org/asset/SCALA_ARCHIVES_10310197828.

35 Jan Van Eyck, *Madonna at the Fountain*, 1439, oil on panel, 24.9 x 18.2 cm, Royal Museum of Fine Arts, Antwerp, accessed April 6, 2020, https://library.artstor.org/asset/ALUKASWEBIG_10313647058.

36 Other examples of artworks manifesting the being of something else could include the *meditations* Mark Rothko crafts from colour and complex layer, or the horrifying sense of disgust embodied by some of Albert Tucker's darkest paintings.

Toby Kamps describes, "one medium . . . stimulate[s] a response associated with another,"[37] like when we experience a taste that has been known to us as a smell, when music makes us cry as if experiencing physical pain or joy, when our breath is taken away not by exertion but by beauty. Clark's photographs are synaesthetic images that establish a direct and profound relationship with the metaphysic Silence as a unique means of exploring how extraordinary rendition functions in terms of both this metaphysic and that of the Law. Ultimately, synaesthesia is the means by which Clark enables viewers to adopt a parrhesiastic approach to what *Negative Publicity* reveals—extraordinary renditions occupying a state of exception in relation to the Law through a manifestation and effect of Silence.

In *Negative Publicity* Clark engages Silence towards both revelation and obstruction. He constructs two main image types, or *visual* formats: the "trace" and the "strikeout".[38] Correspondent to the more general "open" and "closed" senses of silence, these terms refer specifically to their artistic iteration by Clark and encapsulate how his use of Silence defines both the aesthetic and experiential effect of his artworks. Whereas the "trace" image type, by virtue of its composition and included content, seeks to invite viewers to develop a connection between themselves and what the image alludes to, the "strikeout" attempts to block viewers access, providing no points of connection. Though the physical content of what all Clark's images depict has been associated with extraordinary rendition, and thus affected by silence in its obstructive form, the way Clark has chosen to photograph his subjects determines the nature of the Silence evoked. His trace images transform instances of obstructive Silence into revelatory ones; his strikeout images emphasise the obstructive quality.

I will turn first to Clark's "trace" aesthetic—evocative of what Silence may look and feel like in its revelatory mode: open, unpredictable and ungovernable. "Traces," Francesco Mazzucchelli says, can be considered as "condensed narratives" that "concentrate memory into material form."[39] Further to this, Kitty Hauser explains that a trace is that which outlasts its "immediate object," indicating that "something has happened here."[40] Silence informs the notion of trace—that is, as objects or spaces which pose many possibilities for becoming, for alluding to and meaning things beyond their immediate use or constitution. The trace is hence an expansive, extrapolatory notion, unfixed, with a continuing story. Additionally, it is in silence—in settings without clutter, without loud, obtrusive content—and, in this instance, with the artwork acting as conduit, that spaces and objects can function as traces. By referring to "trace images," I hence refer to those which purvey an

37 Toby Kamps, Steve Seid and Jenni Sorkin, *Silence* (Houston: Menil Foundation, 2012), 64.

38 Eyal Weizman, "Strikeout: The Material Infrastructure of the Secret," in *Negative Publicity: Artefacts of Extraordinary Rendition*, Crofton Black and Edmund Clark (London: Aperture, 2015), 287.

39 Francesco Mazzucchelli, "From the "Era of Witness" to an Era of Traces: Memorialisation as a Process of Iconisation?" in *Mapping the 'Forensic Turn' Engagements with Materialities of Mass Death in Holocaust Studies and Beyond*, ed. Zuzanna Dziuban (Vienna: New Academic Press, 2017), 178.

40 Kitty Hauser, "Tracing the Trace: Photography, the Index, and the Limits of Representation," in *Shadow Sites: Photography, Archaeology, and the British Landscape 1927–1955* (Oxford: Oxford University Press, 2007), 61–2.

FIG. 2
Edmund Clark, *Outside the Home of a Family Rendered by the CIA with Assistance from MI6*, 2011–2015, photograph (digital print), 19.2 x 15.3 cm (in publication).

aesthetic that encourage close looking at objects and spaces. In Clark's trace images he emphasises the spaces and objects in such a way as to allow the silence in which they exist, to reach out, welcome and involve the viewer. Clark thereby *deconstructs* the instance of obstructive silence—the setting for extraordinary rendition—by which these contexts have been affected, and is responsible for activating, transforming, his subject into traces.

In *Outside the Home of a Family Rendered by the CIA with Assistance from MI6* (2011–2015) (fig. 2) (*Courtyard*),[41] stark, arid sunlight is softened by honey tones of the balcony overhead; a soothe of shade softens the glare that would otherwise blind our view—of tablecloths, socks, hung out to dry, terrazzo tiles chipped and dusty, palm fronds still, unruffled. We are sheltered here, embraced by the walls of this internal courtyard—the frame of Clark's photograph. As visual and symbolically aural barriers, these walls instantiate quiet, stillness, and removal from the outside world (but for the sky—a shape of transcendence floating overhead). For the viewer, positioned by Clark to stand within the space, there is a sense of *experiencing* the S/silence,[42] rather than merely observing it from without. In this way, we are affected by what S/silence does: that is, encourages focus, close looking, reflection.

As described elsewhere in *Negative Publicity,* this photograph depicts the home of a family rendered by the CIA with the aid of MI6.[43] Yet *Courtyard* is fundamentally a domestic scene which presents recognisable habits and ways of everyday life. The space itself and its objects may prompt recollection, act as signifiers—as traces which, by virtue of Silence clearing for them a setting, allude to more than themselves. What this "more" may be is undefined, infinitely possible: the prints on the tablecloths are about a loved summer dress, nana's kitchen; the tiles, a tatty roadside motel; the balcony, Romeo and Juliet; the palm fronds are dreams of an island escape, or the crunch of them dried under foot. None of these are certain, or planned, or necessarily rational. Such allusions, grounded (or freed, rather) by the ever-possible—by Silence which does not define, or inhibit, but allow for infinite becomings—are law-*less*. It is this effect of Silence—its revelatory capacity, not linguistically bound—the Law is ill-equipped to deal with.[44] *Courtyard*, with its space and objects activated by the silent setting, with these traces themselves representing the capacity for Silence to manifest extrapolations ungovernably, explores one side of Silence: the side which the Law distances itself from, the side which would promise a possible revelation of extraordinary renditions presence, if only there was a care to attend.

In *The Facility at Antaviliai, Front View* (2011–2015) (fig. 3) (*Facility*),[45]

41 Edmund Clark, *Outside the Home of a Family Rendered by the CIA with Assistance from MI6,* 2011-2015, photograph (digital print), 19.2 x 15.3 cm (in publication), in Black and Clark, *Negative Publicity,* 061; *Courtyard* is my own shorthand title for this image.

42 By "S/silence" I mean both the broader metaphysical notion, and this particular instance of iteration, in *Courtyard*. Subsequently, I will use "L/law" to invoke the metaphysical structure, and the functional, or tangible *laws* which constitute the effectual elements of this framework.

43 Black and Clark, *Negative Publicity*, 060.

44 de Vela-Santos, "Verging on divine," 2349.

45 Edmund Clark, *The Facility at Antaviliai, Front View*, 2011–2015, photograph (digital print), 15.5 x 24.2 cm (in publication), in Black and Clark, *Negative Publicity*, 049; *Facility* is my own shorthand title for this image.

FIG. 3
Edmund Clark, *The Facility at Antaviliai, Front View*, 2011–2015, photograph (digital print), 15.5 x 24.2 cm (in publication).

Clark expresses the alternative iteration of Silence—evidencing how it works (or *should* work) in its obstructive capacity, and particularly, in forging a state of exception for extraordinary rendition to occupy. In a daily-life context, obstructive silence, in relation to extraordinary rendition, does its work. That is, the adopted banality serving as mask misleads us into thinking all is normal with nothing at stake. Evoked in an artistic form, however, we are given the context to take note. Silence in *Facility* blocks access, rebuffs, and therefore arouses suspicion in the viewer. Eyal Weizman terms this kind of effect a "strikeout."[46] According to my interpretation, a strikeout is an aesthetic trope which, though not in the form of a black line through text, functions in the same manner—it enacts the notion of "hiding in plain sight."[47] Rather than the black line (or, for that matter, pixilation), a strikeout presents other aesthetic qualities that evoke censorship. In the case of Clark's strikeout photographs, Silence is the conceptual basis, and the aesthetic quality (iterated as "a silence") which establishes for the viewer both a visual and experiential sense that they are being actively prevented from "looking into" rather than merely "at" these images.[48]

A large residential structure sits behind an iron garden fence, seemingly at the end of a cul-de-sac, bounded by tall coniferous trees. Though two cars are seen in its vicinity, the house itself is inactive, shut: curtains are drawn, entrances, openings sealed. This impenetrable façade blocks access and, as Clark places us some distance down the driveway, we can only look from the outside rather than occupy this setting; we are observers rather than participants, and by virtue of this, excluded. This space exists in, as, dead S/silence. Without any active traces the S/silence here functions to obstruct and deter.

The setting seen in *Facility* is not essentially different in nature to that in *Courtyard*: it is domestic, populated with familiar objects (car, bin, basketball hoop). Yet strangely, *Facility*'s atmosphere, what it evokes, and what we feel in communion with it, differs drastically. Whereas in relation to *Courtyard* we become perturbed once informed of the darker occurrences belying its hospitable countenance, confronted by *Facility* we are unsure as to why such a banal array of building-object should deny us connection. In transitory, mundane situations, this sense may not be noted or wondered at. Experienced here, however, in this artistic context, and in relation to the contrasting image *Courtyard*, it takes on significance. Obstructive silence, in a familiar place—a setting we should be able to find connections to—becomes suspicious when we are given the chance to notice it. Extraordinary rendition relies for its continued functioning on such opportunities for revelation not being provided or experienced—as they are in *Negative Publicity*, an artistic forum. It is only because of this circumstance, that *Facility*'s status as strikeout is iterated: by virtue of this being a work of art, rather than a view experienced during an everyday, fleeting moment, the very fact that something is being hidden cannot succeed in hiding itself. This effect is realised

46 Weizman, "Strikeout: The Material Infrastructure of the Secret," 287.

47 Liam Kennedy. "Seeing and Believing: On Photography and the War on Terror," *Public Culture* 24, no. 2 (2012): 281.

48 Black and Clark, *Negative Publicity*, 007.

regardless of Clark's mirroring, rather than tampering with, Silence as it exists in relation to extraordinary rendition.

In *Courtyard*, Clark has sought to deconstruct the obstructive silence which situates extraordinary rendition, turning it into a revelatory form which activates the space and objects seen into traces. In *Facility*, he has retained Silence in its obstructive form. In the case of the former, viewers are actively engaged by virtue of what Clark has caused his art to do; in the case of the latter, viewers are actively engaged simply by virtue of their exposure to this scene occurring in an artistic context—we are placed in a position whereby we have the opportunity to notice the uncanniness.

Negative Publicity brings to light the various strands of unaccountability which define extraordinary rendition. A procedure which works, as it were, on the "underside"[49] of the Law, in the ambivalent space the latter allows itself to be surrounded by, extraordinary rendition corrupts the integrity of this *effective* metaphysic—its content and principles, its force and authority. Carried out in everyday spaces, using everyday processes, extraordinary rendition corrupts these too. It is, however, their very use which mask its presence: banality is extraordinary rendition's means of silencing itself, and what and whom it affects. Silence ensures extraordinary rendition's unaccountability in creating and maintaining for it a state of exception. In turn, this insurance relies on the Law's incapacity to negotiate—recognise even—how Silence functions to do just this. Through doing the deconstructive work not carried out by the Law's own processes, Clark's photographs seek to redress this shortcoming: extraordinary rendition is, as it were "outed," and its S/silence broken. Unrestricted in terms of how it can relate to Silence, art is able to access, and work with Silence, in ways the L/law cannot.

Clark's showing of extraordinary rendition's S/silence is not, though, a destruction of Silence itself (that is, of its metaphysical underpinning), but a repurposing: through evoking Silence's revelatory capacity (its freeing, lawless capacity), and saturating viewers in artistic fora underpinned by S/silence, Clark's photographs effect the space and intent to take more note. We become the conduits via which Silence overturns itself, becoming instead dedicated self-reflection geared towards realising attentiveness as action. This dual possibility I will name *parrēsia*, as defined, or (re)negotiated by Foucault.[50]

Further work is required before arriving at this final extrapolation of Clark's photographs. What constitutes this unaccountability, our inattentiveness? How does this transform into self-reflection, into parrēsia? And what is the role of S/silence, as found in Clark's photographs, in all of this?

The inattentiveness that Clark's photographs call to account is rooted in our making assumptions: either, that the Law functions according to the ("principled" and firm) standards it professes itself constituted of, or, that the Law in the abstract (metaphysic) is wholly separate from its effect, that is, its real-world presence. Both assumptions are predicated on another that is more

49 Desmond Manderson, *Danse Macabre: Temporalitites of Law in the Visual Arts* (Cambridge: Cambridge University Press, 2019), 174.

50 For his full explication on parrēsia, see Foucault, "Parrēsia," 219-253.

basic: that the Law has definite boundaries, that it is not implicated, by virtue of its own constitutive ambivalence, in actions not of its own conception. *Negative Publicity* thus asks us to reconfigure our *own* understanding of the Law: to consider its entanglement with subjects and actions other to itself, and the problems such activities like extraordinary rendition pose to the Law's integrity as a metaphysic, to its overall authoritative status (as grounded upon moral rightness). The value of such a status, our trust in it, can only decrease with our realising the Law's own culpability: the fact that, in states of exception, legal force is retained without legal value and that Law, unable to assert its sovereign constitution, is without the means to address this exploitation. Clark's photographs propose that through facing and working *with* Silence, the attentiveness required to notice and question extraordinary rendition can be established. A consequential realisation is that the silence of the law in relation to extraordinary rendition can only, ultimately, be *our* failure: if it is without the tools to redress its shortcomings, it is because we, through practising assumption rather than critique, have not questioned its constitutive integrity.

Through what Wendy Kozol describes as "looking elsewhere"[51], Clark achieves a destabilisation of the normative narratives (the background to our inattentiveness) we associate with the workings of law; that is, autonomously, honestly, with proper process, and at a distance from our daily, practical lives. In Andrea Liss' sense, Clark's photographs are "courageous enough to ask the viewer to look at the difficult [content] again, to allow themselves to be implicated, to be involved with embarrassment."[52]

The silent, thoughtful settings and atmosphere which define Clark's images embody, or symbolise, the nature of what we must adopt in order to confront the issues *Negative Publicity* addresses: redressing extraordinary rendition, the Law's failings, *our* failings, involves us asserting our self-reflective capacities. Cast in Foucault's terms, self-reflection implies care and curiosity. It is also both a meditative and active state, of concentration, focus and criticality.[53]

> I like the word [curiosity] . . . It evokes "care"; it evokes the care one takes of what exists and what might exist; a sharpened sense of reality, but one that is never immobilized before it; a readiness to find what surrounds us strange and odd; a certain determination to throw off familiar ways of thought and to look at the same things in a different way; a passion for seizing what is happening now and what is disappearing; a lack of respect for the traditional hierarchies of what is important and fundamental.[54]

51 Wendy Kozol, *Distant Wars Visible: The Ambivalence of Witnessing* (Minneapolis: University of Minnesota Press, 2014), 5.

52 Andrea Liss, *Trespassing through Shadows: Memory, Photography, and the Holocaust* (Minneapolis: University of Minnesota Press, 1998), 91.

53 Cooper and Blair, "Foucault's Ethics," 526.

54 Cooper and Blair, 526.

Adopting this attitude is ultimately a commitment to not take things for granted, allow standards to go unquestioned, or let actions pass. Clark's photographs use S/silence to reveal the law's absence, simultaneously invoking a context in which to consider the ramifications of this: the incongruency and detriment of "force-of-~~law~~." *Negative Publicity*'s S/silence is hence ultimately geared towards viewers exercising, to our full capacity, our critical, careful, curious ways of being. And thereby, as Foucault implies above, become better attuned to how we are and to what is happening around us. This self-reflective work is, I argue, a step towards us, as viewers, conducting the further work initiated by *Negative Publicity*. That is, a calling to account the incoherence between what Western democratic law professes to uphold, and the secretive, underhand, earthly processes in which it finds itself entangled. And furthermore, a self-recognition of our own responsibility in relation to the Law, both in terms of its conception, and implementation; in relation also to extraordinary rendition.

The possibility for realising this surplus capacity of Clark's photographs ultimately depends on the effectiveness, or depth, of our own self-reflection. It is through us that Silence itself gains a *useful* value—a presence—and presents the possibility for enacting *parrēsia*. Espoused by the Ancient Greeks, and central to their regime of self-care, parrēsia, literally interpreted, means "truth-telling,"[55] or, more precisely, "freedom to tell the truth."[56] Importantly though, as Foucault emphasises, parrēsia is not a direct disclosure of a fact (a truth), but rather, the realisation of a free-thinking attitude that establishes the open-ended conditions required for negotiating truth.[57] It is a practice, or "technology of the self,"[58] which proposes self-reflection as key to enabling an attitude of conscious engagement towards achieving this. Inward attentiveness serves then as the basis for externalising this attitude, whereby we take responsibility for what we interpret about our surroundings (questioning aspects presented as "given") and how we respond to them.

Arrived at through S/silence, and through the self-reflectiveness Clark's photographs encourage, parrēsia is the ultimate symbol and action manifested through *Negative Publicity*. Using parrēsia, we come to attend, to consider, to recognise the flaws—in the L/law, in us—which allowed, or countenanced, extraordinary rendition to function. Further, *Negative Publicity* reveals extraordinary rendition as made possible not just by our laws and silences, but also by the metaphysical assumptions of the Law and Silence. It is a meditation on the intertwining of metaphysic and effect convincingly demonstrating the potential for the artistic forum to evoke this structure. From S/silence, self-reflection—to parrēsia: a commitment averse to inattentiveness, averse to *silencing*. Extraordinary rendition, the Law, Silence, and us.

55 Colin Koopman, "The Formation and Self-Transformation of the Subject in Foucault's Ethics," in *A Companion to Foucault*, ed. Christopher Falzon, Timothy O'Leary, and Jana Sawicki (Hoboken: John Wiley & Sons, 2013), 535.

56 Koopman, "The Formation and Self-Transformation of the Subject in Foucault's Ethics," 536.

57 Koopman, 536.

58 Mark G. E. Kelly, "Foucault, Subjectivity, and Technologies of the Self," in *A Companion to Foucault*, ed. Christopher Falzon, Timothy O'Leary, and Jana Sawicki (Hoboken: John Wiley & Sons, 2013), 517.

In *Negative Publicity* Clark makes it clear that we are affected by, yet ultimately *responsible* for, both the underhand practice and two metaphysics alike.

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EARLE'S LITHOGRAPHY AND THE FORCE OF LAW

by Keith Broadfoot

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Augustus Earle is regularly credited as the most widely travelled independent, professionally trained artist in the first half of the nineteenth century. He was, as Jocelyn Hackforth-Jones claims, probably the first "freelance travel artist to tour the world."[1] Bernard Smith, evoking a similar sense of new-found freedom, suggests that during "a period of approximately twenty years he [Earle] wandered about the world perhaps more extensively than any [other] artist before him."[2] As part of this ceaseless drifting across the globe, Earle, more by accident than by design, found himself in Australia. He arrived in Hobart in January 1825 and went on to Sydney later that year where he stayed—except for a six-month visit to New Zealand—until October 1828. As Earle's time in Australia was relatively brief, and given the constant discussion of his peripatetic nature, it might be presumed that Australia was no more than of passing interest to him. Yet, I will approach Earle differently, arguing that his substantial investment in establishing not only a possible home for himself in Australia, but equally for art, should not be overlooked.

During his stay in Sydney, Earle opened Australia's first art gallery, displaying selected prints of "great works" from across the history of European art.[3] He also taught art classes at the gallery, in what may have been Australia's first art school.[4] However, as an indicator of his long-term ambitions, the gallery was also more importantly the location of his lithographic printing business, Earle's Lithography, the eponym with which he signed his prints. Earle acquired his lithographic press from the then Governor of New South Wales, Sir Thomas Brisbane, who originally had the press shipped to Sydney in order to publish his astronomical observations. In contrast, Earle saw lithography's artistic, rather than solely scientific, potential. In November 1826, he published two lithographic prints, the first in what was planned to be a series of ongoing monthly publications under the collective title, *Views in Australia*.[5] This article will analyse one of these two inaugural prints, *View from the Sydney Hotel* (fig. 1). As part of the first edition of his projected artistic venture, it is no surprise that this print could be read allegorically as representing the establishing of art in Australia. What may not be so evident, however, is the role that the figure of the law plays in Earle's foundational image.

In the right-hand foreground of the image stand two figures. One faces away from the viewer. He is a distinguished civilian, with his attire indicating he is a member of the legal profession. As we cannot see his face, and thus is depicted without the distinguishing traits of a personal identity, he is included in the image more as a representative of the law. In conversation with "the law" is another representative figure, a high-ranking military man, judging from the attachment of the large feather plume. In the interaction that Earle

1 Jocelyn Hackforth-Jones, *Augustus Earle, Travel Artist: Paintings and Drawings in the Rex Nan Kivell Collection, National Library of Australia* (Canberra: National Library of Australia, 1980), 1.

2 Bernard Smith, *European Vision and the South Pacific 1768–1850* (London: Oxford University Press, 1960), 190.

3 In the advertisement for the gallery Earle makes note of how original prints by Van Dyck, Carracci, Rosa, and Rembrandt would be for sale. *Sydney Gazette and New South Wales Advertiser*, December 27, 1826.

4 He placed a call for pupils under the title of "School of Painting" in *The Monitor*, August 25, 1826.

5 The first review of these two prints appeared in *The Monitor*, November 3, 1826.

FIG. 1
Augustus Earle, *View from the Sydney Hotel*, ca. 1826, lithograph, 26.2 x 35.2 cm, National Library of Australia, Canberra.

depicts between these two representative figures, why does the law turn its back to the lone Aboriginal man? Is Earle showing us that in colonial Australia the law turns a blind eye to the fate of Aboriginal people? Undoubtedly yes, but a close analysis of the image reveals that Earle has even more to tell us about the nature of law in Australian colonial society. Drawing upon Giorgio Agamben's thesis that the ontological status of law is determined by what occurs in the supposedly excluded state of its suspension, it will be proposed that Earle's image demonstrates how the emergence of art in Australia is inseparable from questions of law. With Earle, the violent inscription of what Agamben, after Derrida, refers to as the force of law is one with the mark of the artist.

THE NEW ECONOMY OF THE IMAGE

Earle advertised his new lithographic enterprise with an announcement in the local press that his artistic talents were available to produce "circulars" on "any subject whatsoever."[6] This thematic of the economic circulation of the image—the circular—is reflected in the subject matter of *View from the Sydney Hotel*. As one horse-drawn cart is about to exit the town, another has already replaced it, hastily making its way towards the harbour port below. If one also notices how Earle has drawn attention to the tracks carved into the street, then this is no isolated journey into and out of town, but a continual, repeated loop. The carts, as transporters of goods, establish a connection with the port below, the site for the ever-escalating transaction of commodities. In this sense, the image addresses the notion of commercial potential.

In his reflections on life in early colonial Sydney, the eminent lawyer and judge, James Sheen Dowling, comments on the changing character of George Street, the setting of Earle's print. Dowling writes:

> George Street:—the main artery through which the vital stream of commerce flows to the remotest parts of the Colony, extends in an unbroken line from Dawes' Point, the northern extremity of the City, to the old Toll Bar, at the southern, a distance of two miles, and is continued nearly another mile under the name of Parramatta Street, connecting the extensive and populous suburbs of Chippendale and Redfern with the City, and forming the grand approach from the southern and western districts. The newcomer cannot fail of being surprised with the bustle and animation that pervades this street . . . [7]

Although Dowling is describing what George Street had become sometime after Earle made the print, arguably, this is the future towards which Earle's work, or let us say the horse and cart that is about to exit out of frame, is directed. As a print which is doubling as an image of the founding of a new colony and Earle's new business project, Earle would doubtless be wishing to

6 *The Monitor*, November 3, 1826.

7 James Sheen Dowling, *Reminiscences of a Colonial Judge* (Leichardt: Federation Press, 1996), 23.

associate the future economic prospects of the colony with his own printing enterprise. Thus, if Dowling metaphorically speaks of George Street as the main artery through which the colony's vital stream of commerce flows, then Earle's aim would surely be to include his own prints among the various commodities transported along this thoroughfare. Further, if the circular path of the carts highlighted in Earle's print can be understood as a figure for the circulation of all the various products in this thriving new colony, then it also stands for one in particular, this print—this image. The grooves of the tracks of the carts as they repeat their endless cycle (the circulation of capital) would equally then be a doubling of the trace of the "inscription" (lithography as a form of "writing in stone") that forms Earle's own print.

Within this everyday colonial scene of economic circulation and exchange, Earle has been quite particular with his placement of the equally representative figure of the "Aborigine." Although in a prominent foreground position, he is unable to occupy a position on the street, or even on the footpath, as many of the other colonials seem to be able to with such calm self-assurance. Where, therefore, does he stand in relation to this new economy of the image? Or more specifically, what is the relation between the inscriptions of the artist, the instituting of art in Australia, and the representative figure of the Aborigine?

SPEED AND DISTRACTION

To begin to approach the significance of the inscriptions that have left their mark on the road, the repetitive movement of the carts themselves should first be considered. As noted above, a horse and cart has passed the Aboriginal man on its way into town and another is about to pass him travelling from the opposite direction. This seemingly straightforward observation is not, however, entirely accurate. While the exiting cart has yet to pass the Aboriginal man, Earle has created an effect whereby it is as though the cart already has. An examination of the staff held by the Aboriginal man helps to clarify this view. By following the line of the staff backwards into the image, it becomes apparent that Earle has carefully positioned the wheels of the cart to be just ahead of this line (fig. 2). If this line is extended even further backwards, it meets the base of the cream-coloured wall on the opposite side of the street, roughly at the point where the wall begins and in line with the edge of the paved footpath. The V-shape created by these lines direct the eye backwards into the picture, but also forwards out of the picture. This adds to the sense of movement in the image and the speed of the exiting cart. By rendering the horse's front left leg lifted high, the reins pulled tight, and the horse reaching forward, it is clear that Earle wished to convey that the horse is at full trot, charging as fast as possible into the future. This sense of speed is further accentuated by the manner in which the horse is set against the smoothness of the wall in the background, which can be quickly scanned because of its immaculate finish. In a sense, this element completes the horse's projected movement. As the viewer's look advances in front of the horse, it is as if the horse is being positioned ahead of where it presently is, which is to say in front of the Aboriginal man. This crucial effect, once noticed, is further established

FIG. 2
Diagram indicating V-shape created by lines added to Earle, *View from the Sydney Hotel*.

FIG. 3
Detail of Earle, *View from the Sydney Hotel*.

by many other interrelated details in the image, adding to the complexity of the deceptively simple scene that Earle portrays.

The driver of the cart leaving town (the cart facing the viewer) is depicted with his head turned. Instead of focusing on the road ahead, the driver glances to the side, momentarily distracted. Who and what is he looking at? At first, it appears that he has turned to look at the Aboriginal man by the roadside, but his gaze is in fact directed elsewhere.[8] Standing up in the cart, the suggestion is more that he is looking above this man and across to the verandah of the guardhouse where three soldiers stand. Hence there is, again, an overlooking of, or an inability to see, the Aboriginal man. This is so not only because the driver's look is diverted as he approaches him, but also, as has been argued, insofar as the driver has also already passed him by. Thus, in the next moment, when the driver begins to turn his head back to what lies ahead, it is not to suggest that he would see the Aboriginal man in so doing. From the look to the side and then back to the front, the Aboriginal man will not be visible to the driver as he will have already been placed behind the driver—already, it could be said, relegated to the past.

Equally, this movement from the side to the front as eclipsing the visibility of the Aboriginal man could be understood in terms of the implicit connection that Earle is drawing between the cart-driver and his horse. Depicted with a noticeable lean, the horse veers to the left, away from the Aboriginal man. The horse is also wearing blinkers and is thus, like his driver, blind to the Aboriginal man. Moreover, the blinkering of the horse makes the creature single-minded and determined; it is an animal become machine—the cart already heralding the motorised vehicle—with no other possible purpose than getting into and out of town as expediently as possible. And this assists in further connecting the two carts. Unlike the cart that is exiting, the driver of the cart making his way towards the harbour port would have seen the Aboriginal man as he entered town. As counterintuitive as it might seem, however, this is not actually the case. The exiting cart, seemingly yet to overtake the Aboriginal man, is in fact the other cart that has already passed him by. The entering cart-driver that we only see from behind, who has his back to the Aboriginal man and cannot at this moment see him, effectively doubles the blinkered vision of the cart-driver leaving town. One repeats the other as each fails to see him.

8 The look to the side is a key structural device that Earle used consistently. The most relevant example is in Earle's major painting, *Waterfall in Australia* (1830). This work includes a self-portrait of Earle. Although many have assumed that Earle has turned to the side to look at an Aboriginal man standing in front of a waterfall, Leonard Bell argues that he is in fact looking past this man, and thus misses seeing him. In the earlier *View from the Sydney Hotel*, Earle depicts the same scenario. There are many fascinating parallels between the two works as it can be argued that the driver of the cart in this earlier print is also a self-portrait, or at least a stand in, for Earle. Leonard Bell, "Colonial Eyes Transformed: Looking at/in Paintings: An Exploratory Essay," *Australian and New Zealand Journal of Art* 1, no. 1 (2000): 42–64.

THE SOCIAL BOND

To reinforce this reading, the same could be said of the stiffly posed soldier on the verandah. His erect posture establishes a link with the slight oddity of the driver, since he also stands upright. However more than this, as the soldier is commencing to step forward, and as we also see him as in line with the man in the cart, he is following the same trajectory. Like an automaton, he will mechanically march forward and then turn to retrace his steps, finding himself once again at the exact position where he now presently stands. The inference therefore is that the repetition of this mindless movement back and forth is precisely like that of the carts that repeat their entering and exiting. And more to the point, this is the same repetition in the failure to see the Aboriginal man. From where he stands, the soldier is also above the level of the Aboriginal man and thus he is unable to see him. There is, furthermore, an important subtlety to the composition that might at first pass unnoticed. The soldier holds his rifle upright and in front of his face. It is not completely straight however but at a slight angle, thereby positioning it in alignment with the first right-hand pillar. If this correlation is projected forward, then the rifle, in combination with the pillar, blocks out the Aboriginal man. The result is the same blinkering of the soldier's vision.

Earle adds even further details to enhance this point. In their order and regularity, the steps to the verandah mimic the march of the soldier. As these steps come forward, imposing themselves on the more irregular and unkept grass and dirt, it is as if they are pushing the Aboriginal man to the side. This impression is underlined by the manner in which the steps connect with the well-trodden and heavily incised path. Turning to the left, this path is in symmetrical opposition to the horse as it veers to the right. It is hence as if each is diverted in their combined ignorance of the Aboriginal man. The closed blinds at the end of the verandah also serve the same end. It is mid-morning; the sun is shining onto the verandah from the left, the East. There is thus no functional reason for the blinds to be drawn. But similar to the two cart-drivers—effectively one as they complete the same circuit, entering and exiting without seeing—so too the closed blinds figure the soldier's lack of sight. It can be assumed that the solider is on duty—on watch—but is his purpose not actually the opposite? He will repeat his march only to ensure that he sees nothing. His vision is like the blankness of the brick wall of the guardhouse that cuts across the spectator's view and which also, if it is proposed that the soldier turns back on reaching the steps to the verandah, marks the limit of the soldier's forward march. As this wall so blatantly and dumbly faces the front, reiterating the dead end of the closed blinds, so it is that the solider will remain incapable of seeing what is, in fact, just before him.

As much as one might initially be drawn to this solider, as he does indeed stand out like the similarly upright and thus also over-exposed cart-driver, the other two soldiers should not be neglected. In contrast to their colleague who is clearly on duty, these two men are off duty. Perhaps they have just finished their shift and are relaxing against the verandah rail. One of the men faces away from the street and like his on-duty colleague appears unaware of his surroundings. The other soldier leans forward over the

FIG. 4
Detail of Earle, *View from the Sydney Hotel*.

FIG. 5
Detail of Earle, *View from the Sydney Hotel*.

verandah rail, presumably to look out to the street. He is the only one of the three granted any visual awareness in the scene. Yet strangely, he is also the only one whose face is obscured from view, hidden behind his colleague and a pillar. Thus, even if he is able to see what is happening on the street, what or who he sees is not immediately clear. Why might have Earle, knowingly or not, done this?

The cart-driver's sideways glance has been described above as directed towards the verandah. But a closer analysis enables us to be more precise on this point. Rather than just to the verandah, I would propose instead that the man's eye has been caught by the one soldier we cannot see. The casualness of the soldier's pose also intimates that there might be more than a simple exchange of glances taking place. Perhaps there was a good-humoured greeting or the acknowledgment of a shared joke. Of course, we cannot know exactly what transpired, nonetheless the evident suggestion is that there is some level of interaction, however brief and fleeting, that establishes a social bond between the two. This is not, though, without paradox and an "evident suggestion" would appear to be a contradiction in terms. Something here remains hidden, secret. Yet, according to the equations that the image is putting in place, what is unseen is nevertheless exposed in the clear light of day. The cart-driver could have turned to see the Aboriginal man, but this did not happen because his sighting of the military ensured that he did not enter into his thoughts nor field of vision. It is thus the military that has effectively removed the Aboriginal man. The humorous exchange—the social bond created out of sight behind the pillar—might at first seem to be unrelated to this erasure. What, however, is in front of the pillar and what is obscured behind it are one and the same. One is the other as the creation of any social bond in this new colony is equally at the expense, or the exclusion, of any Aboriginal presence.

THE MILITARY AND THE LAW

Let us then finally return to the significance of the exchange between the two representative figures of the military and the law. As previously suggested, the costumes of the two men clearly establish their high social ranking. Yet, even without such sartorial indicators, the fact that both men stand unperturbed in the middle of the street equally conveys a sense of authority. The crossed arms of the military and the hands of the law in his pockets can be read as a sign that these two individuals expect others to navigate around them. With their poses that evoke an aristocratic nonchalance, they equally stand there as if to calmly, but at the same time quite pointedly, assert that the public space that is the street is indeed their domain.

Absorbed in what is no doubt learned discussion, what then occupies their thoughts in such a highly visible social space? What matters of public good are they addressing? Will their attention be drawn to the Aboriginal man in the foreground and will his plight enter into their seriously weighted discussion? It would seem not. The military man has his body facing in the opposite direction to the lawyer. However, even if from this position it might be possible for him to see the Aboriginal man, the manner in which he is

FIG. 6
Detail of Earle, *View from the Sydney Hotel*.

turned towards the law, in a look that cuts across the picture plane and that runs in line with his own projected shadow, pronounces his obliviousness to this Aboriginal man. Though it is perhaps necessary to qualify this. If not oblivious exactly, he is at least knowingly oblivious, as it is possible to imagine that he could well be keeping the lawyer in conversation precisely so that the Aboriginal man will remain unseen and unconsidered, outside of the purview of the law. In both cases, however, as if to emphasise that the military will maintain its ignorance, even if it is feigned, it is not simply Earle's addition of the line of the shadow which should be noted, with the military as a consequence placing the law in the dark, it is also, if one looks closely at the military figure's face, that he appears to be wearing glasses, a pair of pince-nez. Like the blinkers on the horse, these glasses are darkened, thereby figuring his own turning away from the Aboriginal man. This repeated play upon blindness is ultimately registered by how the law rather blatantly faces away from the spectator and also, of course, the Aboriginal man. Thus, these two will not converse on him. In this colony, with regard to any Aboriginal concerns, law turns a blind eye.

This figurative blindness, however, should not be where the analysis ends, as there is much more than this common, everyday expression that Earle allows us to see. The exacting subtlety characteristic of Earle's art begins to emerge if we adjust our perception about whether the two figures—the law and the military—are standing in "the middle of the street." The two are in reality not in the middle of the street; they are placed slightly off-centre. But the significance of this positioning is that it shifts them more into the centre of what I referred to earlier as the V-shaped area that is created by the diagonal of the Aboriginal man's staff and the line of the wall running along the opposite side of the street. If this represents a space that can be interpreted as dramatising the colony's expansion—with the cart speedily exiting to exploit new territory—then, with his staff becoming a barrier, it is an area from which the Aboriginal man is excluded. As much as he might attempt to use his staff as a means of support, enabling him to lift himself up so that he could fully emerge and stand on flat, secure land, this is repeatedly undermined by the violent incisions that circle around him. None of this violence however seems to be the concern of the law. The law looks elsewhere. Yet, like the face of the soldier that we cannot see behind the pillar, it is not that this hidden side—the violence—is the complete reverse of what we can see. In terms of the law, this is to say that the force of the inscriptions which surround the Aboriginal man are not to be thought of as necessarily opposed to the way in which the law institutes itself. Whether this be Earle's intention or not, insofar as what is behind the law's back is inverted to be positioned in the front, that is, to be in the visible foreground of the image we see, he is showing us that it is what the law does not see that is the law. This, indeed, is why Earle's image is a foundational view of Australia.

THE RELATION OF EXCEPTION

To justify this claim I wish to turn to a more theoretical and speculative line of argument, one that points to the wider implications beyond this one example of Earle's work that I have considered here. The inversion that occurs in *View from the Sydney Hotel* can be understood as exemplifying Giorgio Agamben's thesis that modernity begins with the paradoxical situation whereby the exception to the law (the state of emergency), or in the case of Australia the martial law that was repeatedly declared across the country, actually establishes the law.[9] The suspending or violating of the law as constituting the law is what Agamben refers to as a "relation of exception," and he considers this to be the "original formal structure of the juridical relation."[10] As he explains, in the relation between the exception to the law and the rule of law:

> The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as rule. The particular "force" of law consists in this capacity of law to maintain itself in relation to an exteriority. We shall give the name relation of exception to the extreme form of relation by which something is included solely through its exclusion.[11]

Earle images this extreme form of relation. Everything circulates in the new colony around the figure of the Aborigine as this something which "is included solely through its exclusion." The particular force of law in the work could consequently also be seen as the intensity of the lines—the incisions in the road that double as lithographic engravings—that aggressively turn around the Aboriginal man. These inscriptions of the force of law would also then be registering the capacity of the law "to maintain itself in relation to an exteriority."

For the law, however, to maintain itself in relation to an exteriority with these inscriptions, an important implication is that these jagged lines would not just be the force of law as that which severs the Aboriginal man from his land. As Agamben further argues, providing a commentary on the political theory of Carl Schmitt: "The 'ordering of space' that is, according to Schmitt, constitutive of the sovereign nomos is therefore not only a 'taking of land' . . . but above all a 'taking of the outside.' an exception."[12] Earle's foundational view of Australia can thus be read as this primary "ordering of space," one in which there is both a "taking of land" and a "taking of the outside." Although it might initially appear as if the Aboriginal man is turning so as to step out of

9 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) and *State of Exception*, trans. Kevin Attell (Chicago and London: University of Chicago Press, 2005). These are Agamben's two main works on this topic. For Agamben's discussion of martial law specifically, see *State of Exception*, 18.

10 Agamben, *Homo Sacer*, 19.

11 Agamben, 18.

12 Agamben, 18.

FIG. 7
Detail of Earle, *View from the Sydney Hotel*.

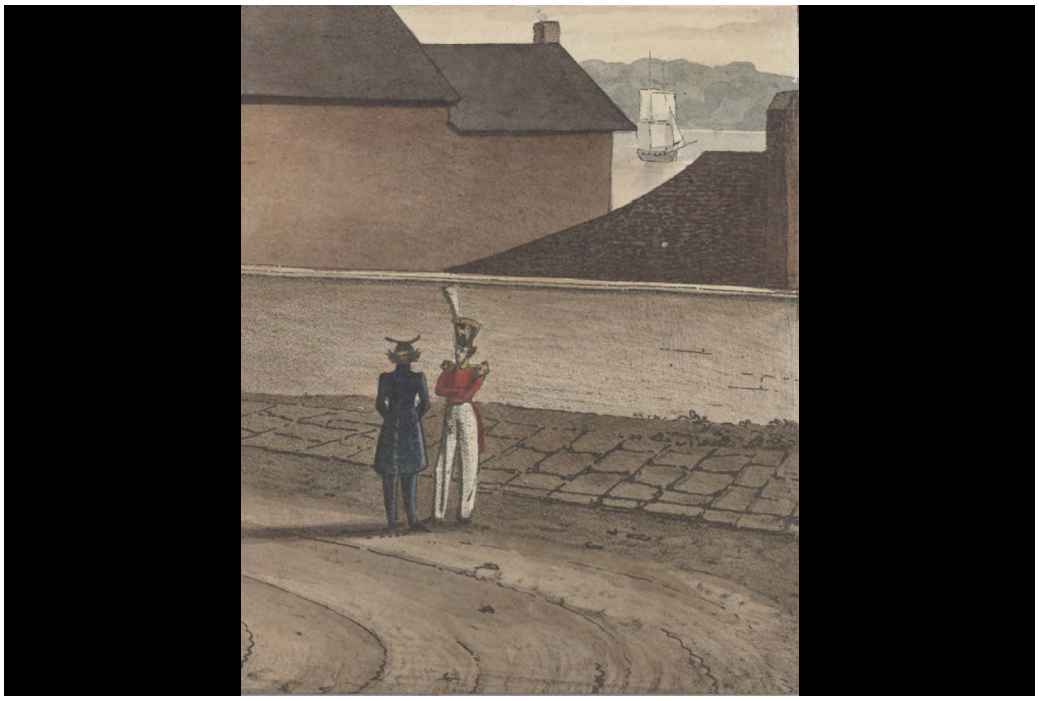

FIG. 8
Detail of Earle, *View from the Sydney Hotel*.

some deep recess, some non-descript hole in the ground, this is not the case. With his staff not in contact with the ground, or as this equally could be thought, not connecting with the material support of the image, he is not seeking assistance so as to raise himself out of a hollow, some absence or vacancy that could be included in space. Rather, with the paradoxical contact-less touch of his staff, the Aboriginal man is embodying a void, an impossible non-place.[13] The inscriptions that viciously swerve around him do not only therefore enforce a "taking of land," but also a "taking of the outside."

THE AFTERGLOW

My reading of Earle's image after Agamben is not that the law has simply turned away from the violence. Law becomes law, or more emphatically, law is law, only in the turning away. This is not to say, however, that what can be seen behind law's back in Earle's image will not be repeatedly erased by the history of Australian art. As another speculative suggestion of what follows from the study of this one image, I can add a final observation. Although we have said that the law is in conversation with the military, the law is not directly facing the military. While the law might be in discussion with the military, Earle has positioned the figure of the law such that he looks past the military. All the law sees is a smoothly rendered blank wall. Turning away, not seeing the Aboriginal man, the emptiness of this wall can be understood to be the immediate profitable outcome that results from this. The cart-driver as colonial landowner will speed by this wall with no time to waste, as the prospect of endless commerce and the exploitation of a yet further empty expanse lies ahead. Equally, if it is, as was suggested, Earle's own print that is one of the potential commodities that is placed into circulation on this street, then the blank canvas of this wall, or better perhaps, this freshly prepared lithographic surface, is ready to receive "any subject whatsoever."

The potentiality of this surface is not, however, presented in isolation. Inordinate attention is given to another, even more expansive (and more immaculate) surface behind: the vast side wall of the building that extends back towards the harbour. That this building covers a sizable area of what is presented as the mountain range in the background—which, in actuality, if you were to view the scene today is just mere hills—adds to the imposing breadth and depth of this building. However, and this the figure of the law cannot see, so it thus joins with what is behind him, the ultimate pure surface in front of the law is the harbour. No violence disturbs the harbour's surface, there is not even a trace of a ripple. A ship peacefully rests there, finding itself almost magically reflected in the water. Although out in the water, this boat is fully enclosed—the walls and roofs of the buildings along the street, in tandem with the land on the other side of the harbour, contain it, safely frame it. In contrast to the Aboriginal man in the foreground of the image, the ship's inclusion in the ordering of colonial space is affirmed, with any open area, any

13 I have argued that there is the same relation between staff and void in Earle's *Waterfall in Australia*. See Keith Broadfoot, "Augustus Earle's *Waterfall in Australia* and the Logic of Fantasy," *Art History* 42, no. 5 (2019): 914-935.

FIG. 9
Augustus Earle, *Port Jackson*, ca. 1826, watercolour, 10.7 x 35.1 cm, Rex Nan Kivell Collection, National Library of Australia, Canberra.

FIG. 10
Augustus Earle, *Port Jackson, New South Wales*, ca. 1826, watercolour, 10.7 x 35.1 cm, Rex Nan Kivell Collection, National Library of Australia, Canberra.

borders, reassuringly sealed. Doubtless to be read as a repetition of the founding of the colony, of the first British ship to enter the harbour, this is a repetition that represses law's origin.

Bernard Smith believed that in the background of one of Earle's watercolours he could detect the future direction of Australian art. Of *Port Jackson* (fig. 9) he wrote, there was, 'perhaps, the earliest attempt to portray the suffused rose and mauve tones of an afterglow over Sydney Harbour during a summer or early autumn evening—an effect greatly favoured by the Australian plein air and impressionist painters of the last two decades of the [nineteenth] century.'[14] Although a seemingly innocent aesthetic effect, if one views another Port Jackson watercolour by Earle, a significance beyond that of the purely atmospheric is attached to the "afterglow" (fig. 10). In noting the presence of Aboriginal people in the foreground of one and not the other, the setting of the sun can be associated with the melancholic passing of the Aboriginal people. The "effect" that the Australian impressionist painters so desired, the delicate abstraction of their painterly gestures that would evoke the "afterglow," could then be understood as a further sublimation, or a forgetting, of what Earle so emphatically included in the foreground of so many of his works.[15] If we return for the final time to the foundational image of *View from the Sydney Hotel*, then this would further imply that after Earle, Australian art consists of the transitioning away from one side of the law to the other, or more, as an attempt to dissociate art and law, as if there were indeed two sides to the law. Yet, if this so, then, as this article has attempted to demonstrate, Earle's work persists as a salutary reminder that this dissociation is not the case, requiring us to turn and look again at what has been placed behind our backs, re-assessing as we do so our understanding of what law is.

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14 Smith, *European Vision and the South Pacific*, 193.

15 For more on the melancholy effect of Australian impressionism as a sublimation of colonial violence, see Chapter 4, "The Bad Conscience of Impressionism," in Ian McLean, *White Aborigines: Identity Politics in Australian Art* (New York: Cambridge University Press, 1998), 52–73.

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FORENSIC LISTENING IN LAWRENCE ABU HAMDAN'S *SAYDNAYA (THE MISSING 19DB)*

by James Parker

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THE RIGHT TO SILENCE

In 2014, Lawrence Abu Hamdan invited me to participate in a day of events he was curating for the Studium Generale at the Rietveld Academie. The wider program, a "conference-festival," addressed to students and faculty across all fields of art and design, was concerned with voice, but Abu Hamdan's own focus would be legal, and the day was therefore titled The Right to Silence.[1] The "Miranda-style" warnings made famous by American crime dramas were mentioned only once, however, and only as a point of departure. Abu Hamdan's concerns were much broader. What interested him, he said, were "the forms of listening that govern and control the voice . . . how voices are received, and how they're also silenced."[2] So, Anna Kipervaser presented excerpts from her film *Cairo in One Breath* (2015), about the Adhan Unification Project and how, in the name of combatting "noise pollution," the call to prayer of individual *muezzin* was quickly being replaced by a single voice broadcast throughout the city. Niall Moore told the extraordinary story of the "broadcast ban": legislation which, from 1988 to 1994, prohibited the voices of members of Sinn Féin and other groups, both republican and loyalist, from being heard on British television and radio, with the perverse outcome that recordings were simply dubbed by actors instead.[3] Tom Rice presented his research on the stethoscope and the dramatic shifts in doctor-patient relations and auditory knowledge it helped bring about.[4] René Laennec's iconic 1816 invention was a key moment, he said, in medicine's broader shift towards pathology and modern clinical techniques. For the first time, here was a technology that allowed the body *itself* to speak, often despite and against patients' own reporting.[5] This was a point that Abu Hamdan had himself deployed to powerful effect in *The Whole Truth* (2012), his documentary on the science and pseudo-science of computational voice analysis in security contexts: about companies like Nemesysco, for instance, that claim to be able to detect everything from whether or not a person is lying, to embarrassment, anxiety, and even a propensity for sex-offending, simply by analysing their speaking voice.[6] Like the stethoscope, such techniques attempt to "pit the subject against itself": what we say against how we say it. The politics, of course, are very different. What is at stake now, Abu Hamdan says, is the emergence of a

1 "Studium Generale Rietveld Academie 2014," Voice: Creature of Transition, 2014, https://voicecreatureoftransition.rietveldacademie.nl/lecture/thursday-march-20/.

2 Lawrence Abu Hamdan, "Lawrence Abu Hamdan: Introduction," Studium Generale Rietveld Academie, 2015, YouTube video, 16:33, https://www.youtube.com/watch?v=B8UAwxoeIi8.

3 Niall Moore, "'Niall Moore: 88–'94': Silence, Censorship & The Broadcasting Ban," Studium Generale Rietveld Academie, 2015, YouTube video, 34:54, https://www.youtube.com/watch?v=w8eeq1-fmVA.; Francis Welch, "The 'Broadcast Ban' on Sinn Fein," BBC News, April 5, 2005, http://news.bbc.co.uk/2/hi/4409447.stm.

4 Tom Rice, "Listening to the Corporeal Voice," Studium Generale Rietveld Academie, 2015, YouTube video, 38:22, https://www.youtube.com/watch?v=jjxNG8R4JAM; "Learning to Listen: Auscultation and the Transmission of Auditory Knowledge," *Journal of the Royal Anthropological Institute* 16, no. 1 (2010): 41– 61.

5 See also Jonathan Sterne, "Mediate Auscultation, the Stethoscope and the 'Autopsy of the Living': Medicine's Acoustic Culture," *Journal of Medical Humanities* 2, (June, 2001): 115–36.

6 Nemesysco, "Homepage," n.d., http://nemesysco.com/.

new "phrenology of the voice."[7]

The rest of the day's program was equally diverse, ranging widely across geography, law and politics. El-Wardany and Maha Maamoun presented work from *The Middle Ear* (2011) and *How to Disappear* (2013), their collections of poetry and short stories on eavesdropping and other forms of illicit listening, and Ali Kaviani gave a performance based on his experience with The Silent University, a solidarity-based knowledge exchange platform developed by and for displaced people unable to use their skills or professional training by virtue of their immigration status. We heard Gregory Whitehead's astonishing radiophonic work *Pressures of the Unspeakable* (1992), which draws from recordings made for "The Institute for Screamscape Studies," a "bogus institution" housed briefly at the Australian Broadcasting Corporation in Sydney.[8] Kobe Matthys performed a version of his longstanding project *Agency* (1992–present), focused here on a collection of found "sonic objects" derived from (in)famous intellectual property disputes, like the one involving a Bette Midler "soundalike" in an advertisement for Ford motors.[9] Noah Angell spoke about the violence of the ethnographic ear, as he narrated a series of recordings—of Inuit throat songs, an 'Are'are panpipe ensemble, Diak flute music—all produced in the name of "preservation" and "national heritage," but which nevertheless entailed a form of silencing and erasure by virtue of their dramatic excision from the relevant ritual or legal contexts.[10] And I was there, finally, to present some of my work on "acoustic jurisprudence" and the trial of Simon Bikindi, who had been accused by the International Criminal Tribunal for Rwanda of inciting genocide with his songs.[11]

THE LAWS AND POLITICS OF LISTENING

Here in this catalogue of projects are the outlines of a whole field of enquiry, concerned, as Abu Hamdan suggested, with the laws and politics of listening: how listening governs and is itself governed. In 2014, this was not yet a field that had been well-mapped: by artists or academics, in law or elsewhere. Indeed, much of my own work both before "The Right to Silence" and since, especially in my collaborations with Joel Stern and Liquid Architecture,[12] has been dedicated to making the case for a renewed concern for sound in law,[13]

7 Lawrence Abu Hamdan, "Aural Contract–Forensic Listening and the Reorganization of the Speaking Subject," *Cesura//Acceso* 1 (2014): 200.

8 Gregory Whitehead, "Pressures of the Unspeakable: A Nervous System for the City of Sydney," *Continuum* 6, no. 1 (January 1992): 115–17, https://doi.org/10.1080/10304319209359386. Full script: Gregory Whitehead, "Pressures of the Unspeakable," 1992. https://gregorywhitehead.files.wordpress.com/2012/10/potuscript.pdf.

9 *Midler v Ford Motor Co*, 849 F.2d 460 (9th Cir. 1988).

10 Noah Angell, "Noah Angell," Studium Generale Rietveld Academie, January 30, 2015, YouTube video, 29:57, https://youtu.be/kuwB2ZmW9Lo.

11 James E. K. Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford: Oxford University Press, 2015).

12 See e.g. Liquid Architecture, "Acoustic Justice," 2017, https://liquidarchitecture.org.au/events/acoustic-justice.; James Parker and Joel Stern, eds. *Eavesdropping: A Reader* (Wellington: City Gallery, 2019).

13 James E. K. Parker, "The Soundscape of Justice," *Grif th Law Review* 20, no. 4 (2011): 962–993; James E. K. Parker, "The Gavel," in *International Law's Objects*, ed. Jessie Hohmann and Daniel Joyce (Oxford: Oxford University Press, 2018); James E. K. Parker, "Codes: Judging the Rwandan

and for a richer account of law in sonic art and music.[14] This, presumably, is why I was invited.

There is still plenty of work to be done, but Abu Hamdan has done more than most to bring such questions to public attention and to foster their discussion in the arts and the academy. In 2014, when we first met in Amsterdam, Abu Hamdan's star was only just beginning to rise. Emily Apter has already written powerfully on a number of his early works.[15] "Shibboleth: Policing by Ear and Forensic Listening in Projects by Lawrence Abu Hamdan," which first appeared in *October*, and then subsequently in a short monograph on the artist for Sternberg Press, focuses on a series of works concerned with the controversial use of language, dialect and accent analysis in determining the origins of asylum seekers.[16] This series, comprising the audio documentary and accompanying sculptures, *The Freedom of Speech Itself* (2012), and the installation *Conflicted Phonemes* (2012), investigates "the listening skills of the phonetic expert," along with the politics of pronounceability and the irreducibility of the voice to a passport. These language tests, generally applied over the phone by government subcontractors, amount to little more, Apter explains, than "technologically sophisticated versions" of the Biblical shibboleth test, since they reduce the asylum seeker's voice to an "aural biopolitical signature": a biological marker of putative statehood. Even when we are free to speak, Abu Hamdan is saying, we are not necessarily "free to choose the ways we are being heard."

In the years since these and other early projects, Abu Hamdan has quickly become one of the world's most sought after and critically acclaimed artists. Not that it is a competition. Having already been awarded the Nam June Paik Award for new media and the Tiger short film award at the Rotterdam International Film festival for *Rubber Coated Steel* (2016), along with various other prestigious fellowships and decorations, when he was nominated, along with Helen Cammock, Oscar Murillo and Tai Shani, for the Turner Prize in 2019, the group petitioned to be named joint winners. It was a characteristically political gesture as well as a canny institutional critique: "the most significant artistic gesture since Duchamp," wrote the art critic and historian Seth Kim-Cohen on Facebook, tongue only partly in cheek. "After a number of discussions, we have come to a collective view that we would like to be considered together for this year's award," the four artists wrote in a letter to the jury.[17] "We are therefore writing to request that you as the jury might consider awarding the Prize to the four of us collectively and not to any of us

Soundscape," in *A Cultural History of Law in the Modern Age*, ed. Richard K. Sherwin and Danielle Celermajer, vol. 6, A Cultural History of Law (London: Bloomsbury, 2019).

14 James E. K. Parker, "The Musicology of Justice: Simon Bikindi and Incitement to Genocide at the International Criminal Tribunal for Rwanda," in *The Soundtrack of Conflict: The Role of Music in Radio Broadcasting in Wartime and in Conflict Situations*, ed. M. J. Grant and Férdia J. Stone-Davis (New York: Olms Verlag, 2013); Parker and Stern, *Eavesdropping*.

15 Emily Apter, "Shibboleth: Policing by Ear and Forensic Listening in Projects by Lawrence Abu Hamdan," *October* 156 (May 2016): 100–115, https://doi.org/10.1162/OCTO_a_00253.

16 Lawrence Abu Hamdan, *[Inaudible] A Politics of Listening in 4 Acts*, ed. Fabian Schöneich (Sternberg, 2016).

17 Taylor Dafoe, "As a 'Statement of Solidarity' the 2019 Turner Prize is Awarded to all Four Nominees at Once," *Artnet News*, December 3, 2019, https://news.artnet.com/art-world/2019-turner-prize-winner-1721373.

individually."[18] And they did, for the first time in the Prize's thirty-four-year-long history. "The politics we deal with differ greatly," the group explained on receiving the award, "and for us it would feel problematic if they were pitted against each other, with the implication that one was more important, significant or more worthy of attention than the others."[19]

But the interest and appeal of Abu Hamdan's work is about far more than its politics. The specific ways in which he weaves law and listening together—both in the service of, and quite apart from, their political dimensions—is crucial too. Abu Hamdan's art presents itself as already jurisprudential. It works with, on and against legal techniques and idioms; gathers, presents and interprets evidence; stages virtual trials; and makes explicit doctrinal claims: all with a view to intervening in political struggles in which questions of law are directly implicated. "Forensic listening" he calls it.[20] And as with "the right to silence," this is both a nod to a specific set of legal practices and an effort at expanding and politicizing them, as we will see.

SAYDNAYA (THE MISSING 19DB)

If "The Right to Silence" speaks to Abu Hamdan's broader curatorial interests and the academic and artistic contexts in relation to which he situates his work, in this essay I want to consider some specifics, and to think with and through one work in particular. Because of its subject matter and methodology, Abu Hamdan's work is always heavy, but *Saydnaya (the missing 19dB)* (2016) is crushingly so. It is one of several artworks, a website,[21] and a major report[22] to have come out of a collaborative project between Amnesty International and Forensic Architecture, the research agency founded by Eyal Weizman at Goldsmiths in 2010 with which Abu Hamdan has been associated since its inception. The work concerns an acoustic investigation into Saydnaya Military Prison, thirty kilometres north of Damascus, Syria, where an estimated thirteen thousand people have been executed by the Assad regime since 2011. Because Saydnaya is inaccessible to independent monitors, the memories of the few survivors to have been released are the only way to learn of, document and condemn the violations taking place there. Further, since prisoners at Saydnaya are kept in tiny cells, in near total darkness, and at risk of death if they so much as make a sound, those memories are largely auditory. *Saydnaya (the missing 19dB)* is therefore constructed largely of testimony about detainees' auditory experience and its analysis by the artist. Abu Hamdan's concern, like that of the survivors whose testimony we hear, is for

18 Dafoe, 2019.

19 Mark Brown, "Turner Prize Awarded Four Ways after Artists' Plea to Judges," The Guardian, December 4, 2019, https://www.theguardian.com/artanddesign/2019/dec/03/turner-prize-2019-lawrence-abu-hamdan-helen-cammock-oscar-murillo-and-tai-shani-shared?fbclid=IwAR1MWV8-svDajlpi_QvHSLLyzTFq7cLZUctMd-hEO6BIe1PfXx1mX5tMI2k.

20 Abu Hamdan, "Aural Contract."

21 "Saydnaya: Inside a Syrian Torture Prison," Amnesty International and Forensic Architecture, 2016, https://saydnaya.amnesty.org/

22 Amnesty International, "Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria," 2017, https://www.amnesty.org/en/documents/document/?indexNumber=mde24%2f5415%2f2017&language=en.

the complex ways in which sound and silence are connected to techniques of domination, power and resistance, including especially by recourse to international law.

Having debuted at the 13th Sharjah Biennial in 2016, *Saydnaya (the missing 19dB)* was subsequently shown alongside *Earwitness Inventory* (2018) as *Earwitness Theatre*, a solo exhibition at Chisenhale gallery, for which, along with the video installation *Walled Unwalled* (2018) and the performance lecture *After SFX* (2018) at Tate Modern, Abu Hamdan was nominated for the Turner Prize. Though all of these works come out of the same investigation, *Saydnaya (the missing 19dB)* is the series' backbone and anchor. Without it, for instance, the significance of *Earwitness Inventory*—which derives from Abu Hamdan's efforts to help survivors from Saydnaya recall and describe the acoustic dimensions of their experience—would be opaque. And both *Walled Unwalled* and *After SFX* rework the Saydnaya material as part of larger stories: in the case of the former, about the permeability of walls and the evidentiary and political potentials thereby entailed. Indeed, *Walled Unwalled* marks a kind of turning point in the artist's trajectory. In one way or another, all of Abu Hamdan's work from 2010 to 2016 was concerned centrally with sound or voice and the laws and politics of listening. With *Walled Unwalled*, however, sound becomes epiphenomenal for the first time. In addition to the Saydnaya materials, the work deals with the trial of Oscar Pistorius for the shooting of Reeve Steenkamp and the crucial role played by audio-ballistics evidence in securing Pistorius' conviction for "culpable homicide" rather than murder. But sound's essential leakiness (and I think for Abu Hamdan it *is* "essential"), its tendency to exceed, surpass and escape, its "fugitivity" to borrow Fred Moten's term,[23] is a pivot now into a much larger story about the material politics of permeability. Like Wendy Brown,[24] Abu Hamdan is concerned with what it means to live in a world in which, paradoxically, walls proliferate but are nevertheless more porous than ever before. Sound is only one part of that story. Moreover, by *Once Removed* (2019), commissioned for the 14th Sharjah Biennial and shown in Australia at the 2020 Biennale of Sydney, the concern for sound and silence is nearly gone altogether.[25]

23 Stefano Harney and Fred Moten, *The Undercommons: Fugitive Planning and Black Study* (Wivenhoe: Minor Compositions, 2013); Andrew Navin Brooks, "Fugitive Listening: Sounds from the Undercommons," *Theory, Culture & Society* (April 2020): https://doi.org/10.1177/0263276420911962.

24 Wendy Brown, *Walled States, Waning Sovereignty* (Cambridge, MA: MIT Press, 2017).

25 The work comprises a filmed conversation between Abu Hamdan and Bassel Abi Chahine, a young writer and historian who "has managed to obtain the most comprehensive inventory of extremely rare objects, photographs and interviews of the PLA and PSP socialist militia led by Walid Joumblatt during the Lebanese civil war." His obsessive investigations are partly about the memorialization of atrocity and the gathering of evidence and testimony against official educational narratives that would prefer this period and what the film describes as the "war crimes" committed during it be erased. But they are also, intriguingly, a kind of auto-forensics, since what motivates Chahine is his belief—an artefact of his Druze faith—that he is the reincarnation of a soldier Yousef Fouad Al Jawhary, who died when he was 16 in 1984 in the town of Aley. "His reincarnation and his research are inseparable," Abu Hamdan explains. "Yet for Bassel it is not his intention to expose the silenced events that he has uncovered about what happened during the war, but rather to seek material and tangible traces that it happened at all, and most of all, despite not being alive at the time, that it happened to him." Notice that the silence is largely metaphorical now, and that if the work is about the politics of listening, it is because of the challenge it issues to its audience: to take this intergenerational investigation seriously, along with the faith and porosity of memory on which it depends.

FIG. 1
Installation view of Lawrence Abu Hamdan, *Rubber Coated Steel* (left) and *Saydnaya (the missing 19db)* (right), Ian Potter Museum of Art, University of Melbourne, 2018. Photo: Christian Capurro.

As a result, and with the benefit of hindsight, it is possible to understand *Saydnaya (the missing 19dB)* as the culmination of a long series of works concerned with articulating and exemplifying what "forensic listening" might entail in artistic and political contexts. Abu Hamdan may well return to these questions again, but for now *Saydnaya (the missing 19dB)* stands as a high point in a particular artistic and political method, in which law and legal technique play a crucial role. Having now curated the work twice for *Eavesdropping*, an exhibition I curated with Joel Stern in 2018 in Melbourne and 2019 in Wellington,[26] what I want to do in this essay is explore how this work works: the claims it makes about silence, both at Saydnaya and more generally; what it means to make these claims in a specifically legal idiom, and to do so, moreover, in a gallery; what this work says about and contributes to Abu Hamdan's practice of "forensic listening." In order to do so, I want to begin by further situating *Saydnaya (the missing 19dB)* in relation to the conversation the work inevitably stages with John Cage's *4'33"* (1952): his notorious "silent work" (though, in fact, it is one of many in Cage's oeuvre). As far as sonic art is concerned, *4'33"* has of course become a ubiquitous, even—in an act of "fabulous retroactivity"[27]—a founding reference.[28] In the case of *Saydnaya (the missing 19dB)*, however, the relationship is more direct. The work can, I think, be understood precisely as a critique of the twin conceptions of sound and silence advanced by Cage and taken up by his inheritors. Indeed, one way of understanding Abu Hamdan's project, both in *Saydnaya (the missing 19dB)* and more generally, would be as a kind of inverse or negation of the form of listening Cage spent much of his career arguing for. "If you want to know the truth of the matter," Cage once explained, "the music I prefer, even to my own or anybody else's, is what we are hearing if we are just quiet."[29] For Cage, "just" listening had nothing whatsoever to do with justice.

CAGEAN SILENCE: THE IMPOSSIBLE INAUDIBLE

There are at least three different scores for *4'33,"* and Cage composed many other "silent" works. However, the canonical version remains David Tudor's reproduction of the lost original manuscript, first performed by Tudor at a piano recital in Maverick Concert Hall, Woodstock, in 1952.[30] A performance comprises three movements totaling the four minutes thirty-three seconds of the piece's title, during which any number of instrumentalists on any instruments "do not play." The result is unexpectedly loud. The audience sits listening to itself listen (to the sounds of each other breathing, shuffling, coughing, sighing), to the peculiarities of the performance space (creaking

26 For full details and documentation of both exhibitions and related public programs, see https://eavesdropping.exposed/.

27 Jacques Derrida, "Declarations of Independence," *New Political Science* 7, no. 1 (1986): 10. "Fabulous" since Cage always thought of himself as a composer. "Retroactive" since the term "sound art" first appeared at the end of the 1970s and would not be used with any regularity until the late 1990s.

28 Marcel Cobussen, Vincent Meelberg, and Barry Truax, eds., *The Routledge Companion to Sounding Art* (New York: Routledge, 2017).

29 Richard Kostelanetz, *Conversing with Cage* (New York: Routledge, 2003), 12.

30 Inke Arns and Dieter Daniel, *Sounds Like Silence: John Cage – 4'33" – Silence Today* (Leipzig: Spector Books, 2012).

floorboards, chairs and rafters, the hum of lighting or ventilation), along with any other sounds able to infiltrate the sanctity of the concert hall (rainfall on the roof, rumbling planes or machinery, buzzing insects and phones, someone talking in the hallway outside). The background becomes the foreground. Not so much silence as the realisation there is no such thing. "The opposition between sound and silence is replaced with a gradient."[31] *4'33"* doesn't just expand the field of music, it abolishes it in favour of spontaneous, ubiquitous sound: "the impossible inaudible," as Douglas Kahn puts it.[32] "One may give up the desire to control sound," Cage once explained: to "clear his mind of music and set about discovering means to let sounds be themselves rather than vehicles for man-made theories or expressions of human sentiments."[33]

"Discovering means to let sounds be themselves." Brian Kane calls this sort of thing "onto-aesthetics": art or discourse about art in which what is valued is the work's ability to explore or disclose its own ontology.[34] In this instance, the desire to reveal and revel in sound as it actually is. As Clement Greenberg put it in his famous 1960 essay championing modernist painting, a great influence on Cage,[35] "what had to be exhibited and made explicit was that which was unique and irreducible not only in art in general but also in each particular art. Each art had to determine, through operations peculiar to itself, the effects peculiar and exclusive to itself."[36] Thus, for Christoph Cox, *4'33"* is important because it points to and embodies music's necessary sonicity, because it "explore[s] the materiality of sound,"[37] and because it exposes and teaches us something about sound's nature as a "ceaseless and intense flow" of vibrant matter that is "actualised in, but not exhausted by, speech, music and significant sound of all sorts."[38] Sound, thus, is an "anonymous flux" that "precedes and exceeds individual listeners and, indeed, composers, who Cage came to conceive less as creators than as curators of this sonic flux."[39] *4'33"* exemplifies this curatorial relationship, Cox says, insofar as it "simply provides a spatial frame" in which to allow sounds to be—and be appreciated for being—nothing but themselves.[40]

31 Douglas Kahn, *Noise, Water, Meat: A History of Sound in the Arts* (Cambridge, MA: MIT Press, 1999), 160.
32 Kahn, 158.
33 John Cage, *Silence: Lectures and Writings* (Connecticut: Wesleyan University Press, 2011), 10.
34 Brian Kane, "Sound Studies without Auditory Culture: A Critique of the Ontological Turn," *Sound Studies* 1, no. 1 (January 2015): 2, https://doi.org/10.1080/20551940.2015.1079063.
35 Robert Rauschenberg's "white paintings" from 1951 were a major influence on Cage. See Seth Kim-Cohen, *In the Blink of an Ear: Toward a Non-Cochlear Sonic Art* (London: A&C Black, 2009), 161–3.
36 Clement Greenberg, *The Collected Essays and Criticism, Volume 4: Modernism with a Vengeance (1957–69)*, vol. 4 (Chicago: University of Chicago Press, 1993), 86.
37 Christoph Cox, "Beyond Representation and Signification: Toward a Sonic Materialism," ed. Margaret Schedel and Andrew V. Uroskie, *Journal of Visual Culture* 10, no. 2 (August 2011): 145–61, https://doi.org/10.1177/1470412911402880.
38 Christoph Cox, "Sound Art and the Sonic Unconscious," *Organised Sound* 1 (April 2009): 19, 22.
39 Cox, "Beyond Representation and Signification," 155.
40 Cox, 159.

SOUND LEADS ELSEWHERE

As Kane points out, the "critical thrust" of onto-aesthetics is to "remove artworks from their cultural contexts (claims about hermeneutics, interpretation, meaning, intention, reception, and so forth) by suturing them to their ontological conditions."[41] The trouble is they can not, since "every time some feature of an artwork is claimed to exemplify this or that ontology [is] a moment where the onto-aesthetician begs the cultural basis of such a claim."[42] With *4'33,"* what's being begged and elided is all the work required to produce the "spatial frame" Cox refers to. This act of framing is anything but "simple." It demands, at the very least: a composer, a score and so a "work";[43] perhaps a conductor; a performer or performers along with their instruments; the staging of a performance; across three movements; in a soundproofed concert hall;[44] for money; before an audience (urbane, elite, often white) trained in the arts of concert-going, with all its norms—both explicit and implicit—of listenership and comportment,[45] and in particular the extremely recent convention of hushed attention; a certain knowledge of the musical tradition(s) into which Cage is intervening; in many cases, direct knowledge of the work itself, along with the powerful mythology surrounding it. All this and more is required to produce and sustain the "frame" that will make the next few minutes comprehensible as having to do with sound "itself," separate and alone.

For Branden Joseph, therefore, *4'33"* is a "pure technique of power." Far from pointing us to sound's essence or materiality, it demonstrates the necessary entanglement of sound, music and listening with "the operation of discipline or control."[46] For Douglas Kahn, it is both about the impossibility of silence and itself an act of silencing in which Cage doesn't so much disappear as creator and master of his work, as magnify his own presence and authority, extended now to include audience members and other institutional actors in addition to those on stage.[47] Just try whispering to your neighbour during a performance of *4'33."* It's much harder to get away with than at a gig or the opera. What is at stake here is the distribution and quality of what Brandon LaBelle terms "sonic agency."[48] Moreover, once the door has been opened to what Seth Kim-Cohen, riffing on Marcel Duchamp, calls the "non-cochlear dimensions" of the work, they quickly "saturate" it.[49] "The normally supplemental parerga," Kim-Cohen writes, borrowing Derrida's term, "become

41 Kane, "Sound Studies without Auditory Culture," 13.
42 Kane, 13.
43 Jacques Derrida, "Before the Law," in *Acts of Literature,* ed. Derek Attridge (Abingdon: Routledge, 1992).
44 Emily Ann Thompson, *The Soundscape of Modernity: Architectural Acoustics and the Culture of Listening in America, 1900-1933* (Cambridge, MA: MIT Press, 2002).
45 Christopher Small, *Musicking: The Meanings of Performing and Listening* (Connecticut: Wesleyan University Press, 2011).
46 Branden W. Joseph, *Beyond the Dream Syndicate: Tony Conrad and the Arts after Cage* (New York: Zone Books, 2008), 188.
47 Kahn, "Noise, Water, Meat," 161.
48 Brandon LaBelle, *Sonic Agency: Sound and Emergent Forms of Resistance*, Goldsmiths Press Sonic Series (London: Goldsmiths Press, 2018).
49 Kim-Cohen, "In the Blink of an Ear," 54.

central to the act of encounter."[50] "Contexts impose themselves: past experiences, future expectations, adjacent sounds, other works, institutional settings, curatorial framing. All these influences, and other parerga besides, are essential components of our experience of what we call 'the work'."[51] Even if they cannot be "heard." In order to explore and appreciate these dimensions of the work, Kim-Cohen claims, indeed of any encounter with the sounding world, we must move beyond a concern for sound-in-itself, beyond vibration, beyond even the "jurisdiction of the ear"[52] towards sound's necessary social-embeddedness; to "disengage sound thinking . . . from its naturalistic rut."[53] "Sound leads elsewhere," Kahn explains.[54] What he does not mention is that this elsewhere includes matters of law and justice. Abu Hamdan's work has always been explicit about this. Nowhere more so than in *Saydnaya (the missing 19dB)*. If in Cage's thinking, the power relations that produce and mediate sound and silence are systematically elided, for Abu Hamdan, it is precisely these power relations and their material residues that we are asked to listen out for.

VIOLENCE AT THE THRESHOLD OF AUDIBILITY

You are sitting in a room.[55] Not a concert hall, this time; a gallery. The room is dark and empty but for the mixing desk on the floor in front of you and the black speakers mounted beside it.[56] The room is quiet, but not soundproof, since, after all, there is no such thing. Sound drifts in through and around the blank walls. Suddenly, an ear-splitting tone jolts you to attention. One of the faders on the desk moves up, as if by some phantom hand. The artist's voice: "Boeing 737 aircraft at one nautical mile before landing." Another tone, not quite so loud, but still uncomfortable, and the fader moves down a notch: "149 glass bottles crash into the back of a garbage disposal truck." Down again: "A freight train passes through Utrecht train station." On and on, quieter and quieter, precisely, methodically: [–] a conversation in a Manchester restaurant; [–] canned music in the lobby of a three-star hotel; frogs croaking throughout the Amazon rainforest in 2010; [–] the few surviving species in 2017; [–] the deathly still of the Chernobyl exclusion zone. Until finally, quietest of all, barely discernible: [–] "Saydnaya, the Syrian regime prison thirty kilometres north of Damascus" where more than thirteen thousand people have been executed by representatives of the Syrian state since 2011.[57] "In Saydnaya, silence is the master," one survivor explains, their original Arabic still audible beneath the

50 Ibid, 229; Jacques Derrida, *The Truth in Painting*, trans. Geoff Bennington and Ian McLeod (Chicago: University of Chicago Press, 1987).
51 Kim-Cohen, "In the Blink of an Ear," 54.
52 Seth Kim-Cohen, *Against Ambience* (London: Bloomsbury Publishing, 2013), 73.
53 Michel Chion, *Audio-Vision: Sound on Screen* (New York: Columbia University Press, 1994), 94.
54 Douglas Kahn, "Sound Leads Elsewhere," in *The Routledge Companion to Sounding Art* (New York: Routledge, 2016), 61–70.
55 Alvin Lucier, "I am Sitting in a Room" (1981). See, for a more legal iteration, Joel Stern, "I am Sitting in a Courtroom" (2017), YouTube video, 11:05,
56 This at least is how the work was displayed for *Eavesdropping*. In *Earwitness Theatre* at Chisenhale and again at Brisbane, the work was presented in a specially constructed box in the center of a room, with a small window out to the rest of the gallery above the mixing desk
57 Amnesty International, "Human Slaughterhouse, Syria," 17.

FIG. 2
Installation view of Lawrence Abu Hamdan, *Saydnaya (the missing 19dB)*, City Gallery Wellington, 2019. Photo: Bethany Woolfall.

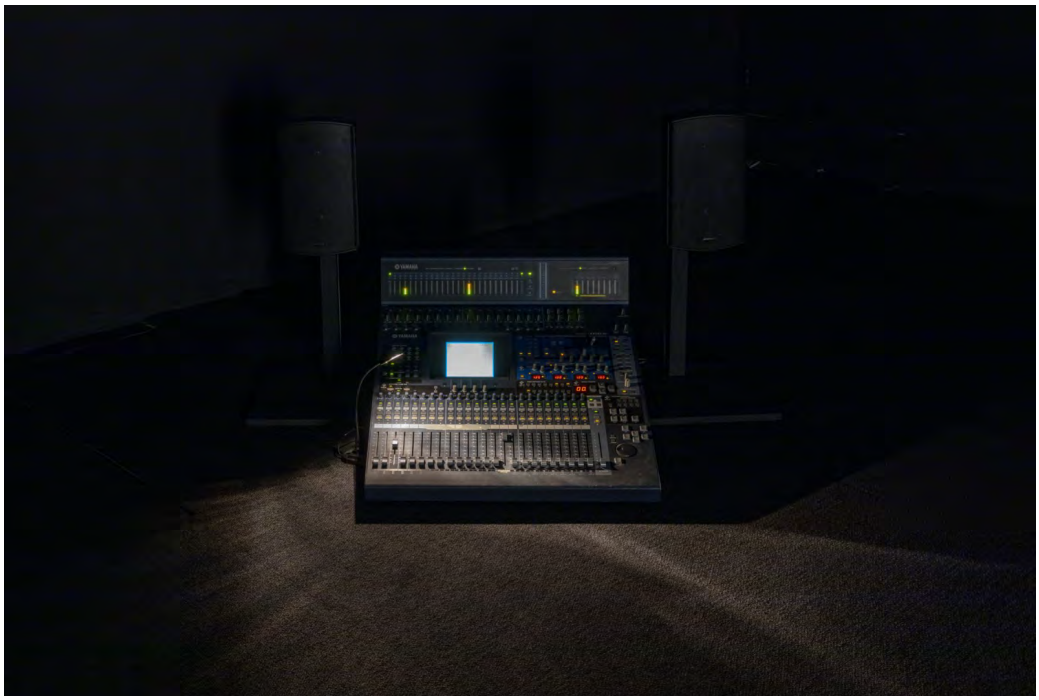

FIG. 3
Lawrence Abu Hamdan, *Saydnaya (the missing 19dB)*. City Gallery Wellington, 2019. Photo: Bethany Woolfall

hushed English of the interpreter. "You can't raise your voice. You can only whisper. And silence is what allows you to hear everything."

These are the opening minutes of *Saydnaya (the missing 19dB)*. Already the work is in dialogue with Cage. Here too, the relationship between sound and silence is a gradient. However, notice that this gradient is precise and measurable now: scientific; a matter of degrees. It is also overtly political. Each tone indexes an event with a name and a cause or perpetrator, and as the volume diminishes so the violence intensifies until, finally, we arrive at Saydnaya, where the silence is simultaneously a form of domination and of great forensic potential. This dialectic is at the work's heart. As it unfolds, we hear survivor after survivor testify about the ferocious silencing to which they were subjected. This is not the silence of solitary confinement: silence as a function of isolation, as a form of sensory deprivation, or—in an older way of thinking—as a method of "inspiring" communion with God.[58] At Saydnaya, the silence is collective and brutally enforced. Indeed, it is "part of the brutality."

> Once in the cell across from ours the guards heard the voice of a man whispering. We heard them say, "who made the sound? Come forward or I will kill you all." One of the detainees confessed and the guard said, "I'm going to take you to the angel of death." All we could hear were hits landing on his body from a distance without a single cry of pain. The hits were so brutal. Eventually it stopped. We heard him say, "I emptied out a spot for you so you can get more comfortable in there. I took your friend to the angel of death. Whoever wants to join him I'll send you over there too."

Or again:

> You'd be there in total silence for two hours and then all of a sudden you hear "vvrrruuu," the shaft opens, and the beatings begin. You hear the beatings, but you don't hear the voices of those being beaten. To scream while you're being beaten is forbidden. In other prisons the guards wouldn't leave the prisoner alone until he screams, but Saydnaya is totally opposite. If you scream the beatings would intensify. So, we could always know if there were new arrivals to the prison if you hear their screams of pain.

Clearly, the beatings are not the only acts of violence here; or even necessarily the "worst." The silence remembered by survivors as such a defining feature of their imprisonment is not just "testimony to the uninhabitable condition of Saydnaya's overcrowded cells," Abu Hamdan claims, but "a form of torture in and of itself."

This is an express doctrinal claim now. In context, it is utterly convincing. To begin with, there is something particularly horrific about a form of devoicing so extreme that it denies a person the expression of their

58 John Frow, "In the Penal Colony," *Australian Humanities Review*, 1999, 13.

own pain. The fact that this silencing also forces detainees to produce the auditory conditions of their own and each other's suffering surely involves a certain violence of its own: a terrible complicity. In an essay accompanying the work, Abu Hamdan likens the silence inflicted at Saydnaya to the "stress positions" used so famously by the US at Guantanamo and other black sites, and the subject of ceaseless lawfare before and since. "The order of silence restricts prisoners' physical movements and suppresses their respiratory functions," he writes, "forcing them to remain still, not stretching their muscles for fear of making a sound," since to do so was to risk death. "When I came out of Saydnaya," one survivor explains, "I used to speak like someone with a twisted tongue. After whispering so long, my tongue wasn't used to speaking loudly. Speech was very difficult for me." Even as Saydnaya's deathly silence mutes the body, it intensifies listening. In jurisprudence and the sonic arts, this kind of "attunement" or "deep listening" is typically celebrated.[59] At Saydnaya it is part of the horror, an excruciating form of hyper-attention whereby even the quietest sound can be petrifying. Under such conditions, "detainees develop an acute sensitivity to sound," Abu Hamdan tells us. "The constant fear of an impending attack makes every footstep sound like a car crash." Such is the effect of a psychosomatic imprisonment no longer defined by bars and walls but by the institution of silence itself.

Considering how readily this silencing is understood as torture in the gallery, it is worth knowing how controversial it would seem to most international lawyers. There is very little relevant precedent on torture's acoustic dimensions, and the little there is has concerned the deliberate bombardment of detainees with "loud music" and "noise." Though there is authority that such practices may rise to the level of torture, or at least cruel, inhuman or degrading treatment, even here the legality question is complex.[60] And the most recent version of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the so-called "Mandela Rules") contains provisions addressing everything from natural light to food, sanitation, exercise, clothing and bedding, but nothing on acoustic conditions at all.[61] So it matters that *Saydnaya (the missing 19dB)* makes the claim so straightforwardly, without working through the doctrinal niceties. There is a moral clarity to it. In fact, this is how the language of international law is often invoked, especially by Non-Government Organisations like Amnesty. The allegation of illegality isn't made because the claim already *is* uncontroversial, but in order to make it so: description as prescription. *Saydnaya (the missing 19dB)* deploys the gallery in the service of a normative world to come. Contemporary art as law's avant-garde.

59 Pauline Oliveros, *Deep Listening: A Composer's Sound Practice* (New York: iUniverse, 2005), 89; Sean Mulcahy, "Silence and Attunement in Legal Performance," *Canadian Journal of Law and Society* no. 2 (August 2019): 191–207; Richard Dawson, *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Abingdon: Routledge, 2014).

60 James E. K. Parker, "Sonic Lawfare: On the Jurisprudence of Weaponised Sound," *Sound Studies* 5, no. 1 (February 2019): 72–96.

61 U.N. General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175 (December 17, 2015).

FORENSIC LISTENING

"Let's all be quiet for a minute. Turn that off." The room hushes. You shift uncomfortably as your mind turns to the profound difference between the "silence" you are experiencing, one of several in the work, and the silence being recalled. "This is how quiet it was in our cell." Another long pause, as the *parerga* rush in. For the artist and composer George Brecht, a student of Cage's, the key intervention of *4'33"* and other compositions like it was to substitute the virtuoso composer and performer for a "virtuoso listener."[62] This is not a bad description of the prisoners at Saydnaya, or indeed of many forced to live through war and conflict.[63] "My hearing is now a third of what it used to be since I was in Saydnaya," one survivor tells us. "I don't rely on it as much now." For Abu Hamdan, this former acuity is an opportunity. It isn't just a matter of translating survivors' aural memories into oral testimony, as we have seen. *Saydnaya (the missing 19dB)* also makes a bold forensic claim concerning the missing nineteen decibels of the work's title: "I despise anyone who says that art is about asking questions and not providing answers," Abu Hamdan explained in a 2018 interview, the year after *Saydnaya (the missing 19dB)* debuted at the 13th Sharjah Biennial. "You hear that pretty much every day in our profession. Artists who repeat this statement think of this as a radical act. But what if art's radicality is actually about art being an engine for truth production?"[64]

Notice that the concern here is not for truth's representation, as in neoclassicism,[65] or its revelation, as in modernist onto-aesthetics, but rather its "production," which is to say something altogether more contingent and material. Abu Hamdan's term for it is "forensic listening."[66] As Eyal Weizman points out, the term "forensics" has not always been law's exclusive property. *Forensis*, he writes, "is Latin for 'pertaining to the forum' and is the origin of the term forensics."

> The Roman forum to which forensics pertained was a multidimensional space of politics, law, and economy, but the word has since undergone a strong linguistic drift: the forum gradually came to refer exclusively to the court of law, and forensics to the use of medicine and science within it. This telescoping of the term meant that a critical dimension of the practice of forensics was lost in the process of its modernization—namely its potential as a political practice.[67]

62 Branden W. Joseph, "Chance, Indeterminacy, Multiplicity," in *Experimentations: John Cage in Music, Art, and Architecture* (London: Bloomsbury Academic, 2016), 237.

63 J. Martin Daughtry, *Listening to War: Sound, Music, Trauma, and Survival in Wartime Iraq* (Oxford: Oxford University Press, 2015).

64 "Lawrence Abu Hamdan in Conversation with Mohammad Salemy," Ocula, April 2018, https://ocula.com/magazine/conversations/lawrence-abu-hamdan/

65 Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge: Cambridge University Press, 2019), 53.

66 Abu Hamdan, "Aural Contract," 200.

67 Eyal Weizman, *Forensis: The Architecture of Public Truth* (Berlin: Sternberg Press, 2014), 9.

It is this political potential that Abu Hamdan is interested in unlocking and exploring. "Forensic listening" is thus both an appropriation and an expansion of the techniques developed, particularly since the 1980s, by scientists with, for and around legal institutions.[68] Abu Hamdan has been very clear, for instance, about the importance of Peter French's work to his practice. French is a founding member and the current president of the International Association for Forensic Phonetics and Acoustics as well as one of the field's most experienced expert witnesses, having testified in and authored reports for courts all round the world, including at the trial of Slobadan Milošević. Abu Hamdan first interviewed him in 2010 for *The Freedom of Speech Itself*, mentioned briefly above.[69] And it is French at least as much as any artist or theorist that Abu Hamdan cites as an influence because of his meticulous concern for sonic materials and how they can be made to speak (*prosopopoeia*)[70] of the social worlds from which they emerge.[71] "Last week, a colleague and I spent three working days listening to one word from a police interview tape," Abu Hamdan reports French as saying, with evident admiration.[72] This is the degree of care and attention that Abu Hamdan himself aspires to: not because the sounds in question are beautiful or interesting, not out of any Cagean fascination with the sounds "themselves."[73] Forensic listening's material orientation is all about what Weizman terms the "politics in matter."[74]

From the silence, whispers. Then a low tone, which we recall from the work's start. It is clean sounding; clinical; probably a single sine wave, without harmonics. "I asked each of the survivors to listen to the sound of a test tone," Abu Hamdan explains, "and to match the volume of the tone with the level at which they could whisper to one another in their cells. A barely audible tone of whisper was consistent amongst Samad, Samer and Jamal, but Diab's whisper was nineteen decibels greater, the equivalent of being four times louder than the rest." Nineteen decibels, Abu Hamdan continues, "is the difference between a jack hammer carving up a pavement and a dishwasher rinsing food off a plate." And Diab's whisper was nineteen decibels louder than the rest, he posits, "because he was released in 2011 when all the inmates of Saydnaya were freed in order to use the prison exclusively for the political protesters that were starting a revolution across the country." The tone becomes audible again and quickly grows louder: urgent sounding. "As a response to these protests, a new era of extreme violence and terror took hold at Saydnaya." The tone cuts out at its peak. "A mass murder that can be measured in whispers."

68 Abu Hamdan, "Aural Contract."
69 Apter, "Shibboleth."
70 See Thomas Keenan, "Getting the Dead to Tell Me What Happened: Justice, Prosopopoeia, and Forensic Afterlives," *Kronos* 44, no. 1 (2018): 102–22; Susan Schuppli, *Material Witness: Media, Forensics, Evidence* (Cambridge, MA: MIT Press, 2020).
71 Lawrence Abu Hamdan, "AURAL CONTRACT: Investigations at the Threshold of Audibility," (PhD thesis, Goldsmiths, 2017), 38.
72 Lawrence Abu Hamdan, "The Freedom of Speech Itself," *Cabinet* 43 (2011), http://www.cabinetmagazine.org/issues/43/abu_hamdan.php.
73 Brian Kane, *Sound Unseen: Acousmatic Sound in Theory and Practice* (Oxford: Oxford University Press, 2014); Kane, "Sound Studies without Auditory Culture."
74 Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (London: Verso, 2012), 46.

The claim probably wouldn't hold up in court. All the more reason to make it in a gallery. *Saydnaya (the missing 19dB)* doesn't just displace forensic listening, it takes full advantage of the additional latitude granted by art as a jurisdiction. The argument is not, of course, that the level at which prisoners could safely whisper "actually" fell by nineteen decibels after 2011. The point is simply to "give scale" to the difference[75] and so make it "serviceable," and in public.[76] The measure is of a psychoacoustic experience and its commitment to memory under conditions of extreme trauma, not sound levels *per se*. So, it isn't only the methods of forensic listening that Abu Hamdan is appropriating and expanding here, but the decibel itself, which now indexes degrees of sonic agency and perceived risk as opposed or in addition to amplitude. The work succeeds to the extent it can make this way of accounting for the violence at Saydnaya seem probative: not simply "in the absence of other material evidence"[77] but because it captures something "truer" than conventional legal fora would likely allow.[78]

CRITICAL COUNTER-LISTENING?

Saydnaya (the missing 19dB) works with and on forensics then, just as it does the law of torture. In doing so, it shows up both the poverty and the luxury of Cagean silence, with its putative separation of sound and the social. Silencing emerges instead as a brutal expression of state authority: the gruesome intensification of a dynamic familiar to the world's courtrooms, concert halls and beyond. In this, the work is extremely potent. Like *4'33,"* *Saydnaya (the missing 19dB)* lingers with you. Like *4'33,"* many will "hear the world differently" because of it:[79] a world in which sound and silence can be weaponised, and in which law and listening are possible modes of resistance. It is on this latter point that I want to finish. Because the appeal to law as an idiom of critique or medium for politics is never without its risks. And international law—the norms and institutions of International Human Rights Law, International Criminal Law, and International Humanitarian Law in particular, since these are the fields in which state torture and killing most obviously register—provides the never-quite-articulated reserve from which *Saydnaya (the missing 19dB)* draws much of its rhetorical and emotional power. The work does not just borrow legal techniques and vocabulary, but also international law's symbolic capital, secular virtue, and the prospect of a cudgel.[80]

As lawyers, activists and scholars of many different stripes have pointed out, however, international law is part of the problem as much as the solution:

75 Lawrence Abu Hamdan, "Saydnaya (the Missing 19db)," in Parker and Stern, *Eavesdropping*, 53.
76 Sheila Jasanoff, "Serviceable Truths: Science for Action in Law and Policy," *Texas Law Review* 7 (June 2015): 29.
77 Abu Hamdan, "Saydnaya (the Missing 19db)," 54.
78 Eyal Weizman, "Open Verification," e-Flux Architecture, 2019, https://www.e-flux.com/architecture/becoming-digital/248062/open-verification/.
79 Kahn, "Noise, Water, Meat," 158.
80 Julie Stone Peters, "Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion," *PMLA 2* (March, 2005): 442.

not just in relation to Syria, and not just when things "go wrong."[81] This is true in all sorts of ways, but we could begin with international law's dubious legitimacy. From the Peace of Westphalia on, the whole edifice of international law is not only rooted in colonialism and its "civilising mission" but continues it,[82] often by means of a humanitarianism that is increasingly carceral and bellicose as well as "excessively universalistic and centralised."[83] Not just that. This "muscular humanitarianism"[84] tends to occupy "the imaginative space of emancipation" and "crowd out other ways of understanding harm and recompense."[85] It can mire political challenges in opaque—indeed fundamentally indeterminate—doctrine, procedure and endless lawfare, funneling precious resources to lawyers, bureaucrats and other professionals in the Global North all the while.[86] Both International Criminal Law and International Humanitarian Law force complex social and historical forces through the myopic lens of criminal accountability and, in doing so, struggle to account both for the structural causes of atrocity and the complicity of the very international community in whose name jurisdiction is asserted.[87] Meanwhile, International Human Rights Law not only "expresses the ideology, ethics, aesthetic sensibility and political practice of a particular Western Eighteenth-through Twentieth-Century liberalism,"[88] but sits all too comfortably with the logics and institutions of contemporary neoliberalism.[89]

The critiques are far too many to repeat, and clearly it is beyond a single artwork to bear them. Nevertheless, to the extent that *Saydnaya (the missing 19dB)* appeals to or draws on the promise of international law, they cannot be ignored. Politics never "runs clean" of course.[90] Neither does law or art. And in other works, Abu Hamdan has turned the methods of forensic listening expressly back on the legal institutions that ordinarily deploy them. For Weizman, law—like forensics—is a *pharmakon*, "both a cure and a poison," so that the question is not whether to invoke it but how, when and why: a question, in other words, of tactics.[91] There is more to this question than the politics or justice of the cause, which in the case of *Saydnaya (the missing 19dB)* are hard to dispute. A robust "counter-forensics" would also find ways

81 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).
82 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).
83 Frédéric Mégret, "International Criminal Justice: A Critical Research Agenda," in *Critical Approaches to International Criminal Law: An Introduction*, ed. Christine Schwöbel (Abingdon: Routledge, 2014), 17, 30.
84 Anne Orford, "Muscular Humanitarianism: Reading the Narratives of the New Interventionism," *European Journal of International Law* 10, no. 4 (1999): 679.
85 David Kennedy, "The International Human Rights Movement: Part of the Problem?," *Harvard Human Rights Journal* (2002): 101, 108.
86 David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006).
87 Mégret, "International Criminal Justice."
88 Kennedy, "The International Human Rights Movement," 114; Mark Antaki, "The World(Lessness) of Human Rights," *McGill Law Journal* 49, no. 1 (2003): 203–24.
89 Jessica Whyte, "Human Rights and the Collateral Damage of Neoliberalism," *Theory & Event* 20, no. 1 (2017): 137–51.
90 Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999).
91 Eyal Weizman, *Forensic Architecture: Violence at the Threshold of Detectability* (Cambridge, MA: MIT Press, 2017), 71.

not to reinforce or celebrate international law, and especially its more insidious dimensions, in the process.[92] The challenge for anyone attempting to critically appropriate law's methods, as Ben Golder argues, is to "pervert and 'performatively undermine'" them in the very process of their employment.[93] "To employ law as a tactic," he writes, drawing on Foucault:

> is to approach it not as a substantive ideal or a normative system binding on all, but rather as an assemblage of power-knowledge available for appropriation by various social actors that can be, and is, put to varying uses. An instrumental deployment of law (or any other assemblage) is a kind of insubordinate, disobedient, and potentially subversive deployment that plays the game in a way that does not respect the stated purpose of the game and hence troubles and possibly undermines it.[94]

We have already seen how *Saydnaya (the missing 19dB)* works with doctrine and evidence in ways that are both novel and persuasive. The fact that these might struggle to hold up in court is not a failing but a critique: of the paucity of law's sonic imagination, on the one hand, and the limits of ordinary legal processes, on the other. There is something gently subversive too about the failure to address the question of redress or sanctions, with which international law and its critics are almost constitutively obsessed, and which an NGO like Amnesty would never go without mentioning.[95] The risk, of course, is that the work contributes to the desire for further "humanitarian intervention" in Syria. But there is also something refreshing in the suggestion that a certain justice may be had in the investigative process itself: in this practice of listening-in to Saydnaya, despite and against the efforts of the Syrian state. The justice, perhaps, of a verdict without a sentence.

In the end, it is not Abu Hamdan who delivers it. The final minutes of the work are given over to survivors, who present the results of their own acoustic investigations, developed far away from the methods and institutions of law. Now, finally, the inversion of juridical procedure is unmistakable. Forensic listening appears, in the final analysis, as a technique of resistance available to the least empowered, precisely as a function of their disempowerment in fact, and independent of law's recognition or authorisation. "Silence is what allows you to hear everything," one man explains again:

> What we figured out from the sounds were that every ten-to-fifteen days the guards would take a selection of prisoners out of each cell of the prison. We would hear them open the doors of each of the cells to take them out and gather them all and put them in the first two cells of our ring. We would hear the guards saying "lie on top of one another." Once we counted that they had crammed three hundred men into one cell. They gathered them

92 Thomas Keenan, "Counter-Forensics and Photography," *Grey Room* 55 (2014): 58.
93 Ben Golder, *Foucault and the Politics of Rights* (Stanford: Stanford University Press, 2015), 21.
94 Golder, 117.
95 Amnesty International, "Human Slaughterhouse," 43.

> here and they keep them crammed inside until the middle of the night. We'd start to fall asleep, then we'd wake up to the noise of their cell opening and the guards cursing and beating them. At around five in the morning they'd collect them, put them in trucks, and we would hear the trucks drive off.

Detainees would count how many trucks came and went during the night. "Once I remember the truck came ten times. Each time it would park, they would fill it up with prisoners and then drive off." Detainees began memorising the names of the prisoners whose names were called by the guards, so that if they ever escaped, they could ask about them. "We asked about them and none of the men were taken to any civil prisons. We don't know where they went. They have disappeared. We would hear the trucks drive off and it would be silent for fifteen minutes and then we would hear the truck return empty." "So, the sound of these trucks leaving and the fifteen minutes of silence until we heard them coming back empty," he explains. "This was the sounds of executions."

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Part 3
ICONS

NO STICKERS ON HARD-HATS, NO FLAGS ON CRANES

How the Federal Building Code Highlights the Repressive Tendencies of Power

by Agatha Court

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On 6 November 2019, two Australian Building and Construction Commission (ABCC) inspectors arrived at a multi-million dollar construction site in Melbourne.[1] Given the complex processes involved in building a project such as this, the presence of a government regulatory agency is not surprising; work health and safety standards, building quality, structural soundness, and wage theft are ongoing issues within the industry, and compliance checks would be expected. Yet the two inspectors were not there for those reasons. Rather, "the purpose of the visit was to identify and take photographs of any union mottos, logos or indicia observed on the cranes, walls of the walkway and the walls of the lunch rooms as a continuation of an audit to assess compliance with the *Code for the Tendering and Performance of Building Work 2016* (the Code)."[2] As the two inspectors walked the site, they took multiple and comprehensive photographs of any posters, flags or stickers on workers' hard hats that had the logo of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) displayed.[3] This included posters that informed workers of "Wage Increases through the EBA [Enterprise Bargaining Agreement], Site Allowances, the CFMMEU RDO [Rostered Day Off] calendar, CFMMEU Fundraisers [and] OHS [Occupational Health and Safety] Alerts."[4] Other notable posters depicted "a chook and a message relating to not working in the rain [that] has the CFMEU Victoria logo on the bottom of it (the chook poster)"; "a poster with CFMEU across the top and a young man dressed in construction gear, wearing a T-shirt with the words "Construction Union" along with a black hard hat with a logo of the CFMMEU"; "a poster bearing logos of the CFMMEU attached to the wall of the lunchroom outlining the benefits of the association."[5]

This was not the first visit by ABCC inspectors to this particular Melbourne site. Photos from previous visits note: "A stuffed animal can be seen hanging from the power cord to the air conditioning unit. The stuffed animal is wearing a black hard hat that is affixed with multiple stickers with logos, mottos or indicia of the CFMMEU" and "An esky is resting on a box beneath the stuffed animal. The esky has a number of union stickers attached to it. The owner of the esky is not known."[6] The inspectors collected a catalogue of images of CFMMEU stickers found on workers' helmets, toolboxes and lunchboxes including the phrases "100% Union"; "There is Power in a Union"; "United we Bargain, Divided we Beg"; "Keep the dirty rats out"; "Danger, Militant Unionist"; "Dare to Struggle, Dare to Win"; "Grub Busters" and "If Provoked, Will Strike."[7] The inspectors reported that "during the site walk, Inspectors observed the crane crew chanting for the CFMMEU. A member of

1 *Lendlease Building Contractors Pty Limited v Australian Building and Construction Commissioner & Anor*, 2020 Federal Court, statement of ABCC inspector, November 19, 2019, 19.
2 *Lendlease v ABCC*, ABCC Compliance Officer, 22.
3 In 2018 the then Construction Forestry Mining and Energy Union (CFMEU) merged with the Maritime Union of Australia (MUA) to form the CFMMEU. This essay will refer to the union as the CFMMEU, unless directly quoting a source prior to the merger.
4 *Lendlease v ABCC*, 30.
5 *Lendlease v ABCC*, ABCC Compliance Officer, 34–35, 37
6 *Lendlease v ABCC*, ABCC Compliance Officer, 69.
7 *Lendlease v ABCC*, 69.

FIG. 1
A hard hat covered by CFMMEU stickers. This hard hat was available for purchase on the CFMMEU website in 2019. Members often decorate hard hats personally, and they can include a huge variety of stickers, from different branches of the Union.

FIG. 2
A frequent union motif, the striking Cobra, shown here on a CFMMEU poster. This image is often found on stickers, posters and Union clothing. This poster is from the ACT Branch of the CFMMEU.

the crane crew was seen to be wearing [a Union Sticker covered hat]."[8]

These interactions, and dozens of others like them, were meticulously documented by the inspectors as potential breaches of the Code. The documentation includes hundreds of photos, ranging from individual construction workers wearing hard hats covered in union stickers, to the Eureka Flag, flying high above the site, atop a crane.[9] This matter is currently before the Federal Court of Australia, as the builder, multinational corporation Lendlease, has sought judicial review on the validity of aspects of the *Code for the Tendering and Performance of Building Work 2016* (Code) that prohibit union insignia. For this multi-million-dollar project, high-powered legal teams pour over hundreds-of-pages of documents, filled with photos of union flags, posters, and stickers.

ICONOMY AND IDOLATRY

When the state seeks to control images through legal mechanisms, it reveals two things. First, that there is an instinct for overreach that is inherent to power, even in a liberal democracy. Second, that the visual is a powerful tool of expression and identity, and therefore a principal target of the legal and political apparatus. "Religion and law have a long history of policing images," argue Costas Douzinas and Lynda Nead, "coupled with an economy of permitted images or icons, an iconomy, and a criminology of dangerous, fallen or graven images, and idolatry."[10] Interactions between certain images and powerful institutions like the Australian Federal Government's ABCC and the Code are discussed in this paper.[11] Because, while it is ostensibly about improving productivity by regulating the procurement of building work by government, the Code also seeks to regulate trade union stickers, flags and other images.[12]

While art can be a culturally loaded and narrow term, it can also be understood not just as images in a gallery but also as images used in everyday life. Understood in this way, union stickers are clearly a form of art. Art as a visual phenomenon is an immensely powerful form of expression. According to seventeenth-century emblematist Matthaeus Merian, "men believe much more in the eyes than the ears . . . it is through the eyes that the great truths are imprinted upon the human soul."[13] More than a form of communication, visual images can be icons imbued with power and belief, as frequent episodes of iconoclasm since time immemorial attest. Critical legal scholar, Peter Goodrich, has more recently suggested that images are "expressly a manner of inserting something, a law, a norm, a moral, into the interior of the subject."[14]

8 *Lendlease v ABCC*, 79.
9 *Lendlease v ABCC*, 87–88.
10 Costas Douzinas and Lynda Nead, *Law and the Image: The Authority Of Art and The Aesthetics Of Law* (Chicago: University of Chicago Press, 1999), 9.
11 In the legislation the Building Code is the code of practice referred to in section 34 of the *Building and Construction Industry (Improving Productivity) Act* 2016 (Cth) s 34.
12 *Construction Industry Act* s13(2)(j).
13 Matthaeus Merian quoted in Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance*, (Cambridge: Cambridge University Press, 2013), xvii.
14 Goodrich, *Legal Emblems*, xvii.

In this sense, images are norm-creating and norm-challenging—a projection of human imagination and culture. Art therefore has a political presence. Opposing ideologies take shape through aesthetic means. Writing on contemporary art, Benjamin Buchloh has described its current meaning in ever more bolder terms, as "a tool of ideological control and cultural legitimation."[15] At the same time, images can convey a counter-narrative that both provokes the ideological policing of the state and resists it. Images both elicit state power and repudiate it.

For this reason, those in power have always sought to control and sway the iconography of images. This has taken many forms, from outright desecration—iconoclasm—to the methods under consideration here: legal restriction. Even the law itself requires visual media; aesthetics is a necessary component of its institutions. Images give law legitimacy, "the appearance of official authority, and draw on an aesthetic of harmony and order."[16] Thus the aesthetic of the law is a source of its influence, and the law in turn shapes the visibility of images. Douzinas and Nead describe the law as a "deeply aesthetic practice . . . Law's force depends partly on the inscription on the soul of a regime of images . . ."[17] The creation of an interconnected regime of imagery is thus a form of cultural legitimation. The dominant political ideology is less concerned with restricting a certain image or artwork from being viewed as creating an aesthetic regime that represents the totality of who or what is seen. French philosopher Jacques Rancière, for example, describes an "aesthetic regime of politics [that] is strictly identical with the regime of democracy, the regime based on the assembly of artisans, inviolable written laws, and the theatre as institution."[18] Thus, the dominant political ideology in Australia is, in part, an aesthetic one, and images that challenge this are subject to legal control.

THE NEO IN LIBERALISM

While even the liberal state is tempted to overreach, the ideology of *neo*liberalism that has been ascendant since the 1980s shows no qualms about doing so:

> By creating a hegemonic discourse of "neoliberal reason" in which all human and social interactions must be understood exclusively in terms of individual and economic goals, the basis of social and collective action is removed. The language of "society" becomes unthinkable, "common good" and "non-economic value" oxymorons.[19]

15 Benjamin Buchloh, "Conceptual Art 1962–1969: From the Aesthetic of Administration to the Critique of Institutions," *October* 55 (Winter 1990): 143.

16 Sionaidh Douglas-Scott, "Law, Justice and the Pervasive Power of the Image," *Journal of Law and Social Research,* 2 (2014–2015): 5.

17 Douzinas and Nead, *Law and the Image*, 9.

18 Jacques Rancière, *The Politics of Aesthetics,* trans. Gabriel Rockhill (London: Continuum International Publishing, 2004), 14.

19 Desmond Manderson "Push 'em all: Corroding the Rule of Law," *Arena* 1(2020): 26.

While diminishing its interaction with economic regulation through privatisation and budget cuts, the neoliberal state at the same time increasingly seeks to regulate trade union activity. On the one hand, the state has reduced the capacity of unions to be seen by limiting their interaction with members,[20] or their ability to act within the state apparatus.[21] On the other hand, union interactions with the state has increased through a surge in regulatory surveillance. Understood in this way, neoliberalism is reduceable to a "legal ideology that also cast an affirmative preference for hierarchy and inequality as non-intervention."[22] Wendy Brown has described the impact this has had on collective power:

> When these kinds of assaults on collective consciousness and action are combined with neoliberalism's displacement of democratic values in ordinary political discourse . . . the result is not simply the erosion of popular power, but its elimination from a democratic political imaginary. It is in that imaginary that democracy becomes delinked from organised popular power and that these forms of identity and the political energy they represent disappear . . .[23]

The more militant the union, the more such assaults occur. In Australia, the CFMMEU, perhaps the nation's most militant union, has been subjected to an expansive and coercive regulatory system generally not deployed against other unions. As a prominent source of industrial power, the CFMMEU has been a target of neoliberal regulatory attention. While other construction unions such as the Australian Manufacturing Workers' Union (AMWU), the Australian Workers Union (AWU), and the Communications Electrical and Plumbing Union (CEPU) are covered by the Code, the ABCC prioritises enforcement against the CFMMEU specifically. Neoliberal governments from both sides of Australian politics have targeted construction unions for this reason. A predecessor to the CFMMEU, the Builders Labourers Federation (BLF)—famous for instigating the Green Bans in Sydney during the 1970s—was deregistered by the Labor Party's Hawke Government, in large part for its refusal to accept pay cuts prescribed by the Prices and Incomes Accord between the Federal Labor Government and the Australian Council of Trade Unions.[24] As a prelude to the expansion of regulatory power under the Code,

20 Cf. Union right of entry laws that restrict union presence in the workplace in the *Fair Work Act 2009* (Cth).

21 For example, the end of the system of conciliation and arbitration within Australia (discussed further later in this essay).

22 Sanjukta Paul, "A radical legal ideology nurtured our era of economic inequality," *Aeon*, June 19, 2019, https://aeon.co/ideas/a-radical-legal-ideology-nurtured-our-era-of-economic-inequality?utm_source=Aeon.

23 Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge, Massachusetts: Zone Books, 2015), 153.

24 Drew Cottle, "Brian Boyd, Inside the BLF: A Union Self-Destructs," *The Australian Society for the Study of Labour History*, https://www.labourhistory.org.au/hummer/no-33/blf/. See further: The former Secretary of the ACT Branch of the BLF Peter O'Dea described stated the reason for the deregistration of the union was "Obviously the major contribution was the gains in wages and conditions made by builders' labourers in the past fifteen years, and more importantly the BLF's

FIG. 3
A 2020 collection of CFMMEU stickers from the Victorian Branch. Under the 2013 version of the Federal Building Code, stickers that indicate union membership is not "a personal choice," such as the "No Ticket No Start" or any reference to a "scab" or a "rat" are in breach of the code. Under the 2016 code, any "Logos, mottos and indicia" of a union are in breach, and all of these stickers would fall under that definition. No stickers that contain the word "CFMEU" or "CFMMEU" are code compliant.

the threat of loss of government work was used by both Federal and State Labor governments to prevent construction companies bargaining with the BLF after it was deregistered.[25] The Victorian Building Code introduced by the Cain Government went so far as to exclude companies from Government work that allowed BLF members to work on their sites.[26]

Inevitably, therefore, the exercise of neoliberal regulation has a visual dimension that crosses both Labor and Liberal party lines. By prohibiting the use of visual marks of trade unionism, the state limits collective identity and unified voices, increasing atomisation until all alternatives to the neoliberal model of hyper-individual economic rationalism become quite literally unimaginable.[27]

THE ICONOCLASM OF THE BUILDING CODE

A procurement code may not be the most obvious example of this phenomenon, but its absurdity demonstrates precisely the extent to which the state's war against union power has been carried on through iconoclasm, a war against images. Under the *Building and Construction Industry (Improving Productivity) Act* (The Act), the Minister may issue by "legislative instrument" a building code in relation to procurement and work health and safety on Australian building sites.[28] Decisions made under the Code are not subject to judicial review under the *Administrative Decisions (Judicial Review) Act* (ADJR Act) or administratively reviewable by the Administrative Appeals Tribunal, resulting in limited access to review of decisions.[29] The *Federal Building Code* outlines the "expected standards of conduct for all building industry participants that seek to be, or are, involved in Commonwealth funded building work."[30] And this is the kicker: building companies that do not comply with the apparently voluntary code are not able to tender for government projects. The Code's stated purpose is to "encourage the development of safe, healthy, fair,

determination to hang on to them in the face of a Labor government and an ACTU committed to an 'Accord' which had as its object the reduction in living standards."

25 Humphrey McQueen, *We Built This country: Builders' Labourers and Their Unions* (Adelaide: Ginninderra Press, 2011), 332.

26 Anna Pha, "Report on the Deregistration of the Australian Building and Construction Employees' and Builders Labourers' Federation and Related Developments," *Victorian Trades Hall Council* (June 1986), 8. See further the history of the deregistration of the BLF in Victorian and Federally by two Labor Governments in chapter eleven of Aidan Moore's thesis: Aidan Moore. "'It was all about the working class': Norm Gallagher, the BLF and the Australian Labor Movement" PhD Diss. (Victoria University, 2013), 247–283.

27 Sheldon Wolin described neoliberalism as tending towards an "inverted totalitarianism," referring to the dominance of corporate power and the ever-narrowing space for ideological difference: 'politics that is not political'. Sheldon Wolin, *Democracy Incorporated: Managed Democracy and the Spectre of Inverted Totalitarianism* (Princeton: Princeton University Press, 2017), xxix.

28 *Building and Construction Industry (Improving Productivity) Act* 2016 (Cth) s 34.

29 Breen Creighton "Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry," *Federal Law Review*, 40(2012): 377. Note: The Judiciary Act 1903 (Cth) remains an avenue of review. *Lendlease Building Contractors Pty Limited v Australian Building and Construction Commissioner & Anor* has grounds for review under s39B of the Act.

30 Australian Building and Construction Commission, *What is the Code?* Australian Building and Construction Commission, accessed August 2, 2020, https://www.abcc.gov.au/building-code/what-code.

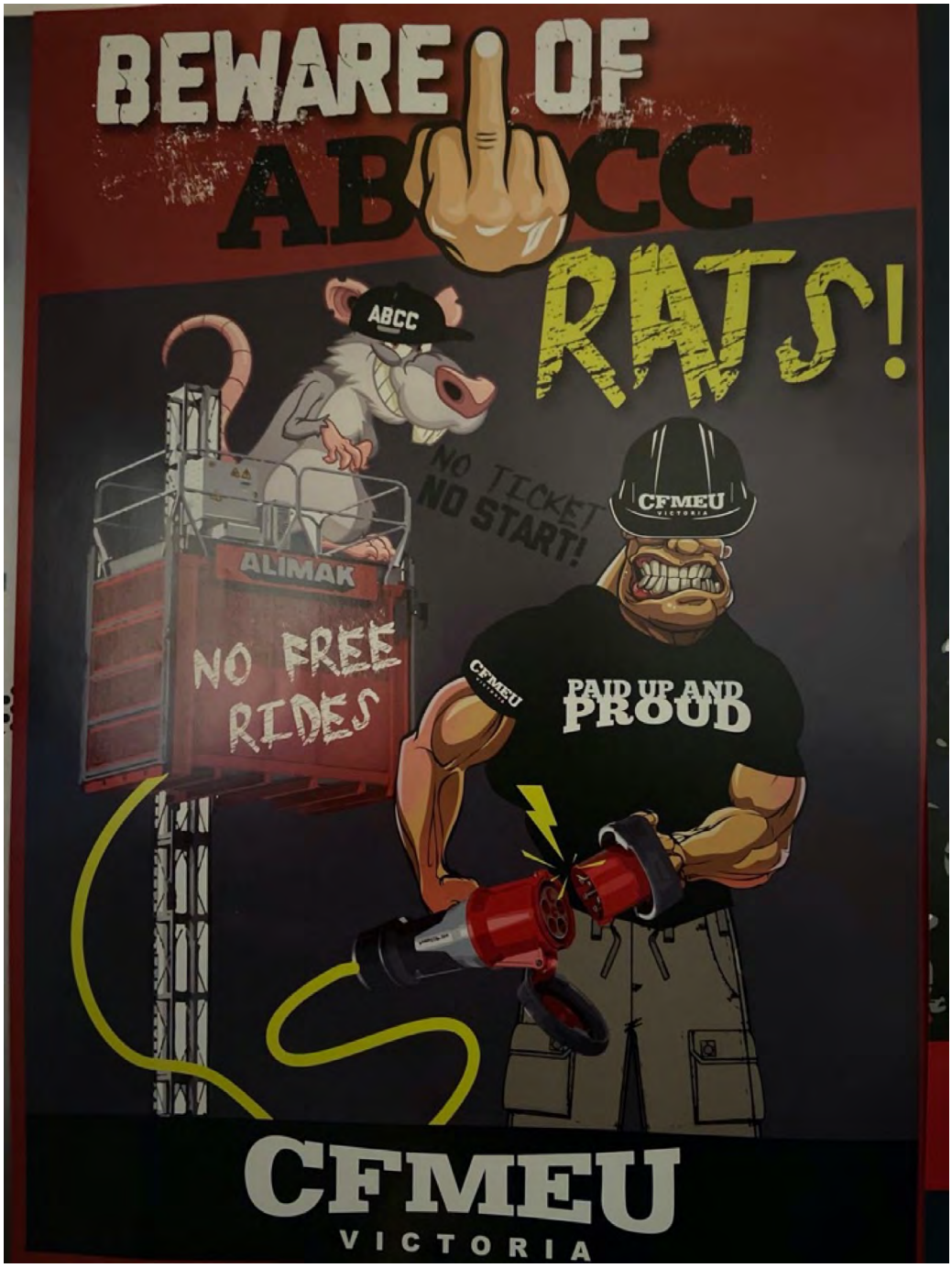

FIG. 4
An Anti-ABCC CFMMEU Poster from the Victorian branch of the CFMMEU. Provocative imagery is an essential theme of union indicia. This poster warns members to watch out for the ABCC and workers who do not pay union dues and "free ride."

lawful and productive building sites."[31] Ostensibly concerned with freedom of association, the Code states:

> building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or for which provision is made by, the employer or any other conduct which implies that membership of a building association is not a personal choice for any employee.

This is an inversion of freedom of association as it is usually understood in international law. For example, the International Labour Organisation's *Freedom of Association and Protection of the Right to Organise Convention*, 1948, confers on workers a positive right to join trade unions:

> Workers' . . . organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes . . .The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.[32]

Australian domestic labour law has historically recognised visual expression as essential to the fulfilment of those rights.[33] As long ago as 1918, the High Court of Australia declared, "The direct object of the claim to wear a badge as a mark of unionism is to place the workers in a stronger position relatively to their employers with respect to the conditions of their employment."[34] Yet under the Building Code, the freedom *not* to join a trade union entitles the state, in the exercise of *its* freedom, to minimise and exclude alternate organising structures and specifically to forestall any visual expression of those structures. The logos or indicia prohibited by the Code include the symbol of a trade union, "the iconic symbol of the five white stars and white cross on the Eureka Stockade flag," signs or stickers that are placed on clothing, cranes, helmets, mobile phones, tools and more.[35]

The Code implicitly recognises the importance of these images, noting the "iconic" nature of the Eureka flag, for example. Despite years of repression, these symbols remain prevalent on construction sites where union membership is relatively highly concentrated. Flying flags on cranes and wearing stickers on safety helmets is a common expression of support for trade unionism and solidarity. They are the visual manifestation of an ideological position. While the stickers often are accompanied by text, such as

31 *Building and Construction* 2016, pt 2 s 5(a).
32 *Freedom of Association and Protection of the Right to Organise Convention,* 1948, No. 87.
33 *The Australian Tramway Employees' Association v The Prahran And Malvern Tramway Trust* (1918) 17 CLR, 680.
34 *Tramways*, 704.
35 "*Freedom of association—logos, mottos and indicia*," Australian Building Construction Commission, accessed March 24, 2020, https://www.abcc.gov.au/resources/fact-sheets/building-code-2016/freedom-association%E2%80%94logos-mottos-and-indicia.

"100% Union," "No Free-Loading," or "No Ticket, No Start," the images can pack an immediate and visceral punch—a striking cobra, a rat, a raised fist, or the skull-and-cross-bones.

Enforcement of the Code has led to the dismissal of workers who have refused to remove stickers from their helmets. In 2016, construction company Laing O'Rourke sacked three union members and gave written warnings to 130 others for refusing to comply with a direction to remove their stickers.[36] Laing O'Rourke undertook this action at the direction of the ABCC following a Fair Work Building Commission audit of the site that found "serious breaches"—meaning workers wearing sticker-covered hard hats.[37]

Flags depicting the Eureka symbol have also been targeted. In another case, *Watpac Construction Pty Ltd v CFMEU*, Commissioner Riordan dismissed a claim that the flag conveyed that union membership was not voluntary.[38] Riordan noted that the Eureka flag was a widely used political symbol in Australia and that its presence did not represent compulsory unionism. Despite this finding, the ABCC has continued to enforce strict compliance with the iconophobia of the Code.

The Code's subjectivity is an essential aspect of its function; it is reliant on the arbitrary enforcement of the ABCC. The stickers and posters themselves are not inherently compliant or non-compliant. Rather, the distinction between compliance and non-compliance is ever flexible and evolving, to suit the capricious regulatory system. As such, what is a code compliant image varies. One example sees the ABCC currently pursuing Lendlease for failing to prevent the CFMMEU from displaying the Eureka flag on its sites (described at the beginning of this essay), but across other construction sites Eureka flags remain undisturbed.[39] Similarly, union stickers and posters are subject to arbitrary enforcement. Indeed, the ABCC's efforts to prevent any and all forms of union presence on construction sites frequently brings it into conflict with the traditional supporters of the liberal state: the bosses. Through the Code, the ABCC forces building companies to become belligerents in a proxy war between the state and the union. These differences in enforcement are not the result of differing appreciation of the aesthetics of particular union stickers but the alternating utility of companies' opposition to union insignia for the ABCC's agenda. As the CEO of the construction company Watpac asked after facing possible sanctions by the ABCC for the volume of CFMEU calendars and safety posters on sites: "The prevalence of a rostered day off calendar or a CFMEU safety sign—does that imply the site is

36 Benjamin Gee, "The sticky issue of union logos," *FCB Workplace Law*, June 15, 2016, https://www.fcbgroup.com.au/news/the-sticky-issue-of-union-logos/.

37 Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia - Electrical, Energy and Services Division - Queensland Divisional Branch v Laing O'Rourke Construction [2016] FWC 3699 (8 June 2016).

38 *"ABCC unmoved on Eureka flag ban despite FWC's contrary view," Electrical Trades Union Western Australia*, published, June 12, 2018, https://www.etuwa.com.au/post/abcc-unmoved-on-eureka-flag-ban-despite-fwc-s-contrary-view.

39 David Marin-Guzman, "Eureka flag ban faces constitutional challenge," *The Australian Financial Review*, March 3, 2020, https://www.afr.com/work-and-careers/workplace/eureka-flag-ban-faces-constitutional-challenge-20200303-p546d6.

promoting anything other than free choice? What if you have ten of them?"[40] Another builder, Hutchinson, was suspended from tendering for government work for three months in 2017 for allowing a "no ticket, no start" union poster on its sites.[41] Not even the wishes of capital, or equal application of the law, will stand between the neoliberal state and its need for control over the means of (visual) production.

THE RISE OF THE REGULATORY STATE AND THE DIMINISHING POWER OF TRADE UNIONS

For most of the twentieth century, Australia's industrial relations system revolved around the *Conciliation and Arbitration Act 1904* (Cth). Under this system, 90 per cent of workers were covered by an industrial award bargained for by a union, and between 42 and 62 per cent of workers were union members.[42] Unions were active participants in the public sphere. The system was based on the concept of "comparative wage justice," where the "strong protected the weak" as the industrial strength of highly unionised industries was the anchor to less unionised industries.[43] Highly unionised industries were the tide that floated all boats. This resulted in Australia's relatively egalitarian wage structure. Trade unions were a dominant presence in the social fabric. They were deeply ingrained in the culture of Australia, their absence unimaginable and essential to the function of Australian Keynesian capitalism.

The importance of the visual dimension of unions' presence in Australian culture and society was explicitly recognised by the High Court in *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust 1918*.[44] Industrial rights, the majority found, could not be gained by individuals successfully; collective organisation, including visual expression of that organisation, was necessary.[45] Union insignia was protected under the arbitration power of the constitution:

> The creation and maintenance of organisations unions are incidental to this power, it seems to follow inevitably that a claim by a member of such an organisation, created and recognised by law for the very purpose of upholding his rights, to evince his membership by wearing a badge of that membership, cannot be foreign to the same power.[46]

40 David Marin-Guzman, "Probuild and Watpac facing bans over CFMEU flags and posters," *The Australian Financial Review*, October 9, 2017, https://www.afr.com/policy/economy/probuild-and-watpac-facing-bans-over-cfmeu-flags-and-posters-20171009-gyx1uj.

41 Marin-Guzman, "Probuild Watpac Ban."

42 "Labour Statistics: Concepts, Sources and Methods, 2013: Industrial Relations," *The Australian Bureau of Statistics*, May 7, 2015, https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/6102.0.55.001Chapter232013.

43 Barry Hughes, "Wages of the strong and the weak," *The Journal of Industrial Relations* 15 (1973): 1–24.

44 *The Australian Tramway Employees' Association v The Prahran And Malvern Tramway Trust* (1918) 17 CLR, 694–695.

45 *Tramways*, 694.

46 *Tramways*, 704.

In the 1980s and 1990s, Australia's industrial framework experienced a paradigm shift that broke with the conceptualisation of labour relations contained in the *Conciliation and Arbitration Act.*[47] The system that institutionalised collective voice was dismantled in favour of one that promoted individualism. Instead, "militant managerialism" came to define industrial relations.[48] Far from removing "red-tape," the reforms initiated under both the Keating and Howard Governments, between 1991 and 2007, shifted many industrial matters into statute as opposed to the award, as awards covered increasingly stripped back "allowable matters."[49] Awards were transformed from the primary mechanism of regulation of the workplace—where "primary wage cases" acted to create industry-wide conditions—into minimum standards decided by the Fair Work Commission that unions and business can make submissions to, as opposed to create through bargaining.[50] Government became the enforcer of compliance, and unions' entry to workplaces was restricted.[51] The so-called "deregulation" of the labour market in Australia demonstrates these complexities very clearly. The steady growth of neoliberal re-regulation in recent years has involved unprecedented levels of state intervention—and anti-unionism—"quite at odds with Australia's past."[52] This is why neo-liberalism has also been called "regulated liberalism," as the vast regulatory state embed corporate influence rather than control it.[53]

THE POLITICAL POWER OF AESTHETICS

The Code confirms the tendency of power to seek control of visual expression. Its purpose, notwithstanding its stated goal of protecting freedom of association, is to diminish and disrupt trade-union activity and expression. Rancière describes how the hegemonic ability of the state to control the visibility of people, communities, or ideas "dooms . . . the majority of speaking beings to the night of silence."[54] Invisibility removes the possibility of communication—the prohibition of union stickers seeks to prevent collective communication on construction sites. If art, as Rancière points out, is also the "framing of a space of presentation by which the things of art are identified as such," the environments for such a presentation must also be considered.[55] In this way, "art is not defined, art is legitimised."[56] Union insignia is therefore

47 *The Conciliation and Arbitration Act* 1904 (Cth).
48 Chris Briggs and John Buchanan, "Australian Labor Market Deregulation: A Critical Assessment," *Economics, Commerce and Industrial Relations Group, Parliament of Australia*, June 6, 2000, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP21.
49 Andrew Stewart, *Stewart's Guide to Employment Law* (Sydney: Federation Press, 2018), 7, 121.
50 Stewart, *Employment Law*, 120, 131.
51 Mark Bray and Andrew Stewart, "From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work," *Adelaide Law Review* 34 (2013): 31.
52 Rae Cooper and Bradon Ellem, "The Neoliberal State, Trade Unions and Collective Bargaining in Australia," *British Journal of Industrial Relations* 46, no. 3 (September 2008): 532.
53 Susan Watkins, "Shifting Sands," *New Left Review* 61 (2010): 12.
54 Matthias Frans André Pauwels, "The spectre of radical aesthetics in the work of Jacques Rancière" (PhD diss., University of Pretoria, 2015), 30.
55 Jacques Rancière, *Aesthetics and its Discontents* (Cambridge: Polity Press, 2009), 23.
56 Sophia Kosmaoglou, "The Self-Conscious Artist and the Politics of Art: From Institutional Critique to Underground Cinema," (PhD diss., University of London, 2012), 108.

able to be understood as similarly accessible through the regime of visibility: far from being legitimised as art, however, they are delegitimised as a violation of the right to freedom of association. The contrast with the treatment by the law of corporate logos, signs, and images, vigorously protected from any encroachment on their right to be seen and preserved inviolate, is striking. On construction worker's helmets, the logo of their employer is acceptable imagery under the Code. On the cranes above the site, the construction company's flags fly undisturbed. On the microcosm of the construction site, the state legitimises imagery that conforms to the neoliberal world view: "the forms of domination . . . within the very tissue of ordinary sensory experience."[57] As Douzinas has argued, the iconomy is sacred, and idolatry—the countering of image with image, of imaginary by imaginary—is ruthlessly suppressed.

Imagery, in many instances, is more immediately powerful and evocative than speech. The use of stickers by construction unions instantaneously communicates a complex political message through an icon. The union movement has always understood this power. From the beginnings of class-critique and worker consciousness in the nineteenth century, collective struggle has been portrayed through the symbols and iconography of labour. Union ideas have always emphasised the visual, originally out of necessity due to higher levels of illiteracy amongst workers but also in recognition of the intimate relationship between aesthetics and politics. Well aware of the aesthetic dominance of capital, unions sought to create alternate cultural structures: Working Men's Colleges, labour media, musicals and exhibitions.[58] In Australia in the 1930s and 1940s, social realism "sought to depict the struggles of society's marginalised groups and the injustices of the capitalist system."[59] Artists Noel Counihan, Jack Maughan, and Nutter Buzacott formed the Worker's Art Club in Melbourne in 1931, producing its own media, artworks, and hosting performances.[60] During the early 1980s, the twilight of the conciliation and arbitration system, unions and government created the "Art and Working Life" program (AWL) to create public artworks relevant to working people. Some unions had cultural officers, and some trade halls levied affiliation fees to run arts programs.[61] The four major building unions in the early 1990s employed a cultural officer, and their collective agreements required that building projects with a value of over $1 million spent one per cent of their value on commissioned Australian artworks to be displayed in the building.[62] Images have long been essential to the collective cultural identity of unionism. Today's stickers and posters are a direct link to this visual history.

By invoking a visual narrative of solidarity and identity, union stickers and flags operate in the communicative field of *art*. Douzinas describes the Byzantine use of "aesthetics to create and propagate an all-inclusive

57 Pauwels, "The Spectre of Radical Aesthetics," 30.
58 Ian Burn, *Art: Critical, Political,* ed. Sandy Kirby (Nepean: University of Western Sydney, 1996), 11.
59 "20th-century Australian Art: Surrealist-impulse and social realism," *Art Gallery NSW,* accessed June 15, 2020, https://www.artgallery.nsw.gov.au/artsets/2e1xzb.
60 "Workers' Art Club. (1932–)." *Trove*, accessed June 15, 2020, https://trove.nla.gov.au/people/1772023?c=.
61 Kathie Muir and Ian Burn, *Unions in the Arts* (Sydney: Union Media Services, 1992), 4.
62 Muir and Burn, *Unions in the Arts,* 4.

FIG. 5
A banner of the Operative Painters & Decorators Union of Australasia, Victorian Branch, 1915. In nineteenth- and early twentieth-century banners women were often depicted as allegories for peace and justice.

FIG. 6
A banner from the Tasmanian branch of the BLF, painted in 1987 by B. Hansen, currently displayed in the Hobart office of the CFMMEU. This banner is 10 x 6 feet wide and shows Mount Wellington behind Hobart. Many CFMMEU members were previously BLF members before the Union was deregistered.

perception of the world . . . the elaborate iconography created a sense of identity . . . the icon is an aesthetic, moral and political category."[63] But this could also be a description of the trade unions' efforts to forge, through signs and images, a collective identity of workers. Stickers and posters portray a moral or political choice, a political position to be a member of a trade union. Like the iconography of old, they are designed to elicit an emotional response from the viewer. The rat, or the scab, is a term of derision for a non-union worker; the visual of the rat is a common feature of union iconography. Does the viewer want to "kick the dirty rats out"? Do they want to "bargain united"? Does the image of a raised fist encourage the viewer? Or turn them away? The creation of group identity through images is part of their power. Group identity similarly requires others to *not* identify with the imagery and so "other" themselves from the group.[64]

The Eureka flag, flying high above the construction site, is a powerful visual link to a famous historical event and a set of values that are culturally assigned as originating from the Eureka Stockade, an 1854 rebellion of goldminers against the British Crown at Ballarat in the Australian state of Victoria. Irishman Peter Lalor lead the rebelling miners in an oath: "We swear by the Southern Cross to stand truly by each other and fight to defend our rights and liberties."[65] The flag was a visual expression of the rebellion and the egalitarian impulses of Australia's emerging identity. The images are creation stories, self-portraits of the union's existence. At a less conceptual level, union posters articulate this message. These include posters listing the historic wins of unions, entitlements under the CFMMEU's enterprise agreements and safety warnings and procedures.

DEPOLITICIZATION AND DELEGITIMIZATION

Examples of the control of visual and other imagery by the state are numerous; art's power to produce symbols is evident in it always having been subject to some form of state censorship. Visual iconography is about creating and breaking norms, and, as such, their erasure or silencing is norm creating and breaking too. In silencing the visual expression of union presence in the area, the state seeks to create new norms out of that absence. In attacking a visual culture that exists outside of its ideology, the state disrupts the historical retelling and reimagining of political images. The visual presence of unions exalts their physical presence in the workplace and in public space more generally. So too their visual absence is a repudiation of their demands for political participation. Gabriel Rockhill also describes how the existence of visual signs understood as "non-art," and as "that which is not permitted to attain the status of art . . . is an important site of politics."[66] This is because "it reveals, to begin with, the political orientation of the establishment, which

63 Douzinas, *Law and Image*, 29.
64 Saul McLeod, "Social Identity Theory," *Simply Psychology*, October 24, 2019, https://www.simplypsychology.org/social-identity-theory.html.
65 "The Eureka Stockade," The National Museum of Australia, accessed August 2, 2020.
66 Gabriel Rockhill, "Is Censorship Proof of Art's Political Power?," *The Philosophical Salon*, June 6,2016, https://thephilosophicalsalon.com/is-censorship-proof-of-arts-political-power/.

seeks to control not only what is produced but also what circulates and is received by the general populace."[67] In Plato's *Republic,* the ideal state separates the citizenry into silos; the workman *must not* participate in politics: "the workman must be a professional at the call of his job; his job will not wait till he has leisure to spare for it."[68]

The Code echoes this Platonic thought; the political participation of a construction worker through the wearing of a union sticker is to be discouraged precisely because the worker should not—*must* not—participate in the body politic while working. Neither Platonic thought nor the liberal state could conceive of the politics of work, or of work, as necessarily political. Thus, construction workers' political voice is rendered illegitimate. Political discourse is narrowed and confined—it belongs in the halls of parliament or our rapidly shrinking newsrooms but nowhere else. Issues of life and death on a work site, the conflict between the profit margin and safe work conditions, are made invisible to the liberal political project.

Thus, the state aggressively pursues the visual representation of workplace political action because in the state's world view, it is illegitimate. The "distribution of the sensible" is how Rancière describes this process, as "the system of self-evident facts of sense perception that simultaneously discloses the existence of something in common and the delimitations that define the respective parts and positions within it."[69] Rancière argues that "having a particular "occupation" thereby determines [one's] ability or inability to take charge of what is common to the community; it defines what is visible or not in a common space, endowed with a common language."[70] In this sense, the construction worker lacks political legitimacy because of the operation of this very process of categorisation, of recognition. In Rancière's framework, union stickers, as the visual expression of worker politics, are outside the distribution of the sensible and thus outside the "regime *aesthetic.*"[71]

The deployment of the liberal category "art" legitimises some visuals—at the expense of their political salience—and reduces the rest to garish noise. In a sense, the contents of the actual images themselves are less important; it is their distribution that upends the dominant social order. But it is their presence that matters, as much as their message. Unionist and artist Ian Burn (1939–1993), who was raised in Geelong, described the importance of images differently to Rancière, focussing rather on "the way that art validates the actions, ideas and values inherent in the forms of organisation and resistance developed by working people in their own interest."[72] Union images are a challenge to the ideological project of the state both in their placement and their expression of a counternarrative that exists despite the tyranny of the aesthetic regime that would exclude their voice. Rancière's concept of "indisciplinarity" builds on Marx's critique of the division of labour: "the

67 Rockhill.
68 Plato, *The Republic,* trans. Desmond Lee (London: Penguin, 2007), 60.
69 Rancière, *The Politics of Aesthetics,* 12.
70 Rancière, 13.
71 Rancière, 23.
72 Ian Burn, "Overseas study in relation to the Art and Working Life Program," *Report to the Community Arts Board of the Australia Council* (April 25, 1983), 7–8.

distribution of territories, which is always a way of deciding who is qualified to speak about what."[73] Democracy is the "poetic assertion of equality by the unaccounted," the removal of qualification for a voice, or the siloing of aesthetic participation.[74]

Hence there is a need by the state to limit the presence of stickers, flags, and other emblems. The state categorises these images as non-art, as non-work, and as illegitimate politics. This distribution of the sensible is maintained by the "police," a wider concept than its legal usage might suggest.[75]

> The police is, in its essence, the law which, though generally implicit, defines the part or lack of part of the parties involved. But to define that, one must first define the configuration of the sensible in which the various parties are inscribed. The police is thus above all a bodily order that defines the partition between means of doing, means of being and means of saying, which means that certain bodies are assigned, by their very name, to such and such a place, such and such a task; it is an order of the visible and the sayable, which determines that some activities are visible and that some are not, that some speech is heard as discourse while others are heard as noise.[76]

Rancière's "police" combine both institutional violence and cultural regulation. The ABCC is a clear example of this institutional control of image legitimacy, literally a system to delegitimise union aesthetics. Rancière charges that contemporary capitalism's main aim is the erosion of democratic politics in favour of the *police*. The arbiters of social discourse fail to challenge the reality of the coalescing of power structures; "the antidemocratic discourse of the intellectuals adds the finishing touches to the consensual forgetting of democracy that both state and economic oligarchies strive toward."[77] In an even wider sense, the reader, upon viewing the union iconography in this essay, the crass slogans, the lack of care for social mores of the workplace, is experiencing and participating in this cultural delegitimisation. The very feeling of recoil at the elements of vulgarity is, in Rancière's thesis, the distribution of the sensible in motion.

THE PICTURE OF THE LAW

In seeking to control union images, the neoliberal state reveals the illiberal underbelly of law and power. The importance of property and capital are

73 Jacques Rancière, "Thinking Between Disciplines: an Aesthetics of Knowledge," *Parrhesia* 1 (2006): 3.
74 Iftekhar Kabir, "Politics and The Limits of the Common: Dissensus, Deliberation and Democracy in Rancière and Habermas" (Masters Thesis, Trent University, 2011), 14.
75 Rancière, *Politics of Aesthetics*, 3.
76 Jacques Rancière cited in Stephen Wright "Behind Police Lines: Art Visible and Invisible," *Art and Research* 2 (Summer 2008), accessed August 2, 2020, http://www.artandresearch.org.uk/v2n1/wright.html.
77 Jacques Rancière, *The Hatred of Democracy*, trans. Steven Corocoran (London: Verso Books, 2014), 92.

FIG. 7
A Eureka Flag with a union motto is prepared to be hoisted above a construction site. “Touch One, Touch All” is a motto of solidarity frequently used by trade unionists.

FIG. 8
CFMMEU ACT organiser Dusty Miller waving the Eureka flag outside Parliament House in 2018. This photograph was taken at a joint CFMEU-MUA rally on the lawns out the front of Parliament House. Photo: Mike Bowers/The Guardian.

central to any discussion of the liberal concept of the rule of law. But images and art can be used to disrupt legal conceptions of property. Another form of visual disruption is graffiti. In a similar sense, graffiti is a constant visual reminder of alternate occupiers of spaces: taggers, excluded by their lack of legal ownership of urban spaces, insisting on remaining visible. Likewise, the union flag above a construction site demands recognition of the workers' presence in the creation of the building. The law too shows itself in aesthetic terms: the courtroom, the blindfolded figure of justice, the scales. As a concept, it is fetishized as a defining feature of the West and as a key, causal factor in the West's economic rise, its expansion, its *civilisation*. The concept of "the West" is drawn from the inclusion and exclusion of select visual narratives. Similarly, the law derives legitimacy from its image—its impartiality, clarity, and its perceived neutrality.[78]

The Code and its policing bring the reality behind this picture of the law into focus. On 18 September 2018, 66 construction workers refused to return to work on a site in Brisbane, after the removal of CFMMEU flags from the cranes on the site. The 66 workers faced individual fines between $14,000 and $42,000 for their decision.[79] This was one of several instances of the ABCC fining individual workers as opposed to the union as an entity or union officials in the first half of 2018. The ideological struggles over union images have significant consequences for workers and their unions. The policing of union images is in stark contrast to the self-image of the law. What is the purpose of this meticulous documenting of the presence of the Eureka flag? In a sense, the Code reveals law's ideological underbelly. Its prohibition of "phrases that express an organisation's guiding principle" is indicative of the state's desire to exercise a monopoly over narratives, creation myths, and images.[80] The history of construction unions, the values, struggles and victories that represent this, must be hidden from sight. Douglas-Scott argues:

> In this situation, an economic, instrumentalist logic, a creature of capitalism, has tended to dominate and function as a place marker for legitimacy. Law has frequently adopted this logic, as well as its technical reason, its reliance on contract and property (the attributes of commerce) and its belief in the "rational actor" of the law and economics doctrine, and . . . all of these often come together in that most foundational of legal concepts, the rule of law.[81]

It is important to note that the Code and the ABCC do not represent an entirely uniform legal position on union images. As with all things, the law can

78 Douglas-Scott, *Power of the Image*, 9.

79 David Marin-Guzman "Commission Pursues Workers for Striking over CFMEU Flags," *The Australian Financial Review*, July 21, 2019, https://www.afr.com/work-and-careers/workplace/commission-pursues-workers-for-striking-over-cfmeu-flags-20190719-p528sp.

80 "Freedom of association—Logos, Mottos and Indicia," Australian Building and Construction Commission, accessed August 2, 2020, https://www.abcc.gov.au/resources/fact-sheets/building-code-2016/freedom-association—logos-mottos-and-indicia.

81 Douglas-Scott, *Power of the Image*, 17.

be also present a contradictory construct. At the Fair Work Commission in 2018, Commissioner Riordan rejected the ABCC's position on union images:

> The Code prohibits any conduct whatsoever which would imply that joining a building union is anything but an individual choice, once again re-affirming the freedom of association provisions of the Act. The question to be determined then requires an examination of whether the identified conduct, (in this instance, the flying of the CFMMEU and Eureka flags on the sites' cranes) implies to an employee working on these Watpac sites that joining the CFMMEU is anything but voluntary.[82]

The Code and the ABCC are extreme, even within the neoliberal legal landscape of Australia. They are examples of the increasingly tightening grip on dissent that characterises the deeply illiberal heart of the neoliberal system and the use of institutions to erase spaces, real and imaginary, that present any alternative to it. Construction workers find themselves excluded from participating in political and cultural spheres beyond a very narrow definition of their position. They remain simply a steel fixer, a crane driver or a bricklayer, the legitimacy of their voices extending only to the edge of their exact position. Their broader collective voice is being systematically excised by the police, the Code, and the ABCC. Their images and self-expression are being fastidiously removed from the picture of the workplace and the city. Yet they persist. The flag flying high above a construction site confirms a fundamental political desire: to be seen.

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82 Commissioner Riordan, "s739 Application to Deal with a Dispute Watpac v CFMEU," *Fair Work Commission*, May 30, 2018, https://cdn.workplaceexpress.com.au/files/2018/Eureka%20recommendation.pdf.

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SPECTROPOLITICS AND INVISIBILITY OF THE MIGRANT

On Images that make People "Illegal"

by Dorota Gozdecka

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INTRODUCTION

"To see is to believe" and "out of sight out of mind" are just two sayings emphasising the extraordinary power of our brain to focus only on what is visible.[1] Once the subject of our visual attention is removed from our gaze, its importance usually wanes and other issues "right before our eyes" require more attention. In this article I will challenge these assumptions when it comes to the contemporary figure of the asylum-seeking refugee. I will demonstrate that when it comes to refugees, invisibility—or a certain form of it—can result in a more powerful response from the viewer than a visible figure can. To illustrate this invisible figure of a refugee, I will focus on two governmental campaigns—one on Australia and one in the UK—that present an invisible refugee and portray them as "illegal."[2]

While governmental poster campaigns are usually released to inform the community, direct the community to appropriate resources or announce important changes, I will show that when the subject is contemporary refugees, the impact far exceeds this typical function and is more akin to war propaganda posters. These depictions differ from typical information posters such as those announcing elections, changes in local laws or openings of public initiatives. Governments and public authorities increasingly use visual campaigns for entirely new purposes justifying unprecedented legal initiatives related to border control. Some of these campaigns have become subjects of heated discussions, which rarely occur when it comes to typical public posters.[3] This is partly due to the fact that new kinds of visual campaigns analysed here have been used by authorities to directly target refugees in order to deter them from arriving, staying or claiming asylum.[4] While allegedly speaking to refugees, these posters replace the image of the refugee with visual symbols that represent the fraudulent asylum seeker. In this article I shall argue that this ghostly invisibility has an unprecedented emotive power of speaking not to refugees, but to domestic voters within host countries.

This article focuses on the figure of an invisible asylum seeker and examines how the construction of this invisibility reflects and reinforces the local population's anxieties about migrants. The refugee is a particular type of immigrant whose movements across and within national borders are generally regulated by laws. As a former settler colony, Australia is a country of migrants that continues to seek migrants. Voluntary migrants greatly outnumber refugees and asylum seekers, but it is the latter that has

1 Dominic McIver Lopes, "Out of sight, out of mind," in *Imagination, Philosophy and the Arts*, eds. Matthew Kieran Dominic McIver Lopes (Routledge, 2003), 215–232.; Robyn Seglem and Shelbie Witte, "You Gotta See it to Believe it: Teaching Visual Literacy in the English Classroom," *Journal of Adolescent & Adult Literacy* 53, no. 3 (2009): 216–226.

2 More on processes of creating illegality in migration law see: Dauvergne, Catherine, *Making People Illegal: What Globalization Means for Migration and Law*, (Cambridge University Press, 2008).

3 Sarah Whyte, "New Asylum Seeker Campaign 'Distasteful' and 'Embarrassing'" *The Sydney Morning Herald* (website), February 12, 2014, accessed September 16, 2020, https://www.smh.com.au/politics/federal/new-asylum-seeker-campaign-distasteful-and-embarrassing-20140212-32h04.html

4 While visual campaigns have been previously sought to attract migrants, the figures of the invisible migrant can be placed in the context of current trends in migration law and their correlation with visual figures used by media and authorities, for more see: Dorota Anna Gozdecka, *Visual Power, Representation and Migration Law* (Edinburgh University Press, forthcoming 2021).

dominated domestic politics and Australian changes to migrant law.

Multiple representations of migrants are possible and in Australia they have historically been positive images designed to promote immigration. There have also been positive images of refugees and asylum seekers used by NGOs and activist groups. [5] This article focuses on governmental campaigns in the context of what has been called an intensifying *crimmigration* related to border control due to refugees largely arriving by irregular means on boats.[6] While these are not the only context in which such images of refugees arise, I will analyse two examples emerging in the Anglophone world: the Australian NO WAY campaign and British GO HOME campaign. I will show how those implicitly depicted in those campaigns are construed as ghostly entities who can be disciplined by the law but who are, at the same time, left completely outside the workings of the legal system. I argue that images that rely on what I call *spectrality of the refugee* leave the refugee out of the frame for a reason. The use of an image of the spectre affects the legal imagery of the community. It creates a fear of the monstrous and allows for legitimating the decisions that would otherwise be difficult to justify if not for the presence of the spectre.[7] I see such play with invisibility as a part of spectropolitics, a term I borrow from Maddern.[8] Related to Derrida's exploration of spectrality, spectropolitics refers to the use of invisibility (metaphorical or visual) to expel some subjects from the community and subsequently place them outside the compass of compassion. In the context of refugees, I will show how spectropolitics are used visually to recast the boundaries of what is legally permissible in domestic refugee regulation.

THE SLIPPERY NATURE OF ILLEGALITY AND WHY IT IS OFTEN INVISIBLE

As a broad category, illegality characterises acts and objects deemed to stand outside the permissible boundaries of the law. Due to its broadness, illegality is itself a somewhat ephemeral and ghostly category. What is illegal is often uncertain and changeable and can be amended quickly and unpredictably.[9] A sovereign can take measures to outlaw a range of activities, from simple daily routines to more morally objectionable acts. From selling alcohol, participation in suffragette protests through to murder, the historical catalogue of outlawed activities is broad. It even includes such actions as

5 Seth M. Holmes and Heide Castañeda, "Representing the 'European Refugee Crisis' in Germany and Beyond: Deservingness and Difference, Life and Death," *American Ethnologist* 43, no. 1 (2016): 12–24.

6 See: Katja Franko, *The Crimmigrant Other: Migration and Penal Power* (Oxon: Routledge, 2019); Brouwer Jelmer, Maartje van der Woude and Joanne Van der Leun, "Framing Migration and the Process of Crimmigration: A Systematic Analysis of the Media Representation of Unauthorized Immigrants in the Netherlands," in *European Journal of Criminology* 14, no. 1 (2017): 100–119.

7 Jefferey Andrew Weinstock, "Invisible Monsters: Vision, Horror, and Contemporary Culture," in *The Ashgate Research Companion to Monsters and the Monstrous,* eds. Asa Simon Mittman and Peter J. Dendle, (Burlington: Ashgate 2017), 275–289.

8 Jo Frances Maddern, "Spectres of Migration and the Ghosts of Ellis Island," *Cultural Geographies* 15, no. 3 (2008): 378.

9 Gregg Barak, "Crime, Criminology and Human Rights: Towards an Understanding of State Criminality," *The Journal of Human Justice* 2, no. 1 (1990): 11–28.

fortune-telling, banned in Baltimore,[10] or being reincarnated without permission, banned in Tibet.[11] What the law deems to be illegal tends to be rendered invisible, to a black market hidden from the law's gaze. Public authorities will typically target illegality with the enforcement of criminal law and penal punishment, spanning from fines through to the harshest methods of legal violence: incarceration or even execution. Criminal law, with its penal system, is the most violent branch of the law targeting illegality. It exemplifies Derridian violence of the law in its preserving form.[12]

Yet, the ephemeral and quickly changing catalogue of illegal activities makes it difficult to portray illegality. Sometimes the simple use of criminal law imagery—such as representations of enforcement officers or penal methods—are sufficient. If illegality hides from the gaze of the law, the mere shadow of the law enforcement figure, such as in this WWI Canadian poster targeting food hoarders, should be sufficient in depicting it (fig. 1). In this poster, illegality is precisely illustrated by the mere shadow of a police officer outside the window. The shadow of the law signifies that, at what first glance appears to be a daily activity of organising a pantry, is in fact an outlawed activity of hoarding limited resources. The presence of the shadow of the law, powerfully communicates the fact that storing too many resources in one's pantry during wartime is an illegal activity, regardless of whether it is visible to others. The symbol of the police officer links the seemingly innocent image of the couple sorting food with the criminal law sanction. It also captures the fear thereof in the guilty facial expressions of the hoarders. Where law casts its light, illegality can be uncovered and will not remain invisible for long.

In the context of refugees, however, illegality is only a recent concept. It was rarely used prior to the 1990s, and only took global hold as a result of discourse of bogus asylum seekers.[13] Furthermore, illegality is usually used to describe forced refugees arriving by irregular (unofficial) means and without proper paperwork.[14] As shown time and again, such illegality relates to border control[15] and the ever more restrictive regulation of the movement of people.[16] Due to the nature of their circumstances, refugees often shift between legality

10 Code of Public Local Laws of Baltimore City, para 24.1.

11 State Religious Affairs Bureau Order (No. 5), *Measures on the Management of the Reincarnation of Living Buddhas*, Central People's Government of the People's Republic of China.

12 Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'," in *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michael Rosenfield and David G. Carlson (New York: Routledge 1992), 3–67.

13 Stephan Scheel and Vicki Squire, "Forced Migrants as Illegal Migrants," in *The Oxford Handbook of Refugee and Forced Migration Studies*, eds. Elena Fiddian-Quasmiyeh et al. (Oxford: Oxford University Press 2014), 188–99. For the contradictions in the earlier depictions of migrants and the tension between being welcome and being illegal one can look at posters and discourse from the time of White Australia Policy. See: Justine Greenwood, "The Migrant Follows the Tourist: Australian Immigration Publicity After the Second World War," *History Australia* 11, no. 3 (2014): 74–96.

14 Scheel and Squire, "Forced Migrants as Illegal Migrants," 188–199.

15 Julie A. Dowling and Jonathan Xavier Inda, eds. *Governing Immigration Through Crime: A Reader*, (Stanford: Stanford University Press, 2013); Cecilia Menjívar and Daniel Kanstroom, eds. *Constructing Immigrant 'Illegality': Critiques, Experiences, and Responses*, (New York: Cambridge University Press, 2013).

16 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, (Cambridge: Cambridge University Press, 2008); Godfried Engbersen and Joanne Van der Leun, "The social Construction of Illegality and Criminality," *European Journal on Criminal Policy and Research* 9, no. 1 (2001): 51–70.

FIG. 1
Anti-hoarding poster produced by the Canada Food Board, 1914, colour lithograph, 63 x 46 cm, Library of Congress, Washington DC.

and illegality and scholars have avoided using the terms "legal" and "illegal" to describe any mode of arrival or any type of a migrant, refugee or asylum seeker.[17] The use of the term illegal has gradually removed people from the compass of compassion and justified the use of criminal law methods in controlling the movement of people.[18] Juliet Stumpf powerfully illustrated how conflation of immigration and crime management results in the appearance of crimmigration.[19] Although migration law was traditionally closer to foreign policy than criminal law, the situation began to change in mid-1990s Australia and intensified throughout the Western world when border control became a domestic political issue due to the influx of refugees from the global South[20]. Stumpf reminds us that the merger between migration law and criminal law became possible because both are essentially connected with the process of deciding who does and who does not belong:

> Both criminal and immigration law are, at their core, systems of inclusion and exclusion. They are similarly designed to determine whether and how to include individuals as members of society or exclude them from it. Both create insiders and outsiders. Both are designed to create distinct categories of people-innocent versus guilty, admitted versus excluded or, as some say, "legal" versus "illegal." Viewed in that light, perhaps it is not surprising that these two areas of law have become entwined.[21]

When the other is created and a label of illegality applied, the use of criminal methods appears justified. Migrants labelled illegal are denied any sense of worthiness or the concomitant compass of compassion.[22] Rather than referring to people as unregistered, for example, the tag of illegal prompts the strengthened response of migration law. Illegality encompasses anyone from a visa overstayer, a *sans-papiers*, or those planning their arrival in a particular manner, thereby ignoring diverse individual circumstances.[23] Doing so creates a confusion about legal categories and leads to an interchangeable use of the terms "migrant" and "refugee". Depending on the jurisdiction and local migration laws, illegality can be used as a blanket label in an extremely wide variety of circumstances. However, these various circumstances and legal categories are erased when the word illegality appears, and a migrant is put in the position of a fraudulent criminal who can be targeted with the greatest severity of the law.[24]

17 Scheel and Squire, "Forced Migrants as Illegal Migrants," 188–199.
18 Graeme Hugo, "From Compassion to Compliance? Trends in Refugee and Humanitarian Migration in Australia," *GeoJournal* 56, no. 1 (2002), 27–37.
19 Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review,* 56 (2006): 367.
20 Cecilia Menjívar Andrea Gómez Cervantes, and Daniel Alvord, "The Expansion of 'Crimmigration,' Mass Detention, and Deportation," *Sociology Compass* 12, no. 4 (2018): 1–2.
21 Menjívar, Cervantes, and Alvord, 380.
22 Menjívar, Cervantes, and Alvord, 419.
23 Simon Goodman and Susan A. Speer, "Category Use in the Construction of Asylum Seekers," *Critical Discourse Studies* 4, no. 2 (2007): 165–185.
24 Stumpf, "The Crimmigration Crisis," 395.

The law is justified to use more severe methods in targeting illegality than targeting irregularity. To achieve strengthened affective response legitimising harsh migration control, visual campaigns can erase the migrant from visual depiction altogether. Instead of using an image of the refugee themselves, images depicting migrant illegality are often related to depictions of unlawfulness and criminality more broadly. In those depictions the symbols of illegality often become a proxy for the figure of the migrant while the migrant themself is missing from the visual field. In those depictions, metonyms of penal justice take the refugee's place. The removal of the migrant/refugee while retaining the symbol of their illegality implies that they haunt the legal system with their presence. Below I will analyse the spectrality behind refugee invisibility and its link with the ephemeral nature of illegality and its depictions.

HAUNTING THE LEGAL SYSTEM—FROM SPECTRALITY OF AN ILLEGAL MIGRANT TO SPECTROPOLITICS

I have so far used the words *ghostly*, *spectrality* and *haunts* to describe the absence of migrants and refugees from certain images about migration. The use of vocabulary associated with ghosts and the paranormal may appear to be an awkward choice. Below I will illustrate why spectrality—or the ghost-like absence of certain figures from the field of appearance—is often a more powerful emotive method of construing an image than direct depiction of the subject that the image speaks about. Using the frame to exclude the subject but retain its ghost-like presence limits the ethical response of the viewer. It recalibrates the discussion to focus on fear rather than ethics, which in turn justifies the use of exceptional methods of law response.

Spectrality, apparitions, haunting and ghosts have been used extensively by Jacques Derrida in his account of Marxist thought. In *Spectres of Marx,* Derrida uses the vocabulary related to ghostly apparitions to describe a certain continuity in history.[25] Derridean focus on the ghost gives rise to all other considerations of spectrality. While for Derrida ghosts are related to history, for others, ghosts are related to fear. In the Derridean account the key feature of the ghost in history is its ability to haunt the future. There is in a way no before or after in this hauntology, because the ghost always threatens to return. The ghost is always there, threatening to arrive but never quite present: just like Derridean justice, always "yet to come."[26] It leaves the imprint of the past on both the present and the future. Its power lies in none other than its invisibility. While the Derridean ghost is not necessarily synonymous with exclusion it nonetheless has the potential of filling the spectator with fear of an imminent threat:

> Is it the difference between a past world—for which the specter represented a coming threat—and a present world, today, where

25 Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (New York and London: Routledge, 2012).

26 Robert Zacharias, "'And Yet': Derrida on Benjamin's Divine Violence," *Mosaic: A Journal for the Interdisciplinary Study of Literature* (2007): 103–116.

> the specter would represent a threat that some would like to believe is past and whose return it would be necessary again, once again in the future, to conjure away?[27]

Expanding upon Derridean theory, authors such as Garoian insist that it has a meaning pertaining to the broader interplay of ontology and hauntology, or, being and not being.[28] Describing the work of French artist Christian Boltanski, Garoian illustrates that this interplay will apply to the visual field, because an image—or the artist behind the image—invites the viewer to consider those who are absent from the work of art.[29] In accounts focusing on the importance of absence, spectrality and hauntology signify not the potential of connection between different parts of history, but the potential of exclusion of those who are absent. For Wolfreys, spectres are those who are invisible but who nonetheless haunt the piece of art or even a piece of writing.[30] Their power lies precisely in their invisibility and their hauntological exclusion applies to a broader political spectrum altogether:

> Haunting—spectral persistence—imposes an impossible necessity on us: we have to be attentive to ghosts, as the work of Jacques Derrida reminds us on several occasions, and there can be no final word, no coming to rest or closure, whether one is speaking of literature or politics, narrowly conceived[31].

When we understand hauntology as the exclusion of spectres from the field of appearance, we quickly realise that the ghost—although invisible—does not entirely disappear from the image. An invisible spectre continues to haunt the image with their absence rather than their presence. Removed from the image, the spectre continues to control the perception the viewer has of the image. The spectre enters the imagination of the viewer through different means, such as through symbols that remind the viewer of them. Her non-ontological but instead hauntological presence underpins the image even when the viewer cannot directly see her. This account of hauntology was developed by Mirzoeff, who observes that hauntological interplay between visibility and invisibility is a potent way of managing exclusion and generating diverse reception in different viewers:

> The ghost is somewhere between the visible and the invisible, appearing clearly to some but not to others. Within the spectrum lies the spectral. In this digital age, the space warriors even want to militarize the hyperspectral. Some hear the ghost speak, for others it is silent. When visual culture tells stories, they are ghost stories.[32]

27 Derrida, *Specters of Marx,* 48.
28 Charles Garoian, "The Spectre of Visual Culture and the Hauntology of Collage," in *Spectacle Pedagogy: Art, Politics, and Visual Culture,* eds. Charles Garoian and Yvonne Gaudelius (New York: State University of New York Press 2008), 114.
29 Garoian, 116.
30 Julian Wolfreys, *Occasional Deconstructions* (New York: State University of New York Press, 2004).
31 Garoian, 116.
32 Nicholas Mirzoeff, "Ghostwriting: Working out Visual Culture," *Journal of Visual Culture* 1, no. 2

The hauntological presence is often symptomatic of the existence of the subaltern and her exclusion. Be it a colonial,[33] racial[34] or migratory spectre,[35] the ghost—or the excluded—"has many names in many languages: diasporists, exiles, queers, migrants, gypsies, refugees, Tutsis, Palestinians."[36]

Taking the theory of spectrality even further, Jo Frances Maddern has shown that some figures, such as migrants, have always been used as ghostly entities in what she calls *spectropolitics,* or, the politics of choosing who can and cannot speak.[37] Drawing on Maddern's theory, I argue that spectropolitics are not only used to exclude some subjects from participation but also from visibility. Spectropolitics involve the use of ghostly entities without showing them as visible subjects. Romeyn has convincingly shown how the presence of the other—be it Jewish, Muslim or migrant—is often construed as a threat. This threat fuels the logic of haunting, which is drawn upon to demonstrate the "excess of heterogeneity."[38] To terrify the viewer, the hauntological presence of individuals "excessive" to the current paradigm of a desirable society is strategically used with the purpose of inciting fear.[39] As a ghost who does not feature in the frame, the migrant is not visible, but their presence is always on the horizon. Papalias has illustrated how the use of spectropolitics in relation to migrants is part of the nexus between biopolitics and necropolitics and the global power relations that dispossess subjects.[40] Spectropolitics exclude the migrant from humanness by making them invisible and this dispossession legitimises the excessive response of the law. [41] Without the presence of the spectre, the often radical or unprecedented response of the law would be difficult to legitimise, if not impossible. The migrant's invisibility as a human being and their presence as a threatening ghost disengages the viewer's ethical response, while the haunting spectre generates a sense of fear. Thus, it is both the image and the lack of image that generate and manipulate power and incite, justify or exercise violence.[42] In what follows, I will analyse the spectropolitics of portraying ghost-like figures of refugees and the exclusionary effects of such portrayals.

THE GHOSTLY ILLEGALS OUT OF SIGHT AND OUTSIDE THE LAW

Illegality's broadness results in a diversity of spectropolitical visualisations of the refugee. When the refugee is used as a haunting presence rather than as a

(2002): 239.

33 Emilie Cameron, "Cultural Geographies Essay: Indigenous Spectrality and the Politics of Postcolonial Ghost Stories," *Cultural Geographies* 15, no. 3 (2008): 383–393.

34 Viviane Saleh-Hanna, "Black Feminist Hauntology. Rememory the Ghosts of Abolition?," *Champ Pénal/Penal Field* 12 (2015), accessed 16 September 2020, https://doi.org/10.4000/champpenal.9168.

35 Penelope Papailias, "(Un) Seeing Dead Refugee Bodies: Mourning Memes, Spectropolitics, and the Haunting of Europe," *Media, Culture & Society* 41, no. 8 (2019): 1048–1068.

36 Mirzoeff, "Ghostwriting," 239.

37 Maddern, "Spectres of Migration," 378.

38 Esther Romeyn, "Anti-Semitism and Islamophobia: Spectropolitics and Immigration," *Theory, Culture & Society* 31, no. 6 (2014): 89.

39 Weinstock, "Invisible Monsters," 275–276.

40 Papailias, "(Un) seeing," 1053.

41 Papailias, 1056.

42 Jean-Luc Nancy, *The Ground of the Image* (New York: Fordham University Press, 2005), 21–22.

real person with a face, story, family and a range of reasons for having migrated in a specific manner, their illegality can be depicted in a less sophisticated way.

The simplest way of capturing illegality is similar to the one we saw above in the war-time Canadian poster warning hoarders. Illegality can simply be represented by using symbolism directly associated with criminality and the workings of penal justice. Such depictions were used, for instance, in the UK in 2013 (prior to the Brexit vote), where the Home Affairs released the so-called Go-Home vans (fig. 2) to target migrants (mainly refugees) it considered illegal.[43] The vans released during this campaign featured an image of handcuffs and an appeal to those so-called illegal people to turn themselves in and receive assistance with voluntary return. This image of handcuffs was deployed as a metonym for justice. in this depiction, however, the alleged illegal is not captured. Without showing the allegedly illegal subjects, this depiction relies upon the idea of the illegal; it implies that migrant illegality is a monster within, hiding and lurking "amongst us."[44] The intended emotive response is relatively straightforward—if genuine, migrants should be honest enough to either be in the territory legally or turn themselves in. If, however, migrants hide from authorities, they're not only bogus, they are also illegal—in a criminal law understanding of the word—and can, therefore, be legitimately targeted with criminal law methods such as deprivation of liberty. Due to the invisibility of this monstrous spectre, the message to the wider community is as follows: all migrants have the potential to be illegal. By conflating the image of the handcuffs with words such as "go home" and "106 arrests last week in your area," the shadow of an illegal ghost was cast upon all migrants. Since the migrant themselves remained invisible, their migrant status remained suspicious unless proven legal to the remaining population. The UK van campaign represents another straightforward method of using metonyms of justice in connection with invisibility to illustrate potential illegality of some migrants without depicting any migrants at all. Such use of symbols typically associated with criminality powerfully amplifies the need to use crimmigration methods to target those potentially hiding from the law.

While the British example is another relatively straight forward fusion of the ephemeral nature of illegality and the ghostly reliance of visual absence, some images take spectropolitics a lot further and use invisibility in a far more sophisticated manner. In 2014, the Australian Department of Immigration and Border Protection issued a graphic novel accompanied by the NO WAY poster and video campaign (fig. 3). The campaign was aimed at supporting the Operation Sovereign Borders, a maritime undertaking aimed at stopping refugee boats from arriving in Australian territorial waters and returning them to offshore detention centres on Manus Island and Nauru.[45]

In contrast to the simple resorting to the use of the shadow of the law in the British campaign, the NO WAY campaign is a form of a sophisticated

43 Hannah Jones, Yasmin Gunaratnam, Gargi Bhattacharyya, and William Davies, *Go Home?: The Politics of Immigration Controversies* (Manchester: Manchester University Press, 2017).

44 Weinstock, "Invisible Monsters," 284–286.

45 Patrick van Berlo, "Australia's Operation Sovereign Borders: Discourse, Power, and Policy From A Crimmigration Perspective," *Refugee Survey Quarterly* 34, no. 4 (2015): 75–104.

FIG. 2
A "Go Home" van on a UK road in 2013. Source: Home Office/EPA.

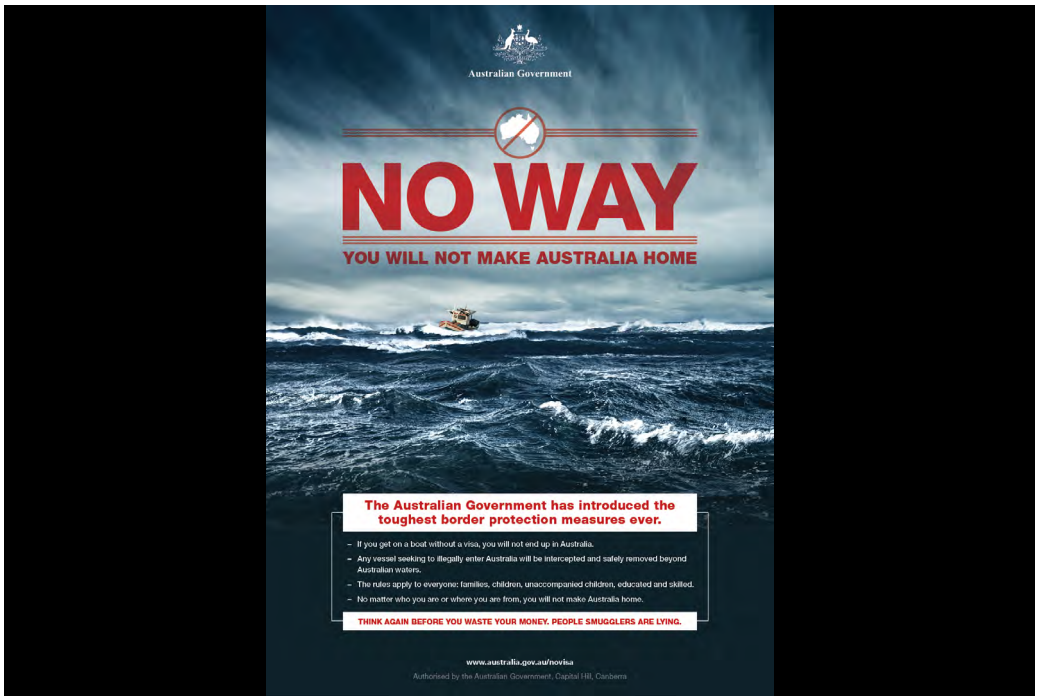

FIG. 3
Operation Sovereign Borders campaign poster, 2014. Source: Australian Department of Home Affairs.

mastery of spectropolitics which carefully balances the elements of visibility and invisibility. To justify the goal of turning back the boats—a policy overseen by current Australian PM Scott Morrison and later Minister for Immigration Peter Dutton—the pictorial mode of the NO WAY posters removes the refugee from the frame and focuses on the image of the boat. The image of the boat is singled out for an affective significance and symbolises the missing ghost—an illegal asylum seeker who can violently emerge on the horizon. For a long time, Australian political discourse had focused on the arrival by boat as a synonym for an arrival mired in deception, stealth, crime[46] and illegal jumping of the non-existing refugee queue.[47] Beginning from the Howard era, boat arrivals have gradually become a subject of multiple discussions leading to continuing changes in the law. From "irregular arrivals" included in the Migration Act 1958,[48] those arriving by boat slowly became "illegal arrivals,"[49] regardless of the fact that the Refugee Convention does not ban any form of arrival. The symbol of a boat used in political discussions has singled out a particular group of migrants and permanently affixed their mode of arrival to illegality. The existence of the fixed symbol of the boat effaced the unique experiences of those on board and connected them irrevocably with criminality. Persecution and meeting the protection criteria have been erased from political and legal discourse and replaced with discourse of delegalisation of boat arrivals. The refugees onboard boats arriving to Australian territorial waters became illegal by default, regardless of whether they met the international law criteria set out in the Refugee Convention.

Rather than using a simple reference to the criminal legal system, illegality and the ghostly invisible refugee were captured in the NO WAY poster by using the boat as proxy. The image not only reminded the viewer about the affective association between the boat and the construed illegality, but also amplified the fear of the ghosts on the horizon: the so-called boat arrivals. What makes amplifying an already existing fear possible is the invisibility of a refugee in the NO WAY campaign and their hauntological presence. The viewer seeing the NO WAY poster faces an open ocean with a small boat struggling in the violent waves in the hostile body of water. Due to the scale of the image the viewer cannot see any refugees in the picture but is, instead, invited to focus on the symbolic image signifying illegality: the boat, and a type of boat which since the Vietnamese refugees of the 1970s, has been racialised as Asian. It is little surprise that the viewers encountering a boat in the middle of a large frame accompanied by the words "NO WAY; YOU WILL NOT MAKE AUSTRALIA HOME" responded by emotionally identifying refugees with the

46 Fiona H. McKay, Samantha L. Thomas, and R. Warwick Blood, "'Any One of These Boat People Could be a Terrorist for All We Know!' Media representations and public perceptions of 'boat people' arrivals in Australia," *Journalism* 12, no. 5 (2011): 607–626.

47 Katharine Gelber, "A Fair Queue? Australian Public Discourse on Refugees and Immigration," *Journal of Australian Studies* 27, no. 77 (2003): 23–30.

48 Elizabeth Rowe and Erin O'Brien, "Constructions of Asylum Seekers and Refugees in Australian Political Discourse," in *Crime Justice and Social Democracy: Proceedings of the 2nd International Conference* 1, Queensland University of Technology, 2013, 173–181.

49 Elizabeth Rowe and Erin O'Brien, "'Genuine' Refugees or Illegitimate 'Boat People': Political Constructions of Asylum Seekers and Refugees in the Malaysia Deal Debate," *Australian Journal of Social Issues* 49, no. 2 (2014): 171–193.

powerfully affixed illegality of the boat. [50] The gaze point—the place from which the gaze is cast, is from the shore, which makes it clear that the message not is directed to the people on board. The posters were distributed overseas, ostensibly so as to discourage refugees taking this path to Australia, but they were widely seen in Australia where their effect served domestic politics. Here, the viewers equated to Australians watching the fate of the haunting boat from the safe distance of the Australian shoreline. In Poon's words:

> The real becomes abstract and the abstract becomes real in a substitution that completely removes the asylum seeker bodies from frame, overwriting them for the only body who is permitted at and who rules over the maritime border space—the sovereign.[51]

Poon further observes that law performs a metaphorical (or perhaps more accurately metonymical) trick by using the image of a boat as a substitute for asylum seeker.[52] The spectropolitics become complete in the erasure of the persons onboard. This erasure creates the fear of the invisible ghostly migrant and leads to the viewer's inability to truly imagine persons onboard as people. Manderson reminds us in the context of quite another, but equally potent image of a boat, that what follows is impossibility of picturing that the people on board "have families and communities that cherish their bodies and their memories."[53]

When we look at the NO WAY campaign, we quickly realise that the invisibility of refugees and their hauntological presence fuel the threat of an illegal arrival. A viewer seeing the boat from the perspective of an Australian shore can easily justify the intervention of the criminal justice methods in approaching such illegals. After all, like ghosts these illegals can materialise fearlessly among the distant roaring waves of the horizon. The viewer confronted with such a broad frame haunted by the presence of the illegals on the distant horizon is capable of justifying and legitimising what would be hard to accept, should they look at the suffering faces of people instead.[54] Looking at the boat presented through a frame conceived by the government, the viewer can easily legitimise exclusion of those onboard from the normal workings of the law.[55] When confronted with the apparition of the boat and the ghostly invisible entities onboard, the viewer is unlikely to ask whether our domestic policy is illegal and contravening international law. Instead, the spectropolitics achieve their goal; fuelled by the fear of the invisible subject who is coming from the broad frame of the horizon, the viewer is likely to ask how the illegals can be prevented. The refugee, on the other hand, may not be

50 Justine Poon, "How a Body Becomes a Boat: The Asylum Seeker in Law and Images," *Law & Literature* 30, no. 1 (2018): 105–121.
51 Poon, 114.
52 Poon, 114.
53 Desmond Manderson, "Bodies in the Water: On Reading Images More Sensibly," *Law & Literature* 27, no. 2 (2015): 286.
54 Rebecca B. Galemba, "Illegality and Invisibility at Margins and Borders." *PoLAR: Political and Legal Anthropology Review* 36, no. 2 (2013): 274–285.
55 Poon, "How a Body Becomes a Boat," 115.

able to recognise their own story in the empty image of the boat, which for them, signifies merely a vehicle of escape devoid of the association with illegality of any kind.

Spectropolitics are a powerful form of visual discourse that can remove subjects from the realm of the normal workings of the law. By using representational invisibility, spectropolitics reinforce administrative invisibility. Since 2013, refugees detained in offshore detention processing centres on Manus Island and Nauru as a result of the Operation Sovereign Borders and the so-called Pacific Solution have been stuck in the legal limbo,[56] unable to be assessed and unable to leave to countries like New Zealand that have offered to welcome them.[57] While the centres in Papua New Guinea have been found to be illegal by the domestic Constitutional Court in the host country,[58] the removal of Australian personnel from the centres and opening their gates have not resulted in any legal progress for the majority of refugees detained there.[59] Spectropolitics, by removing the refugee from the picture and replacing her with a ghost, have performed the ultimate trick of creating the Agambenian *homo sacer*:[60] the subject so far outside the law that their existence is no longer ghostly in the image only, but also within and between the legal systems.[61] Invisible in domestic migration laws in the places where they are detained, not allowed to be recognised by the places willing to host them due to Australian control of their status, and barred from accessing legal processes allowing for their recognition in Australia where their only legal status is that of an illegal, the offshore detention centre detainees captured at sea during Operation Sovereign Borders are the ultimate ghosts paying the price of the spectropolitical play with invisibility.

CONCLUSION

The interplay of visibility and invisibility in representations of migrants controls the narrative surrounding their legal status. Spectropolitical manipulation of the field of appearance is capable of fusing invisibility and illegality together allowing for masterful manipulation of how the migrant is seen in their absence. Their hauntological presence and creation of a threatening apparition of the illegal migrant/ refugee reflects the discourse of, on the one hand, genuine, hopeless and deprived refugees and, on the other, autonomous but illegal, bogus migrants harbouring illegal intentions. When

56 Stewart Motha, *Archiving Sovereignty: Law, History, Violence* (Michigan: University of Michigan Press, 2018), 53–54.

57 Binoy Kampmark, "Undermining NZ: Dutton's Refugee Ploy," *Eureka Street* 27, no. 23 (2017): 58.

58 Azadeh Dastyari and Maria O'Sullivan, "Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah (2016)," *Monash University Law Rev*, 42 (2016): 308.

59 Maria Giannacopoulos and Claire Loughnan, "'Closure' at Manus Island and Carceral Expansion in the Open Air Prison," *Globalizations* (2019): 1–18.

60 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

61 Michael Grewcock, "'Our Lives is in Danger': Manus Island and the End of Asylum," *Race & Class* 59, no. 2 (2017): 70–89; Sara Dehm, "Outsourcing, Responsibility and Refugee Claim-Making in Australia's Offshore Detention Regime," *Asylum for Sale: Profit and Protest in the Migration Industry* SSRN UTS (website), accessed 16 September 2020,

spectropolitics fuse illegality and invisibility using the migrant/refugee as a threatening ghost, the control of their legal status becomes absolute. They become not only a ghost on the horizon of an image but also a legal ghost that the law needs to expel and protect borders from. As an illegal ghost they become the subject of crimmigration and can be effectively expelled from the legal system and deprived of any viable legal status. They become a ghost not only in the picture but also in access to legal remedies as well. Spectropolitical play with invisibility is a sinister form of manipulating the aesthetic field of appearance. It removes the migrant/refugee from the picture precisely in order to disable the possibility of the viewers to stand face to face with them as a person who is not unlike them. Spectropolitics fear such an encounter, because it risks allowing the viewers to lose the sense of purpose of many repressive migration laws. If viewers encountered migrants as people instead of threatening ghosts, they could perhaps no longer make sense of the cruelty of the current migration regimes.

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MURALS AS A PLAY ON SPACE IN THE ISLAMIC REPUBLIC OF IRAN

by Samuel Blanch

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THE CORPSE OF THE SHARIA

What has happened to the Sharia, the partly autochthonous institutions and practices of Islamic governance, under the conditions of modernity and the power of the nation-state? According to Wael Hallaq, the idea of an "Islamic law" or Sharia administered by the nation-state is an impossibility.[1] The classical "paradigm" of Islamic governance embodied such different conceptions and practices of the rule of law, of the legal subject, and of epistemology, that any synthesis with the contemporary "vertical" power of the nation-state is impossible.[2] It follows that modern experiments with "Islamic law" in the recent histories of Pakistan, Aceh and elsewhere are so encompassed by the state paradigm as to not be worthy of consideration by Muslims asking what an "Islamic governance" might look like. Hallaq describes the Islamic Republic of Iran, similarly, as an instance of the state's "[subordination and disfigurement of] Sharīʿa norms of governance, leading to the failure of both Islamic governance and the modern state as political projects."[3] But what kind of state is this? What else might we say about a system of governance that would allow no *room* for alternatives, that would occupy a *space* in such a way as to displace all others?

Such a picture of the nation-state and its unimpeachable sovereignty is the effective premise of much of the literature on the Iranian mural arts after the 1979 revolution. The Islamic Republic of Iran is a profoundly pictorial regime, as witnessed most obviously by its continued production of political murals throughout the streets of Tehran and beyond. And these murals are considered registers of the sovereign's representational control. As Chelkowski and Dabashi have put it, the mural arts are a function of "a pictorial revolution, a revolution in full semiotic control of the representation of itself."[4] This, to be clear, is something like a restatement of Benjamin's famous thesis about the aestheticization of politics; about the state's incorporation of the populace in the unfreedom of the fascist polity through artistic production on a mass scale.[5] The literature on Iranian murals springs from an assumption about the sovereign representational capability of the nation-state to make and dispense with images. This literature draws on a huge range of murals across time. But it does so having already implicitly or explicitly adopted Chelkowski and Dabashi's claim about the sovereign's representational capacity. In short, the literature asks about the sovereign and the representational economy. It asks *who* the sovereign is; who is it that makes images? *What* do these images say? *How* does the sovereign say it? These questions assume the mechanics of a "spatialised" sovereignty. They enquire about the movement of a modernity already pre-figured in terms of "formal

1 Wael B. Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge; New York: Cambridge University Press, 2009); Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2013).
2 Hallaq, *Impossible State,* xi–xiii.
3 Hallaq, 2.
4 Peter Chelkowski and Hamid Dabashi, *Staging a Revolution: The Art of Persuasion in the Islamic Republic of Iran* (London: Booth-Clibborn Editions, 2000), 8.
5 Walter Benjamin, "The Work of Art in the Age of Its Technological Reproducibility," in *Walter Benjamin: Selected Writings* (Cambridge, MA: Belknap Press of Harvard University Press, 2008), 269.

FIG. 1
Mural on Resalat Square, 2018, Qom. Photo: the author.

consistency" and therefore reliant on the idea of a "single legislator."[6] My intention here is not to interrogate the capacity of the legislator or sovereign as such. My focus, rather, is on the murals themselves, and on the way that they operate to shift and destabilise the purported *availability* of space to the sovereign.

Images like figure 1 strike us with the force of their sovereign assertion.[7] Located at a roundabout in the seminary city of Qom in central Iran, the mural captures the entwinement of the martyr paradigm within the modern nation-state. A martyr in the form of a dove flies up and into a trompe l'oeil archway and is transfigured into a supernova as he enters the gate of paradise. Still the dominant subject matter of Iranian murals, one cannot underestimate the prominence of the martyr in contemporary Iran, a "paradigm" forged out of Shia myth, the revolutionary turmoil, and eight years of total war with Iraq.[8] A white epigraphic ribbon runs along the top of the panel. In an Arabic calligraphic style, it marks the mural and the building in the name of the original martyrs of Islam, claiming this site with a benediction highly particular to the Shia sect.[9] Most prominently, the mural features the massive figure of the revolutionary leader Ayatollah Ruhollah Khomeini, pictured here as steward of the martyrs. If there was any doubt, his piety is acclaimed by his hands raised as at the outset of the mandatory prayers. The end of his turban falls down amongst the folds of his cloak, the black symbolising his status as a descendent of the Prophet's family.

This mural is fluently aestheticised politics, and indeed an image of sovereignty itself. The execution of its photorealist representation of Khomeini, the appeal of the cleric's benevolent and pious downward gaze, the masterful rendition of the flat plane of the trompe l'oeil wall, is one of the most technically proficient examples of contemporary mural arts that I saw during my field research in Iran. Employing what Gruber calls an "idiom of persuasion,"[10] the Imam Khomeini gives the martyr's death a beneficent aura of appeal. There is no crude appeal to war here, no other nationalist symbols,

6 Here I draw on Catherine Pickstock's critique of modernity as "spatialized," which describes the ontological "middle" of modernity in terms of the "the portable, convertible, formalized, transferable, mercantile city." See Catherine Pickstock, *After Writing: On the Liturgical Consummation of Philosophy* (Oxford: Blackwell, 1998), especially chapter 2.

7 It seems to me telling that when I have displayed this image at conference presentations, Iranian emigres in the audience have tended to react with obvious emotional and even physical discomfort. Such is the force of the revolutionary leader's aura for part, although certainly not all, of the Muslim community in Australia.

8 The literature on this issue is huge. For the complexity of the representation of martyrs see Ulrich Marzolph, "The Martyr's Way to Paradise: Shiite Mural Art in the Urban Context," *Ethnologia Europaea* 33, no. 2 (2003). For a broader account of the importance of and dynamism of martyrdom in the broader Shia context see Fouad Ajami, *The vanished Imam: Musa al Sadr and the Shia of Lebanon* (London: IB Tauris, 1986). For classic accounts of the so-called "Karbala paradigm" in Iran, see Michael M. J. Fischer, *Iran: From Religious Dispute to Revolution* (Cambridge, MA; London: Harvard University Press, 1980).

9 The epigraphy reads: *al-salām ʿalā al-ḥussein wa ʿalā alī bin al-ḥussein wa ʿalā awlād al-ḥussein wa ʿalā aṣḥāb al-ḥussein* (peace/greetings be upon Hussein and upon Ali bin Hussein and upon the children of Hussein and upon the companions of Hussein).

10 Christiane Gruber, "Images of the Prophet In and Out of Modernity: The Curious Case of a 2008 Mural in Tehran," in *Visual Culture in the Modern Middle East: Rhetoric of the Image*, ed. Christiane Gruber and Sune Haugbolle (Indiana: Indiana University Press, 2013), 16–17.

no macabre remembrance of blood spilled or youth lost.[11] Just so, it represents an aestheticised death no less directed by the state, and moreover, a normalisation of the sovereign dispensation of death. Much has been written about sovereignty as the power of decision over the exception, as that "originary structure in which law refers to life and includes it in itself by suspending it."[12] And here, although Khomeini looks down in humble rectitude, the dove's trajectory is diagonally upwards through his hands and into the archway. It is as if Khomeini begets Iran's martyrs precisely in the moment of his exemplary piety, his prayer urging them towards death and paradise. Recalling the foundational moment of the Shia, when the Imam Hussein was martyred in the deserts of Iraq, the Shia say that "every place is Karbala, every day is Ashura." In this mural, however, it is the head of state who claims sovereignty over the martyr paradigm as renewed in the war with modern Iraq. The wartime experience of the Iranian population and the historical memory of the Shia Islam are folded up within his hands. Consistent with the Hallaq thesis this would be the image of a congealed Islamic governance, where all possible sacrifices are rolled up into the hands of this man. And is this not sovereignty itself, where the fields of dead soldiers along the borders of Iraq and Iran are declared and made constitutive of the ongoing state?

Yet it is the purpose of this article to probe the limits of Chelkowski and Dabashi's thesis. After surveying the range of historical and visual materials already covered in the literature,[13] I focus on four murals to ask does the sovereign indeed have "full semiotic control of the representation of itself"? What would a *problem* of representation entail for this thesis? What might a *scratch* in an image mean for the execution of sovereign power? Consider the mural above. In the economy of sovereign representation, what might we say about the use of the illegible Persian *nastaliq* script, markings that surround the gateway like the scratchings of a bird? This use of a script uniquely associated with the Persian literary tradition could be an oblique attempt to stamp the route to paradise with an Iranian character. However, that would cover over the way the cement of the wall has been scraped with the black of this pen. And what might we say about the failure of the trompe l'oeil device, as the left side of the arch extends too far down? What is the splash of red ochre behind the Imam deforming the wall's otherwise coherent spectrum of sandy yellow?[14]

I describe these scratchings and splashes as breaks in the sovereign representational economy. Rather than focusing on the vulnerability of sovereignty in terms of the sovereign's body, my focus is on the space of the purported enaction of sovereign power. I will argue that the murals shift and

11 Compare this to Gruber's account of the Martyrs' Museum, an institution which revels in the realism of its memorialisation. See Christiane Gruber, "The Martyrs' Museum in Tehran: Visualizing Memory in Post-Revolutionary Iran," *Visual Anthropology* 25, no. 1 (2012).

12 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 28; for something of the vitality debate about sovereignty within Iran see Milad Obadaei, "The Outside (*Kharij*) of Tradition in the Aftermath of the Revolution," *Comparative Studies of South Asia, Africa and the Middle East* 39, no. 2 (2019).

13 For a very recent study of a large number of murals, see Bill Rolston, "When Everywhere is Karbala: Murals, Martyrdom and Propaganda in Iran," *Memory Studies* 13, no. 1 (2020).

14 See note 80.

destabilise the space within which sovereignty is exercised, even the space of sovereignty itself. I will show later how the broader tradition of Persian painting has used material and technique to draw attention to the issue of space and material itself. This will facilitate my reading of the murals as interventions in sovereign space. Central to this argument, therefore, is the apparently benign observation that sovereignty is spatial. Sovereignty, that is, has to do with the delineation and partitioning of space, with the "power of decision" over space.[15] This article's grounding in the concrete walls of the mural arts, and indeed the fields of dead martyrs, is already a gesture toward this. But consider also the following accounts of sovereignty. Hussein Ali Agrama has shown, in the context of the Egyptian state's encompassment of the Sharia, how contemporary sovereignty and the emergence of the rule of law has involved the ongoing delineation of public and private space.[16] The murals we might say, are both sovereign representations *and* possessory claims to public space. Talal Asad has long traced how the emergence of the modern state has involved the careful definition and circumscription of religion.[17] In our context we might say that the particular delineations of true and false religion represented even in the mural above is also an assertion of sovereign prerogative over religion. We might also think of the mural in terms of Carl Schmitt's definition of the political as the friend/enemy distinction, marking the mural with the Shia brand and sequestering this space for the Islamic Republic's particularist experiment in Islamic law. I note that the partitions of space noted here are at once aesthetic and legal acts. But is such space fully available to the sovereign? Can these murals, indexes of both legal and aesthetic power, be tamed by the sovereign? It is my contention that precisely as the murals problematise space through their own material ambivalences, just so they cast doubt upon the legal and aesthetic control of the sovereign. Where sovereignty assumes capacity to master visual and written language in order to delineate claim and arrange legal spaces, here these murals exceed these claims to possession by destabilising space itself.

SOVEREIGN REPRESENTATION IN THE IRANIAN MURAL ARTS

The background to Chelkowski and Dabashi's thesis is the prevalence of images in modernity generally, and in the Iranian revolutionary experience in particular, and their location as the literal and figural signage of the Iranian polity. The thesis of representational control is an important re-reading of the revolution not just as the takeover of political institutions, but as the wrestling of control over the maelstrom of available images. Out of the chaos

15 This phrase I take from Agrama Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago, London: The University of Chicago Press, 2012). The idea, as I will discuss, draws much of its energy from Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, trans. Gabriel Rockhill (London: Continuum, 2004).

16 Agrama, *Questioning Secularism*.

17 Asad and others have shown how the statist *partitioning* of the religious and the political, and the religious and the secular, is the essence of secular modernity, rather than the exclusion of the religious from the political. See generally Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: The Johns Hopkins University Press, 1993); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

of the revolutionary moment, as street art initially indexed the demands of heterogenous opposition groups and individual artists it was finally the Islamist party that succeeded in taking "command," effecting a programme of "representational replacement," substituting the Shah's image with the regime's own image of the "Islamic man."[18] Thus Chelkowski and Dabashi argue that there was something particularly pictorial about the Iranian revolution. The Republic was born making images of itself; storming the United States embassy, falling beneath Iraqi tanks, banners dutifully translated into English for a global audience. Images were not merely utilitarian but were "produced by a nation mobilised to its highest sacred sensibilities, set on a course of self-revelation, exposing itself to the world, for the whole world to see. Imagine a nation that goes public, becomes transparent, reveals, discovers, unveils itself, puts itself on exhibition . . . "[19] Of course similar observations have been made about late modernity in general, about our world "saturated" with images.[20] It is as if the murals of Iran are the analogue forerunners of our own Instagram culture.

At stake here is not merely the economy of sovereign representation beginning with the control of the chaos of images described above. The latter works implicitly with an idea of a public sphere, where the sovereign is the one who controls the space, the making of images, and their distribution. Even more, I suggest that this is the "aesthetic" element, the *image* of the "city" that Pickstock describes as "spatialized," and as central to the constitution of modernity itself.[21] This city craves, as mentioned, a regime of "formal consistency" best achieved by a "single legislator." It reduces space to those objects available to the gaze of the subject. It institutionalises this "political architectonics" through its scientific, aesthetic, grammatical arrangements.[22] It relies, in short, on a particular account of space, an ontology that is, dominated by the state as political sovereign and the subject as epistemological sovereign. To be clear, descriptions also work critically of multiple and overlapping spheres in modernity, well beyond Iran: of the drive towards clarity and singularity in legal drafting, towards the mirage of "certainty" in economic and environmental policy, or towards the purity of government messaging in health and national security policy, all of which ought to free of "physical, mental and political pollutions."[23] What better way to read a second mural (fig. 2), also located in Qom? A kind of double-layer triptych, the upper left panel is again filled by Imam Khomeini, flanked by two lesser clerics. The massive figure of the current Supreme Leader Ali Khamenei

18 Grigor Talinn, *Contemporary Iranian Art: From the Street to the Studio* (London: Reaktion Books, 2014), 22.

19 Chelkowski and Dabashi, *Staging a revolution*, 10. See also Roxanne Varzi, "Facing the Future: The Artistic and Diasporic Afterlife of the Iran-Iraq War," *Anthropology of the Middle East* 8, no. 1 (2013); Christiane Gruber, "The Message is On the Wall: Mural Arts in Post-Revolutionary Iran," *Persica* 22 (2008).

20 Chiara Bottici, *Imaginal Politics: Images Beyond Imagination and the Imaginary* (New York: Columbia University Press, 2014).

21 Pickstock, *After Writing,* 48, 58–59; also Michel de Certeau, *The Practice of Everyday Life,* trans. Steven Rendall (Berkeley: University of California Press, 1984), 94.

22 Pickstock, 48.

23 Certeau, *Practice,* 94.

FIG. 2
Mural on Shahid Montazeri Boulevard, 2018, Qom. Photo: the author.

fills the panel on the top right. Positioned on a thoroughfare leading to Qom's main shrine complex and senior seminary facilities, the Supreme Leaders' sternly oversee the thousands of seminarians, locals and pilgrims thronging down to the entrance. This is a visual version, then, of the Islamic Republic's takeover and modernisation, even of the seminary and the Shia Internationale whose vibrancy and resistance had been its original succour.

Methodologically the maelstrom of images resolves into a scholarly focus on the state and the individual. We have already seen the image of Imam Khomeini as equivalent to the revolution itself. Khomeini won the revolution for Islam, and Islam for the revolution, as Chelkowski and Dabashi put it.[24] Henceforth there could be no revolution except the Islamic revolution, and no Islam but a revolutionary Islam. Images would remain as vehicles for persuasion and resistance. In the post-revolutionary context, murals had ongoing relevance for what Gruber calls "mobilisation"; the need for the state to catalyse individual action during the Iran-Iraq War (1980-1988), and in the broader project of state building.[25] Murals became a state appendage for the management of crowds.[26] They became the mechanisms in an ongoing culture war, where culture literally became the regime's programme of urban signage.[27] It is worth emphasising the obvious parallel between this appropriation of public space and the broader system of "Islamic governance" in Iran. The Islamic Republic's laws–codified and judicially administered and structured according to Western categories like "family" and "criminal" law–are characteristically "modern" in their form. Such is Hallaq's argument, as we have seen. Although structured as a hybrid democratic/oligarchic system with both elected representatives and supervision by the Shia clerical class, power over the state security apparatus, and the effective locus of sovereignty, culminates in the office of Ayatollah Ali Khamenei, the current *Vali-e Faqih* or Guardian Jurist.[28]

Thus for Chelkowski and Dabashi, as for Chehabi and Christia, murals serve the sovereign's function of "persuasion."[29] But if persuasion is the sovereign's intention, there is nevertheless an enduring methodological anxiety about the individual production and reception of images. There is a recognition of the problem of individual artists' intentions, a problem which I do not address in this article. Marzolph caveats his study with the admission that his "interpretation may or may not differ from that intended by the artists or the various institutions that ordered the murals."[30] Chelkowski and Dabashi deflect the problem of individual intention towards an analytical focus

24 Chelkowski and Dabashi, *Staging a Revolution,* 25.
25 Gruber, "Message On the Wall," 44.
26 Pamela Karimi, "Imagining Warfare, Imaging Welfare: Tehran's Post Iran-Iraq War Murals and their Legacy," *Persica* 22 (2008): 48.
27 Talinn, *Contemporary Iranian Art*, 39–41.
28 Ziba Mir-Hosseini, "Sharia and National Law in Iran," in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto (Leiden: Leiden University Press, 2010).
29 H.E. Chehabi and Fotini Christia, "The Art of State Persuasion: Iran's Post-Revolutionary Murals," *Persica* 22 (2008).
30 Ulrich Marzolph, "The Martyr's Fading Body: Propaganda vs. Beautification in the Tehran Cityscape," in *Visual Culture in the Modern Middle East*, ed. Christiane Gruber and Sune Haugbolle (Indiana: Indiana University Press, 2013), 167.

on the collective cultural construction of images of the revolution.[31] Gruber's study of a 2008 mural just off Modaress Highway in Tehran is a rare example of the benefits of scholarly access to the artist, although it is telling that the balance of her analysis concerns the history of the particular motifs that the mural employs.[32] Gruber also shows the complexity of state agency distributed across various quasi-state mural commissioning bodies.[33] Marzolph expresses anxiety about the methodological problem of assessing the Iranian public's reception of murals. He nevertheless asserts that the public dislikes the "dead" images of the older mural style.[34] Gruber admits the difficulty of the "extensive anthropological work" necessary to view "the exact effect(s) a particular mural may have on individuals moving through the cityscape."[35] Talinn asserts that "the people of the streets have censored these signs from their sights."[36] Note, however, that the basic architecture of the sovereign and the citizen sits unchanged beneath this discussion, and moreover, that the state retains effective representational control. Indeed the direction of the analysis here repeats the question of sovereign representation, focussing instead on the resistance of subjects rather than the power of the sovereign.[37]

What then do the murals represent? Or rather, what does the state represent through these art objects? The literature provides a rich account of the mural tradition after the revolution. Talinn, Gruber, Marzolph and Karimi all offer chronologies that chart the regime's adaption of subject matter, motif and technique.[38] To summarise, the state adapted to the changing political circumstances, with the immediate revolutionary polemic against the United States and the Shah soon giving way to the need for a national religious defence against the Iraqi attack on Iran in 1980. The pressures of the Iran-Iraq War, drawing on the existing tradition of pious martyrdom in the Shia imaginary, birthed a genre of portraiture in which martyr's faces were displayed on murals and posters throughout Iranian cities. I have already discussed the richness of martyrdom in the Shia imaginary, and in the political ideology of the Islamic Republic. Marzolph puts it like this: murals are the material evidence of "the popularization of martyrdom as a constitutive element of the Shiite creed in today's Iranian interpretation."[39] Varzi also shows the regime's encompassment of the stories and portraits of individual martyrs within the singular image of the Imam Khomeini.[40] Following the death of Imam Khomeini, the end of the war, and phases of relative economic

31 Chelkowski and Dabashi, *Staging a Revolution,* 41.
32 Gruber, "Images of the Prophet,"
33 Gruber, "Message On the Wall," 38–42. See also Christiane Gruber, "When Nubuvvat Encounters Valāyat: Safavid Paintings of the Prophet Mohammad's *Mi'rāj*, ca.1500–50," in *The Art and Material Culture of Iranian Shi'ism*, ed. Pedram Khosronejad (London: IB Tauris, 2012).
34 Marzolph, "The Martyr's Fading Body," 177.
35 Gruber, "Message On the Wall," 18.
36 Talinn, *Contemporary Iranian Art*, 91.
37 According to Agrama's critical reading of sovereignty in Egypt, "freedom" and "coercion" are the two possible legal categories. See Agrama, *Questioning Secularism*, 126.
38 Talinn, *Contemporary Iranian Art*, 47–48; Marzolph, "The Martyr's Fading Body," 164; Karimi, "Imagining Warfare," 149; Gruber, "Message On the Wall," 38.
39 Marzolph, "The Martyr's Way," 97.
40 See Roxanne Varzi, *Warring Souls: Youth, Media, and Martyrdom in Post-Revolution Iran* (Durham: Duke University Press, 2006).

and political liberalisation under Presidents Rafsanjani and Khatami, each of the chronologies describes a softening or "beautification" of the pictorial programme from the 1990s onwards.

Three observations attaching to the final phases of the chronologies are pertinent to this article. First, the phase of "beautification" does not entail the end of the martyr as a key subject-matter (posters of local martyrs still line the boulevards of Iranian towns), but rather a softening or heightened attention to the presentation of that subject matter using pastels, symbols, and techniques more sensitive to the demands of a war-weary populace. The ultimate intention of the state does not change. It continues to use this more nuanced aesthetic "to both create and solidify identity."[41] Gruber's recourse to the "visual culture" literature to analyse the murals of Tehran concludes similarly, with the sovereign's "appropriation" of complex pictorial history for its sectarian purposes.[42] Second, there is nevertheless some expansion of mural subject matter in the later period, as artists and commissioning bodies turn to themes like Islamic mysticism,[43] and even to the breaking down of subject matter through abstraction and sheer optical 'play'.[44] Across these suggestions the picture of the sovereign's representational capacity and prerogative remains constant. The sovereign maintains possession of public space, and possession is, as they say, nine tenths of the law. Third, whereas Marzolph suggests that the regime has honed its technique to present old themes in a more "artistic" and appealing manner, Talinn suggest that the use of optical illusion represents something altogether more spatial.[45] I will return to this productive suggestion in the final part of this article.

Two murals, located in central Tehran (fig. 3) and the outskirts of Qom (fig. 4), stand as examples of "beautification." Of the four murals that are the focus of this article, to my knowledge only the former has been the subject of scholarly attention. Put briefly, Marzolph reads the mural as employing techniques, including that of perspective illusionism, for the beautification of martyrdom. The newer mural replaces an earlier mural, featuring a full-length portrait of the martyr, with the martyrial metaphor of the dove. The newer mural also includes two trompe l'oeil oculi understood to represent a gateway to heaven.[46] The oculi punctuates the perspective illusion of an industrial frame that traces the edge of the building itself. Again, the martyr ascends towards the gateway in the form of the dove, this time rising from an empty wheelchair. The mural in Qom (fig. 3) has the same oculus, also cut through a frame of concrete or steel. However, here the martyr has not been replaced by a metaphor. To the contrary, he is identified by name and described as *talabih khabarnegār* or "seminarian journalist," a vocation also alluded to by the film reel descending through the oculus. He stands half-in half-out of a second

41 Marzolph, "The Martyr's Way," 97; see also Rolston, "Everywhere is Karbala"; Karimi, "Imagining Warfare."

42 Gruber, "Images of the Prophet," 14.

43 Karimi, "Imagining Warfare," 51. I prefer the term "mysticism" to the more commonly used "Sufism," as the former term covers the theory and practice of what the Shia usually call ʿirfan or gnosis, whereas the latter remains an essentially contested term within the Shia world.

44 Talinn, *Contemporary Iranian Art*, 85.

45 Talinn, 85–87, c.f. Karimi, "Imagining Warfare," 54–56.

46 Marzolph, "The Martyr's Fading Body," 180.

FIG. 3
Mural on Qarani Street, 2018, Tehran. Photo: the author.

FIG. 4
Mural on Al-Ghadir Boulevard, 2018, Qom. Photo: the author.

gateway through which beckon the same blue sky and fluffy clouds. His red bandana and military fatigues indicate his revolutionary credentials and fate in the Iran-Iraq War.

In the chronologies above these murals index a story of abstraction, a history described by Chehabi and Christia as a "liberal wave of murals . . . moving from primary colours to pastels, from realism to abstraction."[47] Figure 4 is therefore a transitionary image, like the martyr standing half-in half-out of his liberation of form. Murals are representational points in an aesthetic chronology. There is an important question here about the expectations we bring to these murals, and the way those expectations subtly parallel the regime's apparent control over images. As a chronology represents itself as a historical guide, here guiding us through history of the regime's favourite subject-matter, so too it presents knowledge as essentially historicised. The Islamic Republic's apparent representational control consists not just in the content of its mural arts, but also in the ability to adapt that content to the demands of history. Even the more recent perspective illusionism is a historicisation, where floating disconnected blocks and levitating trees represent the postmodern condition, a pictorial end of history. Thus, the Islamic Republic's representational control entails a power over history. Power over the art object *is* power over history.[48] I note that this account precisely parallels the Islamic Republic's own story about the Islamic governance; the Islamic revolution is in "progress," it has required the development of systems of justice, economy and technology ex nihilo.[49] The Islamic Republic, that is, has historicised the Sharia. However, the more critical point is that the form of scholarly knowledge represented here replicates this power over history. One could, with a little care, construct a chronology not made of words but of images. It would *precisely* translate the knowledge presented above. It could be "read" for the same content, the only variable being the form of "literacy" required.[50] What this kind of knowledge does not allow for, and what an aestheticised politics would purport to foreclose, is the idea of an image involving something other than representation.

47 Chehabi and Christia, *Art of State*, 12.

48 Benjamin observes that the sovereign prince is supposed to be master of history, that "he holds the course of history in his hand like a sceptre." See Walter Benjamin, *The Origin of German Tragic Drama*, trans. John Osborne (London: NLB, 1977), 65.

49 For an example of this historicised narrative see Ayatollah Khamenei's 2019 statement on the "Second Phase" of the revolution: "The 'Second Phase of the Revolution' Statement Addressed to the Iranian Nation," Khamenei.ir, updated 11 February, 2019, https://english.khamenei.ir/news/6415/The-Second-Phase-of-the-Revolution-Statement-addressed-to-the. Indeed, for the same reason, my own interlocutors in the transnational Shia community would absolutely reject Hallaq's thesis about the contemporary Sharia's disfigurement.

50 I note the dominance of the language of "reading" and the visual "literacy" required for murals in the literature, see Marzolph "The Martyr's Fading Body," 169; Varzi, "Facing the Future," 50; Gruber, "Message On the Wall," 35–36; Gruber, "Images of the Prophet," 15–17; Talinn, *Contemporary Iranian Art,* 49; Chelkowski and Dabashi, *Staging a Revolution,* 41. Given the apparent consensus on the need to "read" it is a shame to have so little discussion of what a more critical hermeneutic might look like.

SPATIAL PLAY IN PERSIAN PAINTING

At what point does Chelkowski and Dabashi's thesis of representational control become vulnerable? One particular vulnerability would stem the sovereign's inability or a lack of will to control its messaging.[51] Consider again the mural on the outskirts of Qom in this light (fig. 3). During my own fieldwork in 2018, the seminarian martyr had gained a renewed relevance in the context of the Iranian state's involvement in the conflict in Syria and Iraq. Many of the seminarians in Qom were returnee volunteers from this conflict, from Pakistan, India, Lebanon and elsewhere, sometimes cared for in Iranian hospitals and now studying in Qom with the beneficent support of the regime. Many would pass this mural every day on their way to the free accommodation provided by the seminary up the road in Pardisan. Yet despite its apparent ideological poignancy, the mural was curiously obscured by the ubiquity of images around it, not least by the garish neo-classical faux stucco façade of its own building, which also houses a cinema, a restaurant, and the improbably named Hotel Venous. The martyr himself looms over a dusty parking lot, along which the proprietors have erected a corrugated iron roof cutting off the base of the mural, mostly obscuring the martyr's name. Coloured neon lights are strung out beneath the corrugations, and more fall down the side of the building, detracting further from the fading paint of the mural. It seems that the zeal of the revolutionary class, even in this town at the ideological heart of the revolution, cannot resist the banality of global faux culture.

Mistakes or the artist's lack of skill, or the artist's ability to build in a visual resistance through what Talinn calls optical "play" would also be vulnerabilities for the state's programme of representation.[52] These interpretations remain implicitly alive throughout this section. It is my proposal, however, to focus on the problems that emerge in the images; as these images play on space, in their claim to re-order and re-partition space itself. That is, rather than looking from within the terms of the representational economy, I contend that these images contain elements problematic to the representational economy. With Rancière I contend that these murals are "litigious," that they effect a challenge to our primary experience of space. Litigiousness here does not denote resistance at the level of the content or intent of sovereign representation. It evokes a basic discomfort about the sovereign's possession of space, as it were about the sovereign's legal and representational standing given the waywardness of that space. I move therefore from Benjamin's aestheticization of politics towards Rancière's political aesthetics. Rancière argues that a true aesthetics is political in the sense that it re-orders the most basic spatial arrangements, even the arrangements that make it possible to think the "community" is *this* set of persons, *this* place, *this* categorical separation of sovereign and image.[53]

51 This is the fate of the sovereign in Benjamin's account of the German baroque, where a pessimistic Protestant anthropology produces princes incapable of decision, and so unable to control history. See Benjamin, *The Origin of German Tragic Drama*, 70–71, 81.

52 Talinn, *Contemporary Iranian Art*, 86.

53 "[Politics] consists in re-figuring space, that is in what is to be done, to be seen and to be named in it. It is the instituting of a dispute over the distribution of the sensible . . . ": from Jacques Rancière,

The murals are litigious, then, in so far as they destabilise the spatialised arrangements described above. So rather than searching for a deeper "reading," we ought for a moment to simply permit the illegibilities and impurities of the mural to disrupt the state's otherwise seamless folding up of the lives and deaths of its population within its aesthetic embrace.

Yet I do want to say a little more about the murals' play upon and contortion of space, that is, about the particular character of the murals' litigiousness. To prepare for this, I want to mention the interest in alternative traditions of sight and vision that has occupied some of the best recent scholarship on Islamic art, and indeed Persian painting's capacity to embody such differences within the materiality of its own artistic production. I will then comment, briefly, on space and materiality in the Twelver Shia tradition of mysticism. This will allow an encounter with murals that offer a different arrangement of both sight and of space itself.

Marzolph's study of the oculus in Tehran does not mention the presence of this motif in Persian manuscript painting. Ernst Grube describes just such a painting from a 1505 manuscript of Nizami's *Khamsa*, executed during the reign of the Safavid Shah Ismail (fig. 5). "Immense and original in conception but tiny in scale," it represents the Prophet's *mi'raj* or night journey to the heavens.[54] The Prophet rides *Buraq*, his human-headed horse through clouds above Mecca en route to Heaven. It includes an oculus probably borrowed from contemporary Florentine examples: "a circular opening at the upper left of the picture, like a gateway to Heaven in the dense cloud formation, is encircled by angels peering down through the precariously tipped oculus to gaze upon the Prophet and his galloping steed."[55] Ernst Grube describes the spatial movement facilitated by the oculus: it is "an exceptional picture that ties together the earth and the heavens, and then punctuates the celestial regions with an oculus."[56] Christine Gruber's study is the most thorough. She observes the oculus "[splitting] open the fabric of the sky and [rendered] in a daring and experimental perspective," and links it with what the text of the *Khamsa* calls a breach in the curtain (*hijab*) between the natural world and oneness with God (*tawhid*).[57] Gruber sees the image as an instance of "visual *tafsir*" or commentary, speaking both to the Prophet's ascent and to the claim to quasi-divinity by Shah Ismail, who considered himself "God incarnate . . . and the essence of Ali."[58] Yet the literature on the murals has steered away from treating the oculus and similar devices as cosmological or mystical, reading them simply in soteriological and political terms.

Such visual enactments of spatial proximity to God are not an anomaly. Classic studies of Persian painting witness their carriage of different spatial and epistemological orders. Ettinghausen's account of a seventeenth century

Dissensus: On Politics and Aesthetics, ed. and trans. Steven Corcoran (London: Bloomsbury, 2010), 37.

54 Ernst J. Grube, "Religious Painting in the Islamic Period," in *Peerless Images: Persian Painting and its Sources*, ed. Eleanor Sims (New Haven; London: Yale University Press, 2002), 151.

55 Grube. On the trans-cultural movement of the motif see Maria Vittoria Fontana, "A Perspective Illusion or a View from the Clouds? Detail of an Early 16th-Century Miniature Painting Produced in Tabriz (Iran)," *Mantua Humanistic Studies* v (2019).

56 Grube, "Religious Painting," 151.

57 Gruber, "Nubuvvat," 53.

58 Gruber, 46, 54.

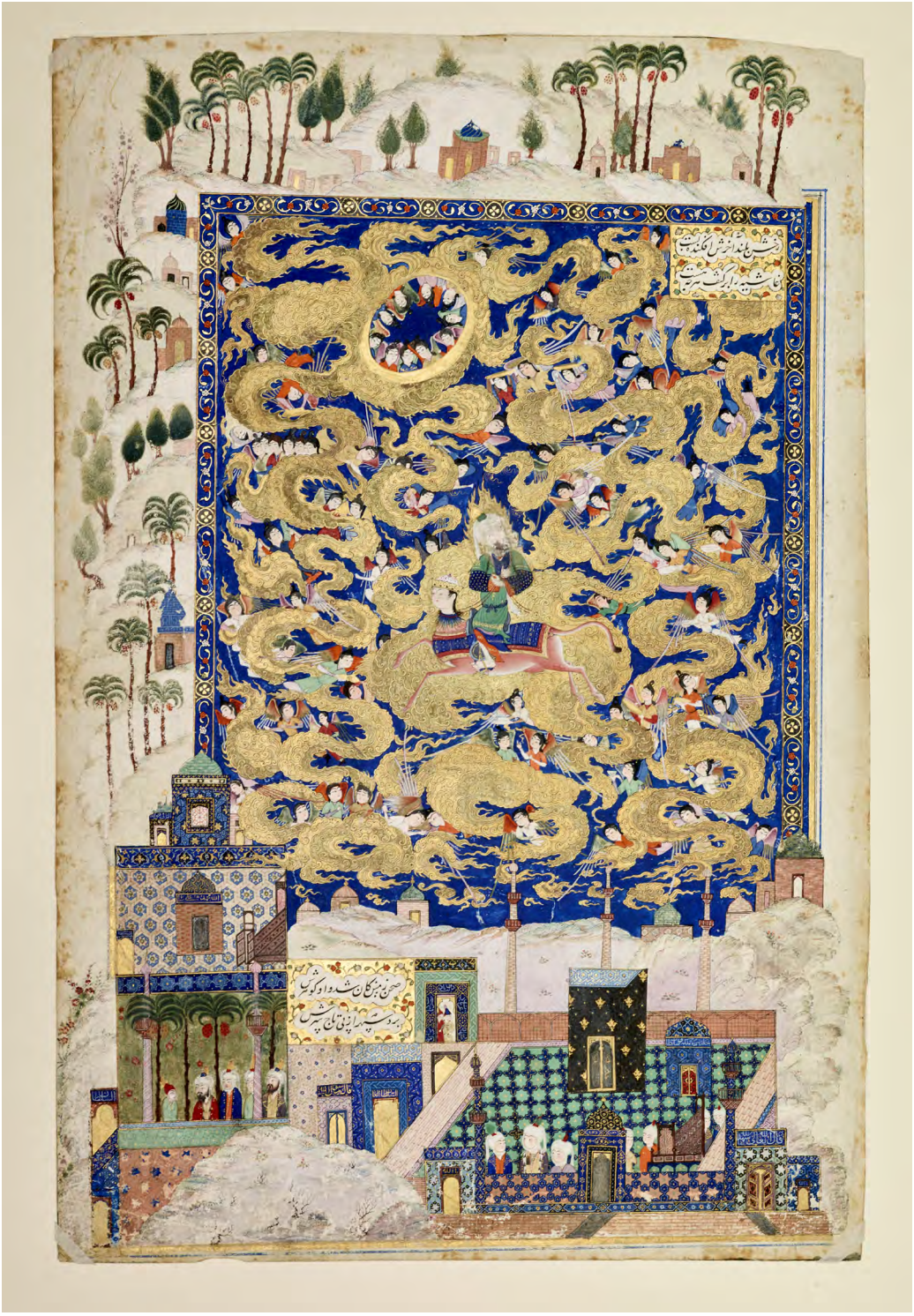

FIG. 5
The Prophet Travels over Mecca and Medina on his Night Journey, folio from a manuscript of the *Khamsa* (Quintet) of Nizami, ca. 1505; Tabriz, Iran; ink, pigment, and gold on paper; sheet dimensions: 11 5/16 × 7 1/2 in. (28.7 × 19 cm); The Keir Collection of Islamic Art on loan to the Dallas Museum of Art, K.1.2014.737.

painting from the Persianate Mughal courts of the Emperor Jahangir notes the artist Bichitr utilising the convention of portraying figures that are more important in larger scale.[59] The Emperor Jahangir or "world seizer" is therefore the largest, followed by a Sufi dervish, the Ottoman Sultan, and finally James I of England. Ettinghausen notes the Emperor's status as *nur-i din* or "light of Religion," suggested by the golden orb behind the Emperor's dais, the luminescence of his jewels, and "ethereal" fall of his clothing. But light is no mere "metaphor." Rather, the "splendid manifestation of the imperial glory suggests even a theophany." Similarly, Hillenbrand surveys the masterful utilisation of margins, empty space, and blocks of colour to suggest spatial and temporal complexity in Timurid painting.[60] Deploying broken frames and panels, which figures of sheep "dive" behind, Timurid artists were able to invoke "several conflicting notions of reality." In an illustration of the mystic poet Attar's *Mantiq al-Tair*, a tree breaks the top border, "escaping from the sombre mortality of the main scene," and its envelopment in a margin "thickly dusted with flecks of gold" suggests a "play on reality" involving a passage from spiritual death to life. Both studies demonstrate Persian painting's capacity to manifest alternative "spatial" arrangements not just through the legible content of their motifs but in the forms and practices of painting itself, in flecks of gold and in the luminosity of watercolour and the blurring of figuration.

Fontana offers a different analysis of the *Khamsa* oculus (fig. 5). She notices the angels looking out from the oculus, including one that looks out of the frame upon the viewer. Thus the painting offers not just a "perspective illusionism" deriving from the European structural oculus, but also an "inverse" perspective where sight is reversed.[61] Fontana here joins some of the most interesting recent scholarship on the history of Islamic art, concerned with what Necipoğlu calls the "gaze." Beyond the formalist methods of some older studies, and paying attention to the cultural history of artefacts, scholars have turned their attention to how the disciplines of Islamic art have interacted with different ways of looking and seeing.[62] Necipoğlu insists on other epistemological and aesthetic traditions allowing for the co-mingling of inner and outer senses, of the intuitive and the visual.[63] Nizami recounts the parable of a competition between Greek and Chinese painters. The former was superior in his figural powers, but the latter, who had polished his wall to reveal the Greek painting all the better, was superior in "polishing." For al-Ghazali the latter displayed mystical insight, for it was he who like the mystic

59 See Richard Ettinghausen, "The Emperor's Choice," in *Essays in Honor of Erwin Panofsky*, ed. Millard Meiss (New York: New York University Press, 1961), 100–02.

60 Robert Hillenbrand, "The Uses of Space in Timurid Painting," in *Timurid Art and Culture: Iran and Central Asia in the Fifteenth Century*, ed. Lisa Golombek and Maria Subtelny (Leiden; New York: Brill, 1992), 87–92.

61 Fontana, "Perspective Illusion," 178.

62 See for example Valérie Gonzalez, *Beauty and Islam: Aesthetics in Islamic Art and Architecture* (London; New York: I.B.Tauris; Institute of Ismaili Studies, 2001); Gülru Necipoğlu, "The Scrutinizing Gaze in the Aesthetics of Islamic Visual Cultures: Sight, Insight, and Desire," *Muqarnas* 32 (2015); Laura U. Marks, *Enfoldment and Infinity: an Islamic Genealogy of New Media Art* (Cambridge, MA: MIT Press, 2010).

63 Necipoğlu, "The Scrutinizing Gaze," 29–33.

"polishes his heart until divine radiance shines in it."[64]

Necipoğlu emphasises the "mix of Aristotelian and Neoplatonic concepts" that have fed traditions of Islamic art.[65] But dominated to this day by the seventeenth century philosopher and mystic Sadr ad-Din Muḥammad Shirazi (or "Mulla Sadra," d.1636),[66] the Neoplatonic legacy takes on a very particular hue within the Shia world. Against Suhrawardi (d.1191) whose philosophy of "lights" involved what we can crudely call an idealist tone, Sadra's is far more attendant to materiality. Sadra begins and ends with Being or Existence (*al-wujud*). Wujud is primary, foundational. It is "the most manifest of all things in its presence" (*ajli al-ashia' hudhuran*) and it "comprises all things'' (*fi kaifia shumulihi al-ashia'*).[67] That is, all that follows in Sadra–space, time, things, even the intellect of the philosopher–is derivative of Being.[68] Quiddities or *mahia* are secondary. They are a "shadow" of the act of being, or existence itself, as Jambet puts it.[69] Nevertheless quiddities–like books, persons, and murals–are what Sadra understands to be "modulations" of Being. The "modulation of being," Rizvi's translation of the Sadrian *tashkik* in the context of Being, conveys the latter's "sense of unity with gradation and most importantly, intensity."[70] So there is a generalisation of the mystical notion of theophany here, where not just a Shah or Emperor, but the whole unfolding of prosaic reality participates with the Oneness of Being (*wahdat al-wujud*). All things are greater or lesser emanations of the One, according to their intensity. Finally, modulation of being extends also to cognition and perception. The idea of essences emerges in the mind as a description of a reality consisting of modes within a singular modulating existing. True knowledge, however, is an illuminative realisation of being "immediately present to one another" within the unfolding of the One. "True knowledge resides in the direct experience of objects of knowledge."[71]

AFTER REPRESENTATION

Let me underline what I take to be two key implications of the above for how we approach the Iranian mural scene. My suggestion is that we allow ourselves to be struck by these murals as pictorial exercises in "modulating" space. I emphasise caution at the outset. With Didi-Huberman, we ought to come to

64 Necipoğlu, 46. For a contemporary example of an alternative ethical practice enacted through painting, see Kenneth George, "Ethical Pleasure, Visual *dzikir*, and Artistic Subjectivity in Contemporary Indonesia," *Material Religion* 4, no. 2 (2008).

65 Necipoğlu, 23.

66 See Sajjad H. Rizvi, *Mulla Sadra and Metaphysics: Modulation of Being* (London: Routledge, 2009); Christian Jambet, *The Act of Being: The Philosophy of Revelation in Mulla Sadra*, trans. Jeff Fort (New York: Zone, 2006). I directly observed Sadr being taught as the key theoretical figure at the Islamic School of Art, an interdisciplinary school for research and studio arts attached to the religious seminary in Qom.

67 Mullā Ṣadrā, *The Book of Metaphysical Penetrations (Kitāb al-Mashā'ir): A Parallel English-Arabic Text* trans. Seyyed Hossein Nasr, ed. Ibrahim Kalin (Provo, Utah: Brigham Young University press, 2014), 6, 9. I have slightly modified S.H. Nasr's translation.

68 Jambet, *Act of Being,* 22.

69 Jambet, 77.

70 Rizvi, *Mulla Sadra,* 40.

71 Rizvi, 89–90. See also Jambet, *Act of Being,* 39.

these murals with a "gaze that would not draw close only to discern and recognise, to name what is grasps at any cost." Instead, with a "suspended attention," we "abstain from clarifying everything immediately."[72] This then is my first point: *the murals insist that what we see of them is not equivalent to insight*. By playing not just with perception but with space, the murals refuse attempts to make them available. My second point follows from this: we encounter these murals as *things that participate in Neoplatonic space, and therefore as mediums for our own participation*. Didi-Huberman's project sought to allow for paradox in the image, the paradox of the invisible God made flesh and the foolishness of rendering such an impossibility in paint.[73] Yet if the paradox of the Incarnation imprints itself on the history of the Western art tradition, the same cannot be said of the Islamic tradition.[74] In place of a constitutive paradox, my suggestion is we allow the murals to participate in the unfolding of Being as a kind of grand theophany. Clearly, I cannot substantiate such a claim sociologically or historically at this point. The test will be whether my account of the "modulation of being" can hold our gaze and elicit an appropriate response as we approach the murals. But these implications go to sovereignty itself. If possession is nine tenths of the law, then here we have cement surfaces—the erstwhile billboards of the sovereign—whose wiggling and precipitous rising-up disputes against their own availability.

I introduced earlier a triptych mural dominated in its two top panels by the figures of Iran's former and current Supreme Leaders (fig. 2). Standing above the street, the figures monitored the passing seminarians and pilgrims as synecdoches of a spatialised sovereignty. Yet as one disembarks from a taxi, or crosses the nearby bridge, it is the lower panel that catches the eye. Significantly smaller than the other murals, a trompe l'oeil anteroom recedes at eye level, its marble floor just a short step off the pavement. Blue skies and fluffy clouds again tempt us through a door and two side windows. Again, there are doves perched on a small bench within the anteroom, upon which a pair of crutches have been haphazardly abandoned. In his rapture the martyr has also left behind a single slipper at the threshold of the door left invitingly ajar. It is an effective illusion; the anteroom recedes wonderfully just above street level. Yet trompe l'oeil devices do more than tricking us with their perspective, as if the viewer might safely see through the ruse to the real representational purpose. As Manderson puts it, trompe l'oeil devices cause an "aesthetic vertigo" through games of "cat and mouse" that cause "disorientation, distrust, and distance."[75] Moreover, is not this effect only increased by the Iranian murals self-effacement of their own trompe l'oeil

72 Georges Didi-Huberman, *Confronting Images: Questioning the Ends of a Certain History of Art*, trans. John Goodman (Pennsylvania: Pennsylvania State University Press, 2005), 16.

73 Didi-Huberman, *Confronting Images*, 23–26. More expansively see Georges Didi-Huberman, *Fra Angelico: Dissemblance and Figuration,* trans. Jane Marie Todd (Chicago: Chicago University Press, 1995).

74 For one synthetic comparison see the introduction to Erica Cruikshank Dodd and Shereen Khairallah, *The Image of the Word: A Study of Quranic Verses in Islamic Architecture*, vol. 1 (Beirut: American University of Beirut, 1981).

75 Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge: Cambridge University Press, 2019), 213.

devices? The trompe l'oeil device in the oculus mural in Tehran (fig. 3) follows the shape of the building, curving perfectly around the corner as a three-dimensional frame to the sea, pier and human figures. Yet the illusory device throws a painted shadow upon all of these, as if the illusion itself was primary. Similarly, in Qom (fig. 4), the trompe l'oeil archway through which the martyr himself protrudes has a problem of "representational" accuracy. The right side of the archway is in the foreground of the martyr, whereas the left side of the archway is behind him, creating the effect of either an imperceptible warp in the wall or a crude rendition of one of Escher's impossible objects. Standing at a twenty-five-degree angle, the oblique staging of the martyr's shoulders only increases the representational absurdity of the arch.

In a highly suggestive passage differing from much of the literature, Talinn points to the expansive possibilities of trompe l'oeil in the Iranian mural scene.

> The use of the trompe l'oeil technique prevails as if to critique or subvert the realism of the earlier murals and to open up—as trompe l'oeil does—the space of the street into somewhere else; perhaps a total reform(ulation).[76]

Talinn hints at the murals' contortion of the space that the sovereign would purport to possess, even upon the sovereign's own cement canvases. Unfortunately, Talinn does not pursue this opportunity, concluding that murals remain "instrumental to representational transformation."[77] So let me extend Talinn's point, if a little speculatively. The trompe l'oeil devices, I have suggested, work to subvert the certainty with which our eyes would grip them. They refuse to allow our sight to be the same as insight. However, this should *not* be understood as a critique reducible to the Cartesian moment of radical doubt. This should be contrasted with Benjamin's understanding of baroque extravagance as technique emerging from the "triumph of subjectivity."[78] The murals, I contend, are not a trick of the eye or perspective, but a play on space. This is an apophatic moment, not an Enlightenment one. This is a moment of theological humility as we come across the face of the object. We can only say this wall is not exactly solid, this gateway is not fully available, this paint is not a decoration. The illusory technique amounts to what Damisch calls a "negation"; of the building, of its concrete render, of our knowledge.[79]

Consider the evasiveness of the mural materials, the way that the

76 Talinn, *Contemporary Iranian Art*, 87.

77 Talinn, 89.

78 Benjamin, *The Origin of German Tragic Drama*, 234–5.

79 Hubert Damisch, *A Theory of /Cloud/: Toward a History of Painting*, trans. Janet Lloyd (Stanford, California: Stanford University Press, 2002), 1. Damisch has illusionistic technique tracing the challenge to Aristotelian metaphysics presented by Galilean astronomy and associated developments. I am suggesting that mural techniques in Iran can do the reverse, by challenging modern sovereignty through a neo-Aristotelian Shia idiom. Damisch, I think, would allow for this, as figures he argues can act as either "integrators'' or "disintegrators" operating to "[guarantee] the unity of the representation" or "to call into question . . . the coherence and consistency of a syntactical ordering." Damisch, *A Theory of /Cloud/*, 185.

boundaries between ornament, figure and material are blurred to the point of breaking. Shades of paint are indistinguishable from the render of concrete beneath them. Where does the colour of the concrete begin and its painted cover begin? Patterns scrawl over the brickwork above the gateway anteroom, but do they adorn the trompe l'oeil or the bricks that surround it? Does the epigraph on the crown of the buildings (a common feature on Iranian apartment buildings) mark the illusory wall or the building itself? Elevator and service shafts, the formwork of bricks, protrusions of built concrete, and windows, all of these lend their form to the illusion of the frames nestled inside them. Yet on the road to Pardisan (fig. 4) the artist has added texture by co-opting three sets of windows as the exposure panels on the film reel. But matching the reel's descent down the left hand third of the mural, a matching set of windows has been painted on the right side, including the illusion of a shadow and a slight overlap of the represented archway. What then is building material and what is ornament? Beyond even the built environment, the murals even integrate the space around them into their vortex of perceptual instability. As we gaze through three of the paradise gateways, our eyes do not meet some other worldly space . . . but in fact blue sky, the same relentless Iranian sky above and painted blue sky below.

It is my contention that the visual and material instability of the murals decreases their availability to both the sovereign and the observer. They are materials that pivot, dodging our attempt to make them objects. I further suggest that their instability rehearses the "intensity" and "modulation" of Being itself, the unstable participation of all things in the One. I noted earlier the scratchings of *nastaliq* around the archway behind the giant figure of Khomeini (fig. 1). Taken together with the red patch or "whack" of inexplicable ochre behind Khomeini,[80] and the grey rubbing around his fingers, these disfigurations of the wall's colour call attention to the wall itself, its wall-ness as it were, and just so to the *problem* of the representation of a wall. Like a chip in a pane of glass, the murals call attention to the fragility of the shimmering material in which they participate.

The temptation through all of this has been to read the murals soteriologically, their trompe l'oeil gateways as symbols pointing to the heavenly fate of the martyrs. Yet the Shia mystical tradition is very much concerned with the immanence of the eschaton in everyday practice and piety.[81] In this light it is worth noting that doves do not only represent martyrs in the Persian tradition but can also function as intermediaries between worlds. Thus the Imams, the saint-figures of the Shia tradition, already at the highest mystical station themselves, were able to communicate with birds.[82]

80 Didi-Huberman describes the "pigmentary white of the background, which comes to possess us" as we enter the cell containing Fra Angelico's *Annunciation*. "It strikes our eye," he says, it is "a very concrete *'whack'* [pan] *of white*." The translator notes that *pan* also connotes a wall or patch. See Didi-Huberman, *Confronting Images*, 11, 17.

81 See for example Henry Corbin, *En Islam Iranien: Aspects Spirituels et Philosophiques. Tome 1.*, 4 vols., vol. 1 (Paris: Gallimard, 1972); Mohammad Ali Amir-Moezzi, *The Spirituality of Shi'i Islam: Beliefs and Practices* (London: I.B. Tauris; Institute of Ismaili Studies, 2011).

82 I thank my interlocutors in Qom for pointing out the polyvalence of the dove motifs. On the mystical capacities of the Imams, see Muhammad Ali Amir-Moezzi, Mohammad Ali Amir-Moezzi, *The Silent Qur'an and the Speaking Qur'an: Scriptural Sources of Islam Between History and Fervor* (New York:

Furthermore, the ability to "see" the inner character of other persons is considered a chief attribute of Shia mystics, to whom the evil person will be seen as he really is, for example as a wolf. I note also that the doves in the murals do not occupy heavenly space. Rather they fly towards or even perch ambivalently outside. Recalling Sadra's account of a modulating but singular reality, the point here is that we ought to allow for motifs like doves to participate in this reality as something more than representations.

Instead of reading symbols of martyrdom, then, the idea is to encounter in murals their own participation in Being. I suggest that the motifs in our murals, and indeed the materiality of the murals themselves, rehearse their status as participants in a theophany. That is, they function to mediate the material and spatial approximation to God insisted upon by Mulla Sadra. And "seeing" the dove as not merely a symbol but as a participant in the One, or striking upon the insight that we are "immediately present to one another," is to encounter in Rizvi's terms "true knowledge" itself. This is what the Shia tradition calls "presential knowledge" (*ʿilm al-hudhuri*), where knowledge subsists not in the copying of the form of objects into the mind, but in the direct experience and achievement of unity with erstwhile objects. Is this not rehearsed in the prosaic elements of the murals themselves? Like the doves, the things in the murals stand across worlds. Crutches lie on the threshold in the anteroom. One slipper has entered the gate already. The film reel extends downwards, *from* the other side into the material of cement and paint, and like a carnivorous plant, it sits poised ready to snap back. The pier extends upwards, and the boy reaches further, perhaps to say goodbye to the martyr, but perhaps too as an aspiration. And does not the mural itself invite participation? The gateway may refer to the fate of the martyr. Just so, for the one with the insight to doubt the finality of the paint that he sees, the mural *is* a gateway.

Is this space available to the sovereign? Given the excess of semiotics embedded in these images, in their spatial shifting and instability, what are the implications for a theory of sovereignty as semiotic mastery? And what precisely is the relationship between the representational function of the Iranian mural arts, a function so extensively accounted by Karimi, Gruber, Rolston, Talinn and others, and the limits in the representational economy that I have discussed here? Significant sociological and ethnographic work would be needed to uncover the spatial polyvalences in Iranian public space, including the implications of Ayatollah Khomeini's role and image as a mystic.[83] What kind of availability might these murals have if they are not available to the sovereign subject? At the very least the problem of these images is a reminder of the political and aesthetic dynamism of the Shia tradition. What is interesting is that this dynamism shows up even on canvases where the Iranian Republic has all the apparent representational initiative, even where an aestheticised politics aims precisely to encompass the whole of

Columbia University Press, 2016), 113.

83 Flaskerud has studied at depth the pietistic use of smaller devotional images in Iranian communities. But to properly consider the issues I have raised here it would not be sufficient to assume or presuppose, like Flaskerud, the semiotic functioning of art. See Ingvild Flaskerud, *Visualizing Belief and Piety in Iranian Shiism* (London; New York: Continuum, 2010).

Shia history with its own image. Yet this speaks, as I have argued, not so much to the weakness of the sovereign, but to the stubbornness of images. It would seem that the aura is neither lost in modernity nor entirely captured with the aestheticizing programmes of the state.[84]

CONCLUSION

Chelkowski and Dabashi recount the Iranian regime's guidance for the production of murals. I quote from their translation at length.

> Under all circumstances the effectiveness of the revolutionary mural must be kept clearly in mind. Vague, indirect and superfluous paintings should be avoided at all costs . . . The location of the murals must be selected carefully so that a passerby can clearly see the complete picture. But the ultimate objective should be brevity of message, deliberate and emphatic brush strokes, clear cut shapes and brilliant colors. Every mural should be framed by solid colors, selected from one of the dominant colours of the picture.[85]

A regime with such a representational mastery of itself as envisaged here would be a formidable edifice indeed. Substituting the terms "mural" and "painting" for "legislation" and "law," we could not find a better account of the modern nation-state's legal positivist mechanisms of governance. Both law and images are representations of the sovereign, pictures capable of carrying clear and stable referents. But in Benjamin's account of the German baroque, the sovereign prince is stripped of his power of decision through an anthropology and a history devoid of redeemer or telos. Baroque allegory, herein, is an ostentatious façade paradoxically calling attention to the "bare state of creation" wherein subsists newly empowered subjects.[86] I have suggested that the murals call attention not to the subject, but to the instability of space itself. And if there were imperfections in the façade of the image of the nation-state, imperfections performed by techniques of perspective illusionism, what would this say about the sovereign itself? One would have to wonder, finally with Benjamin, whether there might be no sovereign at all.[87]

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84 See Georges Didi-Huberman, "The Supposition of the Aura: The Now, the Then, and Modernity," in *Walter Benjamin and History*, ed. Andrew Benjamin (London; New York: Continuum, 2005).

85 Translation by Chelkowski and Dabashi, quoted in Chehabi and Christia, *Art of State*, 4.

86 Benjamin, *The Origin of German Tragic Drama*, 70–71, 81, 234–35.

87 See Samuel Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt," *Diacritics* 22, no. 3/4 (1992). Or perhaps Benjamin is more ambivalent here, suggesting that power has been annexed by another figure in the spirit of Nietzche and Machiavelli, the "sovereign intriguer . . . all intellect and will-power." See Benjamin, *The Origin of German Tragic Drama*, 95–104.

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Cover text – Walter Benjamin, *The Arcades Project*, 476.

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