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Review Essay

On the Stories We Tell

*By Kate Miles**

Judgment at Nuremberg. Directed by Stanley Kramer. Roxlom Films; United Artists, 1961.

The Man Who Shot Liberty Valence. Directed by John Ford. Paramount Pictures, 1962.

Utu. Directed by Geoff Murphy. Utu Productions; New Zealand Film Commission, 1983.

Rabbit-Proof Fence. Directed by Philip Noyce. Miramax Films; Australian Film Finance Corporation, 2002.

International law tells stories. It tells stories about itself and its actors. There are global-scale stories about states and wars and treaties, and, on a human scale, about individuals. There are histories of international law that tell of the establishing of law and order and justice. There are tales of its authority, legitimacy, and beneficence. At times, there are explicit references to the rule of law. Notions of "peace through law" promoting international arbitration remain prevalent. There are so many stories told of international law. Those recounting its "goodness," its "righteousness." And there are the more resigned, disappointed stories told through the questions asked, such as, whose international law is it? There are accounts of the co-option of international law. Reports of its violence, brutality, and oppression. There are those who are disillusioned, now unsurprised at its indifference. Through word and text, through cases and principles, through argument and analysis, stories of international law are projected, constructing narratives, cementing roles, perpetuating myths. This is done also through the visual. Architecture, objects, photographs, paintings, sculpture, television, documentaries, and film are forms of visual international law that tell profound stories. Film—a powerful medium. Film—the focus for this exposition. This essay is a meditation on the stories told of, through, and about law, justice, and international law in four particular films, bringing them into conversation with each other and situating them within current circumstances of politico-legal turmoil.

There is much to be gained from reflection on films from eras not of our own. It seems particularly timely, in an environment in which international regulatory frameworks are increasingly porous, to consider films that have spoken of rule of law, legal orders, and

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international law and draw on their cultural statements to rethink the approaches of and to international law today. With this in mind, I was asked to use two deeply influential films from the 1960s as a point of departure—*Judgment at Nuremberg* (1961)[1] and *The Man Who Shot Liberty Valance* (1962)[2]—as films that address issues of concern to international lawyers. I then added into the mix two films from my part of the world—*Utu* (Aotearoa New Zealand, 1983)[3] and *Rabbit-Proof Fence* (Australia, 2002)[4]—to layer the conversation with histories of law and colonialism that reverberate through the settler colonial societies of not only Aotearoa and Australia, but North America as well.

Each film has at its core a central narrative on law. *Judgment at Nuremberg* reaffirms "triumphant" international law and lionizes the rule of law. These appear as two separate but linked propositions. Explicitly on the rule of law, the film asserts that the flaw lies with the German judges who abandoned the rule of law, but its subsequent application by an American tribunal cures that aberration. And, implicitly with international law as the backdrop to the trial, the film asserts that international law has already "triumphed," procedurally, through the establishment of the tribunal and, substantively, through the bringing of charges reflecting the shift that occurred after World War II toward the international criminal responsibility of individuals. In *The Man Who Shot Liberty Valance*, the rule of law ostensibly prevails, and yet its false premise is also asserted, exposing the pretense that order is achieved solely through the operation of the law. The film points to the violence that is inherent in the birth of a legal order, the replacement of one system with another, and the origin myths that are used to sanitize those events, an analysis that is applicable to the establishing of the international legal system as well as domestic legal orders. And *Utu* and *Rabbit-Proof Fence* speak of the violence wrought by the law of an invading state, that process of colonization having been facilitated by international law.

Each core narrative is, of course, shot through with overlapping themes and complexities and sub-stories specific to the subject and characters of the individual film. However, each film engages, in one way or another, with the uncomfortable realities of the foundation of legal orders and the essential role of power and violence in their establishment.[5] They point to choices made by individuals during those processes and examine questions of responsibility, accountability, and consequences. They articulate the systemic deceit that is involved in preserving the myth that law constructs order out of chaos without the assistance of power and violence. And, although represented in distinct ways, each film explores the dual foundation myths of society and of law itself, conflating, or in the case of *Utu* and *Rabbit-Proof Fence* exposing the conflation of, the concept of "civilization" with law. The implications of these ideas are drawn out still further when these films are juxtaposed. It becomes clear that, although they examine similar themes, their responses are very different. Where *Judgment at Nuremberg* equates "good" legal systems with "civilized" societies and asserts that the non-adherence of individual judges to the rule of law during the Third Reich

[1] Stanley Kramer, *Judgment at Nuremberg* (1961) [Film].
[2] John Ford, *The Man Who Shot Liberty Valance* (1962) [Film].
[3] Geoff Murphy, *Utu* (1983) [Film].
[4] Phillip Noyce, *Rabbit-Proof Fence* (2002) [Film].
[5] See for a discussion of this point for *Liberty Valance*, Russell L. Dees, *Power, Violence, and the Paradox of Founding in John Ford's The Man Who Shot Liberty Valance: An Arendtian Approach*, 6 NORD. J. L. & SOC. RSCH. 57, 63–64 (2015).

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was an aberration righted by the application of American rule of law in the trials depicted in the film, *Utu* and *Rabbit-Proof Fence* confront the reality of the legal system itself as the malign force. In those two films, far from being the savior promised in the myths, the law and its enforcers were, instead, the source of persecution and injustice.

These four films tell visual stories of law that are anchored in specific circumstances. And they are all also, inescapably, products of their time. *Judgment at Nuremberg* and *Liberty Valance* are undoubtedly making statements on law through the lens of 1960s' America; *Utu* on Aotearoa in the 1980s; and *Rabbit-Proof Fence* reflects the socio-political climate of the Australia of the early 2000s. But the fundamentals of such stories are not unique to one time or place. They are concerned with the birth of legal orders and the displacement of legal regimes, communities, societies, and peoples. They are about the exercise of law and control and power and violence in those processes. Triumph of one set of interests involves denial or oppression of another. What is also inherently part of those transitions is the suppression of particular stories, the promotion of the myth of establishing law without violence, and the intwining of narrative with historical memory to construct official stories. These four films speak to that, communicating through the cinematic medium their visual messages on the rule of law and its foundation myths.

Each film also draws those broad themes down into a very human scale to examine the morality of choices made during periods of upheaval, tyranny, or oppression, questions with which individuals have had to contend throughout history. And those timeless messages would also seem to speak directly to the present moment. Currently, the fragility of democratic political systems is being felt again; law is being used to enable authoritarianism; again, there are constitutional contests in which judges choose whether or not to curtail executive action that violates the rule of law; states are invading states; international obligations are being ignored; atrocities are being committed against civilian populations; and the role of power rather than rules is being exalted in the practice of international law and relations. It should give pause for thought. It should cause reflection on the role of law and legal orders. It should cause reflection on the visual international law that currently acts upon us. And it should cause us to consider the stories that are currently being constructed on both the rule of law and international law through photograph, film, television, newsreel, documentary, and now increasingly also through social media. What stories are being told now?

I. Rule of Law as Hero

At first glance, the main characters in *Judgment at Nuremberg* appear to be the German judges on trial, the American prosecutor Col. Tad Lawson and German defense lawyer Hans Rolfe, and the American Chief Trial Judge, Dan Haywood, played by Spencer Tracy. They are fictional characters, although the film is based on the Judges' Trials of 1947, one of the twelve Nuremberg Military Tribunals conducted by the United States military.[6] In fact, it is the rule of law that is the central character in the film. *Judgment at Nuremberg* is a visual

[6] The United States of America vs. Josef Altstötter, et al., *Case No. 3, Military Tribunal III*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council 10 (Dec. 4, 1947). See also for a discussion on all twelve of the Military Tribunals, Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (2011).

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vehicle for the affirmation of the rule of law, the visuality of the medium, and the immediacy that generates, being a powerful mechanism for its communication. At the same time, in addition to that primary messaging, the film inherently also supports the closely related but distinct project of international criminal justice via individual responsibility prosecuted in courts and tribunals, reinforcing longstanding claims made by international law to objectivity, authority, universality, and virtue.[7] The use of fictional people and dialogue in an account of real events, rather than adhering strictly to the facts, allows the focus of the film to be trained toward projecting the overarching themes of the piece, to the story constructed by the director and screenwriter as a compelling, emotional "hook" to capture the audience.[8] *Judgment at Nuremberg* follows this approach in order to build the rule of law as the main character of the film. It takes the viewer on a journey, a character arc,[9] for the transformation within the story of the rule of law, in this instance, set against a backdrop of international law. The audience first meets "inadequate" rule of law. Having faced a "test," the rule of law is found to be deeply, disturbingly wanting. The viewer is shaken, disillusioned; their belief in the rule of law dismantled. The rule of law then goes through a process of redemption, rehabilitation, and resurgence, so that, in the finale, the audience is uplifted by encountering "righteous," "triumphant" rule of law and the sense that it was not, after all, the rule of law that was, nor ever had been, flawed. Rather, it was the weakness, the lack of moral fortitude, of individual people.

The prosecutor in the film, Col. Tad Lawson, refers to this principal theme with the statement: "The case is unusual in that the defendants are charged with crimes committed in the name of the law" (Kramer, *Judgment at Nuremberg*). This assertion is foundational for the character arc, presenting at the outset "inadequate" rule of law that permitted crimes to be lawful.[10] In this way, *Judgment at Nuremberg* initially disrupts the audience's faith in the inherent righteousness, steadfastness, and security of the law. The central destabilizing premise is that the integrity of judges is not assured and legal systems are fragile—both are susceptible to human frailties and cannot be relied upon to protect society from tyranny—and that the rule of law is insufficient to protect against those human failures. Ultimately, however, the film then reassures the viewer that the system is not, in fact, unreliable; it was just those particular judges who were flawed. And the rule of law will prevail. This is made explicit in the scenes where Chief Trial Judge Haywood finds the judges guilty and then speaks with Ernst Janning individually in prison. The following exchange ensues:

[7] For where I have set out the basis for arguing that international law makes claims to objectivity, authority, universality, and virtue, see Kate Miles, *Painting International Law as Universal: Imperialism and Co-Opting of Image and Art*, 8 LONDON REV. INT'L L. 367 (2020).

[8] See for a discussion on this, Maria Hinterkörner, *"The Great Scene That Never Happened" – A Screenwriter's Techniques of Blending Fact and Fiction in Creating a Compelling Character Arc in Biopics*, 10 EUR. J. LIFE WRITING 1 (2021).

[9] See for a discussion on character arc, *id*. *See also* STEPHEN V. DUNCAN, GENRE SCREENWRITING: HOW TO WRITE POPULAR SCREENPLAYS THAT SELL 6 (2008); *see further* BRIAN BOYD, ON THE ORIGIN OF STORIES: EVOLUTION, COGNITION, AND FICTION (2009).

[10] This is, of course, the essence of the discourse between Lon Fuller and H.L.A. Hart on natural law and positivism and the formal and substantive conception of the rule of law articulated in the *Harvard Law Review* in 1958: H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); and Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). This debate is discussed specifically in the context of *Judgment at Nuremberg* in: STANLEY FISH, LAW AT THE MOVIES: TURNING LEGAL DOCTRINE INTO ART 64–68 (2024).

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> Janning: Those people, those millions of people .... I never knew it would come to that! You must believe it. You must believe it!
>
> Haywood: Herr Janning. It came to that the first time you sentenced to death a man you knew to be innocent. (Kramer, *Judgment at Nuremberg*.)

At which point, having again reiterated the responsibility of Janning and the other German judges, Haywood turns his back on Janning and leaves. The absolution of the rule of law is also clear in the entirely fictional speech of Janning who blurts out a "confession" earlier in the film in the courtroom. Fictional in the sense that no such "confession" was ever made by any defendant during the actual Judges' Trial of 1947, Janning declares that he and the other judges were aware of the existence of the concentration camps and that they were complicit in the activities of the regime:

> Janning: I am aware. I am aware! My counsel would have you believe we were not aware of the concentration camps. Not aware. Where were we? Where were we when Hitler began shrieking his hate in Reichstag? Where were we when our neighbors were being dragged out in the middle of the night to Dachau? Where were we when every village in Germany has a railroad terminal where cattle cars were filled with children being carried out to their extermination! Where were we when they cried out in the night to us. Deaf, dumb, blind!
>
> Hans Rolfe: Your Honor, I must protest!
>
> Janning: My counsel says we were not aware of the extermination of the millions. He would give you the excuse: We were only aware of the extermination of the hundreds. Does that make us any the less guilty? Maybe we didn't know the details. But if we didn't know, it was because we didn't want to know. (Kramer, *Judgment at Nuremberg*.)

In this way, the journey the audience is taken on reveals that it is, unequivocally, the individual German judges who are on trial and, indeed, both morally and legally culpable, not the rule of law, nor international law. Janning's speech is key to the film's narrative as it articulates the blamelessness of the rule of law in the failure to protect against genocide. It does, however, have an artificial ring to it. These are not the authentic words of a remorseful German judge at a Nuremberg Military Trial—because there were no such words spoken during the real trials. They are the words an American audience needed to hear from an imagined German judge on trial for his part in the atrocities of the Third Reich.[11] It is manufactured contrition. The speech was, of course, fabricated for dramatic purpose to outline the affronts to the rule of law as well as providing a moment of remorse for the fictional judge and acknowledgement of responsibility and guilt, an essential component of the character arc for the rule of law story. It also implicitly paints the trials in a favorable light as righteous and justified rather than as a form of "victors' justice," which would itself be contrary to the rule of law—Janning's "confession" serves as confirmation for the audience that the decision to hold such trials was legitimate and morally virtuous. So, although the

[11] See the discussion of Janning's "confession" in: Ulrike Weckel, *The Power of Images: Real and Fictional Roles of Atrocity Film Footage at Nuremberg*, *in* REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL NARRATIVES, AND HISTORIOGRAPHY 221, 236–37 (Kim C. Priemel & Alexa Stiller eds., 2012).

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film raises the specter of interrogating the morality, function, and limitations of the rule of law, that does not transpire; there is no real challenge to the idea of law or its virtue.

Far from it, in fact, as the film professes that the savior is the rule of law—the "Hero" is the "Rule of Law." Some of the glow from that hero-framing also rubs off onto the depiction of international law, the inherent "winner" in this attempt to normalize prosecuting for individual criminal responsibility in the commission of international crimes. The film depicts the "rebirth" of a legal order, replacing the "bad" legal system of the Third Reich with the '"right" legal order, the one that should have been in place all along. One that is grounded in the rule of law and brought about by the application of American justice, represented in the unswerving, uncompromising figure of Chief Trial Judge Haywood. So, the audience can breathe easy—the "bad" legal system was an aberration; all that was needed was "good" judges, who abided by the rule of law. The lionizing of the rule of law is complete and that next level of deeper, more complicated analysis is side-stepped. Uncomfortable conversations about the nature of the rule of law, who it serves, and its dependability, although flirted with, are ultimately avoided, leaving the viewer with a somewhat one-dimensional account of the rule of law. Uncomfortable questions such as: what about when the "bad" legal system is not an aberration but *is* the system? What about the legal system that usurped, prevailed, stayed, normalized, and now asserts that it is governed according to the rule of law? Such as in settler colonial societies? Which include Australia, Aotearoa, Canada, and the United States of America. This is the premise that is presented in *Utu* and *Rabbit-Proof Fence*. These two films center precisely those uncomfortable questions on the rule of law that were carefully side-stepped by *Judgment at Nuremberg*.

So, the film's engagement with questions on individual and collective responsibility answers this with a simplistic focus on the personal choices of the judges. What *Judgment at Nuremberg* also innately does as a film is to support the international criminal law project as realized through the vehicle of trials for mass atrocities. Visually, the film used several techniques to do this, including emulating the style of documentaries.[12] Although the film clearly departs from historical reality and writes in personal conversations between invented characters, it was shot in black and white film, aspects filmed on location in post-war Germany, with a tight focus on "talking heads" much of the film taking place in the courtroom, which was designed to replicate the actual courtroom of the Judges' Trial, and, significantly, its presentation of atrocity film.[13] In particular, the use of actual film from the concentration camps inside the dramatization of the trials lends authenticity to the fictional account and, in so doing, amplifies the shock experienced by the audience when confronted with a visual record of the atrocities.[14] There are questions around the extent to which the inclusion of atrocity footage and *Judgment at Nuremberg* itself contributed to the shaping of perceptions and constructing of historical memory around the actual events.[15] Weckel comments that the power of the visual has its limitations even in such extreme circumstances, citing the lack of remorse expressed by perpetrators, the inability to shift entrenched views, and the continued failure of the international community to prevent

[12] Jonathan Hafetz, *Third Annual Symposium on Pop Culture and International Law: Judgment at Nuremberg—Capturing the Complexities of Mass Atrocity Trials on Film*, OPINIO JURIS (Nov. 1, 2023).

[13] *Id.*; Weckel, *supra* note 11, at 235–39.

[14] Weckel, *supra* note 11, at 235–43; Hafetz, *supra* note 12.

[15] Hafetz, *supra* note 12; Weckel, *supra* note 11, at 235–43.

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genocide from occurring.[16] Those visual components certainly served an important role in the creation of the character arc of the rule of law in *Judgment at Nuremberg*. However, although the rule of law is triumphant in the story, there is a footnote at the very end of the film that quietly lets reality in—none of those sentenced in the actual trials were still in prison at the time of the film's release:

> The Nuremberg trials held in the American zone ended July 14, 1949. There were ninety-nine defendants sentenced to prison terms. Not one is still serving his sentence. (Kramer, *Judgment at Nuremberg*.)

So, on one reading, realpolitik prevailed. It runs as a counter to the film's story. Or, alternatively, was it simply that flawed individuals, who abandoned the rule of law, were back in positions of authority? So that once the system was no longer under the scrutiny of American rule of law, it reverted? The footnote also inherently refutes stories that are told in international law, those promising accountability and justice for victims of international crimes. Ultimately, the footnote leaves the audience of the film with a jarring resonance of non-alignment between the stories told and the reality experienced.

II. Law's Foundational Myths: Displacement, Violence, and Power

The rule of law is also presented as the hero in *The Man Who Shot Liberty Valance*, but it has a more complex manifestation than *Judgment at Nuremberg*. It is more equivocal, presenting the triumph of the rule law while at the same time revealing to the audience the events that actually occurred, the compromised morality of the lawyer, and therefore also of the rule of law he represents, and the violence that was needed to establish order rather than solely through the force of law. The film raises questions that were examined by Hannah Arendt on foundational myths of law and societies and the paradox of founding violence that must inherently be wrought in any new legal or social order.[17] More widely, Arendt explored the relationship between power, law, and violence, characterizing settings where violence is the controlling dynamic as a "pre-political" state or "state of nature." Observing that political forms of organization are not a given, she asserts that violence is inevitable.[18] In the midst of constructing any new political and legal order, violence is inescapable in the establishing of those replacement regimes. And origin myths implicitly reiterate and legitimize the message that violence embodies the destruction necessary to bring about "good" political change, "salvation" even.[19] What follows is then a form of collective amnesia and mythologizing of those violent origins so as to erase the brutality and sanitize the process—in other words, the stories a society tells itself in order to live with itself.[20]

The United States of America illustrates this with its "wild west" identity narratives of the "frontier" and "pioneers" that romanticize colonial expansion and use the archetype of the

[16] Weckel, *supra* note 11, at 241–43.

[17] Dees, *supra* note 5, at 63–64; Hannah Arendt, On Violence (2023 [1969]); Hannah Arendt, On Revolution (1990 [1963]).

[18] Arendt, On Violence, *supra* note 17, at 51–56; Arendt, On Revolution, *supra* note 17, at 19–20.

[19] Robert B. Pippin, *What Is a Western? Politics and Self-Knowledge in John Ford's* The Searchers, 25 Critical Inquiry 223 (2009).

[20] *Id.* at 227.

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"Hero," the tough, rugged individual, who operates outside the confines of rules pursuing the "greater good" and whose character and skills have been formed through living in an unforgiving physical environment.[21] The film genre of the American Western is born of and perpetuates this mythmaking. It embodies the particular cultural narrative of pioneer struggle as a virtue, but it also presents another layer, that of bringing law to the frontier town. The model involves versions of the "lawman," whether that is the sheriff or some other figure symbolizing the rule of law, against the "outlaws" or those representing the "old ways," setting up a clash between two modes of existence. It is framed as a form of pitching two modes of "law" against each other—the "law" of the wild west and the new written law from the state—as the regime replacement of this origin story.[22] And the establishing of institution-based law and governance is offered as part of a progress narrative.[23] Within this model, the American Western depicts the imposition of law ultimately triumphing over lawlessness and rule by brute force, and, in this way, denotes the "civilizing" of chaos, signifying the birth of a new political and legal era, and, at a metaphoric level, represents the process of American modernization and achieving of statehood.[24]

The Man Who Shot Liberty Valance is particularly interesting for its multilayered approach to such messaging. Not only does it engage with, and rely upon, frontier and "civilizing" foundational myths, but it also presents an unsettling contradictory proposition on the role of law in regulating society. The film appears to endorse the idea that the rule of law brings order to chaos, while, at the same time, exposing the fallacy that this can be achieved without the use of violence. It would suggest that acts contrary to the rule of law are necessary to achieve the rule of law. Producing a state of cognitive dissonance, it also, at a core level, then, leads to questions on whether the authority of law can be sustained without the implicit reinforcement that is provided by violence. And to come to such an understanding inevitably destabilizes faith in the rule of law at a fundamental level and the authority of law more generally.

In discussing Arendt's work on the paradox of founding violence in the context of *The Man Who Shot Liberty Valance*, Pippin comments:

> the establishment of any legal order, of whatever doctrine, even liberal-democratic and humanist, must be illegal, violent, unjust, and brutal, and a society must find a way to represent that fact to itself as a national memory. It usually does this, as in this [movie], by lying, by a distorting mythologizing.[25]

In the film, the lawyer, Ransom Stoddard, played by James Stewart, comes to the town, Shinbone, symbolically bringing law and order to the lawless.[26] Victorious over the anarchy and rule by violence embodied in the figure of Liberty Valance, Stoddard, and his success in

[21] Richard Slotkin, Regeneration Through Violence: The Mythology of the American Frontier, 1600–1860 (1973); Christine Bold, The Frontier Club: Popular Westerns and Cultural Power, 1880–1924 (2013).

[22] Michael Böhnke, *Myth and Law in the Films of John Ford*, 28 J. L. & Soc'y 47, 47–48 (2001).

[23] *Id.* at 48.

[24] *Id.*; Dees, *supra* note 5, at 69–72; Fish, *supra* note 10, at 37–38; Robert B. Pippin, Hollywood Westerns and American Myth: The Importance of Howard Hawks and John Ford for Political Philosophy 62–63, 75–76 (2010).

[25] Pippin, *supra* note 19, at 103, 227.

[26] Dees, *supra* note 5, at 60–61; Pippin, *supra* note 24, at 62–63, 75–76, 80–81.

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defeating Valance, ostensibly represent the triumph of the rule of law. Law and order neutralized lawlessness—but actually not. Stoddard resorted to a gunfight, not the law, to resolve the issues. In so doing, he adopted and validated Valance's framing, worldview, sense of grievance, and mode of conflict resolution. For this reason, not even on the story's own false narrative that the lawyer won the shoot-out and killed Liberty Valance, does the rule of law prevail. Rather, the "state of nature" wins, its violence and brute force employed. In order to overcome this contradiction, that act of violence and breaking of the law requires presenting as a form of upholding the law, the re-framing, lying, mythologizing to which Pippin refers.[27] Such is the process of creation of origin myths. In *Liberty Valance*, part of this proposition is that the ends justify the means—the bringing of law and order, of "civilization," justifies the violent acts that are contrary to the rule of law.[28] Of course, the notion that the ends justify the means is the antithesis of the rule of law.

These ideas on the lionized violence of origin myths and the innate contradictions within the rule of law have implications for the stories that are told of and within international law. Consider its foundation myths embedded within the construction of Grotius as the "father" of international law providing a cloak of scholarly authority and the perception of depth and coherence, its promotion as a profoundly "good" mode of universal governance assisting with the "civilizing mission" providing a veil of virtue, and its presentation as the end goal for humanity in a progress narrative on achieving a state of law, order, and peace through international adjudication.[29] These stories also perpetuate the obscuring of the violence of the emergence and assertion of European international law as "the" international law and its facilitation of invasion and the imposition of European political and legal orders under colonialism. The methodology involved in such storytelling is not dissimilar to that exposed in *Liberty Valance*. Representations of a lack of violence, assertions of the authority of the ultimately prevailing legal order, and the framing as a "civilizing" force are shared characteristics. *Liberty Valance* makes clear statements that untruths such as these sit at the core of the origins of legal regimes.

International law is no different. Nor should application of those ideas be limited to foundational myths in international law. Rather, the continued reproduction of those dynamics of "justified" violence into the twentieth and twenty-first centuries should also be considered in light of the untruths that are central to the stories told around actions taken ostensibly for "righteous" reasons and under the auspices of international law. It is not difficult to point to relatively recent examples of this—NATO's 1999 use of depleted uranium in its bombing of the former Yugoslavia and its exoneration by the committee established by the prosecutor at the International Criminal Tribunal for the former

[27] Pippin, *supra* note 19, at 227; FISH, *supra* note 10, at 37–38. See also the discussion in: PIPPIN, *supra* note 24, at 80–83.

[28] Dees, *supra* note 5, at 68.

[29] Miles, *supra* note 7; Martine Julia Van Ittersum, *Hugo Grotius: The Making of a Founding Father of International Law*, *in* THE OXFORD HANDBOOK ON THE THEORY OF INTERNATIONAL LAW 82 (Anne Orford & Florian Hoffmann eds., 2016); *see* DOUGLAS STRACHAN, EVOLUTION OF THE PEACE IDEAL (1913); DOUGLAS STRACHAN, NOTES ON FOUR STAINED GLASS WINDOWS IN THE GREAT COURT OF JUSTICE AT THE PALACE OF PEACE, THE HAGUE (1913). See the discussion on the nineteenth century "peace through law" movement in: PEACE THROUGH LAW: THE VERSAILLES PEACE TREATY AND DISPUTE SETTLEMENT AFTER WORLD WAR I (Michel Erpelding, Burkhard Hess & Hélène Ruiz Fabri eds., 2019); views that international arbitration is a peace-making mechanism were expressed throughout THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899, TRANSLATION OF THE OFFICIAL TEXTS (1920).

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Yugoslavia.[30] Or the decision of the United States of America and United Kingdom to invade Iraq in 2003, the use of Resolution 1441 to excuse that unlawful invasion, and the suggestion that this would bring democracy to Iraq and the wider region.[31] These are all decisions made as "official" international law; all choices of someone.

In *Liberty Valance*, the inquiry into the nature of falsehoods and the rule of law is given still further treatment. The film provides the audience with another layer of complexity when it is revealed that Valance was in fact shot by someone else—the character of Tom Doniphon, the gun-slinging advocate of realpolitik, the only individual with the strength and skills to defeat Valance. And so it all rests on a lie, both the fêting of Stoddard and the asserting of the power of the rule of law. Stoddard, whose identity and career revolves around his status as the man who shot Valance, perpetuates the lie. He is complicit in the misrepresentation, actively participating in the falsehood, which, metaphorically, points to the lies that underpin the rule of law.[32] It also again raises the issue of individual choice.

Stoddard's power is based on deceit. As he embodies the rule of law, we need to consider this plot twist as a commentary on the false claims of the rule of law, but claims to what? Its potency? Legitimacy? Its virtue? It is most certainly asserting that the rule of law lies, that it is not at all what it claims to be. So, this might encompass claims to inhabit the core of legitimate legal orders; claims to embody consistency and reasoned, evidence-based judgments; claims to ensure non-violence and due process. To provide a fair trial? To bring law and order? To ensure the absence of vigilante action? Claims, at the very least, that law is not broken in pursuit of law. The assertion that the rule of law lies can be seen in the first layer of deception—the framing of a violent act as the introduction of law and order. But the film moves beyond this to examine a deeper level of deception contained within the concept of the rule of law itself and the networks constructed to sustain it. Stoddard's power is originally achieved through deceit and then maintained by his active, knowledge-based participation in the deceit. So, the rule of law had an act of violence at its origins, which has been perpetuated, infusing through the nature of the concept itself and into its contemporary manifestation. And it is maintained by … whom? Politicians? States? International courts and tribunals? Lawyers? Society?

The concluding scenes of *Liberty Valance* present a far less noble picture of the rule of law than *Judgment at Nuremberg*. The newspaper editor decides not to print the true story of who shot Liberty Valance and conceals Stoddard's decades-long deception. And Stoddard and his wife are seated on the train leaving the town, speaking to each other in an uncommunicative, distant fashion, and it becomes clear that, in a final betrayal, they have not attended the funeral of Doniphon, the man who actually shot Valance, saved Stoddard's life, and who did not at any point divulge the falsehood on which Stoddard's success was based. Dees comments on this, stating that "when the truth is known, the comfort of the legend is

[30] United Nations, International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000).

[31] SC Res. 1441 (Nov. 8, 2002). See for a discussion on democracy promotion as a reason to invade Iraq: Ruairidh Wood, *Promoting Democracy or Pursuing Hegemony? An Analysis of U.S. Involvement in the Middle East*, 6 J. GLOB. FAULTLINES 166 (2020). *See also* Jeffrey Record, *Why the Bush Administration Invaded Iraq: Making Strategy After 9/11*, 2 STRATEGIC STUD. Q. 63 (2008).

[32] Dees, *supra* note 5, at 69–74.

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preferred."[33] The line in the film from the newspaper editor to the journalist makes it explicit: "when the legend becomes fact, print the legend." Several implications can be drawn from this, including that society should not rely on being provided with relevant information or made aware of uncomfortable realities; in a form of infantilizing and control over information flows, those decisions may be made for the population. The message is also that those in positions of power will not destabilize the system that has placed them, and keeps them, in power; they will actively choose deception to avoid any such destabilizing. Those in such positions will, at a fundamental level, seek to maintain the status quo and to maintain the public's faith in the current political and legal order despite the deceit at its core. The justification will be that it is in the public's best interests and that it is, indeed, the preference of the public—people would rather be soothed by a comforting but false "legend" than disturbed by the brutality of reality.

So, *The Man Who Shot Liberty Valance* addresses deception at the heart of the rule of law, the displacement of forms of community organization with others, and the paradox of founding violence.[34] This also speaks to the issues in the films *Utu* and *Rabbit-Proof Fence*. As settler colonial states, Aotearoa and Australia are regulated by legal orders that validated the violence inherent in invasion, colonization, and the displacement of Indigenous political and legal orders.[35] The treatment of these matters in *Utu* and *Rabbit-Proof Fence* also brings the limitations of *Liberty Valance* into the frame. The United States of America is similarly a settler colonial state, but in *Liberty Valance*, the issue of displacement and law and violence is between two settler groups, being the homesteaders and "cattlemen." The violence that has already been wrought against the Native American peoples is unspoken; it does not feature at all in the film.[36] As if it never occurred. This erasure is yet another form of deception. *Utu* engages directly with the conflict between Māori and colonizers during the British invasion and establishing of the colony. *Rabbit-Proof Fence* examines the ongoing conditions and impacts for Aboriginal peoples living under the regime of White Australian governmental authorities and administrators imposed through colonization. Unlike these two films, and although it is unquestionably relevant to the issues with which the American film is concerned, being a meditation on violence and the violent displacement of one community by another, *Liberty Valance* does not address issues of invaded territories, colonization, stolen Indigenous land, and the replacement of Native American political and legal orders with European. Although it exposes the pretense of the rule of law, the film remains limited in its statements by such an omission. And, ultimately, the layers of lying in *Liberty Valance* leave a residue of cynicism and disillusionment at the supposed virtue, power, and even value of the rule of law. The selectivity of the statements in *Liberty Valance* on the legal regime in the United States of America and its origins undermines the strength of its message on the rule of law. Indeed, its presenting of homesteader/cattlemen origin myths and revealing their veiled violence, whilst at the same time avoiding engagement with the founding violence of the United States of America in its own process of colonization, is itself a manifestation of collective amnesia in origin storytelling.

[33] *Id.* at 73. See also similar views expressed by PIPPIN, *supra* note 24, at 85.

[34] Böhnke, *supra* note 22, at 49; Dees, *supra* note 5, at 63–64.

[35] See the discussion on Australia and North America as settler colonial states in: Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006).

[36] Böhnke, *supra* note 22, at 48; Dees, *supra* note 5, at 57, 64.

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Utu and *Rabbit-Proof Fence* paint a very different picture of the rule of law to that of *Liberty Valance* and *Judgment at Nuremberg*. There is no easy answer, glib reassuring, triumphant reemergence, or ignoring of the implications that flow from the fact that the legal regime depicted is operating within a settler colonial society. These two films do not shy away from a conclusion that leads to the destabilizing of faith in law. They confront the viewer with the reality that, in both Aotearoa and Australia, as settler colonial states, the prevailing law is that of the invading force—and with the inexorable understanding that this reality is not confined to the historical setting of each film, but is the contemporary legal and political order in place in each state.

Utu has been billed as Aotearoa's answer to the American Western.[37] It certainly has hallmarks of the genre, adopting standard conventions, such as the role of landscape without specificity of place, the setting in a generic "frontier" town somewhere, wide shots of a column of soldiers, carriages, and carts travelling through a "prairie," and a story centering on a triggering unjust event and revenge.[38] However, unlike *Liberty Valance*, *Utu* is unflinching in its portrayal of the legal framework as the persecutor and of the violence of the origins of that political and legal system displacing that of Māori. The film is set in 1870 against the backdrop of the New Zealand Wars/Ngā Pakanga o Aotearoa, 1844–1872. The central character, Te Wheke, and the plot, are not a strict retelling of one individual's history, but are informed by events involving several key Māori leaders, primarily Te Kooti Arikirangi Te Turuki and Riwha Tītokowaru, both in the context of the New Zealand Wars/Ngā Pakanga o Aotearoa. For this reason, there is a resonance and profound importance to the narrative that stretches beyond the usual fictional tales of the American Western format.[39]

Te Wheke is a complex figure. Initially cooperating with colonial forces assisting as a member of the local militia, he then exacts utu (a concept that encompasses reciprocation, balance, restoration of order, revenge) on soldiers and settlers in retribution for the destruction of his village and massacre of his hapū (subtribe). Later, in separate incidents, Te Wheke also then kills Māori, who have themselves been fleeing the settler colonial forces alongside him, reflecting the, at times, not straightforward relationship between iwi (tribes) during the nineteenth century. Te Wheke justifies all the killings under utu; in colonial framing, that violence places him outside "civilization" and confirms the need for the new "civilizing" legal order of the settlers.[40] Again, of course, this ignores not only the laws of the peoples in place already but also the violence wrought by colonial authorities to establish and enforce that displacing regime. As Nazarian asks: "How, then, does the state's violence distinguish itself from others, and how does it come to legitimize its own vision of law as 'justice'?"[41] It is in those early scenes of the film, in Te Wheke's discovering of his destroyed village and murdered family, that the audience witnesses the moment of Te Wheke's realization that the law, colonial law, the rule of law, does not protect him nor his hapū. The colonial authorities and soldiers who ordered and carried out those killings are not

[37] See the discussion in: Kenneth Marc Harris, *American Film Genres and Non-American Films: A Case Study of "*Utu,*"* 29 CINEMA J. 36 (1990).

[38] *Id.* at 39–40.

[39] Danny Keenan, Utu *and the Search for "Real History,"* 3 N.Z. J. MEDIA STUD. 13 (1996).

[40] *Id.* at 16.

[41] Cynthia Nazarian, *The Outlaw-Knight: Law's Violence in* The Faerie Queene*,* The Man Who Shot Liberty Valance*, and* The Dark Knight Rises, 98 CULTURAL CRITIQUE 204, 204 (2018).

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condemned, pursued, prosecuted, or held accountable—those are treated as "justified" killings within the new colonial political and legal regime.[42] Unlike Te Wheke's. The audience experiences the grim realization that not only has the pre-existing Māori political and legal order been displaced by the colonial authorities, but that the legal framework of partnership guaranteed under Te Tiriti o Waitangi (the Treaty of Waitangi) in 1840[43] will also not be respected within the political and legal order of the new settler colonial society. So, in the background to this film, there is the implication of an impotent international law, ineffectual once its mechanism, the treaty, has been used in the process of colonization, its substance then ignored by the resulting state and its governing settler authorities.

In the final scenes of the film, there is a "court" of sorts assembled, as court martial proceedings conducted by a lieutenant of the colonial forces, but it is, in reality, just a small group of individuals representing the different actors in the colonial encounter (hapū, rival iwi, settler, military, colonial official) gathered around a campfire, in the middle of the night, in the middle of the bush.[44] The lieutenant presides as judge, finds Te Wheke guilty, and sentences him to death by firing squad to be carried out immediately. Although he declares he is without prejudice, the lieutenant is also the lover of the Māori woman killed by Te Wheke and for whose murder, amongst others, Te Wheke has been sentenced to death. The deception at the heart of both foundation myths and the rule of law is again exposed for here it is also clear that there is no bringing of law and order with the new legal system, no dispassionate application of substantive rules, no due process. There is violent displacement of one system by another. Te Wheke asks in te reo "And whose interest does this court represent? Not mine" (Murphy, *Utu*). Although Te Wheke is sentenced to be executed by the colonial authorities, he is, in the end, killed according to Māori utu, by his brother, Wiremu, a figure who, as a member of the colonial militia, Te Wheke's hapū, and the one who killed the head of the colonial troop, Colonel Elliot, embodies the complexities of invasion and colonization.

Rabbit-Proof Fence also lays bare the reality of a legal system that is itself the malign force. In this film, the rule of law is not the savior promised in the myths. It is not the "Hero." Rather, the law and its enforcers are the source of persecution and injustice and the rule of law does not protect against that, does not apply to all people in the way it promises. Where does this leave us as lawyers when confronted with the realization that the legal system does not protect? That it is not the "aberrant" creature of just a few "bad" judges as presented by *Judgment at Nuremberg*, but is the prevailing, normalized legal framework that usurped and displaced another complete and functioning system through acts of violence and now asserts that it operates according to the rule of law? *Rabbit-Proof Fence* presents that reality to the audience. In settler colonial states, the legal system is that derived from the invading forces and the rule of law does not mean the same thing to Indigenous peoples whose political and legal systems have been displaced as it does to settler-based communities.

Rabbit-Proof Fence tells the true story of three Aboriginal girls, sisters Molly (aged 14) and Daisy (aged 8), and their cousin Gracie (aged 10), who, in 1931, were forcibly removed from their families by governmental authorities and taken to a facility 1,600 kilometers away, the

[42] Keenan, *supra* note 39, at 14.
[43] Te Tiriti o Waitangi [Treaty of Waitangi] (Feb. 6, 1840).
[44] Keenan, *supra* note 39, at 15; Harris, *supra* note 37, at 40.

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Moore River Native Settlement, to train as domestic servants for settler communities. Carried out pursuant to official policy and legislation enacted as early as 1869, the removal of Aboriginal children with dual ethnicity was enforced across Australia until 1970. They are now known as the Stolen Generations.[45] The film gives voice to the Aboriginal experience of Australia's legal order. It was based on the book written by Molly's daughter, Doris Pilkington Garimara, *Follow the Rabbit-Proof Fence*,[46] and recounts Molly's story of their escape from captivity and their walking of the 1,600 kilometers home, taking them nine weeks.

The film utilizes one of the most potent symbols of settler colonial society—the fence.[47] The settler fence mars the land, marks out space, cages in, keeps out, claims. In so doing, it manifests as an act of claiming ownership, property, power. The settler fence in Australia makes statements about national identity, Aboriginal land and laws, and relationships with colonial regulatory frameworks both historical and contemporary. In the film, the images of fencing and confined spaces are used to delineate the Aboriginal and settler worlds, together with other indicators of captivity, such as the traumatic seizure of the girls and carrying them off locked into a car, holding the girls in a cage, closing them inside the dormitory at Moore River and bolting the door.[48] However, once the girls escape from the facility and find their own way, moving through the open spaces of the environment, in a form of script-reversal, they were able to use that very same fence as a key to accessing their own Country, leading them back home, to their mother and grandmother, to the women of their Country waiting for them, to their culture, their identity, their land.[49]

Law is also a powerful presence throughout the film. As an overarching framing in which the action takes place, as the source of power, as an explicit reference authorizing the seizing of the girls, and as a symbol represented in objects and individuals. It is under the auspices of the law that pieces of paper are signed, pointed to, waved in front of people to authorize the taking and detaining of Aboriginal children.[50] Pieces of paper and signatures—in the film, they take on a power beyond their materiality as "things." And it is Auber Neville, "Chief Protector of Aborigines, Western Australia," who represents, embodies even, the Australian legal system. The law placed Aboriginal peoples in Western Australia under the jurisdiction of one white man—for twenty-five years, that one white man was Auber Neville. The chief protector was the legal guardian of all Aboriginal children, and those of dual ethnicity, until they reached the age of sixteen years; the marriage of an Aboriginal woman and a non-Aboriginal man required the permission of the chief protector.[51] Toward the end of the film, Neville dictates a letter, in a manifest application of the nineteenth-century "civilizing mission," he states that Aboriginal peoples "have to be protected against themselves. If only they would understand what we are trying to do for them" (Noyce, *Rabbit-Proof Fence*). And in exercising that violence of the law, Neville had pursued the girls relentlessly, issuing orders,

[45] Such as the Aboriginal Protection Act (1869) (Victoria); Human Rights and Equal Opportunity Commission of Australia, *Bringing Them Home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

[46] Doris Pilkington Garimara, Follow the Rabbit-Proof Fence (1996).

[47] Kieran Dolan, *Law and Identity at the Fence*, 3 Stud. Australasian Cinema 133 (2009).

[48] *Id.* at 139.

[49] *Id.* at 138.

[50] *Id.* at 139.

[51] Aborigines Act (Western Australia) (1905).

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writing letters, citing provisions in legislation, instructing police, engaging an Aboriginal tracker to hunt them down. Foundation myths in Australia have erased the violence of not only the process of displacement of Aboriginal political and legal orders in each Country, but also the ongoing violence done to keep that new system in place. The 1997 *Report of the National Enquiry into the Separation of Aboriginal and Islander Children from Their Families: Bringing Them Home* engages with that violence and the damage past and present from those policies and legislation.[52] It contains first-hand accounts from those describing the moment they were snatched, the trauma evident, compounded by the official status of the perpetrators—they are agents of the state, of the law—the law, police, welfare officers, lawyers, courts not just permitted, but created and actively enforced that rupture from their families.

What the film also interrogates is the role of individual choice in the sustaining of a legal order. There are those that stand by, witness, knowing the actions are wrong and do nothing, such as the station men watching as the girls are chased by policemen and are physically ripped from their mother's and grandmother's arms. There are those who embody the law, are its conduit through which it finds practical form, possessing a "shining light" of righteousness and the zeal of the "civilizing mission," such as Neville. And there are those who actively collaborate, such as those the girls encounter en route who then inform the authorities of the girls' whereabouts.

Ultimately, two of the girls, sisters Molly and Daisy, make it to the end of the fence and back to Country. The film tells the audience that they then had to go straight into the desert to hide from the authorities. Again, the imposition of the authorities on Aboriginal lives is made explicit. The narrator, Molly, continues talking to the audience in the final scenes of the film, revealing that once she was married, she and her children were forcibly taken back to the same facility, the Moore River Native Settlement. Again, she walked back to Jigalong. The authorities came for her again. This time, her three-year-old daughter, Annabelle, was taken from her and Molly never saw her again.

In *Rabbit-Proof Fence*, the law was the menace rather than the protector. And despite the two girls outsmarting the authorities, there is no shift in the legal landscape or the reality of their experience of the law. The legal order remains that of the colonizing force. It remains a malign entity. The specific piece of legislation that enabled the seizure of the girls has been repealed, but such regulation continued to be enacted until 1967 and the note at the end of the film comments that Aboriginal children were forcibly removed from their families until 1970. Some remained in those government-run facilities until the 1980s.[53] The legal system that enabled and empowered that legislation and those processes remains. In this film, there is no triumphant lionizing of the rule of law as in *Judgment at Nuremberg*, which proclaims that when "crimes are committed in the name of the law" that "good" wins out in the end (Kramar, *Judgment at Nuremberg*). Nor is there the more compromised, but still supportive view of *Liberty Valance* that although the origin myth is a fraud, law and order was brought to the town and that this was "good." So, the end justified the means. Rather, *Utu* and *Rabbit-Proof Fence* provide a view of the law from the perspective of those whose political and

[52] Human Rights and Equal Opportunity Commission of Australia, *supra* note 45.
[53] *Id.*

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legal orders were displaced and who continue to live under the systems imposed by the forces that invaded their territories. And it is a bleak assessment.

International law is not without responsibilities in this. And it has its own stories. So, perhaps, key insights these four films have for us as international lawyers are to look for the myths, deception, menace, violence, displacement in its stories and in its practice. International law should not be able to embrace the triumphalism of *Judgment at Nuremberg* as "successful" international law while absolving itself of the tragedy that is *Utu* and *Rabbit-Proof Fence*. That tragedy is what international law enabled. With its treaties, its principles of discovery, its rules on sovereignty, its *terra nullius*, its doctrine of diplomatic protection, its nineteenth-century hierarchy of "civilized nations," its facilitation of colonization, its legitimizing of invasion—in this way, "malign" international law was facilitated. International law has its own parallel origin myths, its belief in the power and protection of the rule of law, its assertions of objectivity and neutrality, its faith in its own virtue. Just as there is amnesia and denial in the foundation myths and rule of law presented in *Judgment at Nuremberg* and *Liberty Valance*, there is also self-deception in international law. Directives for us then could include suggestions to reflect on the origin myths of international law—what violence do they erase? Consider the promise of the rule of law in international law—is it even feasible without the backup of violence and does it apply to all actors in the same way? Pay attention to claims of chaos, anarchy, or lawlessness in calls for action under international law or for the installation of the rule of law—what legal orders are being displaced? What falsehoods are being perpetuated? Listen to the voices of Indigenous peoples—is international law the protector it claims to be or the malign entity akin to the legal order depicted in *Utu* and *Rabbit-Proof Fence*? Who emits a version of Neville's "shining light of righteousness" now? Who implements a twenty-first century version of the "civilizing mission?"

And what of international law? It is clear it has its own stories. The question is whether international lawyers are alive to them or not. In circumstances where authoritarianism is on the rise, rule of law displaced, and international rules go unheeded, those four films speak to us also in a contemporary setting. And as the ramifications of current international politico-legal developments are absorbed, we not only need to consider whether the rule of law ever was what we perceived it to be, but we also need to reflect on a key question that arises from these films: what stories is international law telling now?

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