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Legal Borderlands: Law and the Construction of American Borders

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Introduction

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On the coast, at the California-Mexico border, a rusted sheath of metal extends from the beach into the ocean, dividing the waves. There, grains of sand become attributes of different sovereignties. Two nations are brought together at this edge; at the same time, their inhabitants are marked with national identities; they come together wearing the marks of sovereignty inscribed by the border. Yet while it classifies and codifies subjects, the border cannot contain sovereignty itself. The border marks a space that American power proceeds from.

The metal edge on the beach descends into the ocean. From the beach it looks as if it might extend to the horizon, dividing the ocean floor. There are borders, not marked by metal, throughout the ocean. They mark a nation's territorial waters, a sovereignty of currents and of sea life. The boundaries around U.S. territorial waters are not outlined by physical structures; they exist on the shelves of law libraries, their dimensions defined in treaties. Instead of a metal edge, there are words on a page.

The words that place seashells into the category of American sovereignty are the technology of law. Such words are attached not only to unseeable ocean borders. They are embedded in the metal edge on the beach; they are inscribed on bodies on either side. Law defines national borders; it delineates the consequence of borders for the peoples within them. It does not contain sovereign power, but law has an imprint on national power wherever it is exercised.

This volume interrogates law's role in constituting American borders. One project of American studies scholarship has been to explore American culture and history in relation to the rest of the world.[1] But the global turn in American studies raises new questions about the boundaries of the field and of the reach of "America" itself. Once we view the United States in a global context, once territory—formerly the implicit boundary around American studies—is decentered, it becomes important to ask what the frame is around "American" studies, and to ask how, in a global context, U.S. borders and identities are constructed. Law is one window through which to look at the construction of American borders. Law is an important technology in the drawing of dividing

lines between American identities and the boundaries (or lack of boundaries) around American global power. Borders are constructed in law, not only through formal legal controls on entry and exit but also through the construction of rights of citizenship and noncitizenship, and the regulation or legitimation of American power in other parts of the world.

The essays in this volume highlight the multiple ways law figures in American borders. Law has always been there in borderlands writing, although law and American studies scholars have often operated in separate intellectual spaces.[2] It was not at the surf, but in the desert spaces of what we call the Southwest, that Gloria Anzaldúa powerfully rendered the force of law in the role of *la migra*, the border patrol. "In the fields, *la migra*," she writes.

> My aunt saying, "*No corran*, don't run. They'll think you're *del otro lao*." In the confusion, Pedro ran, terrified of being caught. He couldn't speak English, couldn't tell them he was fifth generation American. *Sin papeles*—he did not carry his birth certificate to work in the fields. *La migra* took him away while we watched. *Se lo llevaron.* He tried to smile when he looked back at us, to raise his fist. But I saw the shame pushing his head down, I saw the terrible weight of shame hunch his shoulders. They deported him to Guadalajara by plane. The furthest he'd ever been to Mexico was Reynosa, a small border town opposite Hidalgo, Texas, not far from McAllen. Pedro walked all the way to the Valley. *Se lo llevaron sin un centavo al pobre. Se vino andando desde Guadalajara.*[3]

The U.S. border with Mexico is the most iconic American border, a space that has been the subject of much powerful scholarship.[4] As Sonia Saldívar-Hull has written, Anzaldúa's *Borderlands* "focuses on a specific geographic locale—the U.S.–Mexico border, and presents a specific history—that of Mexican origin U.S. Chicanas." Yet Anzaldúa's analysis goes beyond this, and "opens up a radical way of restructuring the way we study history."[5] Through the work of Anzaldúa and others, this geographic space opens up a way of thinking that writers in this volume take to other locales—spaces on the edge of American sovereignty and internal places at the heart of American identity.

What is "law" on these borders? It is *la migra*, the border patrol. It is the Department of Homeland Security, embodied in the firm hands of the airport security worker across your chest. It is there in the police lights that pull over an African American driver who has crossed an unmarked border into a neighborhood where he seems not to belong, marking internal American spaces. Law can be a force that maintains borders, encountered with varying degrees of pain.

Law also creates spaces within which border meetings come about. Law creates opportunities, new identities that we might seek. It gives us a way to announce to the state that we are joined together, as a family, or in a commu-

nity that shares particular ideals. We pass laws both to manage the terrain within the state and as an expression of who we are as a people, within our borders. Law can also be a tool drawn upon to challenge state power. We might see in law not an inescapable hegemony, but a role in an ascribed identity. Law does mark bodies (as citizen, as alien), but it can also be drawn upon in constructions of self.

In a world where state power seems borderless, law follows the state in its transnational sojourns. It cannot hold back state power; instead law provides the state with a language for its global actions.

In borderland spaces, we can see what law *does* in American history and American culture. In some legal scholarship, law plays the role of tagalong, following changes in society that are seen as more fundamental.[6] Law's role in border regions makes apparent that the relationship between law and society is more dynamic. Mae Ngai demonstrates this in her book *Impossible Subjects*, showing the ways law produces categories that then are seen as social problems in need of legal regulation.[7] The transnational labor market at the U.S.–Mexico border appears, not as a natural phenomenon, but fueled by labor needs of large-scale agriculture in the west, and by legal restrictions on Asian immigration to the United States. Once immigration was funneled into the *bracero* temporary worker program or through restrictive immigration quotas, preexisting migration outside these bounds became "illegal." At the same time, the border itself, a fluid, transnational space, was militarized and patrolled. Through legal and policy developments, the problem of "illegal" immigration is structured and produced. In this example, law does not respond to natural forces outside the law; instead it responds to a social context constructed, in part, through law.

Legal Borderlands

What, then, is a *legal* borderland? We might start with the role of law in borderlands that are geographic places. Borderlands can be contact zones between distinct physical spaces; they can be interstitial zones of hybridization. They can constitute spaces that challenge paradigms and that therefore reveal the criteria that determine what fits in those paradigms. Borderlands can also function not as literal physical spaces but as contact zones between ideas, as spaces of ideological ambiguity that can open up new possibilities of both repression and liberation.[8]

Legal borderlands can be physical territories with an ambiguous legal identity, such as U.S. territories where the Constitution does not follow the flag, or

Guantánamo. Their ambiguity seems to render them sites of abnormal legal regulation, placing them on the edge of the law. But we can also draw upon the idea of legal borderlands to demarcate ideological spaces or gaps, holes in the imagining of America, where America is felt to be "out of place," contexts in which, in spite of American ideals of democracy and rights, violations of the law are routinized, such as in the space of the prison. The supposition that these spaces are exceptional, rather than the norm, enables the continued belief that "the story of America is the story of the rule of law," for stories of the violation of the rule of law are explained through their location in those physical spaces or their placement in those ideological gaps.[9]

Law also helps define the boundaries of American national identity. That American identity and law are conflated is indisputable. But American ideology incorporates a particular vision of law, which is law as the rule of law, and law as the guarantor of democracy, equality, and freedom. Americans believe that their law *is* the rule of law. U.S. history most often renders America as the guarantor of freedoms and rights. Thus, Americanization projects are understood as projects of democratization. And yet sovereign power includes the power to suspend the rule of law. To harmonize suspension with the idea of law, suspension is characterized as a state of exception, and is rationalized in the name of national security.[10] This volume develops the concept of legal borderlands in part to consider spaces of exception that illustrate disjunctures between American identity and the rule of law.

The essays in this volume demonstrate that there is a necessary outside to this notion of the United States as the embodiment of the rule of law. American history is marked by episodes that can be simultaneously conceptualized as violations of the law and as actions sanctioned by law; violations of law are as fully a part of America as what we consider to be its democratic inside. Ruptures in the guarantees of rights have been as central to actual practice as the guarantees have been to American ideology. American national mythology has continued through safeguarding borders of American identity; maintaining the center as mainstream, acceptable, and normal; and differentiating the edge, through marking out the wild and uncultivated.[11] But, as these essays illustrate, we also must acknowledge that slavery, the living dead in prison camps, and a nation in a multiracial hierarchy are a product of America's relationship to the law.

The essays in this volume are organized thematically to illustrate different forms of legal borders. They begin by considering the borders of law itself, where law begins and ends; move to consider borders of identity created by the legal regulation of bodies; turn to examine law's defining of territory and

sovereignty; and conclude with essays on law's role in constituting the borders, or lack of borders, of American global power.

Law's Borders

An exploration of law and borders must begin with a discussion of the borders of law itself. Law plays a key role in American borders, but as it does so, law is not a stable technology, a tool easily seen, whose capacities and limits are apparent.[12] Austin Sarat examines law's borders in his essay "At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality." It is the very idea that the rule of law is central to American identity that requires us to interrogate law's limits, he argues. Sarat's focus is on the tension between law and sovereignty. "Sovereignty troubles the rule of law by being at once prior to and yet a product of it," he suggests. He examines sovereignty in the context of executive clemency, where "law authorizes a kind of lawlessness." Acts of clemency, he argues, "are quintessentially sovereign acts in that they are authorized by law as moments when officials can 'decide who shall be removed from the purview of the law.'"[13] Because clemency removes things from the domain of law, clemency reveals law's boundaries.

To examine clemency, Sarat turns to Alexander Hamilton's defense of the practice, against Blackstone's critique of clemency as a power of monarchy, in debates over the U.S. Constitution. Hamilton's embrace of clemency turned in part on his image of America, a nation faced with difficulties, but one that might "welcome its enemies back into the fold." Sarat then examines court rulings on clemency. Here he finds instability and arbitrariness amid the attempts of judges to tame clemency through law. This very potential for arbitrariness and abuse marks the status of clemency in law's borderland.

Clemency, as a legal borderland, helps to illuminate what might be at the center of law, or a "rule of law," itself. As Sarat puts it, "the rule of law is replete with gaps, fissures, and failures, places where law runs up against national interest or sovereign prerogative. Its boundaries are unclear, uncertain, unchartable. And, in many places, law runs out, law gives way." The places where law runs out are not places where we lose our way, but instead where we might find it, for "it is in its bleeding borders that law itself, and with it American identity, is constructed, contested, and made meaningful."

Borders of Identity

The shackled foot on the back cover of this volume, belonging to a woman in immigration detention, reminds us how bodies are policed in the service of maintaining national borders. Which bodies can enter and which bodies are expelled, and the attempted enforcement of those decisions, bounds American identity through the incorporation of some and the exclusion of others.

The typical narrative of America as a nation of immigrants foregrounds a liberal story of social contract and choice, whereby immigrants are welcomed and then easily assimilate as citizens. Race sharply disrupts this narrative, given the facts of slavery, territorial dispossession, forced removals, and racial bars to immigration and naturalization. But this disruption is conventionally presumed not to threaten national myths of freedom and democracy, and to be rectified through the passage of time and progress.[14] The essays in this section challenge both presumptions, in excavating and interpreting foundational but little-known dimensions of the restrictions of movement and membership of bodies, and in asserting that the inclusion of citizens is in fact predicated upon exclusion.

One way to consider citizenship is to note the hydraulic relationship between the inclusion of some persons as citizens and the exclusion of other persons as the citizens' opposite—as aliens or, post 9/11, as terrorists. But another important and understudied dynamic is the manner in which inclusion and exclusion can be experienced by the same bodies. Devon Carbado, in his essay, "Racial Naturalization," addresses the paradox of black American identity, whereby the black American is included as a citizen, and is presumed to belong to America, but also experiences exclusion as racially subordinate. He labels this phenomenon an "inclusionary form of exclusion."

Carbado seeks to reconceptualize the relationship between black Americans and naturalization. To this purpose, he reformulates the concept of naturalization, from its formal and doctrinal understandings as the process through which one becomes an American citizen, to a social process producing American racial identity, fueled by racism. Tracing the inclusive exclusion of blacks in America to the Supreme Court decision in *Dred Scott*, he notes how enslaved blacks were excluded from citizenship but included as property, which he analogizes to unincorporated territories in the Insular Cases, described as "foreign in a domestic sense," not incorporated but "appurtenant thereto as a possession." The granting of formal citizenship through the Fourteenth Amendment naturalized blacks as citizens, and included them into an American identity, but an explicitly racially subordinate American identity, visible today in the delimiting of black social movement through the police practice of stop-

and-frisk. Carbado's essay helps us understand why racism not only "divides us as Americans" but consolidates American national identity, as it "binds us as a nation in a multiracial hierarchy."

If Carbado's essay fills one important gap in studies of naturalization, Siobhan Somerville's "Notes toward a Queer History of Naturalization" addresses another. Somerville usefully divides the concept of citizenship in the nation from citizenship in the state; the former could be considered citizenship as a matter of identity—the kinship, belonging, or bond that joins a people and differentiates them from others. Citizenship in the state is also called formal citizenship, namely the processes that determine legal membership in a territorial community. As she indicates, work on citizenship and sexuality has attended much more closely to citizenship in the nation than to citizenship in the state. But rules of formal citizenship must be understood also as sexualized.

National borders are not only material and territorial; they are also rhetorical. Conventional renderings of our national narrative cast the immigrant as the desiring subject, longing to come to and belong to America. Somerville examines how the state also functions as a site of affective power, whereby it selects objects of desire and produces them as citizens. Naturalization is presumed to function as a salutary corrective to birthright citizenship, as modeled along the lines of contract and choice rather than ascriptive, accidental characteristics based upon blood. This essay casts a powerful challenge to that presumption, in discerning how, at the inception of the American nation, naturalization did not escape a sexualized logic of belonging. Rather, in the early national period, naturalization depended upon the transmission of citizenship through biological reproduction and presumed only certain subjects as "naturalizable," as capable of "surviving or reproducing as if native." Thus, sexuality has stood at the core of determining which bodies can be incorporated into belonging.

In his essay "Outlawing 'Coolies': Race, Nation, and Empire in the Age of Emancipation," Moon-Ho Jung similarly demonstrates the insights produced by examining together what are considered disparate sites of inquiry. Slavery and immigration are typically studied as separate phenomena and historical processes (unless slavery is studied as a form of forced migration). Jung analyzes legislative attempts to outlaw "coolies" in the nineteenth century to show that the complex origins of U.S. immigration restrictions in fact lay in struggles to demarcate the legal boundary between slavery and freedom. Thus, he questions conventional readings of anti-"coolie" agitation as stemming from anti-Chinese rancor in California, and instead defines it as the culmination of debates over the slave trade and slavery.

"Coolies," Jung argues, were not "a people but a conglomeration of racial imaginings" that emerged in the era of emancipation. Linked with slavery, the banning of the importation of "coolies" allowed immigration restriction to proceed in the name of freedom. The power of this association of immigration and freedom helps explain the perennial contradiction of how U.S. immigration law is imagined to have been historically unfettered, but with certain exceptions. Jung's focus on "coolies" also provides an important piece of the story of American exceptionalism: the moral imperative to prohibit slavery and coolieism around the world rationalized U.S. expansionism abroad, from China and Cuba in the 1850s to the Philippines in the 1890s. Thus, as Jung asserts, the locating, defining, and outlawing of "coolies" helped produce the historical transition of America from a slaveholding nation to a nation of immigrants, and from an empire of manifest destiny to a liberating empire. We can see the legacy of this transition today in the form of a preemptive war in the name of freedom.

Nayan Shah, in "Between 'Oriental Depravity' and 'Natural Degenerates': Spatial Borderlands and the Making of Ordinary Americans," focuses upon the lived experiences and regulation of the bodies of migrants once within the terrain of the United States. He newly examines little-known sodomy, statutory rape, and vagrancy cases in California in the early twentieth century wherein Asian men, perceived as the importers of unnatural sexual practices, were prosecuted for intergenerational, working class, and same-sex relations with adolescent boys. While the "foreigner" and the "degenerate" were not doctrinal categories, they functioned discursively to identify and explain moral peril. American identity consolidated around the normal masculine through the casting out of perverse behavior, ascribed to Asian men. The cases show an intense desire to contain and fix social boundaries and status, which, Shah argues, was both impossible and the product of an irremediable insecurity.

This site of legal regulation—the streets, alleys, boardinghouses, labor camps, and ranches where migrant workers congregated—functioned as what Shah calls a borderland space, a location characterized by police surveillance and anxiety about unruly, uncontained behavior that troubled categories and boundaries. In this sense, the space of the borderland functions as the shadow side, the other, to what is presumed to be the space of the normal. The borderland is the opposite of what we believe to be American normality.

If the borderland and American normality function as spatial opposites, what then is the opposite of the citizen? The citizen is considered the paradigmatic member, one who possesses full rights in the nation state. Linda Kerber, in "Toward a History of Statelessness in America," suggests that we under-

stand the citizen's other not to be the citizen of another country, but to be the stateless person, the "man without a country." The relationship between the citizen and the stateless person, she asserts, may be in some sense necessary: the state "needs its negation in order to know itself." As she documents, when Americans invented a political structure in which to practice the fundamental rights of mankind, they were simultaneously devising structures that fundamentally deprived a large segment of the population of their human rights. Thus, her essay troubles the assumption of "we the people": at its founding core, some Americans could be considered stateless. Kerber also contradicts the assumption of America as an ever expanding circle of citizenship that can embrace all members over time; today, she writes, increasing numbers of people lack secure citizenship.

Hannah Arendt famously wrote that citizenship is nothing less than "the right to have rights."[15] This formulation would suggest that if one possesses formal citizenship, one's state will enforce one's rights, and that it is the lack of formal citizenship that has produced the nightmare of statelessness. But Kerber productively argues that it is not enough to possess formal citizenship if citizenship does not ensure the civil rights of a citizen. In a system of inequality among nation states, citizenship in a state cannot ensure that a prisoner receives the right to counsel at Guantánamo. Economic vulnerability, especially along the lines of gender, also creates what Kerber would consider de facto statelessness, a precarious existence characterized by the failure of one's state to protect. Statelessness, she writes, is most usefully understood not only as a status but as a practice, made and remade through daily vulnerabilities that render one not a citizen.

María Josefina Saldaña-Portillo, in her essay "In the Shadow of NAFTA: *Y tu mamá también* Revisits the National Allegory of Mexican Sovereignty," importantly asks us to consider the relationship between nation states in her examination of the vulnerabilities created by a treaty, the North American Free Trade Agreement (NAFTA). NAFTA involved what she labels a "fiction of development"—that territorial borders could be porous to goods and capital, but closed to those laborers whose impoverishment is often the result of NAFTA-style development. For the nearly three million new immigrants from Mexico who have traveled to the United States post-NAFTA, the treaty is not a story of the success of development, but a story of displacement and diaspora and, for those who are undocumented in the United States, a life on the borders of legality.

Saldaña-Portillo also analyzes what NAFTA has meant for Mexicans, especially the rural subaltern experiencing structural adjustment. For Mexicans,

the eroding of sovereignty over territory created through NAFTA and the structural adjustments that have ensued have created cultural and political transformations that she argues cannot be captured through economic indicators and statistics. Here she turns to an incisive reading of scenes in the film *Y tu mamá también* (2001), which chronicle the subaltern's movement from periphery to center: from fishing village to tourist resort, from Michoacán to Mexico City, from Mexico City to the United States. The film registers the effects of NAFTA in everyday life and death, in brutal migration, and in the erosion of Mexican sovereignty, in the form of the loss of the dream of a nationalist state that will provide work and protect workers. Saldaña-Portillo reminds us that legal changes wrought by NAFTA have radically altered the social geography of the borderland of Mexico and the United States.

Borders of Territory

Legal borderlands can be understood as physical zones where, as Andrew Hebard writes, the "territorial and legal limits of the United States are being negotiated." These physical zones can exist within the fifty states and Washington, D.C.—for example within the space of U.S. prisons—or outside, in the form of an unincorporated territory such as the Commonwealth of the Northern Mariana Islands. In either case they inevitably implicate the relationship between American identity and democracy and the rule of law. Because American identity and democracy are fused, sites where the rule of law is suspended, revoked, or never implemented constitute what we could consider spaces of exception. These spaces of exception, so long as they carry the appellation "American," require some kind of legitimation for the suspension of normal democratic processes, either through the dehumanization of those who do not receive those rights or through the obliteration from the imagination of those spaces, disappeared in a Bermuda Triangle of collective memory.

All three essays in this section raise the question of empire and challenge the idea of American exceptionalism, particularly the presumption that America stands as an exception to the history of imperialism. The idea of American exceptionalism has permitted the notion that the United States is limited to the territorial boundaries of the nation-state; what happens "outside" those boundaries does not implicate the same level of concern for the rule of law, democracy, and full rights. Thus, if Guantánamo is a prison camp, or if the United States fails to guarantee equal citizenship to residents of U.S. territories, the narrative of exceptionalism holds that this does not implicate America itself and its commitment to the rule of law and individual rights.

The belief in American exceptionalism has been fueled by the failure of the United States to claim sovereignty over other nations to the extent that Western European powers did. But imperial powers have also disclaimed sovereignty in the service of imperialism, as contradictory as this might seem. Christina Duffy Burnett, in her essay "The Edges of Empire and the Limits of Sovereignty: American Guano Islands," persuasively shows how American imperialism has, in part, consisted of efforts to impose limits upon expansion. While, as she writes, we tend to associate imperialism with "the expansion of territory, the projection of power, and the imposition of sovereignty," American imperialism has also involved the circumscribing of power to reduce the responsibilities that come with sovereignty.

Burnett mines the history of the American Guano Islands, as "seemingly insignificant" places in the history of American expansion, to show the wide range of formal, legal practices of boundary management that attended territorial expansion. The Guano Islands—uninhabited but rich with fertilizer that led to a nineteenth-century craze for guano—were legally categorized as appertaining to the United States, belonging to yet not a part of the United States. The uncertainty of the status of appurtenance created a flexibility to implement control without responsibility. As with Guantánamo, the limiting of federal power, by reducing the responsibility of the federal government to protect those on annexed territory, is no less an imperialist move than the extension of sovereignty to that territory.

If Burnett shows us that imperialism can be not just about expansion but about limits, Andrew Hebard, in his essay "Romantic Sovereignty: Popular Romances and the American Imperial State in the Philippines," reminds us that imperialism was also about mundane legal and bureaucratic work. As he notes, other scholars have linked imperialism to the literary aesthetic of the romance, aligning the imaginary of an imperial nation to the imaginary of the romance. But Hebard argues that conventions of both romance and realism were reflected in the work of imperialism, which involved both extraordinary and undemocratic acts of violence as well as seemingly ordinary norms of colonial administration.

Imperial administration involved a necessary contradiction, an ambivalence between bureaucratic governance and violence. Violence, says Hebard, was seen paradoxically as both incongruous to civil governance and necessary for its instantiation in the U.S. colony of the Philippines, apparent through the simultaneous existence of both military and civil rule. The Philippines could be independent only when there was no longer a need for tutelage and intervention; the narrative of U.S. imperialism in the Philippines explained vio-

lence through a story of progress and benevolence. Thus, the violence necessary to maintaining colonial rule became a convention within a romantic narrative of progress. This was the common sense of U.S. imperialism.

The contemporary common sense of American empire appears in the United States' relationship to Guantánamo. Amy Kaplan, in her essay "Where Is Guantánamo?," writes against the notion of Guantánamo as a strange aberration, as a legal black hole, or a prison beyond the law. Instead, she argues, Guantánamo lies at the heart of American empire; Guantánamo is America. Kaplan traces the history of Guantánamo as a strategic colonial site to which the United States gained an indefinite lease with jurisdiction and control, but purportedly without sovereignty. The disclaiming of this sovereignty permits the United States government to argue that neither the Constitution nor international human rights treaties apply to U.S. treatment of the prisoners on Guantánamo.

Burnett and Kaplan together show that the ambiguity of the relationship of Guantánamo to the United States is the legacy of the Insular Cases, wherein the Supreme Court ruled in several cases beginning in 1901 that the Constitution only sometimes follows the flag: the United States could rule over distant territories and peoples with impunity and without constitutional restraint.[16] Thus, while Guantánamo is considered today to be a disturbing aberration, Guantánamo is in fact the norm in how the United States has practiced empire throughout history, through choosing to define certain spaces as beyond legal protection, spaces where the United States could govern without normal legal constraints. Kaplan argues that Guantánamo is not extraordinary; rather it appears ordinary when we examine the historical relationship of the United States to territory it seeks to control without constitutional responsibility.

Borders of Power

If state power proceeds from, but is not limited by, the geographic space mapped as "America," how are boundaries of American power drawn? Are there boundaries, or has the globe itself become an American space? Does law play a role in negotiating the terms of American power in the world? Long before the idea of "preemptive war" entered American political discourse and before the Abu Ghraib prison in Iraq came to define a new level of depravity in global perceptions of Americans, there was little faith in the idea that law and legal institutions served as an enforceable brake in the arena of global politics. Law does not provide a boundary around the powers of sovereignty, but instead provides a language within which state power is invoked. The essays in this section

engage the question of where in the world American legal ideas and institutions operate, and examine how legal categories play a role in constructing an American sphere in the world and in defining the terms of entry to that sphere.

Empire is usually thought of as the ultimate expression of a nation's power in other regions of the world. The essence of empire is the conquest of foreign territory, and imperial power is exercised through control of that territory. The essays on borders of territory show that American exercise of imperial power has also involved a disclaiming of sovereign power over territory that it in fact controls. In this section, Teemu Ruskola, in "Canton Is Not Boston: The Invention of American Imperial Sovereignty," introduces a third way of conceptualizing empire, and along the way reframes the way we might think of nations themselves.

The role of American law outside of U.S. territory depends on how other regions of the world are imagined and understood. In the nineteenth century, suggests Ruskola, the world was not divided only into the categories of sovereign and "savage." Although this binary categorization constituted the primary justification for Western colonialism—the physical occupation and control of "savage" territories—there was a third category of "semicivilized" peoples. Such peoples might possess a degree of sovereignty, yet they could not impose their laws on the "civilized," even when the "civilized" came within the borders of their territory. This practice of Western extraterritorial jurisdiction constituted a form of borderless, nonterritorial imperialism.

Ruskola traces the history of the United States' first trade treaty with China, negotiated at gunpoint in 1844, to show how the United States became the leading practitioner of extraterritorial imperialism throughout the Asia-Pacific region. The imperial character of the American exercise of law was illustrated by its unilateral character. While Americans relied upon international law to force China to enter into "free" trade relations, they simultaneously used international law to justify the prohibition on Chinese immigration. The law of nations, Ruskola writes, was "thus seen to give Americans *both* the right to exclude Chinese from the United States *and* the right to 'open' China for the entry of Americans." Ultimately, he argues, the American power exercised through extraterritoriality was attached "to the *bodies* of American citizens—each one of them representing a floating island of American sovereignty."

In contrast, post–World War II Japan was, for the United States, a more traditional site of empire, a nation occupied by a victorious military power. As Lisa Yoneyama describes it, Japan became a site not only for the exercise of American military power, but also for the construction of American norms of equality and liberation. In "Liberation under Siege: U.S. Military Occupation

and Japanese Women's Enfranchisement," Yoneyama takes on the provocative question of the use of American power in post–World War II Japan to achieve the enfranchisement and liberation of women. Her focus is not on the occupation itself, but on how the memory of the occupation has come to be constructed, and the way the liberation of women came to be central to that historical memory.

During the war, the U.S. press represented Japanese women as the "modern girl," the woman warrior. The stereotype of the submissive and obedient Japanese woman appeared near the end of the war, and was central to occupation-era constructions of Japanese culture in the American press. The occupation was celebrated as having brought American-style rights and liberation to oppressed women. Later, postwar women in Japan and the United States were thought to be ensconced in domesticity. The press portrayed American women as motivated by choice, while Japanese women were depicted as bound by a culture that frustrated the realization of Western ideas of equality. The enduring story Yoneyama draws from this narrative is the way the occupation, viewed as the source of emancipation for Japanese women, serves to justify contemporary warfare as a means of bringing rights to oppressed women in Afghanistan and Iraq. Preemptive war creates a state of unfreedom, paradoxically in the name of liberation.

Freedom and its opposite were central categories in the construction of the cold war world. During the early years of the cold war, the world was thought to be divided into two categories, two camps: the "free world," and the Soviet bloc, which was thought to embody enslavement, godlessness, and a rejection of other "Western" values. As Europe turned to postwar rebuilding, the United States emerged as the "leader of the free world." The barrier between East and West was imagined as an "iron curtain," and nations militarized physical borders. Borders became iconic spaces, places of dramatic encounters between cold war adversaries. Across these spaces passed the subjects of Susan Carruthers's essay, the escapees.

In "Between Camps: Eastern Bloc 'Escapees' and Cold War Borderlands," Carruthers argues that the U.S. government essentially created the category of cold war escapees by encouraging flight from the Soviet bloc. The fact that escapees would risk their lives in crossing militarized cold war borders helped to dramatically underscore the difference between the free world and its adversary. Yet these refugees, invited across the wall, were not fully welcome in the United States itself. U.S. immigration law required refugees to have documentation that escapees rarely possessed, and the number of refugee visas was decreased. While they sought entry to the United States, many escapees found

themselves instead in refugee camps, where they were imagined as temporary sojourners awaiting a Soviet collapse so that they could return home. The escapee, for Carruthers, was an "impossible subject," "assigned the task of advertising the desirability of U.S. citizenship while being largely excluded from its entitlements."[17]

In Carruthers's essay, American power is shown to be exercised at a border—between East and West, between worlds—that was physically manifest in Europe. The legal subject, the escapee, is configured both in international law and in U.S. domestic politics. As an idea, the escapee thus crossed political categories. David Campbell's legal subject, the sports utility vehicle (SUV), traverses American freeways, its movement enabled by law, global politics, and a culture of desire for mobility and security.

The war in Iraq has sometimes been loosely linked with American oil consumption, particularly the preference of American drivers for large, gas-guzzling vehicles epitomized by the sports utility vehicle. Beneath the loose political rhetoric, how has oil, a strategic resource, figured in American national security policy? And why is it that high-consumption vehicles are associated with a security-oriented consumer culture? Campbell views oil not in the economistic terms common in American political discourse, which focus principally on the supply of oil. Instead, he argues that analyses of supply are insufficient because they ignore the question of the cultural production of a desire for oil. American desire for oil, Campbell argues, is tied to the centrality of mobility to American culture. This leads passenger vehicles to be the greatest consumers of oil in the United States.

While other essays in this volume address sovereign power, Campbell focuses on biopolitical power, which is distinguished from sovereign power by its focus on preserving the life of the population rather than the safety of the sovereign or the security of territory. In response to Hardt and Negri's argument that distinct national identities are fading, Campbell argues that "the sense of fading national colors is being resisted by the reassertion of national identity boundaries through foreign policy's writing of danger in a range of cultural sites."[18] The cultural site in this essay is the American freeway, occupied by the SUV. As Campbell illustrates, the SUV is a phenomenon enabled by law, defined as a "light truck" in U.S. environmental law and therefore exempt from the emissions standards applicable to cars. The SUV provides American consumers with a capacity for vehicular freedom that they desire but seldom actually use. Consumers defend their choice of fuel inefficient vehicles by invoking the idea that freedom from government regulation of consumer choices is central to American identity. This shows us, according to

Campbell, "the way that individual choices are part of a biopolitical whole with geopolitical consequences."

The legal narrative in Campbell's story is a tragic one, for the regulatory regime designed to decrease energy consumption created a category (light trucks/SUVs) that undermines the law's purpose. The consequences go beyond U.S. borders. The SUV, Campbell argues, "is the vehicle of empire"; it is "a materialization of American's global security attitude, functioning as a gargantuan capsule of excess consumption in an uncertain world."

Campbell's SUV-driving Americans, riding roughshod over international environmental treaties, would seem to portray the United States at the apex of its global power. Michelle Brown's essay brings us to a contemporary paradox. It was American global power that enabled the United States to take power in Iraq and to control the Abu Ghraib prison there. And it was the actions of Americans torturing and humiliating Iraqi prisoners at Abu Ghraib that now threaten American legitimacy. Abu Ghraib raises the question of whether this exercise of power leads to the conditions for its own limitation.

The idea of a rule of law, the idea that law can contain power, has perhaps been most threatened within the walls of Abu Ghraib. Here, the power of one nation is exercised in another through the control of prisoners by their captors. The story that emerges from Abu Ghraib would seem the opposite of the story of liberation Yoneyama finds in constructions of postwar Japan, as the prison is exposed as a site of torture. Yet in "'Setting the Conditions' for Abu Ghraib: The Prison Nation Abroad," Brown argues that conflicting understandings of the prison torture photos were constructed through law. Two legal frames dominated the understanding of the scandal. One focused on individual culpability, the idea that the soldiers who abused Iraqi prisoners were rogue elements in an otherwise lawful regime. The second frame focused instead on the dispersal of authority across a network of government and private actors, under pressure in a post-9/11 context.

While Abu Ghraib is often cast as an exceptional site, Brown sets it in the broader context of American prison policy, and sees the "war on terror" in the context of other "wars without end," against drugs and crime. Abu Ghraib, she argues, renders "the fundamental contradictions of imprisonment in a democratic context acutely visible." Ultimately Abu Ghraib falls into a contradictory space, "a legal borderland filled with spectral violence, a space packed with people and yet profoundly empty of its humanity."

* * *

As these essays go to press, new tensions have arisen over the border fence on the beach at San Diego and Mexico. In the name of homeland security, construction of a stronger fence has been ordered, despite objections about its impact on the environment. There, the metal edge, which had seemed as a scar upon the beach, is now recast as a nostalgic image. The divider is now reconfigured as an agent protecting the coastline, the sea life, and nesting birds.[19] Legal borders can be like this fence upon the beach. We might slip through their passageways, or burrow underneath; we might travel around them; we might fortify them or tear them down; we might simply reimagine them. Whatever their weight upon our imaginations, these borders, these tracings of law, are indelible on the American horizon.

Notes

1. For works that examine American studies in a global or "postnational" context, see Shelley Fisher Fishkin, "Crossroads of Cultures: The Transnational Turn in American Studies—Presidential Address to the American Studies Association, November 12, 2004," *American Quarterly* 57.1 (March 2005):17–58; Amy Kaplan, "Violent Belongings and the Question of Empire Today—Presidential Address to the American Studies Association, October 17, 2003," *American Quarterly* 56.1 (March 2004): 1–18; John Carlos Rowe, ed., *Post-Nationalist American Studies* (Berkeley: University of California Press, 2000); Donald E. Pease and Robyn Wiegman, eds., *The Futures of American Studies* (Durham, N.C.: Duke University Press, 2002).
2. One example of work that brings legal studies and cultural borderland analysis together is Carl Gutierrez-Jones, *Rethinking the Borderlands: Between Chicano Culture and Legal Discourse* (Berkeley: University of California Press, 1995).
3. Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza*, 2nd ed. (San Francisco: Aunt Lute Books, 1999), 26. Special thanks to Shelley Fisher Fishkin for highlighting Anzaldúa's work, and this passage in particular, at the Legal Borderlands symposium.
4. For other works engaging the U.S.-Mexico border and the border region, see José David Saldívar, *Border Matters: Remapping American Cultural Studies* (Berkeley: University of California Press, 1997); David G. Gutiérrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* (Berkeley: University of California Press, 1995); Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (Berkeley: University of California Press, 1998).
5. Sonia Saldívar-Hull, "Introduction to the Second Edition," Anzaldúa, *Borderlands/La Frontera*, 2.
6. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (Chapel Hill: University of North Carolina Press, 2001).
7. Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2004).
8. Akhil Gupta and James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference," in *Culture, Power, Place: Explorations in Critical Anthropology*, ed. Akhil Gupta and James Ferguson (Durham, N.C.: Duke University Press, 1997), 33–51; Susan Bibler Coutin, "Illegality, Borderlands, and the Space of Nonexistence," in *Globalization Under Construction: Governmentality, Law and Identity*, ed. Richard Warren Perry and Bill Maurer (Minneapolis: University of Minnesota Press, 2003), 171–202; and Mehnaaz Momen, "Are You a *Citizen*? Insights from Borderlands," *Citizenship Studies* 9 (2005): 323–34.

9. Sarat, "At the Boundaries of Law," this issue. See also Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds., *The Limits of Law* (Stanford, Calif.: Stanford University Press, 2005).
10. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, Calif.: Stanford University Press, 1998); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (1922; Cambridge, Mass.: MIT Press, 1985). On the relationship between the use of exceptional measures and the rule of law, see Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003). On the American national security justification for the state of exception, see Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitutional Law* 6 (2004): 1001–83. On the suppression of civil liberties, see Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998); Peter Irons, *Justice at War* (New York: Oxford University Press, 1983).
11. Mehnaaz Momen, "Are You a *Citizen*?"
12. Stuart A. Scheingold, *The Politics of Rights : Lawyers, Public Policy, and Political Change*, 2nd ed. (Ann Arbor: University of Michigan Press, 2004).
13. Sarat quotes Andrew Norris, "Introduction: Giorgio Agamben and the Politics of the Living Dead," in *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer*, unpublished ms., 2003, 15.
14. There is, of course, much scholarship critically examining the tension between American ideology and practices. See Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn.: Yale University Press, 1999); Desmond King, *The Liberty of Strangers: Making the American Nation* (New York: Oxford University Press, 2004).
15. Hannah Arendt, *The Origins of Totalitarianism* (London: Andre Deutsch, 1986), 295–296.
16. For a discussion of the Insular Cases, see Christina Duffy Burnett, "Appendix: A Note on the Insular Cases," in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, ed. Christina Duffy Burnett and Burke Marshall (Durham, N.C.: Duke University Press, 2001).
17. Carruthers's "impossible subjects" is a reference to Ngai, *Impossible Subjects*.
18. See Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000).
19. John M. Broder, "With Congress's Blessing, a Border Fence May Finally Push Through to the Sea," *New York Times*, July 4, 2005, A8.