

# Afterword: What's Law Got to Do With It?

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In *How To Hide an Empire*, historian Daniel Immerwahr invites readers to ponder the iconic “logo” map of the United States, with its territorial boundaries contained by the Atlantic Ocean on one side, the Pacific on the other, and stopping below Canada to the north and above Mexico to the south.<sup>1</sup> This jigsaw puzzle version of the United States captures how many observers imagine the territorial scope of the US, Immerwahr argues, but fails to capture the nation’s true legal borders. Hidden from view are not only the states of Alaska and Hawai’i, but also the American insular territories of Guam, American Samoa, the Virgin Islands, Puerto Rico, Wake Island, the Northern Marianas, and other small islands annexed by the US or under its jurisdiction.<sup>2</sup>

The essays in this Special Forum on “American Territorialities” help us to understand why many Americans have such a warped cartographic image in their heads and seek to remap the United States by questioning “the territorial scope and reach of the US nation-state—both from its alleged ‘inside’ and its alleged ‘outside.’”<sup>3</sup> Territoriality typically refers to the sovereign power that the US wields over everything and everyone within its physical jurisdiction. The authors in this forum encourage readers to think about territoriality “otherwise,” drawing on multiple vantage points and imagined territorialities of “peoples, communities, and groups affected by US territorial rule,” as inscribed in maps, explored in literature, solidified through activism, or forged through the movement of bodies in time and place.<sup>4</sup> The result is a rich and revelatory array of territorial theory and practices, rendering a more expansive and diverse understanding of the contours of American imperialism and challenges to it.

The essays prompt us, as legal historians, to ponder (borrowing from an old song), what’s law got to do with it?<sup>5</sup> Law is threaded throughout the essays in this forum, sometimes taking center stage, sometimes playing bit parts, and sometimes providing the essential yet often unexcavated foundation on which American empire was built. We would like to put the spaces of law in American empire at the forefront

of our own essay, to analyze the place of law in American imperialism and how law was deployed to claim and define territorial and jurisdictional spaces.<sup>6</sup> But we also seek to uncover, through these works, the spaces in law—the silences, gaps, and ambiguities in law—and how they simultaneously reinforced imperial power and opened avenues to contest it.

That law could be a blunt instrument of imperial power comes as no surprise, given the historical record. John L. Comaroff, building on years of scholarship with Jean Comaroff on colonialism in South Africa, refers to the “effort to conquer and control indigenous peoples by the coercive use of legal means” as “lawfare,” yet another form of warfare.<sup>7</sup> Grabbing Native American land and new territories in the Caribbean and the Pacific through treaties and congressional fiat, controlling the trade and movement of its new territorial subjects to further its economic interests, assigning legal statuses (citizen, subject, national, alien, other), declaring inhabitants of the insular territories to be beyond the protection of the Constitution—all spoke to the US’s power of law as a tool of conquest.

But perhaps more insidious was the “constitutive” power of law—how law acted not simply as a naked instrument of power, but as a way to organize and legitimate the social and political order, making the order of things seem natural and inevitable. Territorial sovereignty, the Westphalian concept born in 1648 that defined the state as having exclusive jurisdiction over everything and everyone within its physical boundaries, had become a self-evident truth by the mid-nineteenth century. Sir William Harcourt, holding the first chair of international law at Cambridge University, declared in 1868 that territorial sovereignty was as obvious as the mathematical equation two plus two equals four.<sup>8</sup> In the face of such inexorable logic, no other ideas about territoriality seemed imaginable.

Yet, sovereignty “is often more myth than reality,” notes historian Lauren Benton.<sup>9</sup> “Most boundaries are porous and many are contested,” resulting in an American imperial law that was full of gaps and often contradictory.<sup>10</sup> This forum suggests that it was often in the ambiguous, incoherent spaces in law that the US exercised its greatest imperial power. Amelia Flood argues that the gaps in the Treaty of Acquisition (1917), in which Denmark relinquished the Virgin Islands to the US, and in the Johnson-Reed Act of 1924 led to chaos on the ground, especially for individuals like Leander Holder, a native of the Virgin Islands and a resident of New York. Caught up in a tangled web of laws and administrative machinery, Holder’s life became subject to “imperial whim” as her status—and her right to travel—were kicked around by various public and private entities.<sup>11</sup>

Such confusion, while in Holder’s case the result of oversight, had been built into the imperial legal system which, as Judith Madera notes, made the status of the insular territories “contingent, unclear, and attached to slippery formulations of location.”<sup>12</sup> Called on to determine how the newly annexed territories fit within the American constitutional system, the US Supreme Court clarified little about the status of the territories and their inhabitants, issuing opinions which read like Zen koans, or riddles.

“Unincorporated,” the new territories were “foreign, in a domestic sense” and their inhabitants were neither citizens nor aliens, beyond the protection of the Constitution and at the mercy of Congress for their civil liberties and rights.<sup>13</sup> None of this “empire-friendly” ambiguity was accidental, suggests historian Sam Erman.<sup>14</sup>

Those legal sleights of hand categorizing imperial territories as anomalous spaces in law allowed the US to continue to think of itself as a continental territory and as the leader of the free, democratic world—and to become what Madera calls a “quiet empire” which never fully acknowledged the extent of its territories, nor the reach of its power.<sup>15</sup> Puerto Rico “could largely be kept out of sight, zoned at the watery crossroads of the foreign and domestic.”<sup>16</sup> The Trust Territory of the Pacific Islands, discussed in Brian Russell Roberts’s essay, could be reassuringly described as “part of the American family,” albeit a very distant family who would not be coming to visit, beyond the borders of the US but under its beneficent control.<sup>17</sup> And, as Michael Lujan Bevacqua and Manuel Lujan Cruz reveal in their arresting analysis of the “banality of Guam,” Guam could escape the attention even of social justice activists dedicated to decolonization as “the island does not seem to matter,” so invisible had it become in a “dense cloud of ambiguity,” despite its vital importance to American military interests in East Asia.<sup>18</sup>

Yet, even as law proved a supple tool for empire builders, the spaces in law allowed alternative legalities to flourish. “[L]aw is not of one piece,” warns sociologist Kitty Calavita. “There is of course, an institutional, structural and emergent realm, but law in the concrete is necessarily decentralized, diffuse, and made up of myriad ‘distinct discourses.’”<sup>19</sup> Just as a focus on “territorialities” (as opposed to “territoriality”) yields more expansive and diverse ways of imagining sovereignty, borders, and jurisdiction, so, too, we suggest that looking at the many “legalities” in America’s empire decenters the narrative, revealing law as an arena of contestation as well as a tool of power.<sup>20</sup>

“Legalities,” as envisioned by Christopher Tomlins in “The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History,” encompass more than a set of codified rules and thus frustrate law’s desire to seem absolute, singular, and uniform.<sup>21</sup> “Legality,” writes Tomlins, “is a condition with social and cultural existence.”<sup>22</sup> Legalities may be written down and produced by lawyers and judges, but they are more generally “social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale.”<sup>23</sup> Thus, legalities depend on people being oriented towards them, people who are diligent—consciously or not—in the maintenance of these legalities. When officials of the Quebec Steamship Company questioned Leander Hassell Holder’s right of travel, when military officials refer to Guam as the “tip of America’s spear,” and when many American adults misidentify Puerto Ricans’ citizenship status, they maintain and shape legalities. This Foucauldian notion of legalities embodies the practiced and lived deviation from written

laws; it encompasses the hope of the practitioner to fix or fashion the world around them, and it insists on the social construction of the laws it produces.

Tomlins also means to emphasize the vulnerability of legalities. While legalities have unspeakable power to cause pain, construct hierarchies, and demarcate belonging, they “are also fragile and contingent.”<sup>24</sup> They may attempt to order the world around them, but they are vulnerable to epistemological and physical threat. As people and cultures meet, their legalities do as well, “encounter[ing], reconstruct[ing], and eventually displac[ing]” others in uneven processes.<sup>25</sup>

Thus, while US imperial agents drew on an established “legal repertoire” when they sought to subject new lands and people to their control, the law “on the ground” proved more elusive and contested as many players—administrative officials, military officers, indigenous or colonial peoples—employed what historian Lauren Benton has called “legal posturing” to advance alternative legalities.<sup>26</sup> Black Americans in the mid-nineteenth century, for example, challenged the image of an American republic founded on liberty as they envisioned Canada as the grounds of freedom. As Nele Sawallisch shows in her contribution to this forum, Black Niagarans, moreover, refused the notion that US territorial jurisdiction should be extended to their land, appealing both to the “humanity of the British law” and God’s higher law to justify their “fierce resistance” to the recapturing of fugitive slaves.<sup>27</sup> More recently, Kanaka Maoli activists have made courts, the public, and the press bear witness to the power of their place-based Indigenous knowledge, and their fight for sovereignty has made explicit contentious legalities.<sup>28</sup>

Even nonhuman actors—“nonhuman sovereignties” as Brian Russell Roberts articulates it—can challenge concepts of territoriality.<sup>29</sup> While some legal systems may envision the land and waterways as fixed and unchanging, they are continuously challenged by tides, currents, and creatures. “Biopolitics” intersects with geopolitics in René Dietrich’s exploration of Allison Hedge Coke’s poem, “Pando/Pando,” the grove of giant aspen trees in Utah acting as a metaphor for the “the spreading, extending, and continual thriving of Indigenous normative presences,” which connect transnational Indigenous peoples and practices based on a network of relationships that transcends landed space and “settler” territoriality.<sup>30</sup>

Sometimes, these alternative territorialities and legalities gained ground, successfully tempering or countering imperial visions. As the writer Leslie Marmon Silko notes, the Laguna Pueblo people had their day in US courts, where the “old folks told their stories in their own words, in the Laguna language,” insisting on the “Laguna’s ancient, continuous occupancy use of the land,” and saw their territorial testimony triumph.<sup>31</sup> Christian W. McMillen relates a similar occurrence with the Hualapai people.<sup>32</sup> Like the Laguna Pueblo, the Hualapai people operated within a legality that emphasized a deep connection between place and identity, irrespective of US legalities that emphasized treaties and control. When the Hualapais’s land claims landed in the Supreme Court in 1941, Hualapai conceptions of territoriality led to a landmark decision that has helped bolster the domestic and international claims of Indigenous nations

seeking redress.<sup>33</sup> Here we see one set of legalities challenging and ultimately modifying the law of the colonizer. Brian Russell Roberts shows a similar repositioning of legalities via the 1957 Djuanda Declaration; with the declaration, he writes, the Indonesian Archipelagic Outlook “attained force of law,” serving as a forceful rebuke to international law.<sup>34</sup>

Repositioning our thinking of law in favor of legalities—to focus on the socially constructed and maintained nature of these systems—at once makes them seem more powerful yet more porous. The laws that legalities produce can be used to oppress and marginalize, to disenfranchise and disaffect, but they are also impressionable to legalities, or territorialities, otherwise.

## Notes

<sup>1</sup> Daniel Immerwahr, *How to Hide an Empire: A Short History of the Greater United States* (New York: Farrar, Straus and Giroux, 2019).

<sup>2</sup> Immerwahr, *How to Hide an Empire*, 8–9. Immerwahr’s book and an earlier iteration in *Diplomatic History* (Daniel Immerwahr, “The Greater United States,” *Diplomatic History* 40, no. 3 [2016]: 373–91) have generated some controversy. See Paul A. Kramer, “How Not to Write a History of Empire,” *Diplomatic History* 42, no. 5 (2018): 911–31, <https://doi.org/10.1093/dh/dhy071>; and Patrick Iber, “Off the Map: How the United States Reinvented Empire,” *The New Republic*, February 12, 2019.

<sup>3</sup> Jens Temmen and Nicole Waller, “Introduction: Mapping American Territorialities,” *Journal of Transnational American Studies* 11, no. 1 (2020): 23.

<sup>4</sup> Temmen and Waller, “Introduction,” 25.

<sup>5</sup> With apologies to Terry Britten and Graham Lyle, creators of the song “What’s Love Got to Do With It?”

<sup>6</sup> We are borrowing the phrase “spaces of law” from Daniel S. Margolies’s intriguing analysis of the history of extradition in the US/Mexico borderlands in *Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877–1898* (Athens, GA: University of Georgia Press, 2011); for a specific discussion of the concepts, see 23–27. See also **Error! Main Document Only.** Mary L. Dudziak and Leti Volpp, *Legal Borderlands: Law and the Construction of American Borders* (Baltimore: Johns Hopkins University Press, 2006).

<sup>7</sup> John L. Comaroff, “Colonialism, Culture, and the Law: A Foreword,” *Law & Social Inquiry* 26, no. 2 (Spring 2006): 306.

<sup>8</sup> Historicus (a pseudonym used by Harcourt), “The Law of Aliens,” *The Times* (London), February 12, 1868, 5. For more on Harcourt and the context for his article (the fight over the right to change one’s nationality), see Lucy E. Salyer, *Under the Starry Flag: How a*

*Band of Irish Americans Joined the Fenian Revolt and Sparked a Crisis over Citizenship* (Cambridge, MA: Harvard University Press, 2018). For a useful overview of the literature on the “constitutive power of law,” see Kitty Calavita, “Blue Jeans, Rape, and the ‘De-Constitutive’ Power of Law,” *Law & Society Review* 35, no. 1 (2001): 89–116.

<sup>9</sup> Lauren Benton, *A Search for Sovereignty* (Cambridge: Cambridge University Press, 2010), 279.

<sup>10</sup> Benton, *A Search for Sovereignty*, 279.

<sup>11</sup> Amelia Flood, “‘Neither citizen nor alien’: Migration, Territoriality, and Malfunctioning Empire in the US Virgin Islands,” *Journal of Transnational American Studies* 11, no. 1 (2020): 205.

<sup>12</sup> Judith Madera, “Quiet Empire and Slippery Geography: Puerto Rico as Nonsovereign Territory,” *Journal of Transnational American Studies* 11, no. 1 (2020): 177.

<sup>13</sup> Sam Erman discusses the concepts arising from the Insular Cases. These are a series of cases that arrive at the unique status of the insular territories. The particular case that cites the language in this passage is *Downes v. Bidwell*, 182 U.S. 244, 341 (1901). See Sam Erman, *Almost Citizens* (Cambridge: Cambridge University Press, 2018), 47–55.

<sup>14</sup> Erman, *Almost Citizens*, 5.

<sup>15</sup> Madera; “Quiet Empire,” 179, et passim.

<sup>16</sup> Madera; “Quiet Empire,” 183.

<sup>17</sup> Eugene F. Bogan qtd. in Brian Russell Roberts, “Borderwaters: Archipelagic Geometries between Indonesia and the United States,” *Journal of Transnational American Studies* 11, no. 1 (2020): 62.

<sup>18</sup> Michael Lujan Bevacqua and Manuel Lujan Cruz, “The Banality of American Empire: The Curious Case of Guam, USA,” *Journal of Transnational American Studies* 11, no. 1 (2020): 136, 129, 135.

<sup>19</sup> Calavita, “Blue Jeans, Rape, and the ‘De-Constitutive’ Power of Law,” 109.

<sup>20</sup> On “legalities” as a useful concept in exploring colonization, see Christopher L. Tomlins and Bruce H. Mann, editors, *The Many Legalities of Early America* (Chapel Hill: University of North Carolina Press, 2001), 1–20.

<sup>21</sup> See Christopher Tomlins, “Introduction: The Many Legalities of Colonization,” in *The Many Legalities of Early America*, ed. Christopher L. Tomlins and Bruce H. Mann (Chapel Hill: University of North Carolina Press, 2001), 2–3.

<sup>22</sup> Tomlins, “Introduction: The Many Legalities of Colonization,” 2.

- <sup>23</sup> Tomlins, "Introduction: The Many Legalities of Colonization," 2–3.
- <sup>24</sup> Tomlins, "Introduction: The Many Legalities of Colonization," 3.
- <sup>25</sup> Tomlins, "Introduction: The Many Legalities of Colonization," 11.
- <sup>26</sup> Benton, *A Search for Sovereignty*, 7.
- <sup>27</sup> Nelson Hackett qtd. in Nele Sawallisch, "North American Counterterritoriality: Nineteenth-Century Black Activism and Alternative Legal Spatiality," *Journal of Transnational American Studies* 11, no. 1 (2020): 242; Sawallisch, "North American Counterterritoriality," 240.
- <sup>28</sup> Aanchal Saraf, "'We'd rather eat rocks': Contesting the Thirty Meter Telescope in a Struggle over Science and Sovereignty in Hawai'i," *Journal of Transnational American Studies* 11, no. 1 (2020): 151–75.
- <sup>29</sup> Roberts, "Borderwaters," 52.
- <sup>30</sup> René Dietrich; "'Pando/Pando' Across the Americas: Transnational Settler Territorialities and Decolonial Pluralities," *Journal of Transnational American Studies* 11, no. 1 (2020): 94.
- <sup>31</sup> Leslie Marmon Silko qtd. in Katja Sarkowsky, "Cartographies of the Self: Indigenous Territoriality and Literary Sovereignty in Contemporary Native American Life Writing," *Journal of Transnational American Studies* 11, no. 1 (2020): 108.
- <sup>32</sup> Christian W. McMillen, *Making Indian Law* (New Haven, CT: Yale University Press, 2007).
- <sup>33</sup> *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941).
- <sup>34</sup> Roberts, "Borderwaters," 60.

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