

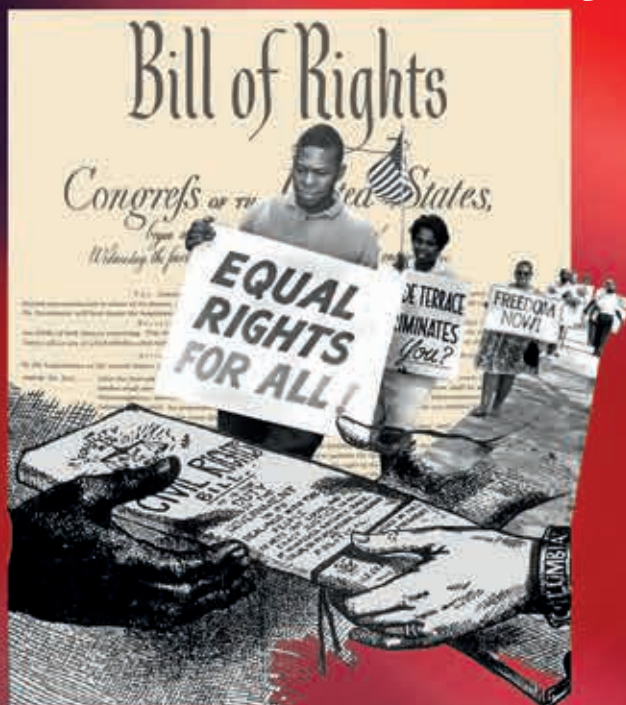
IRINA BRITTNER
SABINE N. MEYER
PETER SCHNECK (Eds.)

We the People?

The United States
and the Question of Rights

American Studies ★ A Monograph Series

Volume 309



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Edited on behalf
of the German Association
for American Studies by

ALFRED HORNUNG

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Irina Brittner, Sabine N. Meyer, and Peter Schneck

Introduction: The United States and the Question of Rights

In his *Rights: A Critical Introduction*, Tom Campbell attempts to formulate a definition of “rights” that is acceptable both to those enthusiastic about and those skeptical of the discourse of rights. “Rights are, at base, best seen,” he argues, “as morally justified demands for establishing and maintaining socially secured entitlements.” Rights are distinctive, he adds, because of “their role in the institutionalization of the moral commitment to equal worth” (xiv). While Campbell thus emphasizes the ability of rights to foster freedom of choice, to protect people’s interests, to create secure and stable communities, and to set limits to governmental power, he also criticizes the selfishness, legalism, and dogmatism that often characterizes the demand for rights. In addition, he points to rights’ capacity to foster a climate of “injustice and inequality through the entrenchment of the power of those who are in a position to control [...] their content and operation” (xv). Rights have enduring social power as they evoke visions of equal human worth and inherently just communities, yet they often fall back behind their egalitarian appearance by empowering certain elites and thus contribute to social stratification.

The question of rights is obviously a highly contested one, not just in regard to their legal substance but also in terms of their more general cultural meaning. As legal scholar Pierre Schlag has noted, “[e]ven within ordinary legal and political discourse, ‘rights’ defy easy identification” (263). Rights are ‘all over the place,’ as it were, they “are cast as acts, scenes, agents, agencies, and purposes” and they “can register on all sorts of different matrices and networks” (264). Schlag concludes:

Indeed, to say, “I have a right,” can mean any number of things, including: “I can do this.” “Give me your money.” “You can’t do this.” “The state should intercede on my behalf.” “This is mine.” “This is not yours.” “You

are a really bad person.” “Stop what you’re doing.” “You’re in trouble now.” “Go to hell.” It can also mean any combination of the above (and much more) (264).

The “extraordinary proliferation” (Schlag 302) and excessive extension of what could be termed the pervasive cultural semantics of rights in the U.S. has been criticized by many and probably most forcefully by Mary Ann Glendon in *Rights Talk* (1991) where she contended that the proclivity of Americans to perceive and address their political controversies as conflicts about rights had led to the impoverishment of political discourse, as the subtitle of her book proclaimed. Yet critical assessments like Schlag’s of the “postmodern condition” (263) and Glendon’s of “rights talk” must be seen as contemporary responses to an essential cultural disposition which is linked to the historical foundations of the United States and was observed rather early on, most famously by Alexis de Tocqueville who stated: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one. From that comes the consequence that parties feel obliged to borrow legal ideas and language when conducting their own daily controversies” (315).

From its very beginning, the United States has been affected by and associated with questions of human and civil rights and, consequently, these questions have become deeply engrained in its foundational narratives and myths. The Puritans, for instance, established settlements on American soil in the seventeenth century because they felt their religious rights to be disrespected in England and because they desired to own land on which to establish their communities. Their plans to settle, however, infringed upon the rights of the indigenous peoples, the original owners of the land. Thus, Colonial America emerged from a complex interplay of rights assertions and violations; it immediately grew out of a consciousness of rights and entitlements. The same consciousness also played a significant role in the actual founding of the United States. As the Declaration of Independence famously proclaims, this founding act was based on an emphatic affirmation of human and civil rights. And the framers of the Constitution and the Bill of Rights, as the young Abraham Lincoln expressed it in 1838, had helped create

a system of political institutions, conducing more essentially to the ends of civil and religious liberty, than any of which the history of former times tells us. ... Theirs was the task (and nobly they performed it) to possess

themselves, and through themselves us, of this goodly land; and to uprear upon its hills and its valleys, a political edifice of liberty and equal rights. (qtd. in Hartog 1013)

This foundational vision of the U.S. polity as a “political edifice of liberty and equal rights” (1014) has ever since held immense symbolic power and has bred both aspirations and discontent. It has served as the source for various interconnected, yet often also conflicting, narratives and discourses through which the question of rights of humans in general and citizens of the U.S. in particular has been constantly re-negotiated. In this regard, the history of the United States can be understood as an ongoing struggle over not only the protection and realization, but also the limitation and violation, of individual and collective rights – a struggle in part provoked by individual indignation and the collective experience of injustice but also inspired by a profound trust in the aspirational promise of constitutional rights. This nexus between indignation and trust is perhaps best expressed in the Seneca Falls Declaration of Sentiments and Resolutions (1848) which states that all men *and women* are created equal, thus invoking the Declaration of Independence, yet pushing its political limits.

But the question of rights is constitutive not merely of the political, social, and cultural self-conception of the U.S., it also informs its perception from the outside – even more so in light of the fact that the question of rights has gained center stage in the debates on global justice and engendered an international ‘culture of rights.’ Thus, from cyber surveillance to trade regulations, from copyright law to the defense against terrorism, the question of rights, which had served as the foundational moment for the U.S., has today become an inevitable international concern necessitating engagement beyond national boundaries and transcending national interests.

It is hardly surprising then, that due to its historical depth and its significance across legal, political, and cultural discourses, the question of rights also echoes through all areas of American Studies and constitutes a major research perspective that is both dynamic and absorbing. Moreover, since the field of American Studies itself – in its development, its central questions and objectives, and its changing self-understanding – has been, and continuous to be, influenced by a fundamental concern for justice and rights, the question of rights in the U.S. also promises obvious potential for disciplinary self-reflection.

These arguments also informed the decision of the German Association for American Studies (DGfA) to dedicate its 2016 annual convention to the topic of rights in the United States. The objective was to offer an interdisciplinary perspective on the multifaceted presence of the semantics of rights in U.S. culture. This edited collection originated from a selection of papers presented at the conference which were revised and considerably expanded into full articles for the purpose of this publication. The volume aims to reflect the breadth and depth of the interdisciplinary debates that took place at Osnabrück University in May 2016 and which we take to be representative of the great variety of approaches to questions of rights in American Studies at large. Written by scholars working in different disciplines – American Studies, Legal Studies, history, political science, TEFL – the contributions in this volume investigate the question of rights as it has evolved and been debated throughout U.S. (legal) history as well as in U.S. literature and popular culture.

The first section of contributions focuses on the social and historical reality of rights in the United States, whereas the second and third sections explore the negotiation of rights in American literature and popular culture. The first two articles of the volume probe into dominant conceptions of citizenship and complicate these by taking into view groups of people that have seen the realization of their civil rights thwarted, on the basis of racial discrimination and/or geographical non-belonging.

In her article “Refugees Welcome?” Leti Volpp explores how a traffic sign has become an iconic symbol for (im)migration in the United States and in Germany. Employing a critical legal studies framework for her analysis, Volpp analyzes the multiple meanings of the sign across the decades and on its journey across the Atlantic, e.g., its use as a warning for illegal immigration, its casting of refugees (DREAMers as well as Pilgrims) as criminals, and its increased presence as an icon for the “Refugees Welcome” movement in Germany. Her main concern, however, is to show how the sign encodes different understandings of and attitudes toward human migration – particularly ‘visible’ in the case of illegal immigration – and how these understandings and attitudes are mobilized in debates about citizenship, its privileges, and its constraints. Her analysis is then completed by a critical discussion of the centrality that the rights concept has assumed in legal discourse. According to Volpp, “[r]ights make people appear to be equal before the law, disguising material inequalities” (35). Volpp’s criticism of the potential chasm between rights

as an abstract idea versus rights as a material practice is reiterated by several other authors in this volume.

Blair L. M. Kelley's historical analysis of the African American struggle for the acknowledgement and realization of their civil rights in "Unabated Protest: American Citizenship and African American Resistance to Jim Crow Segregation" echoes Volpp's discursive approach to citizenship. These two articles complement each other in more than one way as they both share an interest in the nexus between citizenship and mobility. Kelley's article establishes a genealogy of black resistance against efforts to uphold the segregation of public transportation during the nineteenth and twentieth centuries. By filling in the gaps in the history of African American resistance to discrimination and disenfranchisement, Kelley's research throws into sharp relief that citizenship must entail the possibility of fully participating in civic life – if it is to amount to more than paying lip service to the needs of privileged groups of people.

The articles by Susan Herman and Michael Dreyer focus on the judicial branch and review its role in safeguarding the civil rights of the U.S. population. In her article "On Balancing Liberty and National Security," Herman reconsiders the legal changes devised by the PATRIOT and FISA Acts in response to the 9/11 attacks and warns against their potential trade-off between personal liberty and national security. She cautions readers against laws granting the government expanded search and seizure powers, thus facilitating an infringement of citizens' first amendment rights. Drawing on her long experience as constitutional law scholar and president of the American Civil Liberties Union (ACLU), Herman then moves on to criticize the courts' dismissal of almost all charges challenging the legality of these new surveillance laws as failing to protect U.S. Americans' constitutional rights. In contrast, the increased corporate pushback against governmental surveillance may be interpreted as a shift in responsibilities, with the private sector and the free market taking on the tasks formerly enacted by the judiciary.

In contrast to Herman's assessment of the precarious state of civil rights when exclusively dependent on the judicial branch for their realization, Michael Dreyer traces how the Supreme Court has, in the course of its history, acquired its public role as a harbinger of a more progressive vision of social justice. In "Civil Rights from the Bench? The U.S. Supreme Court between Originalism and the Living Constitution," Dreyer particularly concentrates on the Warren Court's successful incorporation

of the Bill of Rights and the legacy it created for future Supreme Court judges by means of its irrevocable entrance into the political arena with its ruling in *Brown vs. Board of Education*. Yet the circumstance that minority groups have turned to the Supreme Court as an ally in their fights for inclusion into the national body does not automatically make the Court an unequivocal supporter of minority civil rights. As Dreyer is careful to remind his readers in the conclusion of his article, the Supreme Court has only rarely taken bold decisions antagonizing or alienating the wider public. In deconstructing the common narrative fashioning the Supreme Court as a non-partisan and impartial agent protecting civil rights as the objective ‘facts’ that the Constitution has rendered them to be, Dreyer shares Herman’s suspicion of the courts’ reliability as universal protectors of civil rights.

The collection’s first part ends with a contribution by Curd Benjamin Knüpfer. In “Technological Innovation and Bottom-Up Democracy: Acknowledging the Crises and Re-Affirming the Research Agenda,” Knüpfer analyzes broader, more recent, developments in the realms of politics and technology as symptoms of crisis tendencies in contemporary U.S. American democracy. His article relates the rising relevance of new information and communication technologies to declining ideological investments into democratic ideals formerly heralded (the conceptual site of the crisis). He then connects the changes in participatory practices to the further dwindling of the public sphere and its replacement with virtual market spaces (the institutional site of the crisis). The diagnosis of these forces and their disruptive interplay serves as his point of departure for a scholarly call to arms, urging the social sciences to step up to the task of rehabilitating democracy. By suggesting concrete research avenues to reconstruct, re-evaluate, and re-appreciate inclusive structures of deliberation in civic, public spaces, Knüpfer points to the multiple answers that academic discourses and practices may offer to the question of rights.

The articles that constitute the second part of this volume, “Literature and the Question of Rights,” continue to present a multifaceted, diverse, and interdisciplinary engagement with the selfsame question. Despite their varying thematic and historical concerns, collectively they present an attempt to further illuminate the interstices between the literary and the legal in the U.S.

The first two articles, “Debt Reckoning: Equity, Property, Bartleby” by Chad Luck and “Right or Obligation? Privacy in Henry James’ *The*

Bostonians” by Katrin Horn, are interested in the way canonical literature comments on some of the legal phenomena that preoccupied nineteenth-century mainstream America: while Luck’s article is concerned with the validation of absolute property rights through the abolition of equity courts in Herman Melville’s “Bartleby, the Scrivener,” Horn explores how changes in the public sphere prompted Henry James to emphasize the protection of privacy in *The Bostonians*. Treating these two articles as complementary pieces is not to suggest that they cannot argue their case individually. But it is their comparative reading that makes readers aware of the larger processes of how literary and legal discourses interact in the formation of socio-economic ‘truths’ and ‘facts.’ Luck, for instance, shows how Melville’s short story evokes mortgage discourse to explore the antebellum U.S. as a distinct historical moment in which alternative ideas of conceptualizing property gained increased traction. Horn, in turn, argues that James’ fictional negotiation of privacy exposes the fundamental gender bias of the public/private dichotomy, a dichotomy that is at the heart of early legal formulations of a right to privacy (e.g., Warren and Brandeis). Besides investigating literature’s investment in the ethical principles underlying the respective rights under consideration, i.e., distributive property rights and the ‘right’ to privacy, Luck and Horn also pay special attention to the representational strategies employed in “Bartleby, the Scrivener” and *The Bostonians* in order to shed light on the complex relation between ethics and narrative form.

The next article in this section, Julius Greve’s “Ventriloquism Against the Copyright of the Concept: Authorial Suspension and Modernist Performativity,” brings together subjects that are commonly considered distinct: U.S. copyright law, Laruelle’s non-philosophy, and modernist poetic practices. Greve does so in order to examine how each of them deals with questions of quoting and authorship, or more generally, with questions of intellectual property. He takes copyright’s failure to successfully enforce an intellectual property regime in the aftermath of the triumphant progress of the new information and communication technologies as a starting point for a critical investigation into the paradigms of the copyright system. Having established the backdrop against which to voice his critique of institutionalized referencing practices, he turns to academia to show how copyright’s underlying paradigms are also perpetuated in scholarly contexts via the “copyright of the concept.” Greve’s phrase refers to the long-standing tradition of reifying authorial dominance and

ideas of intellectual property in academia through the correlation of trademark concepts with those scholars who are deemed their ‘inventors.’ Inspired by modernist poetic practices seen at work in Ezra Pound’s and William Carlos Williams’ poems, he proposes Ventriloquism as an alternative referencing practice. This alternative practice disavows textual and authorial authority and, as a consequence, refrains from quoting or referencing altogether. In addition, it circumvents violating intellectual property laws by negating a text’s ability to make factual statements about the world. Greve aims at re-thinking the conceptual boundaries and functionality of copyright in such a way that would allow for its renewed articulation as a public’s right to copy.

In “Law as Algorithm: Legal Discourse, the Data Imaginary and the 1839 *American Slavery as It Is*,” Sebastian Herrmann focuses on the law in its discursive function, rather than on any right in particular. He is interested in the discursive mechanisms of the law, which are, in Herrmann’s words, “algorithms” that can authenticate facts from mere data. In his analysis of *American Slavery as It Is*, Herrmann demonstrates that the abolitionist compendium applies “law as algorithm” in its strategic representation of slavery’s horrors as objective, rational facts by rhetorically imitating the process of legal arbitration and by making extensive use of legal tropes (e.g., courtroom metaphors). Herrmann’s approach to “Literature and the Question of Rights” is thus implicitly informed by the idea that we can further illuminate the workings of literary texts by tracing how they emulate those modes of perception and interpretation that characterize law as a discourse.

Ina Batzke’s “Contesting Traditional Imaginaries of Citizenship: José Ángel N.’s *Illegal: Reflections of an Undocumented Immigrant*” explores how undocumented migrants, especially DREAMers, use their life stories as political leverage in their support of legislative pathways to citizenship. In particular, she looks at José Ángel N.’s memoir *Illegal*, due to its notable position within the larger body of life writings by undocumented migrants. Although *Illegal* was published at a time when many undocumented migrants vocally told their life stories to an American public, it avoids employing the narrative strategies characteristically found in other DREAMers’ life stories: neither does *Illegal* emphasize its author’s exceptionality and worthiness, nor does it frame his life as a success story or as the epitome of the American Dream. Batzke thus demonstrates that the author’s narrative choices mark his work both as a generic deviation

and as a dissenting voice deconstructing the affirmative discourses on citizenship that have emerged in the wake of the publication of DREAMer narratives.

In “The Gendered Prison: Female Bodies and the Carceral Space in American Women’s Prison Literature,” Kerstin Knopf reads female prisoners’ life narratives as these women’s deliberate effort to write resistance and seek redress by addressing neglect and rights violations as routine incidents of imprisonment. Since the texts she studies frame the prison as a totalitarian and disciplinary institution, Knopf draws on Jeremy Bentham’s and Michel Foucault’s ideas on the panopticon. Her main argument, however, is that the gendered character of this institution has not been duly acknowledged given that the few published female texts tend to recede from our critical view in comparison to the bulk of prison literature penned by male prisoners. As Knopf shows in her close readings of Assata Shakur’s *Assata: An Autobiography* and Judee Norton’s “Gerta’s Story,” female prison literature launches its critique of the U.S. prison system from two perspectives: first, it criticizes that the majority of Americans seem to be uncritical of institutionalized civil rights deprivations; second, it foregrounds how the inmates’ femaleness renders them utterly vulnerable in an institutional context where the female body is subjected to disciplining violence that has been sanctioned by a patriarchal society and is primarily exercised by its male agents.

What these two articles concluding the section “Literature and the Question of Rights” have in common is that they converge in two basic methodological points and suggest another analytical relationship between law and literature: they both rest on the premise that forms of life writing, due to their affective force, lend themselves particularly well as instruments of political intervention, and they both define a certain set of narrative strategies that disenfranchised groups employ to construct and legitimize their rights claims, e.g., the acknowledgement of citizenship status (DREAMers) or the restoration of civil rights (female prisoners).

The last part of this volume, “Negotiating Rights in Popular Culture,” is comprised of four articles that are particularly interested in the ways legal concepts are articulated in a realm that assumes as its audience those unfamiliar with the law, its forms, discourses, and practices: popular culture. What transpires from these scholars’ discussions is that the re-articulation of such concepts as rights, law, and justice in popular cultural texts does not imply a mere rehearsal of them in a different context and for a

different audience; it is rather a palimpsestic practice where new meanings are superimposed on those legal concepts. Thus, popular culture's negotiation of 'legal' content establishes a dialogic relationship between two kinds of signifying practices.

The idea that the way we 'see' the law shapes our understanding of its functioning is reverberated in Katja Kanzler's "Female Lawyer Figures in Contemporary TV Legal Drama: Embodiment and Gender in Figurations of the Legal Process." In this article, Kanzler looks at how two post-millennial courtroom drama series, *The Good Wife* and *How to Get Away with Murder*, stage their lawyer heroines. One of the major changes Kanzler refers to in comparison to the "golden age" of 1950s/60s courtroom drama is that the turn away from iconic male lawyers to female lawyer figures also entails a redefinition of law's workings in these two series: whereas the male lawyers' abilities to deliver justice depend on their detachment from society in many of the golden age dramas, their modern-day female counterparts rely on their social and private lives as a complicating, yet indispensable resource in the quest for justice. Moreover, Kanzler demonstrates that the series' break with generic conventions in terms of gender also impacts on its portrayal of legal norms and values. *The Good Wife* and *How to Get Away* cast law as an institution that is either incompatible with justice or imperfect in its very nature, thus instantaneously compromising the justice it establishes. By spelling out the implications of their gendered figurations for the normative framework that these series put in place, Kanzler helps us understand their interpretation of the relationships between law and justice.

In a similar vein, Josef Raab's "The Disenfranchised Latin@ Alien in *The X-Files* and Beyond" also broaches the question of how TV series participate in larger debates on the relationship between law and justice. In particular, Raab investigates how the *X-Files* episode "El Mundo Gira" reflects the paradigms of the two types of rights potentially applicable to undocumented migrants in the U.S.: civil rights and human rights. "El Munda Gira," he argues, deliberately invokes both legal frameworks in order to play out the de facto legal disenfranchisement of undocumented Latin American immigrants who have no official claim to citizenship rights and no means to enforce their human rights. In his analysis, Raab illustrates how "El Mundo Gira" infuses its political discussion with the respective generic repertoires of the mystery thriller and the telenovela to deliver its 'verdict' on the plight of the undocumented: by connecting the

fictionalized immigrants' legal transgression with a bodily deformation, the episode very literally casts the undocumented as illegal 'aliens' who threaten to contaminate the host country with the diseases they carry. Their bodily deviance paves the way for denying these immigrants humanity – and thus human rights – and testifies to the episode's eventual subversion of its initial humanitarian stance in favor of a threat narrative.

In her article "Picturing Ebola: Photography as an Instrument of Biopolitical (In)Justice," Ingrid Gessner analyzes Daniel Berehulak's photographs of Ebola victims and survivors with respect to the conceptions of justice that they mobilize. Berehulak, who took the photographs in the middle of the 2014 Ebola epidemic in West Africa, divides these into two groups: burial team photographs and "Braving Ebola" portraits. Gessner elaborates on this division by pointing to each group's visual construction of justice. In documenting the epidemic's victims and personal tragedies, the burial team photographs employ an iconography of suffering and human pain, and thus, in Gessner's interpretation, testify to the unequal, and therefore unjust, distribution of human rights. The "Braving Ebola" portraits in contrast show the epidemic's combatants and survivors. By invoking resilience rather than despair, these photographs reinvigorate an iconography of heroism and thus serve as a counterforce to the burial team photographs. Gessner concludes that each group of photographs follows a discrete argumentative line in covering the epidemic for the U.S. public, mirroring the two dominant lines in reporting on the epidemic and (West) Africa more generally.

The final contribution to this volume, Mirja Beutel's "*The Sopranos* and Minority Rights: A Cosmopolitan Approach for the EFL Classroom," expounds on how the EFL classroom may serve as an educational setting in which language instruction is productively combined with civic education. According to Beutel, rights pedagogy in the EFL classroom should particularly invest in students' successful communication with people from a variety of backgrounds. She conceptualizes this ability as "cosmopolitan communicative competence (ccc)," which includes the capacity to discuss minority rights and negotiate individual and group rights in the context of globalization. Beutel's article fuses theories of learning, teaching material, and teaching strategies. Through her "cosmopolitan reading" of the episode "Christopher" from *The Sopranos* she seeks to exemplify how "ccc" can be implemented in the EFL classroom.

Viewed together these contributions demonstrate that the question of rights has been answered differently by members of the various groups and cultures that have historically constituted the United States, and that the answers to these questions given by these groups and cultures have changed significantly over time. They also highlight the enduring power of rights discourse – its attractiveness to those who have rights and fight for their preservation as well as to those who feel to be lacking or to have lost rights and who aspire for their recognition or reinstatement.

These sentiments have been aptly – and rather optimistically – expressed by legal historian David J. Bodenhamer when he observed some time ago that “what is most striking about the conflict over rights has been its democratic character. [...] When we confront each other over our individual rights we are doing the work of democracy” (28). Yet the continuous promise of rights, Bodenhamer insisted, also implies a sustained “American commitment to a society governed by law” (229). Given the climate of exasperating polarization which characterizes the current political and cultural controversies in the U.S., Bodenhamer’s optimism must appear almost outdated, yet his insistence on the shared commitment may serve as a most timely reminder and admonishment.

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We are very saddened by the death of our colleague and friend, Josef Raab, who passed away while this volume was in its final stages. We feel very grateful that we were able to include his contribution, as well as for the inspiring exchanges we had during the editing process. We would like to dedicate this edition to Josef’s memory.

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The Social and Historical Reality of
Rights in the U.S.

Leti Volpp

Refugees Welcome?

Introduction¹

Along the southern portion of Interstate 5, which runs from the U.S./ Mexico border crossing at San Ysidro, California all the way to the border between the U.S. and Canada, stands a yellow road sign depicting the silhouette of a man, woman, and female child in flight. The sign is captioned with text in black, stating: “CAUTION” (Fig. 1). As Cindy Carcamo reports, it is the last of ten similar signs erected by the California Department of Transportation (Caltrans) along the I-5, both south and north of San Diego, starting in 1990. While the sign is still displayed along the freeway, what it signifies has evolved in the intervening decades. The sign has become an iconic symbol of different forms of migration, in the United States and, unexpectedly, in Germany. Tracing the sign’s various

¹ Many thanks to audiences for their helpful feedback at the following venues: the 2016 Annual Meeting of the German Association for American Studies in Osnabrück, Germany where this was a keynote, with special thanks to Peter Schneck; Ludwig-Maximilians-Universität München where this was a Berkeley Lecture; the Indiana University Maurer School of Law where this was the Fuchs Lecture; the American Studies workshop series at Princeton University; the 2016 conference of the International Society of Public Law in Berlin; the Cornell Law School Law and Humanities Colloquium; the faculty workshop at Santa Clara University School of Law; the Townsend Center for the Humanities fellows at UC Berkeley; the faculty workshop at Berkeley Law; and the Law and Humanities working group at UC Berkeley. I also thank Abigail Stepnitz, Chloe Kim, Kathryn Heard, and Julie Pittman for their excellent research assistance. This piece has also appeared in the *Berkeley La Raza Law Journal* 28 (2018) and, in revised form, as “Signs of Law” in *Looking for Law in All the Wrong Places: Justice Beyond and Between*, ed. Marianne Constable, Leti Volpp, and Bryan Wagner (Fordham University Press, 2019).

meanings, as well as its movement as a cultural artifact across both geographical and political divides, illuminates diverging understandings of human flight.



Fig. 1. Jonathan McIntosh, “Caution Economic Refugees,” I-5, San Ysidro, CA, flickr.com, licensed under CC BY 2.0

The sign’s original purpose was to alert drivers to certain pedestrians crossing the freeway. As Seth Mydans reports, between 1987 and 1991, at least 227 people were struck by cars and trucks when trying to cross the freeway in order to avoid capture by immigration agents; 127 were killed and many were injured. Particularly dangerous were two areas: one by the San Ysidro checkpoint just north of the border, where 87 people had been killed by cars as they tried to run into the United States from Mexico, and the second an area by Camp Pendleton, south of an interior border checkpoint at San Clemente, where another 40 had been killed. Agents at the San Clemente checkpoint seized 75,000 undocumented immigrants in 1990 alone, mostly from the floors or trunks of vehicles (Mydans).²

² While this number seems staggering, a 2005 GAO report indicates that approximately 144,000 vehicles passed daily through the San Clemente checkpoint (U.S. Gov. Accountability Office).

To avoid San Clemente, immigrant smugglers would stop vehicles before they reached the checkpoint, tell their passengers to cross eight lanes of freeway, and instruct them to continue north along the west side of the freeway, abutting the shoreline of the Pacific Ocean. After the immigrants had skirted the checkpoint and re-crossed the freeway, the smugglers would pick them up on the northern side of the checkpoint. Many immigrants were seen “in the early evening hesitating by the side of the road before dashing, often hand-in-hand, into the oncoming traffic” (Mydans). Most accidents occurred between 8 pm and midnight. Many immigrants were from rural areas and did not realize the speed of freeway traffic; victims ranged in age from 3 years old to 80. In the words of Captain Ronald Phulps, commander of the Oceanside office of the California Highway Patrol, “[t]hey usually cross in groups of people, rather than one or two at a time. [...] Often they are holding hands, forming human chains, and the chain gets broken as these people try to cross the highway.” Phulps added: “Often what you get is a group of people running in different directions at the moment of panic. [...] Much like a pinball machine, you don’t know which way an individual may be darting” (qtd. in Mydans).

Text signs were initially posted by Caltrans, urging “Caution Watch for People Crossing Road,” but their wordiness made them difficult to decipher (Berestein). Caltrans then asked a graphic artist named John Hood to design an image that would, in the blink of an eye, alert drivers. Before Hood began drawing the sign, he and his supervisors met with California Highway Patrol and saw photos of accident scenes. Moved particularly by the deaths that involved families, Hood decided to depict a family that projected a sense of urgency in flight – running both across the freeway and running from something else as well. The family he illustrated was made up of the silhouetted image of a man, followed by a woman grabbing a female child by her wrist, all in desperate flight. Hood, who grew up on the Navajo reservation in New Mexico, drew on his own experiences fighting in Vietnam, where he had seen families run for their lives as villages were attacked, and also remembered stories about his ancestors who had died trying to escape from U.S. soldiers (Berestein).

The first graphic signs were unveiled at Camp Pendleton in September 1990. To try to further deter freeway crossers, Caltrans put tall fences in the center divider along the I-5 shortly thereafter. Following the posting of the signs, the freeway deaths diminished. However, the decrease was

not the product of the signs, but of shifting border control strategies. Beginning in 1994, the federal government embarked on a strategy of attempting to deter illegal migration through a program named Operation Gatekeeper. The idea was to stem the tide of illegal migration crossing the border from Mexico into the United States by shifting traffic eastward, where the Border Patrol believed it enjoyed a “strategic advantage” over would-be crossers (U.S. Dept. of Justice, Office of Inspector General). By moving migration away from popular suburban migration routes around San Diego and controlling the ‘main gates’ of illegal entry, in the words of then-Commissioner of the Immigration and Naturalization Service Doris Meissner, “geography would do the rest” (qtd. in Cornelius 779), meaning that crossings would be deterred because of the climate of Arizona and its topography, its mountains and deserts. A primary fence was made of welded-together landing mats of corrugated steel, obtained from the Department of Defense and left over from the Vietnam War, and erected along stretches of the border starting at the ocean. Other sections were made up of closely spaced concrete poles. I was told on a tour with the Border Patrol in the San Diego sector in 2001 that these poles were spaced as they were, five or six inches apart, because the area bridging Mexico and the United States south of San Diego is a transnationally protected wetland, so that non-human animals would still be able to cross.³ By creating a wall and a militarized zone along the border between the United States and Baja California, Operation Gatekeeper was successful in reducing illegal crossing near San Diego. This is apparent in govern-

³ For a discussion of how existing fencing was constructed through waiving environmental regulations, and how it has impacted wildlife, see Collier and Satija. The Caltrans sign also spurs thought about the relationship between human and animal movement. With its instruction to drivers to watch out, via an image of the flattened silhouette of a body in motion, the Caltrans sign evokes the ubiquitous sign found throughout the United States warning drivers of ‘Deer Crossing.’ Considering the Deer Crossing sign, is its purpose pastoral care, a kind of humanitarianism directed at deer to protect them from injury, or is it intended to protect motorists from vehicular accidents? Linked to this question is the infamous call to a radio station that went viral, as reported by Brett French, from a woman in North Dakota named Donna who said officials should move the deer crossing signs from high traffic areas to low traffic ones because deer were being encouraged to cross at the interstate, which was entirely too dangerous (in other words, Donna believed the deer were obeying the sign) (French).

ment data about immigration arrests. Between 1992 and 2004, the number of attempts to cross in the San Diego sector dramatically decreased. However, according to the Congressional Research Service crossings were not eliminated, but merely displaced eastward to Arizona (Haddal, Kim, and Garcia 14-15). This strategy of shifting border crossings eastward correlated with a brutal escalation in fatalities – so that the injunction to let geography do the rest became a gruesome message, not about deterrence, but about death. Data from the Office of the Medical Examiner of Pima County (which sits in the center of Arizona's southern border with Mexico and includes the city of Tucson) indicates a striking increase in dead bodies found, with an average of 163 deaths occurring each fiscal year after 1999, in contrast to an average of 12 deaths annually between 1990 and 1999 (Martinez et al. 12).

Pushing crossings east into Arizona created tremendous tensions in that state and helped foster the political pre-conditions for Arizona's passing of the "Save our State" bill, SB 1070, designed to encourage undocumented immigrants to engage in what was named "attrition through enforcement" or "self-deportation" (Plascencia 104). This movement of border crossing away from California also rendered the Caltrans sign something of a relic. Caltrans has no intention to replace the one remaining sign when it disappears, i.e., whenever it is torn down, like its fellow signs, following vandalism, traffic accident, or stormy weather (Carcamo). Yet the sign has a lingering afterlife, in the process accreting new meanings as an image.

In a 1996 article titled "Official Graffiti of the Everyday," sociologists Joe Hermer and Alan Hunt examine the spatial aspects of regulatory prohibition in the form of signs, such as road traffic signs, Entry or Exit signs in public buildings, and signs stating "No Smoking"; they call these pervasive and visible forms of regulation "official graffiti." Hermer and Hunt argue that traffic signs appear as the "paradigm case" of the ability of such signs to create a public discourse of "prohibition, warning, and advice," with authority emanating not only from a legal authority exemplified in the road sign, but also from a "standardized and impersonal form" that aspires to be fixed and permanent (464).

Prohibitory signs – such as a sign stating "No Smoking" – are, according to Hermer and Hunt, never simply "iconic injunctions." Rather, they are "part of a much larger series of articulations that seek to direct the behavior of people in a wide variety of social situations and spaces" (463).

Thus, the sign is not just about behavior at the site of the sign. Moreover, the behavior being shaped by the sign is not only controlled by the sign. And here we should note that some of the Caltrans signs were labeled with words both in English and Spanish, including one placed on the shoulder of the northbound I-5 by the San Clemente border stop (Fig. 2).



Fig. 2. Sean Biehle, “Prohibido,” flickr.com, licensed under CC BY 2.0

The two words on the sign – “Caution,” topping the figures on the yellow background, and “Prohibido,” added below with black text on a white background – do not mean the same thing. Prohibido does not mean caution; it means, variously: prohibited, forbidden, taboo, barred, restricted, and no (“Prohibido”). “Caution” is clearly directed to the motorist; “prohibido” is plainly directed to the undocumented immigrant. The motorist is presumptively English-speaking; the undocumented immigrant is presumptively Spanish-speaking, even while Berestein and Cervantes report that 370,000 residents of San Diego County in the early 1990s self-identified as Spanish speakers, and certainly most of them were motorists. Although two parties are addressed, then, this is not a symmetrical relationship.

As Hermer and Hunt point out, regulatory signs invoke a “common underlying discursive framework.” This shared framework is constructed

through three elements: an “implied reader,” an “implied regulatory object,” and an “implied author who exercises regulatory authority” (466). The bilingual Caltrans sign suggests two implied readers, directed to with a diverging mode of address. As a mode of articulation, a prohibition differs from a caution, which we could consider a warning or an alert. A prohibition orders the reader to cease and desist; a warning or an alert allows the reader to exercise her judgment in proceeding with a particular activity. The implied author exercising regulatory authority here of course is the government, which through this sign is simultaneously telling drivers to drive cautiously and engaging in pastoral humanitarian care, trying to ensure that humans are not killed. Yet the government is also responsible for the policing of the border, which creates the phenomenon of illegal migration in the first place.⁴

The implied regulatory object seems two-fold: both driving conduct and the crossing of the freeway by pedestrians. Yet the implied regulatory object is actually three-fold. Also regulated here is the undocumented immigrant herself. What the sign seeks to regulate is not just the conduct of these bodies; also governed is the presence of the bodies themselves. The sign does not just tell undocumented immigrants that running across the freeway is forbidden; the sign communicates that their own presence is “prohibido” as well. We could consider the fact that the original purpose for these signs (decreasing freeway deaths of immigrants running across

⁴ One might note that attributing responsibility to ‘the government’ for both patrolling nation-state borders and engaging in pastoral care is too simple a story because it fails to account for federalism, with its overlapping systems of state and federal government. The California Department of Transportation, which commissioned and erected the signs, is a state agency. The admission, exclusion, and deportation of noncitizens is today considered a federal power, although until the latter part of the nineteenth century, this immigration power was also exercised by states. While today, California has been articulated by many who seek to defend immigrants living in California against the policies of President Donald Trump as a ‘sanctuary state,’ during the era of the Caltrans sign, California in fact was a site of intense anti-immigrant political activity, including by the state government. This activity included the attempt of then-Governor Pete Wilson to litigate against what he called an “invasion” and culminated in the passage of the ballot initiative Proposition 187 which sought to deny public education, health, and social services to undocumented immigrants throughout the state (Massey 31).

the I-5) has been rendered moot by Operation Gatekeeper, but the sign is still posted.⁵ As a result, what does the freeway driver learn through seeing this sign? Many drivers assume that it means that ‘illegal immigrants’ are not just a traffic hazard, but a generic danger against which they are being cautioned.

Both drivers and immigrants are being told that illegal immigrants are prohibited; the so-called ‘illegal alien’ is, in the words of Mae Ngai, an “impossible subject,” a subject who is not supposed to exist (5). Rather than understanding the ‘illegal alien’ to be a creation of shifting laws which can make and unmake illegal immigration, the ‘illegal alien’ is believed to have committed a personal sin through her presence. This is a sin which can only be expiated through her self-deportation: she can only make the wrong go away by removing herself from the United States, by ceasing to exist.

Illegal Immigration

In the U.S. context, the sign discussed above, with its image of immigrants in flight, along with the text “Caution,” has been deployed as a symbol of undocumented immigrants both by those sympathetic to them and by those who oppose illegal immigration.

Here are three examples created by those opposing illegal immigration, each of which alters the sign in increasingly complex ways. The first refiguring of the sign, not pictured here, simply adds more text. It retains the yellow background with the heading “Caution” over the image of the running figures, with the only change in the form of additional text at the bottom of the sign stating: “Undocumented Democrats.” As Danielle Kurtzleben reports, the term “undocumented Democrats” is one that Republican presidential candidate Ted Cruz re-popularized in 2016, as the “politically correct” term for “illegal aliens.” Invoked here is the suggestion of possible voter fraud by noncitizens ineligible to vote; in addition, the sign intimates the idea of collusion between the Democratic Party,

⁵ The one remaining sign is posted on the northbound I-5 near the San Ysidro Port of Entry. According to Caltrans, there are occasional pedestrian crossings at that location, “primarily by transients” (Bruce-Johnson).

eager to quickly legalize a potential voting base, and immigrants seeking legal status.

The second reworking of the sign pairs a diamond-shaped rendition of the original sign under the caption “Before Amnesty” with a new sign to its right, illustrating the running immigrants multiplied tenfold under the caption “After the Amnesty” (Fig. 3).



Fig. 3. “Before Amnesty” v. “After the Amnesty”⁶

Changing the rectangular shape of the original sign to that of a diamond could be read as suggesting that the viewer is to be warned: the Federal Highway Administration of the Department of Transportation mandates that warning signs be diamond-shaped, with black writing on a yellow background, with only limited exceptions. The reformulated image thus appears intended to warn of the dangers of amnesty, such as was created through the Immigration Reform and Control Act in 1986 which legalized approximately 2.6 million undocumented immigrants. This act had sought to end illegal immigration through both destroying the ‘magnet’ of jobs by newly requiring work authorization (via a program called employer sanctions) and through legalizing those who were undocumented (via amnesty). At the time, the term amnesty did not have the negative valence it has today. In fact, in 1984, then-President Ronald Reagan expressed his support for “amnesty for those who have put down roots and lived here, even though some time back they may have entered illegally” (qtd. in Ahmad 268). But over time, amnesty has for many come to represent an

⁶ Image downloaded from the-american-catholic.com in January 2017.

inexplicable forgiveness of bad behavior, an inappropriate condoning of moral culpability (271-72). Many argue, in addition, that any amnesty cannot end illegal immigration, but actually incentivizes the movement of those who hope for such a program in the future. The suggestion we see in the reworking of the Caltrans sign is that any future amnesty, such as was most recently contemplated by the U.S. Senate in 2006 and 2013, will lead to a massive influx of ‘illegal immigrants.’

The multiplying of the figure of the running man, woman, and child suggests an out-of-control reproduction, echoing nativist concerns about immigrant birth rates, as well as a stampede across the border by a dehumanized swarm of insects, replicating zombies, or a threatening horde. We could think here of the language used in *Chae Chan Ping v. United States* (1889), the first U.S. Supreme Court decision upholding the power of Congress to exclude immigrants from the United States, which evoked Chinese immigrants as “vast hordes” engaged in “foreign aggression and encroachment”:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation [...] It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. (606)

Note also the “¡Aviso!” replacing “Caution” at the top of the sign, suggesting two implied readers. “Aviso” can be translated as “warning” or “caution”; at the same time, though, it can also refer to a notice or advertisement (“Aviso”). Thus, “¡Aviso!” can be doubly read as both warning of a danger and as advertising a benefit, presumably to those who would profit from an amnesty and who, when notified of its promise, would run across the border.

The third alteration of the original sign inveighs against what it labels “Obam-igration,” in a sign with a black background, pairing the running family silhouetted in white, over large yellow text announcing “Obam-igration,” with small white text at the bottom stating “You Don’t Need No Stinkin’ Papers!” (Fig. 4).



Fig. 4. “Obam-igration”⁷

The O in “Obam-igration” is what was known as Barack Obama’s signature “O” logo which appeared in presidential campaign material in red, blue, and white and was designed to invoke a rising sun. The term “Obam-igration” is clearly intended to be a reference to two programs announced by President Obama in 2012 and 2014, called Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA). These are programs that do not create legal status, but provide a temporary and revocable reprieve from deportation, as well as work authorization pursuant to preexisting regulation. While most legal scholars agree that these programs were created by the executive branch as a form of constitutionally permissible prosecutorial discretion, members of the public perceived DACA and DAPA as monarchical, unconstitutional law-making and as actually legalizing undocumented immigrants, which these programs in fact did not do (Volpp, “Immigrants” 385).

The idea that “you don’t need no stinkin’ papers” is a cultural reference to the 1948 film *The Treasure of the Sierra Madre* and the line “Badges? We don’t need no stinkin’ badges!” This line is uttered in the film by a Mexican bandit leader trying to convince American gold prospectors in Mexico that the bandits are in fact Mexican police. Here, “you don’t need no stinkin’ papers” flips the we to a you, a you who is hailed and who is presumptively both Mexican and an ‘illegal’ immigrant who needs no papers, thanks to “Obam-igration.” The papers that one does not need refers to the idea of having the correct papers, equating

⁷ Image downloaded from <http://ronbosoldier.blogspot.com> in January 2017.