LAW AND THE STRANGER





EDITED BY

AUSTIN SARAT, LAWRENCE DOUGLAS,

AND MARTHA MERRILL UMPHREY

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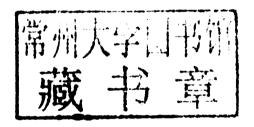
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Contributors

PAUL SCHIFF BERMAN is Dean and Foundation Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University

LEORA BILSKY is Senior Lecturer in the Faculty of Law at Tel-Aviv University

PHENG CHEAH is Associate Professor of Rhetoric at the University of California, Berkeley

LAWRENCE DOUGLAS is James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College

AUSTIN SARAT is the William Nelson Cromwell Professor of Jurisprudence and Political Science and Professor of Law, Jurisprudence and Social Thought at Amherst College

HILARY SCHOR is Professor of English, Comparative Literature, Gender Studies, and Law at the University of Southern California

ROGERS M. SMITH is Christopher H. Browne Distinguished Professor of Political Science at the University of Pennsylvania

MARTHA MERRILL UMPHREY is Professor of Law, Jurisprudence and Social Thought at Amherst College

KENJI YOSHINO is Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law

Contents

CONTRIBUTORS	xi
Negotiating (with) Strangers AUSTIN SARAT, LAWRENCE DOUGLAS, AND MARTHA MERRILL UMPHREY	1
Necessary Strangers: Law's Hospitality in the Age of Transnational Migrancy PHENG CHEAH	21
The Strangers in Ourselves: The Rights of Suspect Citizens in the Age of Terrorism ROGERS M. SMITH	65
Strangers Within: The Barghouti and the Bishara Criminal Trials	96
Conflict of Laws and the Legal Negotiation of Difference PAUL SCHIFF BERMAN	141
Who's the Stranger? Jews, Women, and Bastards in Daniel Deronda HILARY M. SCHOR	180
Of Stranger Spaces KENJI YOSHINO	211
INDEX	237

AUSTIN SARAT

LAWRENCE DOUGLAS

MARTHA MERRILL UMPHREY

Law calls community into being. It constitutes the "we" it governs, hailing us as those subject to its power, naming us as the group under its jurisdiction. This performative act of naming necessarily produces an outside as well as an inside, a border whose crossing is guarded in order to maintain the identity, coherence, and integrity of the space and people within. Those wishing to enter must negotiate a complex terrain of defensive mechanisms, expectations, assumptions, and legal proscriptions. Is that, "we" ask, someone who should be allowed to enter, someone to whom we should offer hospitality? We in turn negotiate those questions with and through law, which enforces the boundary between inside and outside in both physical and epistemological ways. We know who "we" are by situating ourselves, or by being situated, in relation to that boundary.

Law and the Stranger explores ways in which law, and in particular liberal legal regimes, identifies and responds to strangers within and across their borders, both historically and in the present day. The chapters in this book analyze the ambiguous place strangers occupy in communities not their own, and each chapter, from its own perspective (whether theoretical, jurisprudential, historical, or literary), reflects on the ways in which dealing with strangers challenges the laws and communities that invite or parry them.

The inquiries here are all the more timely because questions about how nations, peoples, and communities ought to negotiate with strangers have emerged as an increasingly pressing issue in the early twenty-first century, a time of intensified global conflict and global interconnection both economically and technologically. While Barack Obama may be moving away from the by-now familiar invocation of a "war on terror," it remains the case that the

geopolitics of the United States and Western Europe are inextricably connected to battles, both military and cultural, being fought in other lands. And, as the recent global economic crisis has all too clearly emphasized, the interdependence of nations with each other and with global institutions means that vulnerabilities apparent in one nation's economy reverberate around the world in waves that can bring smaller nations to their knees.

In such a context, conflicts (whether literal or metaphoric) among states, religions, classes, ethnicities, religions, and cultural groups seem to impose themselves on liberal legal regimes in ways that can put their liberalism under pressure. How have and should liberal states confer recognition on those who knock on the door and ask for entry? What complications arise when those perceived as strangers are inside the polity rather than outside supplicants? What, if anything, is owed to strangers without regard to their moral, political, or economic worth?

To the extent that extending hospitality is a legal project, a bestowing of recognition according to conditions created by law, we might say that strangers are made through law, rather than born through accidents of geography. What kind of legal subject is constituted by these processes of recognition? How does the legal recognition of a stranger come to constitute both stranger and self?

What Is a Stranger?

Georg Simmel, one of the most insightful commentators on the social identity of the stranger, argued that strangers are not, as common sense might have it, those who are not known, but are instead those who have been encountered but not fully assimilated into the community. Simmel describes strangers as potential wanderers, people within a community who have not belonged to it from the start and who import qualities that do not stem from the community itself. Such people are, he writes, "a synthesis of nearness and distance." Under auspicious circumstances, that ambiguous position within a group can confer a distinct kind of power on the stranger in relation to the rest of the community.

Dwelling, however temporarily, with others, strangers approach new communities with what Simmel describes as an attitude of "objectivity" because the stranger is not "radically committed to the unique ingredients and particu-

lar tendencies of the group." Strangers such as these can engender a particular kind of intimacy dependent upon their remove from the enveloping everyday world of common custom and culture. They can be entrusted with community members' confidences and confessions that cannot otherwise be spoken. The stranger's objectivity accords him or her a bird's-eye view, unburdened by "habit, piety, and precedent."

Focusing specifically on cultural narratives of the stranger, Bonnie Honig builds on this insight in *Democracy and the Foreigner*, arguing that fantasies of foreignness point to not just fear of corruption but also its cure. Honig argues that narratives that imagine foreigners specifically as founders rather than enemies point to a deep impulse toward renewal. "Sometimes," she notes, "the figure of the foreigner serves as a device that allows regimes to import from outside (and then, often, to export back to the outside) some specific and much-needed but also potentially dangerous virtue, talent, perspective, practice, gift, or quality that they cannot provide for themselves (or they cannot admit they have)." In Honig's view, our capacity to imagine foreigners as founders creates the possibility of what she calls "democratic cosmopolitanism," an ideal that "seeks out friends and partners even (or especially) among strangers and foreigners." Such strangers become objects of desire, sometimes mythologized, who continually help to refound the national community.

Yet both Simmel and Honig note that even those strangers we seem to welcome are also dangerous presences, easily transmuted into scapegoats when communities feel threatened. As Rene Girard observed, scapegoating and sacrificial violence restore equilibrium to a community threatened by internally generated violence.⁵ Simmel ties this possibility to the greater distance and objectivity of the stranger, which enables those within a community under attack to claim that they were provoked from outside the community, not from within.⁶ Honig reverses the logic of Simmel's proposition insofar as she argues that a scapegoat need not be in the first instance a foreigner; rather, a scapegoat is one cast as a foreigner, and as such, cast out of a community. Scapegoating, she argues, is "a social practice that finds or produces the object it needs."⁷

Simmel suggests that a stranger's dual remoteness and nearness has a further effect: in giving a community a sense of the more abstracted nature of the relation between it and those beyond its geographic or cultural borders, the stranger's ambiguous presence highlights the general qualities shared by all in-

dividuals. "The stranger is close to us, insofar as we feel between him and ourselves common features of a national, social, occupational, or generally human, nature. He is far from us, insofar as these common features extend beyond him or us, and connect us only because they connect a great many people." If the stranger is not "one of us," the connections we perceive with him or her nevertheless point to a thin but powerful basis for reciprocal recognition even across the sometimes high barriers of group identification, of the kind necessary for a regime of human rights.9

Strangers and Hospitality

"I have always depended upon the kindness of strangers," purrs Blanche DuBois in Tennessee Williams's A Streetcar Named Desire. Blanche's imposition on strangers is cast as an ethical problem in Williams's play, but some scholars have noted that beyond the ethical there is, or ought to be, a legal dimension to the extension of hospitality to strangers. The foundation of these claims is Immanuel Kant's argument that strangers have what he calls a "cosmopolitan right... not to be treated in a hostile manner by another upon his arrival on the other's territory." This right, Kant suggests, is "a right to visit, to which all human beings have a claim, to present oneself to society by virtue of the right of common possession of the earth." This argument posits a thin but broad basis for a right—one need not recognize in the stranger even Simmel's "common features of a national, social, occupational, or generally human, nature"—and that right is at best minimal: not to be treated with hostility upon arrival. Yet it is a universal right, one that subtends much of the present era's theorizations concerning proper exercises of law in a globalizing world.

Distinguishing between the foreigner and the barbarian (of which more below), Jacques Derrida extends Kant's analysis in arguing that what he calls "conditional hospitality" involves reciprocal obligations, passed down across generations, based on a logic of minimal familiarity. That, in turn, "presupposes... that it is possible for them [the foreigners] to be called by their names, to have names, to be subjects in law, to be questioned and to be liable, to have crimes imputed to them, to be held responsible, to be equipped with nameable identities, and proper names." This capacity to be named by and before the law makes the stranger legible to the law. As Derrida describes it:

[T]his foreigner, then, is someone with whom to receive him, you begin by asking his name; you enjoin him to state and to guarantee his identity, as you would a witness before a court. This is someone to whom you put a question and address a demand, the first demand, the minimal demand being: "What is your name?" or then "In telling me what your name is, in responding to this request, you are responding on your own behalf, you are responsible before the law and before your hosts, you are a subject in law." 12

Although the question "What is your name?" may require a translated response, its very asking not only invites but interpolates a good-faith respondent into the law, which for Derrida confers a right to hospitality on the stranger and engenders reciprocal responsibilities.

In Derrida's view, however, that right is contingent; the host must necessarily choose the guest. There is, Derrida says, no hospitality without sovereignty over one's home; and "since there is also no hospitality without finitude, sovereignty can only be exercised by filtering, choosing, and thus by excluding and doing violence." Hence Derrida, unlike Kant, sees the conferral of hospitality and legal recognition as always already bound up with the violence of law.

Border Patrol: Law's Negotiations with Strangers

In a world of nation-states, modern law organizes these general conceptualizations of the stranger along the axis of citizen/alien. As Rogers Smith reminds us in his chapter in this book, conditions of exclusion and conditional entry vary from culture to culture and era to era, but immigration restrictions and border patrols are constant features of the modern nation state. ¹⁴ Border crossings can be dangerous business; now, in our tightly controlled world borders are in some places likely to be walls made of concrete, metal, and barbed wire; guards are ready with weapons and ever-searching gazes; and noncitizens are subject to passport controls and biometric scans, and sometimes redirected to small, windowless interrogation rooms. ¹⁵

Beyond those concrete borders, though, liberal legal regimes by their very nature grapple continuously with the question of how to negotiate with strangers standing at their points of entry: those who wish to gain access to the privileges of citizenship, those who request entry on a contingent basis for economic or other reasons, and those who remain outside the physical or legal boundar-

ies of the sovereign state but who are nevertheless interwoven in some way with it. As Seyla Benhabib puts it:

Sovereignty entails the right of a people to control its borders as well as define the procedures for admitting "aliens" into its territory and society; yet in a liberal democratic polity, such sovereignty claims must always be constrained by human rights, which individuals are entitled to, not by virtue of being citizens or members of a polity, but insofar as they are simply human beings.¹⁶

If one agrees with Benhabib that there is, descriptively, a set of universal rights, ¹⁷ then one must ask, normatively speaking, how liberal legal regimes should accommodate strangers who claim the right of hospitality.

Embracing the concept of "human rights" in their most abstract form, one that empties humans of their specificity in order to confer universal rights upon abstract legal subjects, does not, Will Kymlicka suggests, in the end resolve some of the most important issues emerging from cultural difference.¹⁸ Rather, negotiations across borders require a thicker understanding of both the subjects in negotiation and the ethical relations at stake. Contemporary scholars have framed their analysis of this problematic in a number of ways. Some emphasize differences across groups and identities and call for a politics of recognition that accords dignity and respect—and sometimes legal recognition—to those differences. The literature in this area emphasizes the dialogic nature of identity production and urges attention to, in particular, cultural diversity.¹⁹

According of substantive rights through mutual recognition, argues Axel Honneth, confers both self-respect (the capacity to assert claims as a morally responsible agent) and self-esteem (the capacity to be distinguished as an individual according to qualities that are valued). A liberal polity, these scholars suggest, has the moral responsibility to engage in a politics of equal recognition of this sort, particularly in an increasingly multicultural world. This type of analysis informs the work of the kind done in this book by Paul Berman and Leora Bilsky, both of whom are concerned to create discursive legal spaces open enough that conflicts between states and communities can be articulated and adjudicated in a way that respects national and cultural differences.

Other scholars emphasize the ways in which identities hybridize when individuals and groups interact, producing a cosmopolitanism that can transcend the we/they binary. As Benhabib puts it:

I think of cultures as complex human practices of signification and representation, of organization and attribution, which are internally driven by conflicting narratives. Cultures are formed through complex dialogues with other cultures. In most cultures that have attained some degree of internal differentiation, the dialogue with the other(s) is internal rather than extrinsic to the culture itself.²¹

Julia Kristeva suggests that one who chooses cosmopolitanism is one who, "against origins and starting from them, [has] chosen a transnational or international position situated at the crossing of boundaries."²²

Indeed, scholars of cosmopolitism problematize the very idea of the border or boundary in ways that cut against some multiculturalists' assumptions about the authenticity and containability of differing cultures. As Homi Bhabha observes, "The boundary is Janus-faced and the problem of outside/inside must always itself be a process of hybridity, incorporating new 'people' in relation to a body politic." Indeed, Bhabha argues, "The 'other' is never outside or beyond us; it emerges forcefully, within cultural discourse, when we *think* we speak most intimately and indigenously 'between ourselves." One can see this dynamic at play most clearly in the chapters by Hilary Schor and Kenji Yoshino, below, both of which turn to the literary to trace internal contradictions in narratives about the relation between strangers and law. Theorizing cosmopolitanism enables a self-reflexivity that destabilizes the citizen/alien binary. To the extent that we are capable of such self-reflexivity, our task is to recognize our own internal foreignness in order to discover and abjure what Kristeva calls "the violence of the desire to be different." ²⁴

The Stranger and the Barbarian

Of course, not all polities are liberal, and not all liberal polities adhere to principles of liberalism and human rights at every turn. When apparently endangered either by threats of external violence or fears of economic disruption, even liberal legal regimes can exert a fierce sovereign power that discriminates and repulses those desiring to enter. The tension inhering in dialogues between those inside and outside a polity, whether literalized in an exchange at an actual border or built into the gritty details of any law governing immigration, informs a community's identity, which, as Benedict Anderson tells us, is imagined as both limited and sovereign.²⁵ In his controversial work *The Clash of*

Civilizations, for example, Samuel Huntington argues that "we know who we are only when we know who we are not and often only when we know whom we are against." The first part of this claim seems relatively uncontroversial. As Robert Cover argued, the stories we tell about our selves, our origins, and our moral and ethical commitments, and that inform the law of any given nomos, help to differentiate us from groups we perceive to hold different commitments." Identity is in that sense profoundly relational. Huntington's further claim, however—that we know who we are "often only" by identifying our enemies—extends that proposition in undifferentiated ways, and places violence rather than respect at the heart of the self-other relation.

This conception of the we/they relation harkens back to the problematic of scapegoating and reminds us of Honig's claim that scapegoating is a social practice that finds or produces the object it needs. The move to classify the other as "enemy" rather than "stranger" as a means of self-knowledge and self-recognition implies the possibility that strangers can be *manufactured* in order to define and strengthen a community's identity. What is law's role in that process? That role might be best perceived by examining a limit case, one in which a community reimagines a member or encounters another who, rather than being forcibly excluded or forbidden from entering for reasons of policy, is thought *incapable* of meaningful entry into "civilized" community quite without regard to policy or expedience. This kind of epistemic violence need not be written into any legal regulation (though often enough across the history of colonialism, for example, it was). For reasons of language, of custom, of religion, of climate, of physiology, even of being, some borders appear unbreachable.

To assert a divide between potential recognition and necessary nonrecognition is to invoke the venerable conceptual distinction between the stranger and the barbarian. The word "barbarian" has its origins in ancient Greece: the Greeks caricatured those who lived outside their city-states after what they heard as the guttural, untranslatable "bar-bar" of their speech. From its inception, then, the word signified both linguistic opacity and lack of interest in overcoming that opacity. In Derrida's terms, barbarians are those who cannot have a name, and therefore cannot be interpolated into the law. Strangers can be offered hospitality and brought into the fold; barbarians cannot, and are therefore always already excluded from the reciprocal relations of conditional hospitality.²⁸

Uday Singh Mehta asserts that the term "barbarian" took on a distinctly modern character only during the Enlightenment, when philosophers and politicians began to conceive of barbarism as the direct converse of "civilization."²⁹ Moreover, Hannah Arendt locates the origins of totalitarianism in this kind of "race thinking" and argues that its logic ultimately generated, after World War I, stateless populations that were no longer accorded the rights of man.³⁰ Having lost their homes and political status, refugees found it impossible to find a new place in a world in which humanity was, finally, completely organized and "civilized." Like scapegoats, the stateless no longer belonged to any community whatsoever, with the result that they lost the very right to have rights.³¹ And like savages, stateless people were, and are, thrown back into a state of nature in which they live and die without leaving a trace.³²

One can see the effects of this kind of displacement in Pheng Cheah's chapter on migrant workers in a global economy. Perhaps the best example of contemporary legal attempts to constitute a class of stateless "barbarians," nameless, untranslatable, and unrecognizable to law, is the post 9/11 Bush administration strategy of holding "alien enemy combatants" at the U.S. naval base at Guantanamo Bay, Cuba. As Amy Kaplan has made clear, since the United States brokered a lease agreement with the Cuban government in 1903 (made perpetual in 1934), Guantanamo Bay has served as a "transitional political space," one with an indeterminate relation to law grounded in the harsh history of U.S. imperialism.³³

In 2002, exerting what it asserted was plenary executive authority, the Bush administration began to use Guantanamo as a detention center for several hundred men captured abroad, mostly in Afghanistan during the early days of combat, detaining them indefinitely and incommunicado. In a series of cases beginning in 2004, the Bush administration argued that because Cuba, not the United States, is under the lease agreement the "ultimate sovereign" governing Guantanamo Bay, U.S. courts lacked jurisdiction to issue the "Great Writ" of habeas corpus to force the government to articulate a reason for holding prisoners in Guantanamo.³⁴ In conjuring the new legal category "enemy combatant" in order to exempt those persons from many of the protections of international law and international treaties, the Bush administration attempted effectively to render stateless those it detained in a place unmoored from any sovereign law. Its inhabitants erased as legal subjects, Guantanamo became, to

those who endorsed this strategy, synonymous with a black hole that no legal light could penetrate.

Refusing this rendering of foreign nationals as barbarians, both the Supreme Court and the Obama administration have recognized those in Guantanamo as strangers owed some hospitality by U.S. courts, giving name to them in law by asserting the expansiveness of habeas corpus at least in places over which the United States has de facto sovereignty.³⁵ The Court's decisions rest on a reading of the legal history of habeas corpus rather than an analysis of the universality of human rights, and as such are limited in their reach. Yet the decisions can stand for the proposition forwarded by Arendt, that the right to have rights can be guaranteed by humanity itself—indeed only by humanity itself (that is, no longer by nature or history, as the great Enlightenment political philosophers imagined)—through government.³⁶ In granting the minimal recognition of habeas corpus, the Supreme Court's extension of the reach of U.S. sovereignty in effect allows the detainees to name themselves before the law: it accords them conditional hospitality, which in turn engages the minimal reciprocity of recognition by right.³⁷

As Kristeva suggests, "Strangely, the foreigner lives within us: he is the hidden face of our identity, the space that wrecks our abode, the time in which understanding and affinity founder." Thus the struggle between the Bush administration and the courts is a struggle, in the end, over the very definition of "Americanness." Debates about the rights that the United States will accord strangers-turned-barbarians have made us agonizingly self-conscious of the tensions in our own moral and legal commitment to the ideal of the rule of law. We have watched ourselves as we have responded to revelations of torture and abuse, to assertions about the need for indefinite detainment, and to the countermoves various institutions have made as they resist those revelations and assertions. As a number of the chapters in this book suggest, that self-consciousness can point in the direction of a greater justice, both now and in the future.

Overview of the Chapters

In the chapters that follow, our contributors examine sites of encounter and estrangement within and across the borders of nation-states, situating "strang-

ers" in the delicately ambiguous space wherein legal recognition and the rendering of hospitality is negotiated. We begin with two chapters that explicitly address relations of hospitality, exploring how legislation and court decisions conjure strangers in particular ways that can either emphasize or de-emphasize the divide between citizen and alien.

Pheng Cheah's "Necessary Strangers: Law's Hospitality in the Age of Transnational Migrancy" explores the ways in which global capitalism, and the circulation of workers across borders, creates what he calls "necessary strangers." Cheah both takes up and critiques Kant's ideas on neighborliness and hospitality as a way of framing his analysis of globalization's effects. Kant argues that conditional hospitality of the sort discussed above flows from sovereignty and nation states, and that law's relation to the stranger is governed by a dynamic of attraction and repulsion that can be overcome only by the unconditional hospitality afforded through commerce and world trade. Cheah counters this claim of Kant's with two examples illustrating the ways in which contemporary globalization intensifies rather than ameliorates the tension one already finds in law between the attraction and repulsion of the stranger: the legal construction of female migrant domestic workers in Southeast Singapore and migrant sex workers moving from mainland China to Hong Kong.

Foreign domestic workers and sex workers—that is, low-status workers are fundamentally disposable in the world market, Cheah argues, and law is implicated in global capitalism's modalities of inclusion and exclusion. One can see this hostility, he suggests, in Singapore's imposition of levies and security bonds on families who hire foreign domestic workers. Cheah also analyses Fruit Chan's 2000 film Durian Durian, in which a mainland Chinese sex worker travels to Hong Kong and then back to the mainland. Though the protagonist can find refuge in ties of friendship, Cheah notes that her work disqualifies her from the law's hospitality, rendering her permanently dislocated from both work and home. Moreover, Cheah argues, human rights law and international equality movements, which might ameliorate some of the more oppressive conditions of this conditional hospitality, are limited in vision, scope, and implementation. Both examples suggest that even in the world of global commerce, because law necessarily involves coercion, its hospitality can never be unconditional; global capitalism has made such workers into permanent strangers.