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PREFACE

PABLO MITCHELL

A friend of mine, an immigration scholar, once told me that immigration is the result of failure, that immigrants leave their homes because their home countries have in one way or another failed them. There's a lot of truth in this; for some immigrants, it's the only reason they leave their homes and brave dangerous crossings and new lands. Historians too can be moved by failure, inspired to embark on their own far-flung journeys by home disciplines that provide less and less sustenance—as new methods and approaches seem to be ignored or one generation too faithfully begets another—and only slim hope for the future.

Like immigrants, however, historians can be driven by hope as well as loss and despair. There is an optimism in immigration, an opportunity that comes from leaving home and embarking on the new and novel. A similar form of optimism propels this volume as well. Like most decent ideas, *Beyond the Borders of the Law* owes its origins to another good idea. Brought together by Crista DeLuzio and David Wallace Adams for their 2009–2010 Clements Center symposium “On the Borders of Love and Power,” Katrina Jagodinsky and I discovered a shared interest in both Borderlands history and Western legal history. We also, perhaps most importantly, shared a sense that each of those vibrant fields seemed not to have met each other, much less gotten to know each other very well. Maybe it was the lingering influence of the Love and Power workshop, but it seemed, as we had our initial conversations about this project, that these two fields might kind of hit it off, might actually be kind of good for each other.

Encouraged by the high spirits and wisdom of Andrew Graybill and Sherry Smith of the Clements Center, we thus set about planning the symposium. We invited a handful of scholars doing precisely the kind of work that we hoped would draw the fields together to participate in the workshop and hoped to entice several others to join us in this critical journey into and through the legal borderlands. Borderlands historians, legal historians, and historians well-versed in critical theory would of course be welcome, but so too would be those formally trained in and practicing the law, lawyers with an eye toward both legal history and the intricacies and subtleties of law and

its many borders. From an outstanding set of proposals that were submitted in response to our call for papers, we selected participants who could speak to topics and time periods including Native history, the US-Canada and US-Mexico borders, regions from Texas to Alaska and Montana to California, and a chronology that stretches from the mid-nineteenth century to the near present. The chapters that follow are what have come of this sentiment that Western legal history and Borderlands history are better with each other than they are apart.

Beyond the Borders of the Law has been warmed by the suns of many scholars. One of the most important intellectual contributions to the scholarship of this volume has been Gloria Anzaldúa's insistence that the borderlands is a place of creativity and possibility as well as a land of despair and diminishment. We have as much to learn, she suggests, from the margins—the margins of empires, of territories, of languages, of cultures, even of ourselves and our own mottled, fearful, frayed edges—as we have to gain from our knowledge of the center and the stable and the more easily governed. Borderlands spaces are often unsettling locales where the tried-and-true can prove unwieldy and alkaline. New languages are required in border regions (new *lenguas*, to follow Anzaldúa's lead), new skills, new approaches and intimacies.

The rich novelties and adaptations of the borderlands are widespread. In the borderlands where the United States and Mexico meet, Mexican culture was no less transformed by its *frontera* than the United States was, and is, continuously renewed by its own border crossers. It is tempting to credit this creative, generative possibility of the borderlands, along with the untold dangers and deprivations, to the absence of governing bodies and empowered authorities. Indeed, the lawless West is one of the most enduring of American myths. As it happens, there is a curious twist in the myth of lawlessness: the more law there is, the less there seems to be. In fact, there was an abundance of law in the West, as there is in all borderlands regions, an overlapping of claims and jurisdictions and domains, a legal supersaturation rather than a watered-down skimpiness. Overflowing with law rather than law-less, legal borderlands can appear especially disorienting, with law and justice unevenly, even capriciously, enforced.

These overlapping legal systems (state, tribal, municipal, federal, transnational, international) never fit perfectly together and are always to some extent misaligned, sometimes with gaping omissions, sometimes with more subtle faults and cracks. Inequities of race and gender and other asymmetries of power add deeper perils to these uncertain legal terrains and in many

respects those entering the borderlands bereft of power and resources tend to find fewer benefits in its liminal spaces and engaging hybridity. But even while barred from full citizenship, the most marginalized border dwellers could in fact prove quite capable of turning these cracks and fissures to their own advantage. In fact, one of the most remarkable features of the borderlands is the extent to which dispossessed individuals and communities could take the law, as it were, into their own hands and exhibit sophisticated and savvy legal maneuvers.

The chapters that follow reflect these broader themes of the creativity of the borderlands, the overabundance of law in the borderlands, and the surprising legal acumen of disenfranchised border dwellers. These themes flow beneath and inform each of the three sections of this volume: Legal Borderlands of Race and Gender, Legal Borderlands of Property and Citizenship, and Legal Borderlands of Justice and Reform. Exceptional in their own right, the essays in each section also reflect the volume's overarching interest in drawing Western legal history into more sustained conversation with Borderlands history.

Coeditor Katrina Jagodinsky's introductory essay argues that critical Western legal histories most accurately characterize law in the North American West, advocating for an increased standard of critical inquiry in the field and inviting senior and junior scholars alike to participate in the revitalization of Western legal history. Taking the reader through the variety of texts we might see as Western legal history, Jagodinsky shows how the field has paid some attention to race and gender. The chapters in the first section, by Sarah Deer, Jeffrey Shepherd, and Alicia Gutierrez-Romine, provide even more nuanced approaches, giving flesh to the intersections of race and gender that Anzaldúa and other borderlands scholars have highlighted for decades in their work.

Although focused on the turn of the twenty-first century, Deer's chapter on the Violence Against Women Act places current violence directed at Native women within a broader, centuries-long context of a US settler-colonial state that has repeatedly targeted Native communities, and particularly Native women. In this way, Deer vividly introduces readers to the perils of life in the borderlands, especially in spaces of overlapping laws and legal jurisdictions and the potentially devastating effects of legal ambiguity, and is thus for us a powerful way to start the volume.

In the next chapter, Jeffrey Shepherd focuses on the Blackfoot Confederacy, which spanned much of the present-day Montana-Alberta Plains region, and explores the array of legal boundaries and borders that Blackfoot

bands encountered around the turn of the twentieth century. He describes the hardening of the US-Canada international border and the enforcement of reservation boundaries, while at the same time highlighting the border and boundary crossings by Blackfoot people: families visiting each other across the line, band members registering on tribal rolls in both the United States and Canada, and Blackfoot adoption of fluid yet contradictory notions of status, blood, and citizenship.

Alicia Gutierrez-Romine's chapter moves south and focuses on women and abortion along the US-Mexico border. In 1953 a California higher court reversed the conviction of two men charged with violating California's abortion statute by arranging abortions in Mexico for American women. Although abortions were illegal in California and Mexico, the decision opened a new path for women seeking abortions in the West and a lucrative abortion industry emerged south of the border. As women crossed a national border to procure abortions in Mexico, they highlighted failures of the American medical and legal systems. Gutierrez-Romine's chapter documents the terrible effect that these failures had on women's lives as well as the legal, medical, and physical borderlands surrounding abortion before *Roe v. Wade*.

Resource law (laws governing, for instance, water, oil, timber, coal, gold, and uranium use or extraction), laws of property and ownership, and laws of citizenship and exclusion are some of the most venerable and valuable subfields in the Western legal tradition. The essays by Dana Weiner, Tom Romero, and Brian Frehner in the second section of the volume suggest that, properly nudged, these subfields can speak to broader themes as well.

Dana Weiner uses disputes over land rights to open a window onto black Californians' fight for legal rights in the face of crushing discrimination before and after the Civil War. Weiner offers an important discussion of race, citizenship, and property rights. Like the subjects of many of the essays in this volume, African Americans in California refused to concede to exclusion and second-class status and proved canny and persistent claimants of both property in California and full membership in society.

Drawing two prominent, yet often disconnected, themes in Western history into direct conversation, Tom Romero examines in the following chapter the turn-of-the-twentieth-century connection between water and immigration law and policy. In Romero's compelling account, the rise of hydraulic society and laws governing water use in the West, one of the key events in the history of the region, and indeed in the history of the nation, appears to play a powerful role in regulating immigration and determining the flow of agricultural labor into the West.

Similarly, natural resources are for Brian Frehner an important set of legal borderlands. Frehner examines the decisions by significant numbers of Chickasaw and Choctaw citizens in Oklahoma to permit non-Indian companies to extract valuable resources, such as coal, from their lands. Frehner's account also speaks to intimate relationships in the borderlands with profiles of important intermarried families in Oklahoma and highlights the often ambiguous nature of citizenship and belonging that can emerge in spaces of overlapping legal authority and jurisdiction.

The law's all-too-familiar cast of characters (lawyers and defendants, judges and juries) can also expand from a borderlands perspective. The essays in the final section bring new legal actors and institutions into the spotlight, prompting us to reconsider the legal knowledge of Native Alaskans and Mexican immigrants and their families as well as the genealogies of federal prisons and detention facilities, desegregation movements, and racial conservatism.

The courtroom, the most iconic of legal spaces, is at the center of Andrea Geiger's exploration of clashes between Indigenous legal tradition and colonial law in late nineteenth- and early twentieth-century Alaska. Geiger's chapter considers the courtroom as a site of cultural contact and colonial encounter, paying close attention to the intricacies of legal cases filed in Alaska's territorial courts, where Indigenous people were prosecuted for exercising traditional rights—but where they also turned for protection of those rights, sometimes against members of other Indigenous communities.

Extending this discussion of national borders to incarceration and mass imprisonment in the West, Kelly Lytle Hernández examines the criminalization of unlawful entry into the United States in the 1930s, which sent tens of thousands of Mexican citizens to federal prison. Mexicans imprisoned for violating US immigration laws in fact constituted the second largest prisoner population during the decade (behind liquor law violators) and, in turn, the federal government built three prisons in the US-Mexico borderlands to incarcerate Mexico's unlawful border crossers. The chapter explores the unique programs that the US Bureau of Prisons developed during the 1930s to rehabilitate Mexico's unlawful border crossers, educating them to appreciate Mexican culture, excel in the Mexican economy, and never again violate US immigration laws by unlawfully returning to the United States.

In the next chapter, Allison Powers Useche examines charges of police violence, land theft, and involuntary servitude filed before the US-Mexico Claims Commission by Mexican nationals living in the American West. In the 1920s and 1930s, these claimants forced the Claims Commission to

address the problem of how to deal with state actions that complied with constitutional requirements but violated international law. Useche uncovers forgotten moments of struggle over the limits and possibilities of international law to address structural injustices within the US legal system.

Another legal case, *Keyes v. School District No. 1*, is at the center of the final chapter, by Danielle Olden. After a group of multiracial parents filed suit against the Denver school system, alleging that school officials purposely segregated students, the *Keyes* case became, in 1973, the first de facto school segregation case heard by the US Supreme Court. Although scholars have long described *Keyes* as the first northern school desegregation case, Olden locates the case within Denver's ambiguous physical borderland between "the North" and "the West." She explores the educational consequences of the court's decision in favor of the plaintiffs, a decision ordering racial balance and racial classification of schoolchildren throughout the city. The chapter brings to the surface debates about racial formation and "common sense" understandings of race, ethnicity, and culture as Denver residents tried to articulate, negotiate, and adjudicate racial identity.

Among the most enduring of borderlands conventions is a wariness of, if not weariness with, convention. Our mea culpas will thus appear here at the beginning of the volume, rather than at its end. Inspired to fill gaps and absences in the fields of Western legal history and borderlands history, we have convened, through invitation and acceptance alike, an assembly of work that, despite its merit, has omissions and missed opportunities of its own. Most glaring for scholars like us who are indebted to and inspired by the work of Evelyn Nakano Glenn, Nayan Shah, Moon-Ho Jung, and Grace Peña Delgado, is the failure to include an essay on Asian Americans in the legal borderlands. Many of the themes and topics central to the study of Asian Americans in the West—such as the link between law and sexuality, especially in the work of Nayan Shah, and the persistent, and inspiring, assertion by ordinary Asian immigrants and Asian Americans, especially Chinese and Japanese workers, of their legal rights in US courts—would have undoubtedly enriched this volume and strengthened it significantly. While the chapters in this volume begin the hard work of drawing the fields of Borderlands history and Western legal history into conversation, this absence, and the other absences that readers will undoubtedly discover, are reminders that there is still hard work ahead.

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