Borders, Territory, Law

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This article takes as its starting point legal arguments deployed by the United Nations on the situation of detainees held in Guantánamo Bay. This case raises a series of provocative questions about the contemporary relation between borders, territory, and law. First, it challenges dominant assumptions about the nature and location of authority in world politics based upon a conventional logic of inside/outside. Second, it raises the issue of what critical theoretical/philosophical resources might be available in order to rethink the above relation. Third, it summons the need to develop alternative border imaginaries. It is argued that some prospects for addressing these questions are found in the work of Benjamin, Derrida, Schmitt, and Agamben.

In February 2006, the United Nations (UN) Working Group on Arbitrary Detention published a report on the situation of detainees at Guantánamo Bay, Cuba (United Nations 2006). The report begins by setting out the legal framework that the assessment of the United States’ treatment of the detainees is based upon. According to this document the relevant provisions under international law to which the United States is party fall under two main categories: first, a series of human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); second, several international humanitarian law treaties, such as the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention) (United Nations 2006:3). On the issue of the scope of the United States’ obligation to international law the report invokes Article Two of the ICCPR, which declares: "each State Party... undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR without distinction of any kind” (United Nations 2006:4, emphasis added). Prima facie the applicability of the provisions of this Article could be called into question due to the seemingly anomalous territorial and juridical status of the US naval base at Guantánamo Bay. After all, this land, which has been the site of colonial struggle for almost a century, is not strictly part of US territory but has been leased from Cuba since February 1903 for "any and all things necessary to fit the purposes of coaling and naval stations only, and for no other purpose” (quoted in Gregory 2006:411). Therefore, it might be suggested that, while the provisions of Article Two of the ICCPR apply in the rather more conventional context of sovereign practices within bounded territorial states, they make little sense in the case of Guantánamo Bay.

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However, seeking to clarify the phrase “all individuals within its territory and subject to its jurisdiction,” the report refers to two recent international legal opinions that challenge this commonsensical view. First, the authors note the view of the Human Rights Committee that monitors the implementation of the Covenant that: “a State Party must respect and ensure the rights laid down in the Covenant to anyone with the power or effective control of that State Party, even if not situated within the territory of the state party” (Human Rights Committee 2004). Second, the UN report highlights the position of the International Court of Justice (ICJ) on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories” (International Court of Justice 2004). On the one hand, the ICJ recognized that the jurisdiction of states is primarily territorial. On the other hand, the ICJ also acknowledged that the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory” (International Court of Justice 2004). On this basis, the UN report concludes that the US government has the same obligations under Human Rights law in Guantánamo Bay as it does within its own territorial borders.

By now there has been wide-ranging discussion and much disagreement about the multifarious problems posed by Guantánamo Bay for a critical analysis of some of main dynamics of contemporary global politics in the context of the on-going “War on Terror.” These themes have included analysis of the juridical and political status of indefinitely detained “unlawful enemy combatants” (Butler 2003); the way in which the liminal position of detainees enables the permanent application of exceptional measures such as forms of torture in the name of national security imperatives (Agamben 2005); the issue of whether or not Guantánamo Bay is better considered as a space of exception where law is suspended entirely or alternatively as a site of hyper-intensive legal efforts and authorities (Johns 2005; Gregory 2006); as well as renewed debates about the purchase of Carl Schmitt’s work, Giorgio Agamben’s particular adoption of it in his Homo Sacer tetralogy and the politics of exceptionalism more generally (Bigo 2007; Bigo, Carrera, Guild, and Walker 2007; Dean 2006; Edkins and Pin-Fat 2004; Minca 2006; Walker 2006).

The aim of this article is not to address each of these themes or Guantánamo directly but rather to contribute indirectly to some of this literature by taking the legal arguments deployed by the UN above as a starting point for thinking critically about the relation between borders, territory, and law in contemporary political life. This is because the conclusion reached by the UN report indicates that the limits of territory are not necessarily coextensive with limits in law. Indeed, the case points to an interesting disaggregation between spaces of juridical competence on the one hand and the space of the sovereign territorially delimited state on the other. Such a disjunction, which, nevertheless, may not be something “new,” raises a number of key questions that the article seeks to explore. First, the disjunction challenges a series of dominant assumptions about the nature and location of authority in world politics based upon a conventional logic of inside/outside, as reflected in the norm of “territorial integrity,” enshrined in the UN Charter and often reified in accounts of world politics (Walker 1993, 2006). Second, it raises the issue of what critical theoretical/philosophical resources might be available in order to interrogate the relation between borders, territory, and law in such a way that takes account of the complexity of the inside/outside frame. Third, it summons the need to develop alternative frames and border imaginaries that might reconfigure how we conceptualize the above relation in current global politics.

**Violence, Territory, and the Borders of Juridical-Political Order**

In a well-known journal article, John Agnew argued that the modern geopolitical imagination constitutes a “territorial trap” underpinned by three problematic
assumptions: that states have exclusive power within their territories as represented by the concept of sovereignty; that domestic and international spheres are distinct; and that the borders of the state define the borders of society so that the latter is constrained by the former (Agnew 1994). The modern geopolitical imagination to which Agnew refers is one that relies upon and reproduces a familiar story about the birth and subsequent development of the sovereign territorial state in early modern Europe (Walker 1993; Agnew 1994; Ó Tuathail and Dalby 1998). According to this story, which often begins with end of the Thirty Years War and the Treaty of Westphalia in 1648, non-territorial and overlapping dynastic rule gave way to a system of states defined by strict territorial divisions (Jackson 2000:318). Irrespective of the historical accuracy of this account, it is a seductive narrative that has come to frame the way in which the relation between borders, territory, and law has been—and continues to be—conceptualized in the theory and practice of international relations (IR) (Walker 1993; Agnew 2005).

Within this framework it is possible to identify three regulative ideals that have shaped the international legal and political system: states must be responsible for their own internal domestic legal system; states must respect the legal existence and equality of other states before international law; and states must not violate the principle of the territorial integrity of any other state (Gregory 2006:422; Elden 2007). According to Elden, these ideals are mutually reinforcing: “the notion of territorial integrity means both territorial preservation and territorial sovereignty and political independence requires both internal and external sovereignty” (Elden 2006:11). Territorial integrity, enshrined in international law under Article 2 Paragraph 4 of the UN Charter, is comprised two components: the notion that states are not to promote secessionist movements in other states or take land from them; and the assumption that the state has sovereign jurisdiction over its own territory. As well as a cornerstone of the UN Charter, Elden points to the way in which the principle of territorial integrity underpins other international organizations including: the Arab League; the Organisation of Arab States; the Organisation of African Unity Charter; the African Union; and the European Union. On the one hand, despite its centrality and importance in juridical–political organization, it is clear that the principle of territorial integrity and the three regulative ideals upon which it rests is flouted on a regular basis (as the recent wars in Afghanistan and Iraq demonstrate). On the other, as Elden explains, the fact that the foreign policies of states like the United States and United Kingdom do not always uphold this principle is somewhat incidental for our purposes here: the regulative ideal of territorial integrity can be read as a “necessary myth” in order to create and maintain a “semblance of order in the international system” (Elden 2006:1). Indeed, without the notion of territorial integrity as a founding principle there would be no international system, understood as a historically contingent juridical–political order, to speak of in the first place.

Building on Elden, it is instructive to note that intrinsic to the principle of territorial integrity, and the juridical–political order it gives rise to, is the concept of the border of the state. Within the dominant inside/outside framing that Walker (1993) has identified, this border can be understood as a marker of the limits of sovereign power assumed to be located and fixed at the geographical outer edge of the sovereign territory of the state. Yet, despite the enormous epistemological and ontological work that the concept of the border of the state does in the theory and practice of global politics, many scholars have complained about the relative lack of attention given to this concept, especially, although not exclusively, in the context of the theoretical literature produced by the discipline of IR. For Chris Brown, “neither modern political theory nor IR theory has an impressive record when it comes to theorizing the problems posed
by borders’’ (Brown 2001:117). Similarly, Robert Jackson has argued that “it is remarkable that state borders are usually taken for granted by IR scholars. They are a point of departure but they are not a subject of inquiry’’ (Jackson 2000:316). Others in IR who have written in a similar vein include Mathias Albert (1999), Yosef Lapid (2001), R.B.J. Walker (2000, 2006) and John Williams (2003). Similar complaints are made within other disciplinary literatures such as Political Sociology (Rumford 2006) and Political Geography (Newman 2001; Kolossov 2005; Paasi 2005). Williams sums up the basic point made by all these writers that borders between states are all too often treated as if they were merely “fixtures and fittings” of the international system (Williams 2003:27).

Nevertheless, when taken collectively, these complaints perhaps overstate the case and over the past 5 years or so in particular there have been some notable attempts at acknowledging and offering theoretically reflective accounts of the concept of the border of the state. Jackson, for example, has built upon the work of Hedley Bull and emphasized the normative role that state borders play in international life: “the sanctity and stability of inherited boundaries is a fundamental building block of international society and a principle behind which the vast majority of sovereign states rally” (Jackson 2000:333). On his view, borders between states not only delimit the spheres of national interests, security, and law but also shape rights and duties such as those relating to non-intervention (Jackson 2000:319). As such, borders are said to perform a key normative role by distinguishing between insider groups (members of international institutions such as the UN) and outsider groups (those who enjoy no legal existence as independent states) (Jackson 2000:333). A similar line of argument is pursued by Williams who also draws on Bull to argue that borders between states perform an important ethical function in world politics (Williams 2002:739). For Williams, state borders are “ubiquitous” and “embedded” in IR because they are a necessary facet of human existence: “The durability and depth of sedimentation of territorial borders as fences suggest that division, and division on a territorial basis, speaks to a deep-seated need of human identity and also in human ethics” (Williams 2003:39; emphasis added). On this view, borders between states are said to act as “fences between neighbours” in such a way that “tolerates diversity” instead of stifling difference (Williams 2003:39). Without borders, Williams claims, the international juridical–political system would not be able to ensure “state independence, limits on violence, sanctity of agreement or the stability of possession” (Williams 2002:739–740). Hence, he argues, “to remove, or even to re-conceptualize, territorial borders would mean the end of IR... requiring a shift in the conduct of politics on the planet that is unimaginable” (Williams 2003:27). However, Williams’ argument might be challenged on two grounds: first, that borders between states are not necessarily limits on but rather markers and even upholders of violence in political life; and, second, in any case, as we have already seen in the case of legal arguments deployed by the UN in defence of the Human Rights of detainees in Guantánamo, planetary shifts in the conduct of politics occasioned by (or reflected in) the disaggregation of territorial limits and limits of law appear to be already well under way.

William Connolly points to the rather more Janus-faced character of borders between states when he argues that “boundaries form indispensable protections against violation and violence; but the divisions they sustain also carry cruelty and violence” (Connolly 1995:163). On the latter, Connolly refers to the etymology of the concept of territory as deriving from the Latin root terrere, which means to frighten or terrorize (Connolly 1995:xxii). From here Connolly suggests that territory can be thought of as precisely “land occupied and bounded by violence” (Connolly 1995:xxii). On this view, to territorialize is “to establish boundaries around [territory] by warning other people off” (Connolly 1995:xxii). This etymological connection between territory and violence is also
made by Barry Hindess: “While terror may sometimes pose a threat to the territorial order of state, the possibility that territory and terror derive from the same Latin root suggest that it might also be an integral part of this order’s functioning” (Hindess 2006:244). For Hindess, terror and territory are intrinsically linked not just because territorial impulses imply violence to those who are deemed not to belong; the threat of violence is also imminent to those who do belong through the regulation of conduct using fear (Hindess 2006:244). Indeed, as Hindess reminds us, the territorial order of states often fails to domesticate terror: when states do not have a monopoly on the legitimate use of force; when terror is used as an instrument of policy by a state against their own or other states’ populations; when there are disputes over the government of a population that are under the jurisdiction of another state (Hindess 2006). Echoing the connection between violence and territory made by Connolly and Hindess, Walker has argued that borders between states should not be read as sites of “airbrushed achievement” but re-appraised, and indeed re-politicized, as a “site of struggle” (Walker 2002:22). On his view, the historical transition from a system of overlapping loyalties and allegiances in favor of sharp borders did not happen either peacefully or overnight: “One has to ask how have we so easily forgotten the concrete struggles that have left their traces in the clean lines of political cartography and the codifications of international law” (Walker 1990:159). Connolly, Hindess, and Walker thus emphasize a deep connection between the borders, territory, law triad and violence that is not only etymological but historical, structural, and colonial. The next part of the article seeks to explore this connection further by drawing on analyses of the violence of the foundation and reproduction of juridical–political order offered by Benjamin and Derrida.

Walter Benjamin and Jacques Derrida: Cartographies of Violence

In his essay Critique of Violence (1927), Walter Benjamin considers the relationship between law and violence. More specifically, Benjamin analyzes the foundations of justifications for the use of certain forms of violence and the designation of such violence as legitimate. Indeed, it is precisely the assumed distinction between what counts as legitimate and illegitimate violence that he seeks to interrogate overall. His hypothesis is that the interest of law in having a monopoly of violence over a population within a given territory is not simply to preserve legal ends but rather to preserve the very foundational structure of the juridical–political order of the state itself. Thus, in an extended passage, Benjamin argues:

For if violence, violence crowned by fate, is the origin of the law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of the law jut manifestly and fearsomely into existence.... For in the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself. But in this very violence something rotten in the law is revealed, above all to a finer sensibility, because the latter knows itself to be infinitely remote from conditions in which fate might imperiously have shown itself in such a sentence. (Benjamin 2004:242 emphasis added)

As this passage indicates, Benjamin’s analysis refers to a separation between law-making violence on the one hand (the origin of the law is violent) and law-preserving violence on the other (the law reaffirms itself through the exercise of violence). However, according to Benjamin these two types of violence merge in a “spectral mixture” in the authority of the police: police violence is both law-making because “its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree” and law-preserving “because it is at the disposal of these ends” (Benjamin 2004:243). The police, he argues, often
intervene where there is no clear legal situation and as such their power can be thought of as “formless,...[a] nowhere-tangible, all pervasive, ghostly presence in the life of civilized states” (Benjamin 2004:243). Nevertheless, the key point Benjamin seeks to emphasize is that these inter-related forms of violence are inextricably implicated through the problematic of law. According to Connolly, this argument has provided an important point of departure for a number of critical twentieth century thinkers who have sought to theorize the ways in which violence is bound up in the juridical–political order of the modern sovereign territorial state and state-system (Connolly 2004:24). One of these engagements, which, as I will go on to suggest is instructive for any attempt to interrogate the borders, territory, law triad, is that given by Jacques Derrida.

In *Force of Law: The Mystical Foundations of Authority* (Derrida 1992), Derrida engages with Benjamin’s text in order to offer a deconstructive critique of the inter-relationships between the law and justice, authority and violence, and authorizations of authority and mystery. At first, Derrida invokes and elucidates the Benjaminian distinction between law-making and law-preserving violence in order to claim that the law rests on non-law through these two types of violence. Derrida explains the former type of violence (law-making or “originary” violence) in terms of the attempt of the authority behind the law to establish itself by a “pure performative act that does not have to answer to or before anyone” (Derrida 1992:36). The latter type of violence (law-making or “secondary” violence) works to secure originary violence in order to conserve, maintain, and ensure the “permanence and enforceability of law” (Derrida 1992:31). Since the origin of the authority behind the law cannot rest upon anything but itself it is understood by Derrida to be a violence without a ground: a state of suspense beyond the conventional opposition between “legal” and “illegal.” Derrida calls the moments when the authority of a new law tries to establish itself the *épokhe*: a Greek word, meaning pause (Derrida 1992:36). These moments, supposing that they may be isolated, are said to be “terrifying moments” because of the “sufferings, the crimes, the tortures that rarely fail to accompany them” (Derrida 1992:36). On this basis, Derrida argues that, no matter how distant it may feel, “the foundation of all states occurs in a situation that we can call revolutionary” (Derrida 1992:36). For each revolution to be successful in the founding of a new authority behind law it is necessary for that authority to create “après coup what it was destined in advance to produce, namely, proper interpretive models to give sense [and] legitimacy to the violence it has produced” (Derrida 1992:36). Elsewhere, Derrida claims: “successful unifications or foundations only ever succeed in making one forget that there never was a natural unity or a prior foundation” (Derrida 2002:115). These interpretive models and imperatives to forget are all bound-up in what Derrida calls a “discourse of self-legitimation” (Derrida 1992:36). The justification for the violent origins of the foundation of authority behind the juridical–political order of every state can only ever be justified belatedly (Derrida 2002:115). According to Derrida, one only has to look at revolutionary situations with their accompanying discourses throughout the twentieth century in order to get a sense for the way in which the recourse to violence is always justified “by alleging the founding, in progress or to come, of a new law” (Derrida 1992:35). However, while Derrida takes his lead from Benjamin, the argument presented in *Force of Law* is that the oppositions set up in the Critique of Violence between law-making and law-preserving violence do not hold in the final analysis. Derrida claims that this conclusion is reached implicitly within Benjamin’s own text in his discussion of the police referred to earlier: it is precisely because the police are everywhere that the separation between law-making and law-preserving violence becomes indiscernible. Thus, in an important section, Derrida writes:
The very violence of the foundation or *posing* of the law must envelop the violence of the *preservation* of the law and cannot break with it. It belongs to the *structure of fundamental violence* in that it calls for the repetition itself and founds what ought to be preserved, preservable, promised to heritage and to tradition, to partaking. A foundation is a promise.... Consequently, there is no more pure foundation or pure position of law, and so a pure founding violence, than there is a purely preserving violence. Positing is already an iterability, a call for self-serving repetition. Preservation in turn refounds, so that it can preserve what it claims to found. *Thus there can be no rigorous opposition between positing and preserving*, only what I call a *differential contamina-
tion* between the two, with all the paradoxes this may lead to. (Derrida 1992:35 emphasis added)

Derrida’s engagement with Benjamin’s *Critique of Violence* opens up a series of insights into the connection between the borders, territory, law triad on the one hand, and violence on the other. *Force of Law* permits a reading of borders between states as spatial instantiations of the *épokhé* or moments when the authority of a new law establishes itself. On this reading, borders between states can be said to represent traces of the violent foundations of the juridical–political order they supposedly delimit: scars in the territorial landscape that act as reminders of “the sufferings, the crimes, the tortures” that rarely fail to accompany the founding of states as distinct entities. To do as Walker suggests and treat state borders as “sites of struggle” is to politicize the way we think about them: not only as merely “socially constructed” phenomena but the outcome of violent encounters. Moreover, to remember the *épokhé*, the “anxiety-ridden moment of suspense [or] interval of spacing in which... revolutions take place,” is also to remember the “deconstructibility” of the foundations upon which juridical–political orders rest (Derrida 1992:20). In short, it is to remember Walker’s axiom that “once upon a time things were not as they are now” (Walker 1993:179). The memory of the *épokhé* is potentially revolutionary: state borders may serve to uphold the status quo but, paradoxically, they are equally a reminder of the ability to challenge authority, enact change and act politically. After all, following the Benjamin-Derrida line of argument, the border of the state can be considered a product of the violent attempts to establish authority in the lack thereof. Hence, there is a locus of possibility at the heart of the concept of the border of the state. To recognize this locus of possibility is to remember the possibility of politics, and therefore, the potential for alternative forms of political arrangements.

While Benjamin and Derrida’s analyses of the violence of the foundation and reproduction of the juridical–political order deepen some of the insights of Connolly, Hindess, and Walker earlier, there is a sense in which more critical work is necessary to untie an interrogation of the relation between borders, territory, and law from an assumed correlation between fixed territorial and juridical limits. Both Benjamin and Derrida take the juridical–political order of the modern sovereign territorially bordered state precisely as the ground for thinking about the borders, territory, law triad on the one hand, and violence on the other. Yet, as we have already seen, one of the interesting aspects of the legal arguments mobilized by the UN in response to the position of detainees in Guantánamo is precisely the problematization of the dominant inside/outside framing of this relation. The following section of the article investigates whether resources for developing alternative imaginaries might be found in the thought of Carl Schmitt, and in particular, in the context of his later work on spatial structures and order in *Nomos of the Earth* (1950).
German legal theorist Carl Schmitt wrote his influential book *Political Theology: Four Chapters on the Concept of Sovereignty* against the backdrop of successive governments’ almost continuous use of emergency powers under Article 48 of the Weimar constitution. On Schmitt’s view, under such emergency situations there are often no norms or principles on the basis of which a response may be formulated. A decision has to be made in order to close the gap between existing codes of practice and any given situation. Thus, for Schmitt, the essence of sovereignty is understood to be a monopoly on the ability to decide on the exception: “For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists” (Schmitt 2005:13). Indeed, such a decision involves two steps: first the decision that an emergency actually exists beyond the scope and provisions of the existing legal order; and second the decision about what can be done to remedy the situation. It is through this analysis of the figure of the sovereign that Schmitt’s formula recognizes that the operation of the juridical order is actually grounded in the realm of the non-juridical. The sovereign, he who makes a double decision on the exception, has an unusual relationship to the juridical–political order: “Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety” (Schmitt 2005:7). At once the sovereign both belongs to and stands above or outside that order in his capacity to decide when the constitution no longer applies. According to this formula, the law is said to be outside itself, since the sovereign who is outside the law declares that there is nothing outside the law. Schmitt refers to the strange situation arising from the suspension of existing legal norms and practices in this way as the “state of exception.” The strangeness of this situation stems in part from a blurring of the normal lines between the legal and the political within the day-to-day operation of the juridical–political order of the sovereign state. Such a situation characterized most of the Weimar period, save one or two periods of so-called normality between 1925 and 1929, as well as the entire 12-year duration of the Third Reich. However, what is perhaps more striking about Schmitt’s book is the realization that the state of exception seems to provide the condition of possibility for the “normal” operation of the juridical–political order as such.

Following Schmitt’s treatment of the logic of norm/exception, it can be said that in order to define the “normal” territory of the juridical–political order some notion of “exceptional” territory is required. One way of thinking about this exceptional territory is to interpret it as precisely the site of state borders, located, according to the inside/outside model, at the geographical outer edge of the sovereign state. Paradoxically, borders between states can be seen to be simultaneously exceptional territory, a zone of anomie devoid of law, and excluded from the normal juridical–political territory of the state, but nevertheless an integral part of that juridical–political territory (in fact the very condition of its possibility). The characterization of state borders as exceptional territory perhaps clarifies why border sites between states are sometimes spoken about in quasi-mythical terms: a no-man’s land; a void; a place of nothingness neither strictly inside nor outside the state (Bennington 1996). This characterization also resonates with images of state borders as sites of exceptional measures, practices, and rules (such as passport control, body searches, and a sense of lawlessness). Understood as exceptional territorial sites, borders between states mark a threshold between the inside and the outside, the normal situation, and an exceptional situation, where these distinctions become impossible to maintain. Indeed, this point has been recently illustrated by Mark Salter’s discussion of the global visa regime in which he comments on the paradoxical situation at borders between
states where “one may claim no rights but is still subject to the law” (Salter 2006:169). Salter sees state borders as the space where exceptional decisions are made: “the sovereign decides the political status of the individual as they cross the frontier: national, stateless, refugee, foreigner, alien. This decision is absolute…. Thus, state actions at the border are a special case of law” (Salter 2006:171–172). Following Salter, it can also be argued that exceptional activities associated with state border sites reveal the realm of the non-juridical as the ultimate ground of the normal juridical order of the state. As such there is a certain nakedness about the territory occupied by borders between states where the violent and extra-legal foundations of the state are revealed.

Schmitt’s paradigmatic treatment of sovereignty as the decision on exception enables some interesting claims about the relation between borders, territory, and law. However, like Benjamin and Derrida, Schmitt presupposes the modern territorially bordered sovereign state as the basic ground for analysing this relation and also seems to read territorial and juridical limits as congruent. While, as Hidemi Suganami notes, Schmitt is unclear about whether sovereignty resides in the person of the Head of State, the government or a particular regime as a whole, we are left in little doubt that his analysis privileges the state as the supreme sovereign political entity. Hence, Suganami writes: “In short, the state, when it functions and qualifies as a sovereign political entity, is the supreme authority in the sense of the authoritative-entity-in-decisive-cases that makes decisions to resort to war against its enemy, internal or external, when it judges it necessary to do so” (Suganami 2007:517). The result of this privileging is that Schmitt reads the notion of juridical–political order as something that is synonymous with the state. In this way, there is a sense in which an interrogation of the relation between borders, territory, and law based on his understanding of sovereignty in Political Theology remains already caught within an inside/outside rendering of that relation. On this reading the limits of territory and the limits in law appear coextensive and yet, as the Guantánamo example illustrates, many practices in contemporary political life call this framing into question. Nevertheless, despite the limitations of Schmitt’s analysis as developed in Political Theology, some of his later work on the spatial consciousness of law is suggestive of the possibility of developing an alternative frame without the state at its center.

The stated aim of Schmitt’s later book The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, written in Berlin during World War II and first published in 1950, is to “understand the normative order of the earth” (Schmitt 2003:39). Schmitt’s argument develops around the central concept of nomos: a derivation of the Greek word nemein meaning “to take or appropriate” (Schmitt 2003:67). In German nemein translates as nehmen, which is linked to the verbs teilen (to divide or distribute) and weiden (to pasture) (Schmitt 2003:344–345). Schmitt explores planetary division and order in light of these three dimensions: the appropriation of land (nehmen); the division and distribution of the appropriated land (teilen); and the utilization, management and usage of that taken land (weiden). On this basis, nomos can be understood as the visible form of a social and political order derived from the measure and division of pasture:

Nomos is the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process. Here, measure, order, and form constitute a spatially concrete unity. (Schmitt 2003:70)

For Mitchell Dean the emphasis Schmitt gave to nomos can be understood as a corrective to strands of thought within jurisprudence that fail to consider how land appropriation is constitutive of law and the spatial character of the socio-economic and legal order (Dean 2006). Dean explains that, if Michel Foucault
wanted to shift the focus from the “who” to the “how” of power, then Schmitt’s reformulation was from the “who” to the “where” of law (Dean 2006). For this reason Schmitt uses the concept of nomos to grasp the geographically situated nature of law: “it creates territory, defines locality, marks places, separates backyards, and defines households” (Dean 2006:7). Schmitt argues that there has always been some kind of nomos or spatial consciousness of the earth: history consists of land-appropriation, division, and cultivation. Respublica Christiana constituted the first nomos, a spatial order characterized by divisions between the soils of the medieval West, the soil of heathens, and the soil of Islamic empires. Later, in the sixteenth century, discoveries of vast new spaces, and the appropriation of uncultivated land conditioned the possibility of the emergence of a second nomos: an international law based upon centralized, spatially self-contained states in Europe. According to Schmitt:

The core of the nomos lay in the division of European soil into state territories with firm borders, which immediately initiated an important distinction, namely that this soil of recognized European states and their land had a special status in international law. (Schmitt 2003:148)

European appropriation, division, and utilization of the earth extended through protectorates, leases, trade agreements and spheres of interests, and culminated in the division of Africa. However, the Eurocentric nomos is said to have come to an end following World War II, which ushered in a new planetary division between East and West. Although this nomos characterized the period in which Schmitt was writing, his conclusion to Nomos of the Earth points to three possible futures: the complete unity of the world resulting from the victory of either East or West; the attempt to retain a balanced structure between East and West; or the combination of several independent entities (grossraume) constituting a new order and orientation of the earth.

Schmitt’s account of the appropriation, division, and management of the earth from the Middle Ages through the Jus Publicum Europaeum to the Cold War is a highly contestable grand narrative. Nevertheless, what is interesting about the argument of Nomos of the Earth is the way it ultimately seems to question an earlier assumption Schmitt makes in Political Theology: namely that limits in territory and law are necessarily coterminous. An approach predicated upon this assumption considers borders to be fixed and located at the outer edge of the state as markers of the limits of sovereign authority. Such an assumption, according to Schmitt’s historical narrative, made sense in the context of the division of European soil into state territories during the sixteenth century. However, Schmitt challenges this inside/outside framing of the relation between borders, territory, and law by arguing that the changing economic trends of the nineteenth century meant the demise of state borders as sharp delimitations of sovereignty and neat containers of order and orientation: “over, under, and beside the state-political borders of what appeared to be a purely political international law between states spread a free, i.e. nonstate, sphere of economy permeating everything: a global economy” (Schmitt 2003:235). Schmitt connects the declining importance of the concept of the border of the state with the development of modern technology and the advent of a new technical–industrial–economic order. As an illustration of this trend Schmitt points out that on the one hand the United States is spatially delimited but on the other hand its political, legal, and economic reach has far surpassed these spatial delimitations. On this basis, Schmitt seems to problematize the concept of the border of the state as a frame for understanding the relationship between sovereignty and territory in favor of thinking more in terms of “magnetic power fields of human energy and work” (Schmitt 2003:30). Overall,
Schmitt offers a tantalizing glimpse of an alternative way of thinking about the relation between borders, territory, and law, but this is ultimately left undeveloped in his work. Picking up Schmitt’s emphasis on the concept of nomos, however, the work of Giorgio Agamben offers some suggestive directions in which this line of analysis might be taken.

Giorgio Agamben: Rethinking Borders, Territory, Law

The recent work of geographer Claudio Minca has pointed to the way in which, despite Agamben’s well-known ideas about sovereignty and the generalized state of exception, relatively scant attention has been paid to the spatial dimensions of his thought (Minca 2005, 2006, 2007). According to Minca’s formulation, there can be “no politics, and thus no political analysis, without a theory of space,” and it is precisely Agamben’s spatial theory that deserves closer attention when thinking about possibilities for developing alternative imaginaries to the inside/outside model with which it might be possible to rethink the relation between borders, territory, and law (Minca 2006:388). Minca focuses on what he refers to as two “spatio-ontological devices” found in Agamben’s work, namely the camp and the ban (Minca 2006:388). However, I want to suggest that it is more instructive to consider briefly the broader spatial theory that informs Agamben’s use of these devices in the first place: his overriding commitment to “a logic of the field.”

In an interview with the German Law Review Agamben calls for a radically different approach to the study of politics that foregrounds what he refers to as a logic of the field:

[W]e need a logic of the field, as in physics, where it is impossible to draw a line clearly and separate two different substances. The polarity is present and acts at each point of the field. Then you may suddenly have zones of indecidability or indifference. The state of exception is one of those zones. (Agamben 2005:612)

For the purposes of this paper, the key point about the notion of the field is that entities within it are not mutually exclusive phenomena but physically continuous within their milieu of interaction (Kwinter 2001:14). Since entities collapse into and interpenetrate each other the concept of the border—or the notion of separate “bordered” entities—makes little sense according to this paradigm. Thus, thinking through strict binary oppositions is unhelpful and an alternative topology is called for: one that reads the terms of a binary “not as ‘dichotomies’ but as ‘di-polarities’” (Agamben 2005:612). Agamben illustrates the different topological register implied by a logic of the field with reference to the Mobius strip (Figure 1; Agamben 1998:37).
The Möbius strip is a surface with only one side so that what is inside and what is outside enters into a zone of irreducible indistinction: what is “presupposed as external... now reappears... in the inside” (Agamben 1998:37). This zone of indistinction between inside and outside remains otherwise obscured when relying on a straightforward inside/outside topology. However, the alternative topological approach represented by a logic of the field brings this zone of indistinction into relief: it allows for the identification of fuzziness, ambiguity, and lack of clarity. The importance of this alternative topology in Agamben’s work should not be underestimated for it provides a spatial theory that, as I will go on to demonstrate, informs his analysis of the limits of sovereign power, law and territory, and the nomos of the West: “It is precisely this topological zone of indistinction... that we must try to fix under our gaze” (Agamben 1998:37).

Agamben’s reliance upon a logic of the field enables him to develop an alternative conception of the ways in which sovereign power operates: a conception that does not rely upon the concept of the border of the state or imply a philosophy of history as the forward march toward borderlessness (as Schmitt’s grand narrative in Nomos of the Earth arguably does). Agamben diagnoses a fissure in the political structures of the West: between zoë on the one hand (natural life—life common to all living beings—associated with the private sphere) and bios on the other (politically qualified life associated with the public sphere) (Agamben 1998:1). According to Agamben sovereign power does not work simply by drawing borders between insiders and outsiders at the outer edge of state territory as conventional approaches to sovereignty and political community predicated on the inside/outside model suggest. Rather, he argues, sovereign power relies upon the production of a form of life that is amenable to its sway: a form of life called homo sacer or “bare life.” Furthermore, it is only by adopting a logic of the field that Agamben is able to identify and interrogate this practice.

The concept of bare life is a difficult and contestable one in Agamben’s work and it is possible to read it in different ways. There is a tendency to reduce bare life to zoë but this suggests that it is something we are all somehow born with rather than a status that is performatively produced in different locations at different times. The reading advanced here is to treat bare life as something that is produced by the sovereign machine rather than something that pre-exists it. On this view, bare life is synonymous with neither zoë nor bios but rather a form of life that occupies a zone of indistinction between the two: a form of life that disrupts the zoë/bios dichotomy with which the relationship between politics and life is usually studied. Agamben fuses Schmitt’s approach to sovereignty as the decision on the exception with Benjamin’s notion of the permanence of the state of exceptionalism, and Jean-Luc Nancy’s understanding of the ban. In summary, bare life is a form of life that is amenable to the sway of sovereign power because it is banned from the realm of law and politics: an abandonment that takes place whenever and wherever the law is suspended. The use of the concept of the ban is significant here: bare life is not simply excluded from this realm but rather maintained in what Agamben calls an “inclusive exclusion.” If someone is banned from a community s/he continues to have a relationship with that community: indeed it is precisely because of the ban that they are still nevertheless linked to that community. Sovereign power produces bare life as a banned form of life because its undecidable juridical–political status allows for the routinization of exceptional practices such as detainment without trial, torture, and even execution.

In the conclusion to Homo Sacer: Sovereign Power and Bare Life (1998), Agamben claims that any attempt to re-conceptualize the nomos of the West must take into account the fact that “we no longer know anything of the classical distinction between zoë and bios, between private life and political existence, between man as a simple living being at home in the house and man’s political existence in the city” (Agamben 1998:187). On the one hand, the production of bare life in
zones of indistinction upon which sovereign power depends is perhaps most visible in camps designated for that purpose. On the other hand, Agamben also points to the way in which the production of zones of indistinction, where exceptional activities become the rule and bare life is subject only to the whims of sovereign power, is more and more widespread or *generalized* in world politics. Under biopolitical conditions in which “the paradigm of security has become the normal technique of government,” Agamben argues that the blurring of the citizen, and the bare life of *homo sacer* is not something that is localized or encumbered by traditional limits: “Living in the state of exception that has now become the rule has... meant this: our private body has now become indistinguishable from our body politic” (Agamben 2000:39). On the contrary, as Minca has put it, there has been a “normalization of a series of geographies of exceptionalism in Western societies” throughout everyday life (Minca 2006:388). Consequently, an Agambenian account of the activities of sovereign power predicated upon the production of bare life offers provocative insights for any attempt to rethink the relation between borders, territory and law, and develop alternative imaginaries to the inside/outside model.

Agamben’s use of a logic of the field to identify the way in which sovereign power relies upon the creation of zones of indistinction in law opens up new ways of thinking about bordering practices in contemporary global politics. Instead of viewing the limits of sovereign power as somehow fixed at the outer edge of the state, Agamben conceives these limits in terms of a decision or speech act about whether certain life is life worth living or life that is expendable (Gregory 2006). Such a decision performatively produces and secures the borders of political community as the politically qualified life of the citizen is defined against the bare life of *homo sacer*. On this view, the concept of the border of the state is substituted by the sovereign decision to produce some life as bare life: it is precisely this sovereign cut or dividing practice, one that can effectively happen anywhere, that constitutes the “original spatialization of sovereign power” (Minca 2006:388). Moreover, such a decision can be interpreted as a security practice because the production of bare life works to shore up notions of who and where “we” are: notions, for example, that are commonly mobilized as part of an array of responses to threats of terrorism (Closs Stephens 2007).

Although Agamben does not refer to it in his work, one way of capturing this alternative border imaginary is what I have called elsewhere the concept of the “generalized biopolitical border” (Vaughan-Williams 2007, 2009). The concept of the generalized biopolitical border refers to the global archipelago of zones of indistinction in law in which sovereign power produces the bare life it needs to sustain itself and notions of sovereign community. Here, following Eyal Weizman, the concept of the “archipelago” is used to describe “a multiplicity of discrete extraterritorial zones, the spatial expression of a series of “states of emergency,” or states of exception that are either created through the process of law [through which law is in fact severely undermined or annulled] or that appear de facto within them” (Weizman 2007:13). Thinking in terms of the generalized biopolitical border unites an analysis of the operation of sovereign power from the territorial confines of the state and relocates such an analysis in the context of a global biopolitical terrain that spans “domestic” and “international” space. With its focus on the production of zones of indistinction the concept of the generalized biopolitical border can therefore be read as a response to those who call for alternative border theorizations. This particular imaginary points to the way in which bordering practices are rather more diffused throughout society than the inside/outside model conditioned by the concept of the border of the state implies. In this sense it reflects Étienne Balibar’s observation that borders are being “multiplied and reduced in their localization,... thinned
out and doubled,... no longer the shores of politics but... the space of the political itself” (Balibar 1998:220).

However, despite Agamben’s commitment to a “logic of the field,” there is a sense in which the notion of a generalized biopolitical border does not completely escape a logic of inside/outside understood as a form of dividing practice. After all, if one of the central purposes of the production of bare life is to define the politically qualified life of the polis then the former acts as a constitutive outside of the latter. In other words, while the border between inside and outside is not necessarily fixed at the outer edge of the state as the conventional inside/outside model of thinking about world politics would have it, Agamben’s diagnosis of the activity of sovereign power as the decision to produce some life as bare life (and thus other forms of life as non-bare life) is still reliant upon an inside/outside way of thinking. Effectively the substitution of the concept of the generalized biopolitical border for the concept of the border of the state means that the dividing practice upon which sovereign power relies is recast: not as something pre-given, static, and localized at an outer-lying territorial site but re-inscribed as a performative activity throughout society in a more generalized sense. Nevertheless, the notion of the generalized biopolitical border that can be derived from Agamben’s work illustrates one way in which we might respond to the need to diversify, pluralize, and radicalize our understanding of what studying the relation between borders, territory, and law in world politics might mean.

**Conclusion**

Derek Gregory has pointed to the way in which the War on Terror unleashed in the wake of the attacks on the World Trade Center and Pentagon on September 11, 2001 has mobilized an array of legal formularies (Gregory 2006). Highlighting the United States’ subsequent portrayal of other states, including Afghanistan, Cuba, Iran, Iraq, as threats to its national security, Gregory argues that “most of the emergencies and “exceptional measures” that have punctuated Bush’s presidency fold the national into the transnational” (Gregory 2006:407; emphasis added). Such a “folding” is reminiscent of the topology of the Möbius strip that Agamben draws upon in order to reorient his conception of the way in which sovereign power operates across a global biopolitical terrain. Moreover, this spatial imaginary, though not free of difficulties as Bigo (2007) has pointed out, seems particularly apposite for thinking about how the UN’s legal argumentation in relation to the situation of detainees at Guantánamo Bay indicates the complexity of the contemporary relation between borders, territory, and law. The arguments deployed by the UN illustrate how the War on Terror has perhaps intensified the folding to which Gregory refers, which certainly complicates a straightforward inside/outside way of mapping the relation between borders, territory, and law. Further still, such folding is not merely conceptual but above all lived, for example through the bodies and experiences of those detained at the US naval base in Cuba. In contrast to the ideal of the modern sovereign subject, autonomous or “bordered” before the law like the state of which it is a citizen, the detainees’ status is fundamentally indistinct and it is precisely the production of this fuzziness that, as Agamben has demonstrated, the logic of sovereign power depends upon.

However, as Gregory emphasizes, there is also a sense in which the inside/outside imaginary has always been something of a fiction and that folding of the kind illustrated in the example of Guantánamo is not necessarily something “new” at all: “American attempts to decouple law and location have a much longer history and do not derive uniquely from the global assertion of military force” (Gregory 2006:407). Indeed, pointing to the regulation of transnational economic activities and the extension of rights to citizens of the US overseas,
there is a long history of a disaggregation of territorial limits and limits in law (Gregory 2006:407). Nevertheless, while we are not necessarily witnessing either the erasure of the logic of inside/outside or an entirely new departure in how this dichotomy is being played out, it is possible to identify ways in which, as Balibar puts it, borders are ‘vacillating’ in contemporary political life: “no longer at the border, an institutionalized site that could be materialized on the ground and inscribed on the map” (Balibar 1998:217–218). What this demands, perhaps especially in the context of the War on Terror, is an incessant identification and perpetual deconstruction of diverse and multiple logics and practices of inside/outside in order to highlight for interrogation what is enabled, legitimized, and often concealed by border politics.

References


