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VIOLENCE AND LAW'S LIMITS

Julie Novkov

ERIC M. FREEDMAN, *MAKING HABEAS WORK: A LEGAL HISTORY* (NEW YORK UNIVERSITY PRESS 2018). PP. 208. HARDCOVER \$45.

BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (HARVARD UNIVERSITY PRESS 2018). PP. 360. HARDCOVER \$39.95.

In 1986, Robert Cover's germinal essay "Violence and the Word" laid out his theory that "legal interpretation takes place in a field of pain and death."¹ From questions of constitutional interpretation to everyday civil disputes, legal interpretation carries "the seeds of violence" because of its connection to the institutional capacity to exercise power legitimately. Two recently published books, Eric Freedman's volume on habeas corpus and Betty Lew-Williams' history of Chinese exclusion, provide accounts that enrich our understanding of the relationship between law and violence. Freedman considers how and when law may be interposed to short-circuit state violence through judges' capacity to remove individuals from state custody,² and Lew-Williams explains how extra-legal violence can generate conditions that provoke the development of new, legitimated institutional violence.³ In both instances, however, state actors' interest in exercising violently coercive authority proved to be only partially containable through law. Furthermore, when judicial authorities step back from reviewing the legitimacy of state action, their deference often implies the appropriate exercise of state power – or at least that some practices of state violence are not subject to independent oversight.

Eric Freedman interweaves an analysis of recent federal cases involving habeas corpus with the early American history of legal interventions to rescue individuals from the coercive power of the state.⁴ His primary aim is to show that the early history of the great writ should be reconfigured to incorporate cases that sought release from unlawful detention, even if they were not formally styled as habeas cases.⁵ This functional

1. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

2. See ERIC M. FREEDMAN, *MAKING HABEAS WORK: A LEGAL HISTORY* (2016).

3. See BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2018).

4. FREEDMAN, *supra* note 2, at 56–59.

5. See *id.* at 7–26.

definition, he claims, expands the scope of how we think about the courts' role in curbing state power, providing to them a potent tool for reviewing state actions independently to determine whether they are justified.⁶ He recaptures a lost history of legal remedies that functioned to free aggrieved individuals from the state's coercive power, whether exercised legislatively or by the executive.⁷ These remedies, in addition to providing judicial intervention to short circuit coercive state authority over the person, provided opportunities for the democratic check of juries as an additional safeguard.

Freedman explains habeas as having two distinctive aspects: that of a specific legal remedy for state overreach, and as an important and inadequately recognized element of the foundational checks and balances established in the constitution.⁸ In the early history of the United States, he claims, habeas set the boundaries for governmental control over individuals.⁹ This power was not a broad limit on governmental authority, but it did provide the opportunity for individuals to challenge coercive action by the state that limited their freedom, and linked with other legal protections to form a "web of legal restraints on government misconduct."¹⁰ The strands of this web, in addition to the foundation of habeas, included individuals' capacity to sustain claims of false imprisonment, malicious prosecution, trespass, and related wrongs. While individual state agents were the primary targets of such claims, they nonetheless served to curb state authority over private individuals.

Beginning in the colonial era, Freedman presents the early history of American courts' actions to secure individuals' protection from illegitimate state restraint comprehensively, explaining not only the opinions, but the circumstances of the litigants, derived from records. He argues that this richer history was lost and only recently and partially recovered with the Supreme Court's 2008 ruling in *Boumediene v. Bush*. He places a significant portion of the blame on John Marshall, who, he argues, in maneuvering to protect the institutional space of the courts in the early republic, planted a dangerous "sea mine" under the broad and widely accepted scope of habeas that had prevailed in the pre-constitutional era.¹¹

As Freedman details, in the early 1800s, Marshall and his judicial colleagues were the sole remaining Federalist outpost standing against the wave of Jeffersonian transformation of the political branches.¹² Scholars have discussed Marshall's efforts to define and defend the Supreme Court's power in *Marbury v. Madison*, but have attended less to the case of Erick Bollman, one of Aaron Burr's co-conspirators. Rather than being arrested for attempting to seduce officials in the western territories into contemplating secession, Bollman was apprehended by a general and detained under military authority. General James Wilkinson transported him to Washington, DC, ignoring writs of habeas corpus issued by judges in New Orleans and Charleston.¹³ Congress bolstered this process

6. *Id.*

7. *Id.* at 27–72.

8. *Id.* at 40–81.

9. FREEDMAN, *supra* note 2, at 40–81.

10. *Id.* at 68.

11. *Id.* at 89.

12. *Id.*

13. *Id.*

by suspending habeas for three months and specifically authorizing the imprisonment of Bollman and his co-conspirators.¹⁴ Bollman then applied to the Supreme Court for a writ under the intense scrutiny of Congress, which had just narrowly failed in a highly politicized effort to remove Justice Chase through the impeachment process.¹⁵ Marshall wound up ruling that Congress had indeed authorized the Court to issue writs in these circumstances, but for Freedman, the most important and unfortunate part of the ruling was Marshall's dictum.¹⁶ In establishing the source of the Court's authority, Marshall denied a broad and inherent power to consider and address wrongful detentions, linking the power instead to explicit authorization by Congress.¹⁷

Freedman argues that not until two hundred years later would the Supreme Court amend this error in its decision in *Boumediene*, and as he explains, *Boumediene*'s legacy is uncertain. *Boumediene* involved claims by prisoners detained in Guantanamo Bay on suspicion of involvement with al Qaeda or other terrorist organizations.¹⁸ Detained indefinitely but not charged with criminal offenses, several filed for habeas relief under the modern statute.¹⁹ Congress had attempted to foreclose this gambit legislatively by withdrawing jurisdiction from the federal courts to hear such claims, but the Court in 2008 invalidated the non-judicial alternative Congress tried to impose.²⁰ Freedman sees the Court's dicta in this case as equaling the outcome in its importance; however, he notes with distress the D.C. Circuit's ruling in *Kiyemba v. Obama* in 2009 denying relief to seventeen Uighur men.²¹ The government acknowledged it had detained them improperly but could not legally transfer them to China because they faced serious risk of persecution there. When they applied for habeas relief, the DC Circuit rebuffed them, finding that they had no access to habeas relief because the remedy they were seeking would override both the tradition of prerogative and the well established executive authority over immigrants.²²

Freedman delves deeply into the historical cases. He does so by mining the records of these disputes to provide detailed evidence about the kinds of circumstances that provoked judicial intervention to remediate illegitimate state exercises of violence. His analysis of court records also supports his argument that our thinking about the early history of habeas should include more than just a consideration of the cases in which a formal writ was requested through the established process. The richness of his case narratives are both a strength and a weakness; the details are fascinating, though at times, they threaten to overwhelm the larger points he is making.

Freedman's technique of interweaving analysis of the early historical cases with critique of modern habeas doctrine highlights what has been lost in the shift to a far more statute-bound approach. The early cases are both strange and familiar, giving us a glimpse of a world in which courts took a variety of actions to provide functional freedom from

14. FREEDMAN, *supra* note 2, at 90.

15. *Id.* at 90–95.

16. *Id.*

17. *Id.* at 92–95.

18. *See Boumediene v. Bush*, 553 U.S. 723 (2008).

19. *Id.* at 723.

20. *See id.* at 723–25.

21. *See* 555 F.3d 1022 (D.C. Cir. 2009).

22. *Id.* at 1029–32.

inappropriate state restraint. His call for revitalization is likely to resonate sympathetically for the many scholars, lawyers, and activists who expressed concern with the rise of unitary executive theory and the general expansion of state power during the series of military engagements initiated after September 11. Habeas proved a powerful tool for addressing the Guantanamo Bay detention camp, a lever that activists and courts used to pry open the dark world of the indefinite, unreviewable, and lawless treatment of enemy detainees captured in pursuit of the worldwide military campaign against terrorism. However, as he and Kim Lane Scheppele have realized, ringing endorsements of constitutional principle have little meaning if they are not used effectively to provide concrete relief to aggrieved litigants who attempt to activate them.²³

One down side to Freedman's analysis is that, in focusing on the early history of habeas and bringing it into dialogue with contemporary struggles, he skips over a critical period of the writ's development. While many discussions of habeas in recent years that invoke history turn to the American Civil War to compare the use of the writ in a time of perceived military emergency, another significant moment in its historical development was its use by Chinese immigrants and residents in the late nineteenth and early twentieth centuries. Chinese hoping to enter or remain in the United States used habeas to stave off denials of entry and deportation orders issued by administrative agencies. Over the period between the passage of the first exclusionary federal legislation in the 1870s through the 1924 National Origins Act, which completely excluded Chinese immigrants, thousands of Chinese turned to the legal system, either for themselves or for others, and sought to have administrative determinations reversed.²⁴

This period itself, however, is understood best in the larger context of exclusion. Beth Lew-Williams investigates the history of Chinese exclusion between the early 1880s and the dawn of the twentieth century.²⁵ Her analysis blends the story of local uses of extralegal violence to drive out the Chinese with state and national policy-making efforts, showing how vigilantism ultimately provoked a national policy agenda, inviting if not demanding that Congress step in to modulate, control, legitimate, and legalize exclusion. Lew-Williams presents a developmental perspective that usefully distinguishes between different policy periods and highlights the interplay between law and legalization on the one hand and extralegal violence on the other. In doing so, she looks both at the exclusionists (both state and non-state actors) and the Chinese responses to various exclusionary gambits. This dynamic, she argues, would ultimately produce the new legal and cultural category of the alien, someone distinguished from earlier migrants.²⁶

The Chinese first began arriving on American shores in the 1850s, coming in primarily as laborers. Lew-Williams notes that the Chinese faced two distinct but interrelated forms of resistance. One was a fairly unorganized campaign of harassment and violence, often with roots in personal jealousy or loathing, and the other a more

23. See FREEDMAN, *supra* note 2; Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89 (2012).

24. See LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE MAKING OF MODERN IMMIGRATION LAW* (1995).

25. See LEW-WILLIAMS, *supra* note 3.

26. *Id.* at 8.

coordinated political movement that relied on mobilization, demonstrations, and pressure on policymakers as well as violence to try to stem Chinese migration and drive out resident Chinese.²⁷ Initially some American political elites like William Seward saw significant economic advantages in facilitating the mass migration of Chinese laborers who could be relied upon to do the arduous, ill-paid, and low status work of building American railroads, peddling vegetables, and engaging in agricultural labor.²⁸

Nonetheless, popular sentiment in the west against the Chinese made them ready targets for legal and extralegal targeting. Initially, state legislatures attempted to stem Chinese migration and settlement by legislating against the Chinese, but the Supreme Court quickly foreclosed this tack. Lew-Williams shows convincingly that extralegal violence against the Chinese then functioned as a political tool to convince Congress to act, both because of the highly negative sentiments expressed against the Chinese and as a means of maintaining the civil order and removing the incentives for extralegal mobilization to drive them out.²⁹

While white sentiments in the west ran high against the Chinese, these sentiments clashed with the growing demand for cheap and docile labor. They also ran afoul of important foreign policy objectives as China opened its trading markets and American economic elites saw the advantages to be had in working with their Chinese counterparts. Popular resistance to Chinese migration, however, created political incentives to engineer an exclusionary regime that would function by law. Lew-Williams painstakingly reconstructs a list of around 200 actions undertaken on the local level in the west between 1885 and 1887 primarily in California, Idaho, Oregon, and Washington, to drive the Chinese out of communities where they resided.³⁰ While not all involved dangerous physical violence, the worst episodes saw multiple deaths.³¹ The mechanisms for the enforcement of an anti-Chinese regime had to be constructed and implemented in a fashion to supplant the desire for extralegal enforcement.

The legal regime of exclusion has received significant scholarly attention.³² Beginning with the Page Act in 1875 and culminating with the 1924 Johnson-Reed Act, which set strict quotas for immigration and completed the legal closing of American doors to Chinese migration, Congress acted repeatedly and consistently to limit legal entrance and continued residence by Chinese. Due to the Supreme Court's federalization of immigration regulation, the states had little constitutional capacity to control or limit migration, but some could and did take measures formally and informally to discourage Chinese attachment to American land. The Supreme Court allowed the states to legislate against Chinese land ownership,³³ a practice greatly expanded with the arrival of Japanese

27. *Id.* at 19.

28. *Id.* at 25–26.

29. *Id.* at 44–50.

30. See LEW-WILLIAMS, *supra* note 3, at 247–52.

31. Thirty-four Chinese lost their lives in an expulsion in Hells Canyon Snake River in Oregon, and twenty-eight in Rock Springs, Wyoming. *Id.* at 250.

32. See, e.g., SALYER, *supra* note 24; RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1998); Julie Novkov & Carol Nackenoff, *Civic Membership, Family Status, and the Chinese in America, 1870s–1920s*, 48 *POLITY* 165 (2016).

33. See Douglas W. Nelson, *The Alien Land Law Movement of the Late Nineteenth Century*, 9 *J. OF THE WEST* 46–59 (1970).

immigrants in the early twentieth century.³⁴ Yet overarching control and management of immigrant entry and management of access to rights and citizenship were quickly claimed as the exclusive province of the national government. Lew-Williams shows how the Supreme Court's insistence that only Congress had the regulatory authority to manage these questions led to the mobilization of private violence, which then served as a political tool to extract vigorous congressional intervention.³⁵

Lew-Williams' account fills the significant scholarly gap between the policy struggles taking place among state actors, primarily between the federal courts and newly empowered administrative agencies, and the struggles taking place on the ground between individuals promoting and enforcing exclusion and the Chinese themselves. She highlights the importance of regional interests and tensions, as internationalists and promoters of commercial development in the east locked horns with xenophobes and labor protectionists in the west. Her analysis helps to make sense of the mounting frustration among exclusionists, who could see clearly that policymaking from the top, even when it did take their demands into account, did not result in the creation of sufficient state capacity on the ground to meet their expectations. For instance, Lew-Williams describes how the highly ambiguous and porous system of restriction on Chinese migration initially implemented in Washington State provided incendiary fuel for the outbreaks of vigilante violence and enforcement shortly thereafter.³⁶ This early episode saw echoes after a series of efforts to reform the immigration system and close American ports to mass Chinese migration;

Lew-Williams' work to recover the voices and perspectives of the Chinese, however, distinguishes the book. Painstakingly working through records of the era, she finds substantial evidence of how the Chinese responded to exclusionary efforts by migrating – at times back to China, but often remaining within the United States but simply moving to areas where neither vigilantism nor formal governmental action would pose as much of a threat.³⁷ This history of internal migration provides additional nuance in our understandings of responses to threats of coercive state and non-state power when the threatened individuals had only uncertain assurances of legal checks on the process.

CONCLUSION

Both Freedman and Lew-Williams recognize the importance of law, courts, and habeas in addressing situations in which the government has incentives to exercise violence against individuals who do not have access to the standard package of rights recognition accompanying full citizenship. Both carefully consider historical struggles to contain, channel, and legitimate state violence. Their readings acknowledge that while courts sometimes provide the independent institutional space to consider the legitimate exercise of state violence, the courts themselves, whether they check or allow state violence, serve a legitimating function. Both remind us forcefully as well that too much

34. Roger Daniels, *Asian Americans: Rights Denied and Attained*, in *TWO CULTURES OF RIGHTS: THE QUEST FOR INCLUSION AND PARTICIPATION IN MODERN AMERICA AND GERMANY* 19–33 (Berg & Geyer eds. 2002).

35. See LEW-WILLIAMS, *supra* note 3, at 44.

36. *Id.* at 53–55.

37. *Id.* at 53–90.

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attention to the doctrinal rules courts produce may blind us to the real pain and violence experienced by the denizens of law's empire – pain and violence that, in Lew-Williams' analysis, need not even be imposed by the state to serve the state's interests.