Away from the border and into the frontier: The paradoxical geographies of US immigration law

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Abstract

This paper investigates US immigration law as a spatial system whose application results in geographic confusion. I take the case of *Barton v. Barr* as a vivid example of this structure, where the petitioner was found to be simultaneously "outside" and "inside" the country under a legal perspective. Beginning from this paradox, I focus on the law's ability to produce extraterritorial folds within the country's interior, thus confining aliens into spaces that escape constitutional rules. Through an engagement with legal geography and Niklas Luhmann's work, I conceptualize immigration law as a system which lives off the repetition of a binary operation that distributes rights and privileges to aliens by assigning a degree of foreignness to their location. The resulting paradox must not be confused for a mistake or a flawed logic. Instead, it constitutes the dispositif that allows the law to produce its effects and draw its territorial enclaves.

There is no excuse for geographers who use the terms 'frontier' and 'boundary' as synonyms.

(Prescott and Triggs, 2008: 23)

Introduction

In one of his essays on US immigration law, Hiroshi Motomura (2010, 1725) recounts his experience on a television network, when a viewer asked him a question that was impossible to answer: do immigrants have rights? Motomura's immediate reaction was to wonder what classes of immigrants his viewers were thinking about. Were they thinking of residents? "Illegal" aliens? Asylum seekers? To answer, he was forced to narrow the scope of the question. As anyone familiar with immigration law knows only too well, to speak of "aliens" is meaningless. The rights of noncitizens must be determined in reference to the classes among which they are repartitioned, so that the question of "who" is the alien always escapes us, as it may only be answered by distinguishing one alien from another. What geographers must consider, however, is that the question of "who" is always also a question of "where." When determining the rights of a class of aliens, we must first establish their location, whether inside or outside the United States. But this complicates the problem, because to ask *where* leads us to the same problem of asking *who*. The law makes it impossible to tell, as it fragments domestic and foreign territory just like it does with the immigrant population.

In 2016, Andre Barton had to face this very problem. In 1989, he left his native Jamaica and immigrated into the United States. He entered the country "legally," after being regularly admitted at a port of entry. In the years that followed, he obtained his green card, got engaged, and had children. During this time, he also committed two crimes that rendered him removable under immigration law. Normally, an immigrant in his situation would have the opportunity to

ask for a relief from removal. The government, however, did not agree. They thought that Barton's situation was peculiar, because an older criminal conviction had made him "inadmissible" to the country, despite him having been admitted almost thirty years earlier. But "inadmissibility" is a condition that should only encompass immigrants who are yet to be admitted, and who are fictionally situated "outside" the country, as if they were waiting at its border. As a result of being both admitted and inadmissible, Barton lost track of his location. How could he be inside and outside at the same time? This was the challenging question for the Supreme Court in the 2020 case of *Barton v. Barr*.

In this article, I use this question to conduct an analysis of US immigration law and its relation with space. This is not a linear relation. Immigration law unfolds by fracturing the country's border, and by scattering foreign folds across the nation. The results can be paradoxical, as in Barton's case, but never senseless. The law regulates the lives and rights of noncitizens by enclosing them into territorial enclaves with limited constitutional protections, thus preventing the constitution from applying uniformly across the interior. This prevents aliens from being able to tell where they are, and thus, what rights they have. The production of paradoxical, unmappable locations sustains a form of power that is resistant to constitutional scrutiny. Thus, to ask *where* Andre Barton is, has the exact purpose of accounting for these spaces and the rights of the aliens who occupy them.

In asking this question, I engage with a vast body of geographic literature that has examined the productive effects of practices of bordering to govern, identify, and classify individuals and masses (for example Gargiulo, 2021; Tazzioli, 2020; Maillet et. al. 2018; Andrijasevic, 2010; Van Houtum, 2010; Walters, 2004). In performing these functions, the border also complicates the very territorial repartition that it aims at instituting and defending

(Parker and Vaughan-Williams, 2009; Bigo, 2007; also Castañeda and Melo, 2019). More specifically, I situate this research in the field of legal geography, and within a theoretical approach to law and space as mutually constitutive of one another (Gorman, 2017; Bennett and Layard, 2015; Braverman et. al. 2014; Coleman, 2012; Kedar, 2012). Spatial and legal analysis here converge, and I use geography to interpret case law and statutory rules. I treat space as a material, discursive, and metaphorical concept. Space is not just an external reference to the law, as if the law would merely affect or designate a space, but it also consists in the form of the relation between immigration and constitutional law, with the former exceeding the latter and producing a paradoxical space in between.

The article is divided into two sections. In the first section, I offer an analysis of immigration law and its relation to the US Constitution. I begin with an historical overview of its formation and its roots in US imperialism. I proceed with introducing the work of Niklas Luhmann, which I use as a framework to analyze the case of *Hernandez v. United States,* so as to describe how immigration law constructs its space of application. I conclude the section with an analysis of contemporary immigration law and focusing particularly on how the law utilizes territory to distribute rights and privileges to aliens. Finally, in the second section I focus on the case of *Barton v. Barr*, and I present a reading that makes sense of its paradoxical conclusions.

The spaces of immigration law

Plenary power

The question in *Barton v. Barr* was to determine whether Barton could be inadmissible despite having been admitted, meaning legally outside the country but also inside of it altogether, to a point where it became impossible to determine his position in law. As we shall see, however,

Barton is but one of the most vivid examples of a broader geographic paradox that characterizes immigration law as a whole, and which can be visualized clearly only by beginning with its history.

Scholars situate the birth of contemporary US immigration law in the late 19th century, when the Federal government began passing laws that would put immigration beyond the reach of the states to make it a solely federal prerogative (Hester, 2017). At its inception, the law was supported by a specific judicial doctrine that had been gaining ground at that time, which is commonly known as the plenary power doctrine (Chan, 1996). In a nutshell, plenary power refers to a power that may be exerted against subjects and territories other than US citizens and US states, and that is, subjects and territories that stand outside constitutional jurisdiction. Historically, it was first adopted to address the legal status of American Indian tribes under federal law, and it eventually expanded to regulate immigration and to encompass those territories that the United States had acquired through the Spanish-American war: Puerto Rico, the Philippines, and Guam (Cleveland, 2002). There are three main characteristics of plenary power: it has few constitutional limitations; it demands a virtually absolute deference from the judiciary; its source of authority is not in the constitution (Cleveland, 2002, 5).

Why are plenary powers to be found *outside* the constitution? The answer to this question lies in the pressure that was brought on the judiciary to sanction the United States' transition into an imperialistic and colonial power, a transition that had little textual basis in a constitution written from a liberal perspective (Ramos, 1996; also see Karuka, 2019). In the absence of a textual authority, plenary powers were constructed as "inherent to sovereignty." The reasoning was that the United States must have possessed certain powers as a sovereign nation, and these would be found in international law (Cleveland, 2002). As a nation, the United States could

conquer territories and subject populations that lacked or had lost a separate national allegiance. In between the 19th and 20th century, the government identified three such nationaless populations and territories.

The first of these were the Indian Tribes, as they were not white, sovereign nations. While the Federal government never acknowledged the Tribes as sovereign authorities, for most of the 19th century they could rely on a degree of territorial autonomy. However, with the introduction of plenary power this autonomy was erased, and Native Americans were constructed as subjects at the full disposal of the federal government (Ablavsky, 2015). This allowed the government to unilaterally rescind the American Indian Treaties and displace Native Americans from their land. Eventually, the same logic was extended to the US colonies, because after the conquest these territories were not foreign, as no other country could claim them, but neither were US states. Therefore, the United States could integrate them into its possession without having to extend constitutional rights to their inhabitants (Ramos, 1996). And finally, in the Chinese Exclusion Case the Supreme Court extended the doctrine to immigration law, and it established that aliens remained subject to plenary power for the time they were present in the country. This would invest the government with the unquestionable authority to remove them without offering meaningful constitutional protections (Hester, 2017). According to the Supreme Court, without these powers the republic would have become something less than a nation under international law, and the constitution itself could not be effective as it would lack a sovereign nation to enforce it.[1]

[1] This juridical deduction of a sovereign power preceding the constitution is not exclusive to US jurisprudence. In European legal theory it is most famously associated with the philosophy of Carl Schmitt (2005), and more broadly with the problem concerning the relation between force and law dating back to Hobbes (also Benjamin, 2007; Agamben, 1998).

In other words, the judicial construction of the doctrine looked outwards. Plenary powers were not to be found inside the constitution because they were not, from a certain perspective, domestic, as they concerned foreign affairs. Nonetheless, it is easy to notice that the doctrine has its own domestic counterpart, and that is police power (Dubber, 2005). Just like plenary power, police power can escape several constitutional limitations. It usually targets subjects that are constructed as other than the normative citizen, such as the mentally ill, orphans, vagrants, or drunks. Furthermore, both powers are deeply paternalistic, as they aim at improving the welfare of society by taking care of those who lack full autonomy. Native Americans, aliens, and colonial subjects were not necessarily conceptualized as enemies, but also as non-autonomous individuals that the government would take care of in the interest of society (Ablavsky, 2015). In fact, while most historians have focused on foreign affairs to analyze the plenary power doctrine, a few have also stressed its origins in the police (Lindsay, 2010; Dubber, 2005, 139-156). This is particularly true for immigration law, as prior to its federalization US states could often regulate immigration into their borders as part of their police power (Bilder, 1996).

This is not to say that the two theses are contradictory. Instead, plenary power should be thought of as neither strictly foreign nor domestic, but as rooted in a geographic imagination that defied the distinction between the two. Under the doctrine's logic, the existence of an extra-constitutional power is necessary not just to protect the country's border, but also to institute it, therefore making the very existence of a domestic territory sensical and effective. In this sense, more than a territorial limit to the doctrine, the border constituted its own creation. Plenary power is logically precedent to the border, and it originates in a territory where the border may

be eventually drawn. I will refer to this un-bordered space as the frontier.[2] Just like the doctrine lacks a textual presence in the constitution, the frontier does not possess a material location. Instead, it is a concept that remains unclarified and unmapped, but which must be present as a logical condition and prerequisite to thinking about sovereignty.

The most memorable description of the geographic confusion that results from the doctrine's application was given by Justice White in *Downes v. Bidwell*, when the Supreme Court had to decide the status of Puerto Rico as neither a foreign territory nor a US state. According to White, Puerto Rico could not be foreign in an *international* sense, as it was under US sovereignty, but neither could be domestic. Instead, Puerto Rico was "foreign to the United States in a *domestic* sense" (341-42).[3]

White's quote opens up for a critical reading of immigration law and its paradoxical traits. Here, my usage of the term "paradox" should not be confused for a legal argument where a statement may be accused of being paradoxical in order to reject it as invalid. A paradox does not designate a lack of sense. Instead, it constitutes the act of producing a new sense through two terms that were previously contradictory. More specifically, the paradox allows the production of new space, a new territorial enclave that complicates the geographic designations of foreign and domestic and pushes them toward a new geographic imagination. As will be discussed through the following analysis, immigration law's motor of reproduction consists exactly in its ability to produce more and more paradoxes, of which the case of *Barton v. Barr* is a particularly vivid example. In this sense, the starting question for a geographic investigation of immigration law should be: *where* are the aliens?

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[2] Admittedly, the two terms may be used interchangeably when referring to borders as political frontiers. However, here I use "frontier" with the meaning that is associated with the American West, meaning a territory of settlement that is not fully integrated within the sovereign possession of the State (Prescott and Triggs, 2008, 23-47).

[3] More recently, the detention center of Guantánamo Bay has posed similar problems (Kaplan, 2005).

The boundaries of immigration law, or life at the edge

In order to find the territory of immigration law, let us now borrow from Niklas Luhmann (2004). For Luhmann, a legal theory consists in a reflexive endeavor, where a description of the law is given from an internal, legal perspective. In other words, a self-description. The ability to describe itself is what makes an autopoietic system, such as the law, autonomous. However, the law cannot tell us what it is, or else it would be describing itself through an identity, therefore losing its autonomous structure by being identical to a non-legal object. Instead, the autopoietic system will coalesce around an exclusive set of operations that no other system uses, and it will acquire its uniqueness and closure through the repetition of those exact operations. Beside performing their function, the operations also work as reflexive endeavors, thus rendering the law autonomous. For this reason, the self-description will not be an identity but a difference: legal theory will tell us what the law is by telling us what it is not, and that is, everything else.

In this sense, Luhmann suggests we seek a border, the legal description of a non-legal object that establishes a threshold between what is law and what isn't. By looking at how the law describes its other, and that is, what remains *outside*, we will obtain a negative definition of the interior. Following Luhmann, to find the territory of immigration law we must seek those instances where the law produces it through operations that distinguish it from another location. We must first find a case that happened somewhere else, and specifically on a territory that could acquire its substance by presenting itself as distinct. An instance of this kind may be found in the case of *Hernandez v. United States* (5th Circuit, 2015).

In 2010, a Border Patrol officer standing in El Paso, Texas, shot and killed a Mexican teenager who was standing on the other side of the international border in Juárez, Mexico. The boy's name was Sergio Hernández. He and his friend were playing a game where they would run

through the culvert separating the two countries, touch the fence on the American side, and run back to the fence on their side. Upon seeing this act of defiance, the agent grabbed and detained one of the youths, but Hernández was able to flee across the culvert and watch the scene unfold. The agent then pulled out his gun and fired it toward Hernández, striking him in the face.[4]

The US government refused to bring criminal charges against the shooter. Hernández's family, however, did not stop there and they brought a civil suit to seek a reparation for the killing of their son, and that is, for the violation of his constitutional rights (Liptak, 2016). When the case reached the Fifth Circuit Court of Appeals, the court was faced with a problem: could a Mexican citizen possess constitutional rights while standing south of the border? At the rehearing,[5] the court decided that he could not. Hernández was an alien, outside the United States, and without a "voluntary connection" to the country. The presence of all three factors barred the possibility of extending fourth amendment rights to the victim. Additionally, qualified immunity shielded the shooter from any claim under the fifth amendment, thus fully preventing the family from suing.

While the decision was eventually dismissed by the Supreme Court, the judicial reasoning at work here deserves greater scrutiny. In order to determine the applicability of the fourth amendment to the case, the Fifth Circuit began by distinguishing Hernández and his location from others that would lie under its jurisdiction: a US citizen within the United States. It then followed with a second operation that further distinguished Hernández from an alien "with a voluntary connection." What constitutes a "voluntary connection" for an alien outside the United

[4] Far from an isolated incident, Hernandez's killing is one of many deadly shootings involving US agents on the US-Mexico border in recent decades. The shootings are a result of the increasing militarization of border control by the US government, which began in the 1990s and has skyrocketed after 9/11 (see Slack et. al. 2016).

[5] Normally, federal cases are heard by panels consisting of only three judges. However, in matters of a certain importance a rehearing en banc in front of the full court may be granted.

States is not easy to say, but at a minimum, the alien must be an immigrant, meaning that he must be aware of being *outside* the border. Had Hernández been a green card holder on a brief trip to Mexico, the case could have been decided under different grounds. But even after the second operation the court could have carried a third and given Hernández a positive status. During the first hearing, the panel had done so and found that Hernández must have possessed fifth amendment rights as a "civilian killed *outside* [emphasis added] an occupied zone or theater of war." (*Hernandez v. United States*, 757 F.3d 249, 269). In this case Hernández was distinguished from an enemy fighter, and Juárez was characterized as a territory at peace, thus acquiring a more specific characterization than just being outside the United States.[6] During the rehearing, however, Hernández's status as a civilian was not considered, and no constitutional violation was found.

Of course, the entire process is grossly inconsistent with human rights law. As a human being, Hernández must possess a status which, at a minimum, makes his killing different than that of an animal. But to conclude that the decision made Hernández "less than human" would be mistaken. The Court did not deny Hernández's humanity. Instead, he was coded as a subject within a system where humanity is not a meaningful concept, unlike in human rights law. This is a binary system that can only give two answers: one is either American or not. Having established that, the Court carried out a second operation and determined what else Hernández was not, and that is an alien with a "voluntary connection." In this sense, the Court's treatment of the extraterritorial location of the shooting is more complex than a territorial repartition between outside and inside. Immigration and constitutional law are both at work here, because they

[6] At the first hearing the panel had rejected the possibility of extending fourth amendment rights to the victim, but they also decided that the Hernández family had a viable claim under the fifth amendment. Because the previous case law had excluded the applicability of the fifth in situations involving enemy fighters abroad, they underlined that Hernandez was a civilian, and that Juárez was a territory at peace contiguous to the US border.

perform a double exclusion through the same operation: Hernández is outside the constitution *because* he is outside immigration law.

The court did not tell us what would have happened had Hernández been a US resident, but only that the possibility of distinguishing him from such an individual determined his exclusion. This rendered Hernández's location a double negative. The court acknowledged a lack of law, and it reaffirmed it as such. They argued that the border prevented the case from entering their jurisdiction, but also that it remained under no one else's for the very same reason. Furthermore, as a result of the two operations they left us with a third possibility: a subject who may be less foreign, on a territory that would not be outside as much. This is the immigrant, or the subject of immigration law.

Excessive laws

As *Hernandez* illustrates well, the relation between immigration law and space cannot be reduced to a mere matter of designation, where a certain space is "outside" and another is not. A space may only be described in relation to the legal status of the lives who occupy it, in the sense that we are never looking at an empty space or at a placeless life, but always at the mutual relation between the two. Thus, geography here does not help us to designate a space, but more appropriately it is the tool to interpret the spatialized relation between immigration and constitutional law. Immigration law exists as a space unbound, which is in excess to constitutional law. Its very designation as an autonomous body of law indicates it, as these are cases that are not decided under ordinary rules (Motomura, 1990). To quote from Valverde (2009), the problem here is not just one of scales, but of jurisdiction. The immigration case is decided under a separate body of law not simply because of a geographic location, but because of the interaction between an authority, its subject, and a territory.

Hernandez is a good starting point exactly because it is *outside* immigration law, and it shows this relation with clarity. In this case, the border is both a physical and legal boundary, as it designates the end of the constitution and of the country's territory at once. But once the aliens cross it they leave this emptiness behind, and they begin to benefit from a certain access to the constitution while never being fully inside of it altogether. Hence, immigration law re-enters the country whilst following them, and it reproduces foreign space inside, preventing the constitution from applying uniformly across the interior. It is this peculiar structure that is the object of this article. As the relation of outsideness re-enters the country, foreign folds begin appearing across its territory.

Ideally, the alien who enters is accorded "a generous and ascending scale of rights as he increases his identity with our society" (*Johnson v. Eisentrager*, 1950, at 770). This statement is partly inadequate today, as the "identitarian" scale cannot fully encompass the logic behind the production of statuses. However, it still captures the idea of a ladder that distributes degrees of legal protection to the alien population, which is partitioned across a hierarchy of personalities each closer to the ultimate status of the citizen which remains *outside* immigration law (see Menjívar and Lakhani, 2016). But the alien always carries a certain constitutional void, meaning a certain extraterritoriality where the constitution does not fully apply, and immigration law regulates this foreign space inside. For this reason, the extent of constitutional protections that are available to aliens during their immigration proceedings is difficult to determine, because even though they do have some rights, this is never a full integration of their lives into the Bill (Heeren, 2014).

Instead, the aliens' condition is regulated through statutory law,[7] which distributes privileges to immigrants but without clarifying which rights they may or may not claim under constitutional law during their immigration proceedings, thus leaving constitutional questions largely unanswered (see Motomura, 1990). Statutory law fragments the alien population across statuses, each bearing different privileges and rights, and this allows courts to escape plenary power while also avoiding grounding their rulings on a firm constitutional territory (Heeren, 2014). With time, the demise of plenary power has made immigration law less alien to the constitution itself, and quite more entangled in a game of catch up, where judicial interpretation often consists in wondering loudly whether we are still on the frontier or have already crossed the threshold. As a result, immigration law has developed as an abnormal body of law, where courts rarely decide their cases under constitutional grounds (Lindsay, 2016). Instead, immigration cases are generally decided through statutory construction and administrative law, thus leaving aliens on shifting and perilous grounds (Kim, 2017).

However, the "normalization" of immigration law, meaning the departure from the "exceptionalism" of plenary power, does not imply a mutual exclusion between plenary power and the constitution. To picture their relation as such is a modernist idea, whereby "progress" is thought of in terms of a territorial extension, with the constitution "conquering" the space of plenary power beyond the border. Instead, immigration law exists at once on both sides, and it reproduces itself through its uncertainty that makes us lose our orientation. Thus, the departure from the "exceptionalism" of plenary power corresponds exactly to the normalization of this uncertainty, and of the paradoxical relation between the normalcy of the inside and the

[7] In US law the term "statute" identifies the law written by legislative bodies, and the term statutory rights refers to those rights that have been assigned to a subject by non-constitutional, statutory law.

exceptionality of the outside (see Hussain, 2007). What we witness is the re-entering of immigration law into the country, which does not result in the displacement of the frontier.

Quite differently, as immigrants are brought inside, the border is reconstructed but this time to separate among them, with an entrenching of immigration law that creates multiple distinctions and subclasses (Eagly, 2013). Immigration law maintains its fundamental property of establishing an outside, but it does so from *within*, making the threshold an immanent condition of life across the entire legal space. Hence its complexity: "Much of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects" (*Techt v. Hughes*, 1920, at 237). The subjects that are so constructed are distinguished on the basis of the rights and protections that they enjoy. Each legal status is the result of an operation where a certain privilege is distributed to a group of aliens at the expenses of another. Hence, each status is the result of an operation of bordering, meaning that each operation establishes an inclusion through an exclusion, leaving someone outside and someone inside in relation to what is being distributed.

To take a quick look at how this process works in practice, let us briefly consider certain characteristics of removal proceedings. First, across the alien population we extract the group of those who lack a right to stay, which makes them removable. From this group, we distinguish those who are deportable, as they had been previously admitted, and those who are inadmissible, as they were never admitted in the first place. The former group has several advantages in removal proceedings, particularly if they are Legal Permanent Residents. They do not bear the burden of proof (CFR §1240.8(a)), and they have lesser requirements for being eligible for relief from removal (INA §240A(a)). They may be detained, but they maintain a right to a bond hearing (INA §236(a)). However, those immigrants who have been rendered deportable due to a

criminal conviction might belong to another sub-group (INA §236(c)(1)). They are mandatorily detained and cannot be released until the completion of their removal proceedings. From this group we extract another one, those convicted for "aggravated felonies," as they also lose eligibility for cancellation of removal which makes their deportation virtually unavoidable (INA §240(a)(3)).

I could continue, but the point is to observe how the system operates through the repetition of a simple operation, which ends up producing a very complex scenario. Each right or privilege that is assigned to a group is accompanied to the exclusion of another, because the operation is always binary, and can only perform an inclusion through an exclusion. Each operation establishes a norm through its exception, as each protection is made meaningful and possible by the construction of an exception from its application (Agamben, 1998: 20-25). The operation mirrors the original split between citizens and aliens, and it reproduces it across the immigrant population, creating a hierarchy of statuses among them. The meaning of these judicial categories cannot be found through identity, however, but only negatively through the cross references between themselves. To describe it, I borrow from Roberto Esposito and his research on Roman law: "A category defined in juridical terms, no matter how broad, becomes *meaningful* [emphasis added] only thanks to the comparison and indeed the opposition with another category from which all other categories are excluded. Leaving aside its breadth, inclusion only makes sense to the degree to which it marks a limit beyond which there is always someone or something" (2012b: 23).

The characteristic of this system is that of making outside and inside relative concepts. While aliens are not entirely "outside," as the constitution always applies, neither are they "inside," as the extent of constitutional protection remains limited. However, each legal status

manifests a relation of exclusion and inclusion with another, so that each alien is "inside" in relation to another and the other way around. In this sense, the condition of the alien is always a tension between these two positions: on one hand, the alien's position in law is uncertain, and on the other, the alien has a fixed position in relation to someone else, as their statuses are mutually exclusive. For this reason, it matters less who is "outside" or "inside," but only that someone is an outsider to someone else, and an insider to another.

Geographically, these two conditions correspond to the tension between the border and the frontier. As the border separates two discrete entities, it gives a sense of certainty in respect to the separation that is performed. And yet, this certainty can never expand beyond a binary relation between two aliens, and it does not correspond to a clarity of one's location within the country. The space where all these borders are made and unmade is the frontier. This is a territory that does not sit on a line separating two countries or people, but in a land that is neither inside nor outside, foreign in a domestic sense. The frontier is the space at the edge, whose boundaries shrink and expand unpredictably, and whose inhabitants cannot be fully accounted for.

The alien and the native

Perhaps, it is already evident by now how in the analysis above I am deliberately playing with the ambiguity of the term "outside." To be outside could either mean being outside the country or outside the protection of a status, and I began with *Hernández* because in that case the two meanings coincided, while they do not elsewhere. I focus on this fracture to highlight how an excessive de-territorialization might lead to paradoxical conclusions, as we shall see in the case of *Barton v. Barr.* But before diving into that case, I will further discuss how the law

conceptualizes territoriality, meaning how the law uses one's physical location to guide the production of statuses.

In the early 20th century, immigration law developed while distinguishing between immigrants inside and outside the country's borders, leaving the latter in a less favorable position (Coleman, 2012). Whenever immigration authorities set out to remove someone, they would have to distinguish between those who were already inside, who would be "deported," and those seeking admission at the border, who would be "excluded." Within this structure, the separation between "outside" and "inside" appears to be neat, as one's legal status has a direct correlation with a physical location. Nevertheless, two exceptions from the rule were rapidly identified. First, whenever incoming immigrants would be brought inside the country to decide on their removal, their presence would not be acknowledged, and they would be treated as if they were still "outside." Second, when permanent residents would briefly leave the country and come back they were not treated as applicants for admission, thus preventing them from being entirely "outside" even when physically outside the country. These two possibilities where one's legal and physical location did not coincide are known as the "entry fiction" (see Lee, 2021).

In 1996, this process made a leap forward with the passage of IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act) which conflated deportation and exclusion into one proceeding, removal. The distinction between the two was transferred from the type of proceedings to the grounds under which aliens could be removed. Those who had been legally admitted would only be removable under grounds of "deportability," and they would benefit from greater safeguards. Conversely, all those seeking admission at the border, *and* those who made it inside without having been admitted, would be removed on grounds of "inadmissibility." The distinction switched from the physical border to the administrative process

of entry, therefore bestowing an "outsideness" to all the "illegal" aliens who made it inside the country while eluding border control (Coleman, 2012).

Under this expansion of the entry fiction, it appears that inadmissible aliens in the country are legally "outside." However, this is only true when we look at their status in cross reference to those who are deportable. If we focus on their binary relations with other categories, the result changes. Among the non-admitted there is yet another group, the aliens who may be expelled through "expedited removal." Expedited removal may be used against immigrants at a port of entry, and against those who have "illegally" entered fewer than two years earlier.[8] It offers no procedural rights, as immigrants are immediately removed without ever seeing an immigration judge (CFR §1235.3(b)(2)(ii)).[9] No doubt, these aliens are "outside" when comparing them to the rest of the inadmissible population.

In other words, the concept of "outside" must not be confused with an actual geographic location. Instead, it functions as a supplement[10] that allows immigration law to perform its operations. While there is an historical and geographic connection between the outside and the US border, this does not work as a limit for the law, meaning that there is no overarching principle forcing the law to rely on a definition of "outside" that is external to its own system. Instead, the "outside" identifies the negative result of a binary operation. Its definition is a tautology, because it lacks meaning outside of the operations that use it to produce their effects.

Borrowing from Esposito again, this structure can be best conceptualized as an immune mechanism (2011). The law's purpose is to establish an inside, and to protect it through the

[8] The two years limit was introduced in 2017. Previously, expedited removal could only be used against immigrants who had been in the country for less than two weeks (Johnson, 2017: 644-648).
[9] The only possibility for avoiding removal is to apply for asylum, but in this case they first have to pass a "credible fear interview" where an immigration officer tests the credibility of their testimony.
[10] I use the term "supplement" with the same meaning that is found in Derrida's work (1976).

exclusion of what lies beyond. But in doing so, the very integrity of the national space is violated. To reject the outside, the law integrates it as a supplement for its operation, thus reproducing foreign folds in the interior with the purpose of preventing the border from fading. Therefore, the constitution's integrity and the country's borders are protected from the unruliness that lies beyond by integrating that very unruliness within the law, potentially making every legal case extra-constitutional and every space inside the country extra-territorial (see Benjamin, 2007).

If we go back to the origins of immigration law, the nature of this paradox is sufficiently clear. As discussed, plenary powers were first applied against the American Indian Tribes. This signifies that Native Americans are the very first aliens in US history, as they stand outside the territory of the outsiders, who are bringing their own country with them. This is the birth of immigration law, as the impossibility to establish an outside, and the extension of the frontier to the country. It is as if the outsiders, who are conscious of their alienage, have no other way to establish their community but to include the Native Americans in an antinomic relation: so that the distinction between alien and Native is already a paradox. The Native is brought *inside*, as the internal territory of the country cannot be maintained if not by allowing it to be outside of itself. Thus, no life and no land is truly in or out, and they are all caught in the paradox which is the very condition for the law's existence. Within this structure, uncertainty is not an incidental byproduct, but the very condition for the law to apply and reproduce.

Where is Andre Barton?

I picked the case of *Barton v. Barr* not so much because it exemplifies the arguments above, but because it brings them forward, reaching a new level in the paradoxical relation between law and space. In *Barton,* the Supreme Court found that while Barton was legally (and

not only factually) inside the country, an old criminal conviction made him inadmissible and hence "outside," even though this did not make him removable because he was still "inside." If the reader thinks that what I wrote makes little sense I shall absolutely agree, but far from being the effect of some clumsy legislator this language is a necessary consequence of the enlargement of the frontier. *Barton* represents the perfect case for exemplifying this phenomenon, not only because of its final decision, but also for the incredible tediousness and technicality of the argumentation that reaches it.

When writing for the majority, Justice Kavanaugh invited caution, almost as if he were apologizing to the reader, because: "these arguments are not easy to unpack" (2020, at 1450). Justice Breyer was even more direct during oral arguments, when he complained that "whoever wrote this draft was not a genius" (Rathod, 2019). This extreme technicalism, however, is the necessary consequence of the law breaking free from its territorial constraints in order to produce new, unmappable spaces while also avoiding the brutal clarity of plenary power. For this reason, I ask the reader to bear with me as I unpack the case below, but also to appreciate the morbid, Kafkian charm of a legal argument where the court decides a matter of life and death while complaining about the intelligibility of the statute that it is supposed to apply (Kanstroom, 2002, 421).

Andre Barton was a Legal Permanent Resident (LPR) of Jamaican origins, who arrived in the United States in 1989. He was found deportable because of two crimes that he committed during his residence, and he subsequently applied for a "cancellation of removal" in order to prevent his deportation. This consists of a discretionary procedure where an Immigration Judge (IJ) reviews the alien's case to decide whether he may be granted relief from removal. In the case of Barton, his ties to the country made him an ideal candidate for relief. The problem, however,

was to establish whether he was eligible, meaning whether his status was one of those that the INA had constructed as eligible for cancellation of removal.

An LPR may apply for cancellation of removal if he collected at least seven years of continuous residence, and if he has not committed an aggravated felony (INA §240A(a)). Barton satisfied both requirements. There is, however, a third requirement that made the difference in this case, the so-called "stop-time rule." This rule dictates that the commission of a certain type of crime "stops" the continuous residence for immigration purposes. Therefore, if the LPR commits a crime *before* his seven years have passed, he will never be able to reach seven years of residency, and he will not be eligible for cancellation of removal. The crimes in questions are those that make an individual deportable, and those which make an individual inadmissible. Barton was being removed for two offenses that made him deportable, but the earliest happened in 1996, just a little after his seven years had passed. There was, however, a third offense for aggravated assault that he committed 6 ½ years after entering the country. This specific offense cannot make an immigrant deportable, meaning that Barton could not have been rendered removable solely based on this conviction. However, it is included in the broader group of offenses that render an immigrant inadmissible. Thus, the government's argument was that "time stopped" for Barton in 1996 after committing aggravated assault, and that even though his status as an LPR prevented the offense from making him removable, it permanently barred him from applying for relief in the future.

The big question in this case lies in the language of the Act. Specifically, the stop-time rule does not simply say that to commit a crime of inadmissibility stops the time. It says that it stops the time if the offense "renders the alien inadmissible to the United States" (INA §240A(d)(1)(B)). Therefore, there are two possible interpretations of this clause. One is that

Barton was rendered inadmissible in 1996 when he committed aggravated assault. The other, which was argued by Barton, is that he could not have been rendered inadmissible because he was an LPR, and inadmissibility is a status that only extends to people who have not been admitted and are seeking admission: namely, undocumented immigrants and people seeking entry at the border. The question at hand here is greater than Barton's case. It concerns the meaning of "inadmissibility," and as we have seen this is no ordinary status. Inadmissibility grounds immigration law because it refers to the condition of not having entered the country, whether physically, as it was before 1996, or fictionally, as it has been since then. To change the meaning of this status is no ordinary operation.

To unpack this case, I shall first describe the logic of the dissent. Justice Sotomayor's argument is quite clear: an immigrant cannot be inadmissible and legally admitted *at the same time.* The contradiction in the two conditions being valid at once is not just common sense, but law. This is because inadmissibility is one of the two causes for a person being removable, with deportability being the other. The two grounds of removability are mutually exclusive, as they follow the original territorial distinction between exclusion and deportation. Therefore, and in a more technical terms, an alien can only be inadmissible if he is also removable for that very reason. But an alien who is legally admitted and commits an offense of inadmissibility cannot be removed, exactly because he cannot be rendered inadmissible. Thus, and as Barton argued, the only offenses that could make him ineligible for cancellation of removal are the "deportable" offenses which rendered him removable, but because he committed them after seven years of residency, they did not bar him from applying for cancellation.

The divergence between the dissent and the majority concerns the meaning of inadmissibility. They both agree that the stop-time rule only applies to those who are

"inadmissible," but they disagree on who these are. Sotomayor believes that the meaning of the term must be found outside the clause and in the legal history of removal proceedings, which prevents it from applying to Barton as an admitted immigrant. Conversely, Kavanaugh argues that the stop-time rule already contains a definition of the term. Thus, the rule not only prevents inadmissible aliens from benefiting from cancellation of removal, but it also establishes what "inadmissibility" means. It is simply a condition that follows a sentence, as in a recidivist statute. Its consequence is to lose eligibility for cancellation of removal. Whether Barton had been previously admitted is irrelevant, because the term has no connection to admission procedures.

Beyond its tedious jargon, this truly is a debate about space, and specifically about the rules regulating the signs that designate a geographic location. By restricting "inadmissibility" to non-admitted immigrants, Sotomayor wishes to put a constraint on the executive power to deport aliens. If the Government wants to deport Barton, the argument supporting this outcome must make sense with the terms that it uses to achieve it. Hence, if Barton is "outside," that must make sense with a definition of "outside" that is *external* to the operation that deports him.

The same executive power, however, can break free if it can decide at once to deport the inadmissible alien and what being "inadmissible" means. For Kavanaugh, "inadmissibility" has no other function but to designate someone who is "outside", whereby "outside" does not refer to a geographic location or to an admission, but it simply indicates an exclusion from a certain privilege. The term has no separate meaning from the clause because its function is that of being a supplement that allows it to be valid and produce its effects. Barton's geographic location, his admission proceedings, or any other external reference that would constrain the power to deport him is irrelevant. If Barton is not inadmissible, meaning that he is not outside, we can simply fold the meaning of the term in the same operation that deports him, and include him in the void

inside immigration law and *outside* the constitution. Thus, "inadmissibility" could be substituted with any sign without making a difference. I would propose using a blank space across two brackets: ( ). This makes much more *sense* because it shows what we are looking at here: a void, which can be made present in law as such, with the brackets allowing us to see it.

Once Kavanaugh signs his opinion, we cannot tell whether Barton is inadmissible or deportable, because he can only be removed on grounds of deportability, but he suffers from the same ineligibility to relief from removal of inadmissible immigrants. Indeed, and as Sotomayor argued, this condition is paradoxical, because it is composed of two statuses that are mutually exclusive. But we cannot simply contest it on this ground, or else we would be assuming that immigration law does not operate through paradoxes, and we have seen how this is not the case. A paradox is not an absence of sense but the condition for producing new senses. Kavanaugh is engaging in the by now familiar practice of producing a new sense through a paradoxical reasoning, and thus, a new space within immigration law.

Barton's legal condition is undefinable because it is a pure negative, and it does not matter what we call it or why, but solely that it is an exception from "normal" eligibility to cancellation of removal. Thus, "inadmissible" refers to the border separating Barton from those who are eligible for relief. At the border, we can be certain of this name and this position. But ( ) is Barton's condition in the frontier, where "inadmissibility" has no meaning but that of being the supplement through which ( ) masks itself as presence and is brought forward as a double negative (see Derrida, 1976: 44-64). ( ) can be written through any word, as what is important is solely that it is written, and not how, because it is by writing it that we establish a new fracture in space and law. ( ) is the residue of the constitution, the space that is beyond and here, and which cannot be located, but is *inside* nonetheless.

Kavanaugh himself has to acknowledge that his decision makes no "sense," and he almost apologizes for it in the closing paragraph. He admits how deporting Barton might be cruel, because removal "is a wrenching process, especially in light of the consequences for family members" (2020, at 1454). And yet, "Congress made a choice." Thus, while the decision makes no "sense," it can if Congress wants to legislate a nonsensical condition, exactly because once the law unfolds within itself its "sense" is simultaneously constructed by the very operation. Kavanaugh is aware of being in the frontier, where constitutional rules or territorial limits can hardly offer a guide for the interpretation of the statute. In the frontier, Congress maps and legislates as it sees fit, and the court may interpret such laws regardless of any logical or geographic principle. Thus, the term "sense", like "inadmissible", masks a void that is made present with any congressional decision. Congress *always* makes sense because what is sensical is what is decided by Congress. While Barton should not be outside and inside at the same time, he can be if the government wants him to.

Conclusion. Is there life beyond the border?

For Niklas Luhmann (2004), the law is an autonomous system which distinguishes itself from any other through its operations. The form of the operation is simple. Upon observing a fact, the law will code it as either legal or illegal. Outside the law, the same fact may acquire all sorts of other meanings. The law does not pretend to substitute itself for reality. However, as long as our gaze is internal, no aspect of reality can escape it. The lack of a third answer to the binary coding, meaning the lack of an eventuality where the law could identify a situation where it would not apply, makes everything legal. Even what is illegal is legal, because it is legal to code it as such, meaning that it is not *outside* the law. In this article, I adapted Luhmann's theory to the question of space: can there be space outside the law? The answer is negative again. But

this cannot be confined solely to the land beyond the border, where Hernández was. It must be extended to capture how the nationalist idea of an integrity *inside*, and a cleanliness of the national space, cannot be conceived but without violating that very same space, letting there be foreign voids as holes for aliens to fall in.

In this article, I analyzed immigration law as an autonomous system in order to demonstrate how the system operates in such a way as to make inclusion and exclusion formally identical. This is where immigration law reveals its structural paradox, which is that in order to protect the nation it must undermine its very limits. The reason for this structure is rooted in the historical, imperialistic origins that I have discussed at the beginning of the essay. The nation that is protected by plenary power is truly an empire, and it owes its legitimacy to the frontier, and to the ability of making borders mobile and uncertain. Thus, its strength does not lie in the prerogative to exclude, but in the ability to include humans and territories as negative results of its binary operations. Autonomy is reached at the exact moment that nothing is left out.

The question of space is always also a question of life. As we have seen, space only matters in relation to the form of life that occupies it. There is a broken line connecting different authors and genres, who have all attempted to answer the same question in their own way: can there be life beyond the law? (Esposito 2012a; Dayan, 2011; Kafka, 2009; Agamben, 1998; Benjamin, 1996). Kafka suggests an answer. In *The Trial* (2009), when Josef K. is woken up by the two guards who inform him that he is being indicted, his reaction is one of surprise and annoyance. The guards ignore what K. is charged with, and neither do they tell him under what law. But they firmly reject his protests that there might have been a mistake: “That is the law,” they tell him, “Where could there be an error?” (9). “But I’m innocent”, K. replies, to which one guard looks at the other and says: “Look, he admits he doesn’t know the law and at the same

time claims he's innocent" (9). Isn't this the same answer that Justice Kavanaugh gave Barton? Because Barton protests that he could not be outside, as he has been inside for thirty years and never left. But Kavanaugh corrects him, because Barton doesn't know the law, so how could he know where, and indeed *who* he is?

The guards also explain that their law does not seek guilty people. Rather, the law is attracted by guilt, and has to send its guards out (8). Thus, as Salvatore Satta put it, "[everyone] is intimately innocent, but the true innocent is not he who is acquitted, but he who lives without ever being judged" (1994: 27).[11] Hence, Sergio Hernández had never been an alien before being shot, as the law never looked at him before then. He never knew to be an alien, as he never thought of himself as being *outside* the border. What was true for the Native Americans in the 19th century held true for Sergio Hernández in 2010: the absolute aliens are not the unauthorized aliens in the country, but those who never had any intention to enter it, as they lack a "voluntary connection," *and* are outside. It is not that everyone in the world is an alien but for the Americans, but rather that people become aliens once US law takes notice of their existence. To be an alien is the condition where it does not matter where one is, but for the fact that they are not *in* the United States, meaning that they are nowhere, but still inside the law. The alien is ( ).

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[11] The translation from Italian is mine.

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