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Territory, Personhood, and Immigration Law: Legal Geographies of Immigration and Border Control

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by

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ABSTRACT

Territory, Personhood, and Immigration Law: Legal Geographies of Immigration and Border Control

by

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This dissertation examines the link between territory and personhood that underpins contemporary system of immigration and border control. It consists of four independent chapters that investigate how immigration law constructs the "alien" as a governable subject. Both territory and personhood are conceptualized here as the outcomes of processes of partition, which classify land and human life through political and juridical categories. Borders enclose land, and they link inert soil to territorial qualities, thus giving a spatial extent to sovereignty. Personhood bestows political life on bodily matter, thus making citizens and aliens out of human bodies. The chapters examine the relations between these two processes as they unfold in contemporary legal-geographic systems of immigration control. From these premises, the research question that guides this dissertation is rather simple: who is the alien?

After the introduction, the first two chapters approach this question while examining two distinct legal systems. The second chapter focuses on US immigration law,

which is described as a system that classifies the alien population across statuses, with each status being interpreted as a legal-geographic location that expresses a specific degree of foreignness within the country. The third chapter examines alternative conceptualizations of the relation between territory and life by focusing on human rights law, and specifically on the jurisprudence of the European Court of Human Rights. The last two chapters abandon an exclusively legal focus to investigate the US system of immigration detention. The fourth chapter introduces this topic by examining the geographic literature concerning detention and incarceration, while the fifth and final chapter describes an episode of political resistance inside a US immigration detention center during the Covid-19 pandemic. The final contribution closes the dissertation by describing the attempt to subvert the legal-geographic system that was previously analyzed in the second chapter.

In its totality, the dissertation advances a legal-geographic analysis that focuses on the spatial structures that are inherent to contemporary systems of immigration control. Through an engagement with the philosophic literature on biopolitics, I argue that geographers are uniquely positioned to contribute to the study of the relation between law and life by highlighting the spatial dynamics that inform said relation. I utilize space as a material, discursive, and metaphoric concept that illuminates the necessity to thinking through space when confronting complex systems of power and control.

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1. Introduction

Borders appear to be more important than ever. In just two decades, the 21st century shattered misconceptions that were so popular at its dawn, which envisioned "flat" or borderless worlds, where networks, flows, and freedom of movement would dominate a post-nationalistic world order. To the young inhabitants of the "global north," these ideas appear today as the distant talk of an older generation that was perhaps too hasty in believing its own myths. Instead, those born at the close of the Cold War are accustomed to a world where borders and walls continue to be erected, and they have been taught to fear their demise, which could only signify the end of our world, and ultimately the end of us. Not only have borders maintained their importance, but their fences have grown higher. The mistake was not so much in thinking through flows and networks, which indeed characterize contemporary times, but in the assumption that these were antonymic with walls (Painter, 2006).

Instead, borders are there precisely to regulate flows, and to ground the restructuring of nations, territories, and their authorities in the new century. Borders are important *because* connections are stable and overreaching, and because this is a century of great mobility. Mass displacements, poverty, droughts, and wars encourage those who suffer them to move in large numbers, thus reshaping those territories and identities that borders are there to affirm and protect. In this context, borders become the quintessential technology to govern unwanted human mobility, leading to complex political geographies encompassing walls and fences, but also the strategic usage of islands (Mountz, 2011), bilateral agreements with countries of transit (Gammeltoft-Hansen and Hathaway, 2015),

and pushback operations where migrants are apprehended en route (Border Violence Monitoring Network, 2020). To geographers, these dynamics hint at neither a resurgence, nor a mere persistence of borders and territory, but to their restructuring in a globalized world, where boundaries play functions that are more complex than a simple partition between outside and inside (Mezzadra and Neilson, 2013; Ochoa Espejo, 2020; Tazzioli, 2020).

More than anything, borders generate order. They classify, count, and separate. In performing their functions, they partition not just land, but humans. Borders establish a direct connection between land and life by linking places to identity, and they provide the nation state with the two components that it needs to exist: a people and a territory. The identities that they affirm, however, can only be meaningful against those of the other humans and places from which they are distinguished. Border politics are negative politics, as they do not concern the content of a territory or a community, but solely the boundaries that enclose it and distinguish it from others.

Because of this negative structure, the political importance of borders increases at those junctures where the issue of foreignness takes over domestic politics, and thus, at those moments where flows put territorial partitions under stress. At a time of greater attention and fear over immigration, constitutional democracies tend to transition toward a negative model of politics, where democracy is not negotiated over the meaning and content of political participation, but the exclusion of those who do not have it. In this context, citizenship only remains meaningful to the extent that it distinguishes its bearer from those who lack it, thus subverting its inclusionary function (Rigo, 2008). Through this process, the border turns the periphery into the center. The over ranging significance

of its territorial partitions leads to a negative politics, meaning a politics that is solely concerned on the definition of its political subject against those who remain outside, thus emptying the very notion of political participation of any positive meaning.

This scenario results in the increasing centrality of the "alien," as a political and juridical subject, and of immigration law as the field that regulates the boundaries of this category as well as those of citizenship. There is something paradoxical in the increasing attention over immigration law in contemporary democracies. Because this is the law that concerns subjects who lack unobstructed access to the polity, its centrality signifies that democracy is currently negotiated at the periphery. Just like the border, immigration law possesses a position in-between, which is quite difficult to circumscribe. The term generally encompasses the rules regulating the admission, residence, and expulsion of noncitizens, but it possesses peculiar characteristics due to its intrinsic transnational horizon. It effectively regulates the presence of foreignness within the domestic space, and for this reason it feels quite foreign despite its domesticity. Most of all, immigration law concerns the construction of the alien as a person and a subject of law.

The connection between borders and personhood informs the present investigation sitting at the intersection of law and geography. Here, I examine the mutual relation between space and life that unfolds in law, and which is materialized at borders, immigration detention centers, and courts of law. What is the advantage in such a research design? I argue that borders and personhood are complementary political technologies, with separate origins but currently enjoined together in contemporary nation state politics. They both establish a break between two poles, which they proceed to connect. Borders enclose land, and they link inert soil to territorial qualities, thus giving a

spatial extent to sovereignty. Personhood bestows political life on bodily matter, thus making citizens and aliens out of human bodies. From these premises, the research question that guides this dissertation is rather simple: who is the alien?

This question suggests a gaze where life is examined under the juridical and political categories that permit its sensical inclusion into a sphere of authority. The alien constitutes a person to the extent that alienage corresponds to a status that is bestowed upon a body, and in the absence of which the body could only be described as inert matter. In this investigation, I engage with the contributors and disciplines that most have elaborated on this problem to examine the role of space as a key factor in the biopolitical relation linking law to life. I argue that for us to ask, "who is the alien?" we must also determine *where* the alien stands. This implicates two distinct, while connected, inquiries.

First, how the law provides foreigners with their persona, and therefore with an answer to the question of *who,* which makes aliens subjects of law and subjects them to power. Second, how borders produce territories, meaning how the same relation of power bestows a territorial status on an inert section of land, which becomes meaningful in law due to this geopolitical partition. Both territory and personhood are transcendent qualities of the inert matter that they are linked to. They are also each the condition of the other, so that any research on *who* remains incomplete until the *where* is not equally considered.

The investigation that follows is separated into four independent chapters, each examining a separate topic in a particular context. The material is ordered so as to guide the reader through an analysis that progressively expands its object of research, beginning from a study of territory and aliens as solely negative categories, to increasingly focus on alternative instruments to conceptualize space and life. The dissertation opens with an

analysis of US immigration law, and it concludes in the fifth chapter with the description of an episode of resistance inside a US immigration detention center. The two chapters stand at opposite poles, one examining the alien as a juridical, negative category, and the last switching the focus toward those strategies that lead to affirmative politics against the partitions performed by the law. The chapters in between are positioned across this trajectory. The third chapter examines human rights law as a body of law that relies on alternative models of territory than US immigration law, while the fourth focuses on prison and camp studies so as to position immigration detention in the relevant literature and framework.

I take the rest of this introduction to address the content of each essay, and to outline how they connect as part of a larger investigation.

I. Territory

As mentioned, the next two chapters focus exclusively on law, and they examine the productive function of borders in the definition of personhood and territory that ground contemporary systems of immigration control. In different terms, the first two chapters look at the negative relation linking space and life to power, where the persona of the alien is constructed against the citizen, and as a subject partially or totally excluded from the rights and privileges that characterize the life of the latter. In this context, space is interpreted as a homogenous surface that is partitioned among separate enclaves, and life is similarly reduced to a uniform, biological matter that acquires its qualities by being associated to juridical categories that regulate rights and privileges among human beings.

The second chapter examines these representations of life and space in US immigration law, which is here interpreted as an autopoietic system within a reading of Niklas Luhmann's system theory (2004). Why a system? I choose this concept to demonstrate how immigration law revolves around its ability to partition the immigrant population among categories, each with its specific set of privileges and disadvantages. The system lives off the repetition of a simple, binary operation that consists in the distribution of a privilege to a group of aliens at the expense of another, thus creating two immigration statuses through this process. In reference to my research question, the first chapter clarifies that to determine "who is the alien?" remains ultimately impossible, because immigration law does not give us a clear answer, as it operates by distinguishing between aliens so that their statuses never coincide. In this sense, the alien can only be identified negatively as a non-citizen. Yet, if we were to ask for further clarification of what constitutes an alien, we might never receive a satisfactory response because the law splits this negative identity further into other narrower categories, so as to always defer the question of "who" through its operations.

Therefore, more than a stable legal persona with a precise degree of constitutional access, the life of the alien is integrated in law as a matter that may be repartitioned among groups, while also lacking any substantial meaning. Instead of showing what this life entails, the law can only conceptualize it as a homogenous matter that is to be split across categories, so that one cannot find a "sense" or an overarching principle guiding this process, because its means and ends coincide into an unending set of classifications that defer the questions of "who?" or "why?" to the next binary operation. In this sense, immigration law operates by separating the border from its physical location, and by

reducing it to a formal operation of partition that may be performed over and over again. In doing so, the very distinction between foreign and domestic space is undermined, because the operation consists precisely in treating aliens inside the country as if they never left their foreign location, which puts the very domesticity of US territory under question. More than protecting the country's boundaries, immigration law makes them mobile and uncertain so as to enclose aliens into non-domestic enclaves where the constitution does not fully apply.

The definition of territory that animates this chapter is rather conventional: here, territory corresponds to a bounded, homogenous sector of land which may be further partitioned by borders. The third chapter deviates from this model to propose alternative conceptualizations of territory, which may prevent some of the most extreme (and lethal) implications with the system described above. The conventional definition of territory is sensical within the US immigration system, and more broadly from a nationalistic perspective that is also common to public international law. However, it is less adequate for international human rights law (IHRL) due to its different functions. In public international law, territory overlaps with jurisdiction, which identifies a state's lawful prerogative to exert its authority. In IHRL, however, jurisdiction identifies a normative threshold that makes human rights applicable to a given situation, and to interpret it territorially would prevent the law from applying to the violations that states commit outside their territorial boundaries. Thus, IHRL constructed its own functional models of jurisdiction, which links it to the factual exercise of power, and not to a territorial location.

In this sense, IHRL overcomes the "territorial trap" (Agnew, 1994) by detaching the normative relation linking a life to an authority (jurisdiction), from the relation linking an authority to a bounded enclave (territory). In doing so, jurisdiction is de-territorialized. This trajectory resonates with current geographic research on territory. Just like jurists theorize alternative forms of jurisdiction, geographers have attempted to reconceptualize territory in a globalized world, so as to stress its relational character that renders it something more complex than a bounded sector of land (Elden, 2009; Murphy, 2013; Painter, 2010). In Chapter three, the two trajectories meet, so as to link functional models of jurisdiction with a relational concept of territory.

As mentioned, conventional definitions of territory treat it as a transcendental concept, and a quality that is attributed to inert space, which leads to a two-dimensional world vision where uniform sectors of lands are partitioned by borders. Relational conceptualizations of territory are designed to complicate this vision, and to interpret territory as a social and material construction which comprehends all those spatial interventions that enclose space and bound it for a political purpose. While conventional definitions of territory depict it as the transcendental quality of land, relational perspectives flatten the distance between the physical and the transcendent, so as to visualize territory as a political technology that exploits land and terrain to govern life on its surface. Within a relational perspective, the relation linking space to authority, and thus, territory, is not transcendent but immanent, meaning that space does not simply *contain* territory as an idea but it constitutes its very condition of possibility, so that every physical characteristic of space has immediate political significance for how it determines different territorial organizations.

In this sense, the third chapter begins to deviate from conventional definitions of territory and jurisdiction by conceptualizing authority in relational terms, so as to abandon the negative philosophy that characterizes nationalistic visions of territory and life. This is the first step toward the final chapter, and thus, to affirmative politics of life and space. This design is chosen to highlight the importance of space for any attempt to formulate a politics of life in non-negative terms. Across this trajectory, I establish a dialogue with influential authors in the field of biopolitics, and I examine the spatial significance of their work in reference to the question of "who is the alien?"

II. Life

The final two chapters deviate from an exclusively legal analysis to examine the material components of authority, and ultimately the possibility for political resistance within the immigration detention system. In this sense, here the boundaries that I consider are no longer those of borders and territory, but the walls enclosing carceral sites. The fourth chapter introduces the topic by tackling biopolitics directly through a close engagement with the work of Giorgio Agamben (1998; 2005). Agamben's work has critical significance within this investigation, as possibly the most influential philosophic analysis of a negative theory of biopolitics. For this reason, I closely engage with his work to eventually deviate toward other contributions in the final chapter, which examines the possibility of affirmative biopolitics inside immigration detention.

In his work, Agamben interprets biopolitics to coincide with sovereignty, thus breaking with the Foucauldian tradition that describes it as a modern technology. For Agamben, biopolitics constitutes the very foundation of Western political thought, which

he situates in Ancient Greece, where human life was conceptualized as the duality between *zoé*, the biological life that humans share with other living beings, and *bíos*, meaning the political life that is lived by the men who are member of the polis. Within this reading, biological life is captured by the political system as its excess, meaning the bare life that renders life possible while also lacking any affirmative political quality. Thus, biological life is a purely negative concept, which is included in law through its very exclusion.

Within this theory, the "camp" corresponds to a political technology that stems from the encounter between biopolitics and the modern nation state. In his work Agamben is primarily concerned with death camps during WWII, but his theory can be adapted to other instances of camps in between the 18th and 19th century whether in Europe or its colonies (Martin et al. 2020). Here, the camp is conceptualized at the opposite of the city, and as the container for those reduced to bare life by sovereign power. Notwithstanding its conceptual value, however, an empirical analysis of confinement requires a vision that is less rigid. Thus, the fourth chapter elaborates on this concept to reach a less dogmatic understanding of the camp, which could be subsequently employed in empirical analyses of contemporary carceral sites, including immigration detention centers.

The final chapter brings the analysis to its conclusion by focusing on political resistance inside immigration detention. All of the concepts that were previously developed are here enjoined together to examine how affirmative politics unfold in sites that best exemplify the violence that is inherent to contemporary systems of immigration control. The chapter discusses the wave of hunger strikes that erupted across the US

detention system in the spring of 2020, when Covid-19 spread across carceral sites all over the country. Covid led to a rapid mobilization of detainees across separate facilities, and to collective hunger strikes that demanded an immediate collective release due to the gravity of the situation.

In this case, the political subject that mobilizes in detention is neither a single individual with a name and a juridical status, nor a mass of detainees speaking with one voice. Instead, it constitutes a multiplicity of separate strikers who cannot be included within the categories that ground immigration law. The political here coincides with *zoé*, and specifically with the biological vulnerability to the virus that encourages political participation. Thus, it is the body itself to become political, and the resulting politics are designed to affirm the life that inspires them. The very biological matter that the law leaves out as insignificant here constitutes a radical political formation, which can shake the detention system by growing and spreading as a force. This dynamic can hardly be explored from an Agambenian focus. Because Agamben only conceptualizes *zoé* in negative terms, affirmative biopolitics are beyond his model but not those of other philosophers. Here I am primarily thinking to those authors who trace their thought to the work of Spinoza or Nietzsche, and particularly Deleuze and Guattari (1987), Rosi Braidotti (2013), Donna Haraway (2016), and Roberto Esposito (2011; 2012).

Thus, what is pursued here is an impersonal (Esposito, 2012) theory of politics, where the political does not coincide with identity, but with the subversion of those very categories that partition spaces and humans through boundaries and enclosure. The conflict that erupts in detention revolves around the strikers' ability to spread the protest across the network of units and facilities, and the authorities counter this strategy through

the same techniques of lockdown and quarantine that also curtail the pandemic. Thus, the distinction between *bíos* and *zoé* ceases to exist, because the biomedical process of contagion assumes immediate political significance, and the physical and juridical boundaries regulating detention reveal their vulnerability once the strikers can defy them by establishing connections and alliances across the network.

III. Who/where

With the concluding chapter, the question of "who is the alien?" is finally answered. The alien constitutes the negative outcome of a partition, and thus, it lacks a content outside the structure that distinguishes it from the citizen as its negative other. In this sense, it doesn't matter who the alien is, if not for the fact that the alien is someone, and thus, a person who may be included as a category within a partition. Each of the essays examines this problem either to describe it or to show alternatives to it, and they all highlight the bio-geographic functions of borders and boundaries in supporting negative politics. In this sense, the question of "who is the alien?" may be asked, and it has been asked, through numerous other disciplinary perspectives, but geography is well suited to highlight how it cannot be answered without also considering *where* the alien stands. In this research, I explore immigration law and immigration detention as technologies that regulate lives through space, and whose very effectiveness is contingent on the spatial orderings that are needed to perform these functions. The same vision underpinning personhood also sustains territorial visions of space, where both life and land are treated as inert and homogeneous matter to be partitioned across enclaves.

However, it is not the purpose of this dissertation to advocate for a geographic and political imagination that does away with boundaries and scales. Instead, each essay takes the dichotomy between bounded and relational visions of space as generative of new meaning. Because boundaries separate and divide, they are also necessary to connect and bring together. They are essential to conceptualize difference, and thus, to think through forms of coexistence and becoming other than those envisioned by border politics and negative identities. The point is not to think outside boundaries, but to examine their structuring within the political and historical processes that characterize the present, along with their alternatives.

By the time the dissertation ends, I will have discussed a selected number of concepts, authors, and instruments that work together in an analysis of law, life, and space as mutually constitutive of one another. Because the chapters are designed to stand as single pieces, they do not directly engage with one another, but their ordering allows the reader to follow the trajectory from negative to affirmative models of biopolitics, and their grounding in different concepts of territory. The goal of this collection is to analyze this exact relation, so as to demonstrate the usefulness and necessity of a geographic approach for law, political science, and philosophy.

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2. Away from the border and into the frontier: The paradoxical geographies of US immigration law.[1]

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.

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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.

I. 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.[2]

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

[2] 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).

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.[3] 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,

[3] 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).

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).[4]

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?

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

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

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.[5]

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,[6] 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

[5] 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).

[6] 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.

connection" for an alien outside the United 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.[7] 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

[7] 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.

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 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,[8] 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

[8] 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.

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 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.[9] It offers no procedural rights, as immigrants are immediately removed without ever seeing an immigration judge (CFR §1235.3(b)(2)(ii)).[10] 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[11] 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 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

[9] 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).

[10] 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.

[11] I use the term "supplement" with the same meaning that is found in Derrida's work (1976).

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.

II. 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).[12] 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 ( ).

[12] The translation from Italian is mine.

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3. Territory, terrain, and human rights: Extraterritorial jurisdiction and border control under the European Convention on Human Rights.

Abstract

Geography can contribute to current debates concerning extraterritorial jurisdiction in human rights law. Both disciplines are concerned with escaping conventional definitions of territory to account for contemporary geographies of state power. For jurists, this concerns the concept of jurisdiction, because its territorial interpretation prevents human rights law from being applicable against states operating outside their borders. As a solution, human rights law constructed its own functional models of jurisdiction in opposition to territorial versions. This effort could be strengthened by linking functional jurisdiction to relational concepts of territory as they have been developed in geographic research. I examine this topic in reference to the European Court of Human Rights, with a particular focus on the court's case law concerning the collective expulsions of migrants at European borders.

Introduction

Over the last two decades, political geographers have highlighted an historical lack of disciplinary engagement with the concept of territory (Elden, 2010). Despite its crucial importance in political, legal, and geographic theory, too often the meaning of territory has been taken for granted, either identified as a bounded sector of land (Elden, 2013: 3), or as excessively vague to the point of overlapping with concepts such as land, region, or terrain (Painter, 2010). Two main reasons explain this lack of interest. First, the influence of post-structuralism during the late 20th century led geographers to emphasize flows, networks, and assemblages as analytic instruments to conceptualize space (Massey, 2004, Marston et al. 2005; Soja, 1989). Consequently, conventional definitions of territory came to be perceived as suspicious due to their emphasis on boundaries, identity, and scales (Agnew, 1994; Painter, 2006, 3). Second, the end of the century coincided with the widespread perception that nation states were experiencing a crisis, and that borders and territories were outdated institutions that would soon be overwhelmed by globalization (Elden, 2009, 6-11).

Events and developments in the 21st century shattered these misconceptions and reaffirmed the centrality of nation states and their territories in political geography and political theory (Balibar, 2009; Paasi, 2022; Rigo, 2008; Walters, 2004). Therefore, geographers refocused on territory to investigate its durable allure in a globalized world (Murphy, 2013). This led to a variety of contributions, altogether linked by the common goal of escaping conventional definitions of territory while accounting for the persistence and importance of boundaries in collective imaginaries of space (Forsberg, 2003; Ochoa Espejo, 2020; Paasi et al. 2022). Through this process, territory has been conceptualized

in relational terms (Dell'Agnese, 2012), and as a concept where boundaries and networks reinforce one another without constituting a contradiction (Painter, 2006).

In the same period, human rights law went through a parallel process concerning the link between territory and jurisdiction. Just like geographers challenged conventional definitions of territory as a bounded enclave, human rights lawyers and scholars abandoned territorial readings of state jurisdiction with the purpose of strengthening states' accountability under human rights law (Milanovic, 2011). Specifically, as contemporary nation states increasingly rely on extraterritorial operations to protect their interests and borders, a territorial concept of jurisdiction is often inadequate to sanction state abuses when they occur abroad (Trevisanut, 2014). Accordingly, scholars and practitioners of human rights law constructed jurisdiction as a *functional* concept, and in opposition to its territorial version under public international law (Giuffré, 2021). Within a functional model, jurisdiction is linked to the normative relation subjecting a person to a state's authority, and not to the territorial location where said relation exists. This can extend jurisdiction to situations happening outside a state's boundaries, thus reinforcing the universalistic principles of human rights. In the European region, this process continues to unfold at the European Court of Human Rights (ECtHR), which is a site of crucial interpretive debates concerning the meaning and scope of jurisdiction in human rights law (Mallory, 2020).

With this article, I seek to establish a dialogue between the disciplines and epistemologies of political geography and human rights law. I argue that geography could offer positive contributions to legal scholarship by examining the relation linking territory and jurisdiction in human rights law. I examine this issue in reference to the jurisprudence

of the ECtHR, and particularly the Court's decisions on "pushback" operations, where Member States expel or forcibly return migrants headed to Europe before reaching the territorial borders of the continent. In this regard, I make two arguments, each occupying a separate section of this article.

Firstly, jurisdiction is a legal-geographic concept. Even when interpreted under a functional model, the relation subjecting an individual to a state refers to a spatial locale, because state power needs specific spatial conditions for its interventions to be effective. Non-territorial models of jurisdiction risk obscuring this reality, particularly by detaching the relation of power from its spatial components. A solution is to link functional models of jurisdiction to a relational concept of territory, which could highlight the spatial dynamics that render a state's power material and effective. Thus, jurisdiction could be linked to processes of *territorialization,* meaning those practices through which states enclose and bound specific enclaves in order to exert control over the people within them (Sack, 1986).

Secondly, a greater engagement with territory in legal scholarship is beneficial for examining the application of human rights law at European borders, and how it varies depending on their conformations. This requires attention to terrain, and not only territory. I develop this argument in the second section of the paper, where I focus on pushback operations, and particularly the ECtHR's application of the concept of collective expulsion to pushback cases. More specifically, the case of *N.D. and N.T. v. Spain* shows that Member States can manipulate the territorial organization of their borders in order to escape their obligations under human rights law. If jurisdiction could be directly linked to territory as a normative component, the specific territorial

organization that a State chooses to pursue would become a meaningful factor for the application of human rights. This would extend to states' efforts to exploit the terrain in order to prevent migrants from crossing, thus making states responsible for the effects of their territorial interventions.

I. Territory and Jurisdiction

Jurisdiction and human rights law

Article 1 of the European Convention on Human Rights (ECHR) compels the Contracting Parties to secure the rights of the Convention for everyone "within their jurisdiction," thus establishing state's jurisdiction as the fundamental threshold of applicability of the Convention itself. Under this article, states are only burdened by their human rights obligation within their own jurisdiction, and nowhere else. Consequently, state jurisdiction is also a necessary condition for the judicial jurisdiction of the ECtHR, because the court can only scrutinize the actions of a state that happened within the latter's jurisdiction, or else the case should be rejected as inadmissible (Milanovic, 2008). However, while this mechanism is clear, the meaning of the term is not. Art. 1 does not clarify what jurisdiction stands for or how a state can trigger it, thus creating considerable confusion.

It is unclear what concept of jurisdiction the Contracting Parties had in mind when the ECHR was originally drafted (Mallory, 2020, 19-23). It is possible that they interpreted jurisdiction territorially, but this does not explain why references to territory are missing from the clause. Whatever the answer may be, the ECtHR eventually reached an internal consensus that national boundaries do not always restrict jurisdiction under

Art. 1, thus opening the application of the ECHR to cases involving states operating outside their territorial borders. The concept of "extraterritorial jurisdiction" first appeared in the 1960s, and slowly but steadily expanded in the rest of the century, most notably with a series of cases concerning the interstate disputes between Cyprus and Turkey, and another string of cases concerning the arrest or extradition of individuals located outside of Europe (Mallory, 2021). Through this process, the ECtHR eventually constructed jurisdiction in human rights law under different terms than those characterizing its conventional and primarily territorial definition in public international law (Milanovic, 2011).

The distinction between the two concepts of jurisdiction corresponds to the different functions of these bodies of law. Public international law regulates interstate relations, and thus, relations between equal subjects. Here, jurisdiction designates a state's prerogative and capacity to lawfully exercise its authority (Shaw, 2003, 572), and it is further broken down into the state's ability to proscribe, enforce, and arbitrate its own laws, each corresponding to a different aspect of jurisdiction (Crawford, 2012, 440-69). While a state may possess extraterritorial jurisdiction in certain specific circumstances (Milanovic, 2011, 24-25), a state's own territory is usually the only place where the three functions may be exercised together, under the so-called territorial principle (Aust, 2010, 43).

For this reason, while territory and jurisdiction identify two different concepts in public international law, they also overlap in practice and are connected by their common function. Both identify an *exclusive* sphere of authority, which is limited by the authority of other actors. A state's jurisdiction is limited by the jurisdiction of other states, while

territory is limited by borders that mark the separations among states, each being a subject of international law (Shaw, 2003, 189-93). Both regulate interstate relations in the same fashion that property regulates relations between individuals in private law, by assigning to each subject its own exclusive sphere of autonomy, which is bounded by the borders and fences that are erected to protect it (Blomley, 2016; also Moore, 2015, 17-21). Thus, jurisdiction identifies the space of a state's lawful prerogative to exercise its power, and to exclude others from exercising theirs within the same enclave.

However, this definition is inadequate for human rights law. Unlike public international law or private law, human rights law does not regulate relations between equal subjects, but rather the unequal relation linking a state to an individual. Here, jurisdiction corresponds not to a right but to a burden. It identifies a normative relation between the state as a duty bearer and the individual as a right holder, thus imposing specific obligations on the state which correspond to the human rights of the individual under its control (Besson, 2012). It follows that human rights law does not link jurisdiction to a state's *lawful* claim to exercise its power, but to power itself (Milanovic, 2011, 26-30). What is relevant is whether a state *factually* controls the life or liberty of an individual, and not whether the state has a lawful claim to exercise its authority under public international law. Here, jurisdiction works as a normative threshold for the applicability of the law, so that when the threshold is met, states become liable for their human rights violations.

Clearly, a theory of jurisdiction linking it to its function, as in the above, encourages the extraterritorial application of human rights law. In fact, progressive interpretations of Art. 1 stress the importance of abandoning a narrowly territorial reading

because extraterritorial situations are precisely where human rights law is most needed, as states often operate abroad under lesser scrutiny from their domestic courts (Mallory, 2020). Thus, the interpretation of Art. 1 affects the very nature of the Convention, as either a regional agreement or a universal document protecting individuals from European states regardless of their location. From this founding premise, progressive interpreters elaborate separate models that link jurisdiction to different grounds, for example the exercise of factual power (Milanovic, 2011), the capacity to prescribe a person's conduct (Duttwiler, 2012), the exercise of public powers (Besson, 2012), or the planning preceding a state-sanctioned operation (Giuffré, 2021). These differences notwithstanding, all the separate models conceptualize jurisdiction under relational terms, and as the normative relation linking a state to a person (*ratione personae*), instead of a territorial location (*ratione loci*).

Extraterritorial jurisdiction and the ECtHR

However, it is unclear which concept of jurisdiction the ECtHR wishes or feels impelled to adopt. At times the Court has seemed to embrace a functional paradigm but, at others, jurisdiction appears to be triggered by mechanisms resembling those happening in a state's own territory (Miller, 2009), thus linking jurisdiction to territorial components that could diminish its application to different situations. Furthermore, a general rule determining how and when jurisdiction can be triggered is still lacking (Giuffré, 2021). The reason for this confusion is rooted in the sensitivity of the topic. Member States are especially vocal against an excessive expansion of Art. 1, under the argument that it could cripple their ability to operate abroad in pursuance of national or international interests

(Mallory, 2020). Thus, the Court suffers from considerable political pressure when deciding extraterritorial cases, and this has resulted in contradictory decisions that make it harder to reach a general theory.

This tendency first emerged with the case of *Banković and Others v. Belgium and 16 Other Contracting States,* which was decided in October 2001. Prior to *Banković,* the ECtHR appeared to be set to adopt a progressive interpretation of Art. 1, which it had expanded and pursued during the previous decades. *Banković* signaled the apparent end of this trajectory, and the surprising return to a language where jurisdiction was described as "territorial in nature," and through terms indicating the Court's desire to move back to a territorial model (Altiparmak, 2004; Shany, 2013, 54-56). The case concerned an aerial strike against a radio tower in Belgrade, which was launched by NATO Members during the Kosovo war in 1999. Sixteen people were killed, and their families lodged an application claiming that by killing the victims, the Member States had also brought them under their jurisdiction, and consequently violated their right to life under Art. 2. The Court rejected this argument under the logic that "instantaneous acts" could not be a sufficient ground for jurisdiction, meaning that jurisdiction could not be triggered by the very same act that allegedly violated the ECHR. In the Court's language, to hold otherwise would conflate jurisdiction with causation, as every extraterritorial effect of a state's action could potentially trigger Art. 1.

Undoubtedly, *Banković* was affected by the political climate that followed the 9/11 attacks, and by the imminent invasion of Afghanistan. At that juncture, the ECtHR was likely worried about antagonizing the Member States through a decision that could have immediate political effects on their decision to participate in the US-led War on

Terror (Mallory, 2020, 99-100). However, in the years that followed, the Court simply went back to its previous progressive approach, thus finding numerous cases of extraterritorial jurisdiction and augmenting the confusion (Mantouvalou, 2005). This led to complaints and criticisms of the ECtHR's apparently unpredictable jurisprudence, including from domestic courts that protested the difficulties in applying the ECHR in a uniform manner (Raible, 2016; Shany, 2013, 57-58). The ECtHR answered these concerns in the 2011 case of *Al-Skeini and Others v. The United Kingdom*, which it took as an opportunity to reorder the existing case law and draw a general theory concerning the extraterritorial application of Art. 1 (Mallory, 2020, 165-99). While *Al-Skeini* was only partly successful in this regard, and while the decisions that followed further complicated the scenario, to date it remains the most thorough attempt by the ECtHR in elaborating a doctrine of extraterritorial jurisdiction.

In *Al-Skeini,* the ECtHR designed two fundamental instances of jurisdiction, one *spatial* and the other *personal*. The former is triggered when states exert an effective control over an area, either through their own armed forces or a subordinate or proxy local administration. This particular instance of jurisdiction is less common due to its stringent requirements, with the result that jurisdiction tends to be personal for the majority of cases. Personal jurisdiction can be triggered by several separate links, which are: the acts of consular agents who may bring an individual under their state's jurisdiction when operating within their functions abroad; the exercise of public powers in another state's territory, either with the permission or acquiescence of the latter; and finally the use of force against an individual by a state's agent, which brings the person within the state's jurisdiction regardless of the territorial location. These enumerated

grounds were eventually the object of successive decisions which further expanded (and complicated) their meaning and application.

After *Al-Skeini,* the Court expanded extraterritorial jurisdiction in subsequent cases while also attempting to maintain a logical connection with the grounds of jurisdiction elaborated in that case. One of the most significant developments has been the extension of jurisdiction to cases concerning extraterritorial killings by state forces, which have progressively shrunk the distance between jurisdiction and causation that was established by *Bankovic*. The recent case of *Carter v. Russia* (2021) has intensified this transition by extending jurisdiction to an extrajudicial killing by covert Russian operatives in the UK (see Tzevelekos and Berkes, 2021). Conversely, at times the Court has moved in the opposite direction, most notably in the case of *Georgia v. Russia II* (2019) where jurisdiction was not extended under the bizarre logic that the moment of chaos that accompanies active military combat cannot coincide with the "effective control" that is required by Art. 1.

Additionally, in several instances the Court has utilized the concept of "special features" to extend personal jurisdiction to cases that do not fall within the enumerated categories (Giuffré, 2021). The Court relies on special features when extending jurisdiction under narrow grounds that are very specific to the case at hand, so as to avoid a reordering of the theory which could bind it in the future. This approach has been criticized not only by commentators, but by judges within the court as well (see *Hanan v. Germany*, Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni, and Eicke).

Therefore, jurisdiction still lacks a comprehensive theory guiding its application. Art. 1 remains a heated terrain of interpretive debate, and the case law continues to be

quite unpredictable and confusing. In this context, scholarly attempts to delineate a functional model of jurisdiction aim to overcome the current confusion in favor of a comprehensive doctrine, which would encompass all the separate instances. This would have the undisputed advantage of providing clarity, while also extending jurisdiction to a vast range of situations that the Court has rejected or is yet to consider.

Jurisdiction as a territorial relation

As mentioned, the trajectory leading legal scholars to propose a functional model of jurisdiction runs parallel to geographers' attempts to reconceptualize territory in a globalized world (Antonsich, 2009; also Kuijer and Werner, 2017). However, legal scholars approach this problem very differently. Instead of examining alternative definitions of territory to support a functional model of jurisdiction, they cut off the relation between jurisdiction and territory entirely, thus linking jurisdiction to an individual relation subjecting the individual to the state. In this process, territory is left untouched. In fact, human rights law and public international law share the same concept of territory, which is interpreted as a bounded container of normative relations. The difference is that human rights law links jurisdiction to the relations themselves, and not to the container.

But precisely for this reason, the functional model risks an excessive de-territorialization, as it implicitly separates state power from its spatial conditions of possibility, thus treating space "as inert and pre-political in ways that geographers would find objectionable" (Blomley, 2016, 595). By leaving territory untouched, the model risks representing those normative relations that trigger it as happening in a vacuum, and the

inherent nature of jurisdiction as a legal-geographic concept is obscured. Here, I do not propose a greater engagement with territory as a theoretical exercise, but rather as a pragmatic move to direct attention to the relation between jurisdiction and space, and ultimately space and power.

A starting point is to examine the empirical situations that activate jurisdiction under a functional model. Even if we were to link jurisdiction solely to the individual relation between a state and its subject, we would quickly find that this relation can never be possible if the state does not control the space of the individual as well. This is well exemplified by the ECtHR's inconsistency in its distinction between personal and spatial jurisdiction. Notably, in *Al-Skeini,* the Court characterized personal jurisdiction as consisting in the control over people, and not the spaces surrounding them. The Court cited three extraterritorial cases concerning the detention of individuals, where jurisdiction was triggered by the control over individuals themselves, and not the prisons or vessels where they were detained. However, and as noticed by Mallory (2020, 177-78), in each of those cases the Court had originally found jurisdiction to be also triggered by the possession, seizure, and control of the facilities where people were kept or otherwise prevented from departing. More than a lack of consistency, this confusion points to the practical impossibility of controlling people without controlling their spaces. Personal jurisdiction involves the control of bodies, but also walls, buildings, and routes.

In fact, and as argued by Besson (2012, 875), the very distinction between personal and spatial jurisdiction leads to confusion, because jurisdiction is always personal given that its function is precisely that of regulating the relation linking a state to a person. According to Besson, spatial jurisdiction merely identifies a specific instance

where jurisdiction is inferred from the "effective control over an area." Similarly, Milanovic (2011, 129-135) approaches spatial jurisdiction as a problem of scale, in the sense that the issue is to determine the boundaries of what constitutes an "area" under the ECHR. From this perspective, "area" certainly includes territory, but possibly also narrower enclaves, and even "places." Control over an area, however, is only meaningful to the extent that it allows and acknowledges the existence of a personal control that is exerted over people within the enclave.

These authors thus conceptualize spatial control as external to the normative, *personal* relation constituting jurisdiction, but they also acknowledge how the same relation can often only exist *because* of the control over space. In other words, and precisely because jurisdiction is triggered by a relation of power, certain specific spatial organizations will have to be present for the relation to be effective and factual. We may describe these in reference to their function, which corresponds to the definition of territoriality by Robert Sack, who described it as "the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships, by delimiting and asserting control over a geographic area" (1986, 19). While research on territory and territoriality has moved beyond Sack's initial reflections (Brighenti, 2010; Elden, 2010), this general description remains valid to examine the territorial aspects of state power that are of interest here.

From a geographic standpoint, territory does not coincide with a bounded container that is conceptually separated from the relations happening on its surface. Instead, it is practiced, reproduced, and continuously re-territorialized through the efforts of actors who aim to enact a specific political-geographic regime (Painter, 2010). Thus,

territory constitutes the *effect* of specific practices linking space to power, just like jurisdiction is the effect of the relation linking power to human life (see Brighenti, 2006). The two concepts can be linked together by interpreting jurisdiction as a *territorial* relation.

To further clarify what is meant by "territory" here, I now compare two landmark cases that were decided during the last decade, the already mentioned *Al-Skeini*, and the case of *Jaloud v. The Netherlands*. Both cases concerned the killings of Iraqi civilians during the occupation of Iraq in 2003 and 2004, but they reflected different situations. *Al-Skeini* concerned the death of six people, allegedly killed by UK soldiers in the province of Basra, in southern Iraq. The applicants were relatives of the victims, and they complained that the UK government had failed to adequately investigate the killings, thus violating the procedural limb of Art. 2 of the ECHR. Jurisdiction was triggered by the general and stable control that UK forces were exercising across this region. Specifically, at that time the UK had taken up functions of government in the Basra province to guarantee security and the transition toward a new Iraqi administration. Thus, *Al-Skeini* does not explicitly support a concept of jurisdiction *ratione personae*, because the UK was exercising a territorial form of control, specifically by relying on boundaries to distinguish its own area of concern from those of the United States and the rest of the coalition. Thus, *Al-Skeini* did not clarify whether other Member States could have exercised jurisdiction in Iraq without also taking up the same level of responsibility.

This question was answered affirmatively in *Jaloud* (Raible, 2016). This case concerned a deadly incident at a military checkpoint in south-eastern Iraq, which was managed jointly by Iraqi and Dutch forces. The victim was a passenger in a car that did

not stop after the soldiers' halt, and which appeared to be speeding toward the checkpoint. The soldiers shot the car, killing the victim and injuring the other occupants. The victim's father complained that the homicide had not been properly investigated, thus claiming a violation of Art. 2. However, in this case The Netherlands was not exercising control over the entire province, as Dutch soldiers were merely providing support to their allies but without taking up explicit functions of government. For this reason, the government's position was that *Jaloud* could not be analogized to *Al-Skeini*, and that The Netherlands lacked jurisdiction and, therefore, culpability. The ECtHR rejected this argument. Importantly, the Court ruled that jurisdiction was not triggered by the shooting as an "instantaneous act," but by the checkpoint itself, because every person driving through it was being brought under Dutch jurisdiction for the time that it took them to cross it.

Notably, and as argued by Raible (2016), the Court in *Jaloud* did not specify whether jurisdiction in this case was personal or spatial, precisely because the decision appears to blur the two concepts. Unlike *Al-Skeini*, jurisdiction in *Jaloud* differs from its classic territorial version. Clearly, the checkpoint can hardly be analogized to a territory under international law, as its boundaries are not stable. At the same time, to only focus on this aspect obscures the connection between the checkpoint and the territorial organization that is pursued through it. The checkpoint did not appear out of nowhere. Its function was that of participating in a broader archipelago of military installations, whose common goal was to control and surveil human mobility over the occupied territory. Certainly, the checkpoint does not have borders, but any area where the occupying forces wish to hold sway must be supported by similar technologies that altogether *territorialize* it. In this sense, checkpoints are vital for establishing boundaries, no matter how stable,

just like other technologies of surveillance that states adopt either within their territory or elsewhere (also see Lambach, 2020). Whether jurisdiction is exerted over a large area, a prison, a vessel, or a checkpoint, it is always dependent on systems of control that are coterminous with the territorialization of the space over which they operate. This exact mechanism should be sufficient to trigger jurisdiction, thus reaching a functional paradigm that does not stand in opposition with territory.

In other words, territory should not be regarded as an object of power, meaning a bounded enclave that is governed as if it were external to the power that is exerted across it. Instead, the focus should attend to those spatial mechanisms that regulate the exercise of power itself, and which constitute its conditions of possibility (Brighenti, 2006). This is not to say that whatever is spatial is territorial. Instead, a territorial organization corresponds to practices of containment (Tazzioli and Garelli, 2020), surveillance (Amoore, 2006), detention (Conlon et al. 2017), and enclosure that are *functional* to exert control over human mobility across varying scales (Tazzioli, 2020). Most extraterritorial operations undertaken by the Member States will share these goals and features, precisely because they aim for the same goal.

Following Deleuze and Guattari (1987), we may describe these interventions as operations of "deterritorialization" and "reterritorialization." Here, "deterritorialization" does not identify a process where territory ceases to matter, as if state power could "shift from a territory-based regime to a function-based regime with no a priori territorial limitation" (Trevisanut, 2014, 662).[1] Instead, it identifies the unmaking of a specific

[1] For a criticism of this usage of the concept of "de-territorialization" also see Fitzgerald, 2020.

territorial regime, and it is always accompanied by simultaneous processes of re-territorialization that constitute new territories. Jurisdiction must be linked precisely to these territorial interventions.

Importantly, this thesis does not stand in opposition to a functional model of jurisdiction. Instead, this is merely a change of perspective where the function of a certain operation is associated with the territorial organization that is needed to pursue it. For the same reason, it is not my claim that this model could encompass a larger number of extraterritorial situations than the functional models proposed by legal scholars. Instead, this change in perspective is beneficial to the extent that it highlights the territorial components of state power, so as to treat them as a normatively meaningful component of functional jurisdiction. In this sense, "functional" should not be interpreted in opposition to "territorial."

This is true even in cases where states appear to operate without relying on any form of territorial control. As an example, we may consider this problem in relation to drone strikes, which are currently a heated topic of debate among legal interpreters (Mauri, 2019). First, drone fleets require secure facilities to store and refuel them, in addition to analysts who must have facilities to receive and analyze live feeds and decide who or what to hit. Second, these facilities participate in the establishment of bounded areas where to exert absolute aerial control, even when lacking forces on the ground. Drones are territorial technologies to claim hegemony over the sky, as they rely on the disparity of forces, and the enemy's inability to shoot them down (also see Kendall, 2017). This is the situation that characterizes drone warfare in the War on Terror, to which the UK and other Member States seem enthusiastic to participate in (Chamayou,

2015). In this sense, jurisdiction is not triggered by the actual bombing, but by the very ability to decide whom and where to strike, which is contingent on a territorial control that is deeply felt by the people on the ground, who live under the constant threat of aerial attacks.

II. Collective expulsions and the problem of terrain

Jurisdiction and pushback operations

As discussed, the advantage of linking jurisdiction to a relational concept of territory is that of highlighting how state power always unfolds through specific spatial interventions. The objective here is not to "improve" the contributions of legal scholars by advancing a better model, but to connect the same functional models of jurisdiction to a relational concept of territory, so as to examine the geographic components of jurisdiction. This is not only relevant for discussing the admissibility of a case under jurisdictional grounds, but also for the phase of the merits, where the Court examines whether the ECHR has been violated or not. In this section, I focus on this problem in reference to the jurisprudence concerning Article 4 of Protocol nr. 4 (Art. 4 P4), meaning the prohibition of collective expulsions, and specifically its application to pushback operations and expulsion happening at states' borders.

The problem of territory has become central to the application of Art. 4 P4 since the 2020 case of *N.D. and N.T. v. Spain*. There, the Court inaugurated a new line of reasoning, which focuses on human mobility as a significant factor for determining whether a border expulsion violates the ECHR. Specifically, the Court concluded that a State does not commit collective expulsion if the migrants who are being expelled had

previously attempted to cross the border by moving in manners that endanger public security. This logic, however, blatantly ignores how the mobilities that are available to immigrants are directly related to the physical characteristics of the borders that they wish to cross, and that states may further restrict them by intervening on the specific border sectors.

As a consequence, *N.D.* allows states to territorialize their borders in manners that could elicit favorable rulings from the ECtHR, thus escaping their human rights obligations through this process. This would not be the case if the ECtHR could recognize that states exercise their power not only by physically apprehending individuals, but also by strategically altering the physical characteristics of their borders so as to elicit specific reactions on their part. In this sense, a territorial focus is beneficial to render states accountable for the territorial organization that they choose to pursue, and which should be interpreted as part of the normative relation triggering jurisdiction. In what follows, I examine the judicial history of Art. 4 P4 and its application to pushback operations, using the case of *N.D.* to demonstrate my argument.

Pushback operations were first examined by the ECtHR in the 2012 case of *Hirsi Jammah v. Italy*. There, the Court confronted the interception by the Italian Coast Guard of a group of boats carrying asylum seekers across the Mediterranean. The authorities had seized the boats and moved the occupants onto Italian ships before forcibly returning them to Libya, from which they had sailed. The government argued that the applicants never entered Italian jurisdiction because this was a "rescue" operation outside Italy's territorial borders. For this reason, Italy had no obligation to examine the travelers'

requests to asylum, as they did not possess any rights under the ECHR while remaining at high sea.

The ECtHR ruled against the Italian government in a landmark decision that was to deeply affect border control across the entire region (Den Heijer, 2013). First, the court established that the Italian boats were flying their national flag, and they were to be considered as part of Italian jurisdiction under international law.[2] Second, and most importantly, Italy had assumed control of the applicants by moving them onto the Italian vessels to transport them, and this was sufficient to meet the jurisdictional threshold. As a consequence, the Court established that Italy had violated Art. 3 of the ECHR by returning the migrants to Libya, because it exposed them to the risk of torture. Furthermore, the Court also found that this was a collective expulsion under Art. 4 P4, which constituted a separate violation of the ECHR.

Art. 4 P4 prevents Member States from expelling noncitizens "as a group," meaning without first examining the presence of individual obstructive factors to the removal. Before *Hirsi,* it had never been applied to border expulsions, and it was generally interpreted as an instrument to prevent the displacement of minorities within the European region. Crucially, Art. 4 P4 does not prohibit an expulsion *because* an obstructive factor is present. For example, if a Member State unduly repatriates an asylum seeker who is at risk of persecution, this does not constitute a collective expulsion, but only a violation of Art. 3. Instead, Art. 4 P4 is violated when a State does not check whether the removal *could* violate a separate provision of the ECHR (Di Filippo, 2020).

[2] Vessels flying a national flag are one of the enumerated exceptions to the territorial principle of jurisdiction under public international law.

However, it appears that the Court is divided on the correct interpretation of this article. This is exemplified by the contrast between Judge Albuquerque's concurrence in *M.A. and Others v. Lithuania* and Judge Koskelo's dissent in *N.D. and N.T. v. Spain*. According to Albuquerque, Art. 4 P4 grants a procedural right to every immigrant coming to Europe. By imposing an obligation to review the individual case of each person before expelling them, the article deters states from conducting summary expulsions that could potentially affect asylum seekers. The consequence of this logic is that Art. 4 P4 could be violated by the collective expulsion of immigrants who lack any legitimate claim to stay. Judge Koskelo considers this a paradox, and an unacceptable limitation of a state's sovereign prerogative to govern its borders. According to her, asylum seekers are already protected by Art. 3, and Art. 4 P4 should be reduced to an ancillary protection that could not be triggered independently. Thus, just like jurisdiction, collective expulsion is a heated terrain of debate due to its political implications. While *Hirsi* appeared to defend a progressive interpretation, the subsequent case law has narrowed the applicability of Art. 4 P4 to reduce the Member States' burden.[3]

Migrants' mobilities and the question of terrain

In 2020, the case of *N.D. and N.T. v. Spain* signaled a new trajectory in the interpretation of Art. 4 P4. The case involved the summary expulsion of the two applicants who had attempted to cross the border separating the Spanish enclave of Melilla from Morocco. Along with the city of Ceuta, Melilla possesses one of the most

[3] See especially *Khlaifia and Others v. Italy*, where the Court decided that under Art. 4 P4 states are not obligated to individually interview migrants before expelling them.

fortified borders of the entire European region, comprising three fences reaching heights of 6 meters which are constantly patrolled by the Spanish *Guardia Civil* (see Johnson and Jones, 2018). The two applicants were part of a larger group of hundreds of individuals who ran together toward the fence in the hope that the resulting confusion would allow some of them to make it through. N.D. and N.T. failed, and they remained on top of the fence for hours, before finally climbing down and being immediately returned by the Spanish police.

Apparently, the expulsion in *N.D.* fits the parameters of a collective expulsion, as the applicants were expelled as a group, and without a review of their individual cases. This was the initial conclusion of the Third Section of the Court in 2017. There, the Court simply took notice that the applicants had been immediately expelled after climbing down the fences, and that no legal procedure was initiated before removing them. Thus, the Third Section concluded that Art. 4 P4 had been violated. However, Spain was unhappy with this result and requested a referral to the Grand Chamber of the ECtHR. In 2020, the Grand Chamber ruled in Spain's favor, thus finding that the removal did not violate the ECHR.

When examining the legality of the expulsion, the Grand Chamber invented a new test for determining a violation of Art. 4 P4, which establishes that a violation is not committed if the Member State provides a legal pathway to asylum that the migrant *chooses* not to take. This legal pathway does not necessarily need to be effective. The ECtHR accepted the government's claim that its crossing point at the border was receiving asylum applications, and that the applicants did not lodge one there before attempting to enter Melilla. However, the Court was also made aware that the Moroccan

police would contain African immigrants within their makeshift camps and did not allow them to reach the crossing point. Nevertheless, the Court ruled that Spain could not be blamed for the fault of Moroccan authorities, even though the two governments have bilateral agreements in place for curtailing immigration (see Sundberg Diaz, 2020).

Having established that the applicants "chose" not to take the "legal" pathway to asylum, the Court resolved the case by deciding that it was their "individual conduct" that put them at risk, and not the actions of Spanish state agents. They had attempted to cross the border illegally "by taking advantage of their large numbers and using force" (*N.D.,* §210). This is how the Court distinguished *N.D.* from *Hirsi*. In *Hirsi*, the applicants were drifting at sea, and they had no control over their mobility; they were deemed to be lacking in agency and were constructed as passive subjects at the mercy of the Italian Coast Guard and the Mediterranean itself. Conversely, the two applicants in *N.D.* had their feet on the ground, and they were able to run along with hundreds of others. The act of running is interpreted as the expression of an unbound agency, which shows a deliberateness that is inconsistent with the passivity and vulnerability that should characterize a legitimate asylum seeker (Fassin, 2012, 109-129). In his aggressive concurring opinion, Judge Pejchal twice referred to the applicants as "young men," so as to underline that they are far from qualifying as vulnerable subjects under the Court's case law. Their vitality and strength are also visible in their ability to climb the fence of Melilla, a decision they made without outside pressure, and quite deliberately (at least from the Court's perspective).

But the possibility of expressing the strength of a young man, along with the cunning attitude of a "bogus" asylum seeker, is only made possible by the flat surface of

the terrain around Melilla. Conversely, the vulnerability that legitimizes one as a refugee is most visible at sea, where migrants are helpless after losing control of their boats and their fate. One place creates an obligation to rescue, while another deprives individuals from the protection of the ECHR. Here, mobility is treated as an epistemic object to which meanings may be ascribed (see Tazzioli, 2020). The speed and synchrony of the bodies running together is interpreted as an act of force that is threatening, and which justifies the state's violent response. Mobility functions as an instrument to measure the legality of different responses, and how people move determines whether their treatment must reflect humanitarian principles or security concerns (Tazzioli and Garelli, 2020; Williams, 2010, 2015).

This representation of human mobility replicates the same problem that I discussed in the previous section, when I highlighted how "personal" jurisdiction should not be conceptualized in opposition to its "spatial" version (see Besson, 2012, 875), because the possibility of controlling a person is always contingent on the ability of controlling the territory as well. In this case, the ECtHR relies on a fictional representation of mobility that ignores how the "choice" of whether to move and how is largely determined by the physical conformation of the surface that is to be crossed, and furthermore by how states organize their territory so as to force specific forms of human mobility. This scenario presents us with two distinct, yet connected, geographic concepts.

First, the Melilla border constitutes a *territory* that is enclosed by both Spain and Morocco, and which relies on Spanish and Moroccan agents to control people's mobility. It is crucial to stress that Morocco participates in this assemblage because of its agreement with Spain, so that the behavior of Moroccan agents should fall under Spanish

jurisdiction as well (see Gammeltoft-Hansen and Hathaway, 2015; Kim, 2017). Second, the effectiveness of this territorial organization is contingent on the physical characteristics of this border, and thus, its *terrain*.

Terrain is conceptually distinct from territory, while remaining fundamental for any discussion of the latter. In the words of Stuart Elden, terrain is "land that has a strategic, political, military sense" (2010, 86). Thus, terrain, unlike territory, does not correspond to the relation between power and space, but to those physical characteristics of land that determine the possible conformation of territorial power that may be exerted across it. Terrain does not identify an enumerated set of characteristics, but a gaze over land which classifies those characteristics that are relevant to a specific territorial project. In this sense, the same land can possess multiple terrains that are distinguishable based on the strategies that they allow to pursue. In reference to border control, this includes all those spatial features that a state may exploit to curtail immigration, and furthermore to support legal arguments that diminish its accountability under human rights law.

The problem with *N.D.* is precisely the depiction of the events outside their territorial context, and thus, the representation of state power and human mobility as non-spatial phenomena. For this reason, the criticism must be extended not only to the ECtHR decision on the merits, but also to the specific concept of jurisdiction that is adopted by the Court, and which is similarly detached from its territorial components. Notably, in 2017 the Third Section of the Court had originally found jurisdiction on non-territorial grounds, because the applicants had been apprehended by the Spanish police, and that was sufficient to trigger jurisdiction regardless of their territorial location. Conversely, the Grand Chamber extended jurisdiction based on the applicants' location inside Spain,

possibly hinting at the lesser sympathy for the functional model by the sitting court. However, both disregarded the territory and terrain of the Melilla border, which spans more than the three fences separating Morocco from Spain. The Third Chamber did so by linking jurisdiction to the applicants' apprehension, thus relying on jurisdiction *ratione personae*. Similarly, the Grand Chamber disregarded how Spain's power is expressed through specific territorial arrangements by relying on a conventional definition of territory as a bounded, homogenous sector of land.

The same simplification of the relation between Spain and the applicants supports the construction of their mobility as a *choice.* In reality, both the choice and the subsequent apprehension are inextricably linked to the territorial interventions that preceded them, and which deeply limited the migrants' ability to move in ways other than the one they "chose." At this border, Spanish power is not only expressed by the actions of its police force, but furthermore by the work of containment operated by Moroccan agents, and by the three high fences that slow down the migrants' attempts at climbing them. If jurisdiction could be linked to this specific territorial organization, the restriction on the applicants' mobility would be treated as a meaningful factor as well. The failure to do so frustrates the apparently progressive step of extending jurisdiction, leading to the absurd conclusion that makes Spain the victim of an attack.

Thus, and finally, jurisdiction should be presumed to exist across the larger area around the fence, which includes the international crossing point, the makeshift camps where migrants wait for an opportunity to cross, and the Moroccan police who are acting under precise directives that are partly coming from Spain. Importantly, this does not signify that jurisdiction should be identified with a static, bounded area where all these

events are unfolding, or else we would be moving backwards toward a conventional territorial model. Instead, jurisdiction is linked to the *territorial* relation linking individuals to the state, and which includes all those geographic features that participate in it. The threshold stands at that point in space and time where Spain restricts the applicants' ability to move, by exploiting the terrain so as to prevent alternative mobilities on their part. A failure to acknowledge this mechanism is a failure of acknowledging the material components of power itself.

Conclusion: Jurisdiction, territory, and life

Cross pollination between geography and law are fruitful and promising, although challenging (Delaney, 2010). Geographers focusing on law, however, often do so while remaining entrenched in their own discipline, thus avoiding those "legal technicalities" that are so crucial for jurists (Valverde, 2009). Conversely, jurists make large use of spatial concepts in their own work, but they rarely dwell on their complexity, often taking their meaning as self-explanatory. The concept of territory is a typical example of this tendency. Over the last two decades, however, legal-geographic investigations have progressed toward a greater exchange between the two disciplines and epistemologies (Coleman, 2012; Forman and Kedar, 2004; Gorman, 2017; also Kahn, 2017; Kendall, 2017). This article moves in the same direction.

Here, I have uncovered an opening to bring geography into legal scholarship by examining the implications of adopting a relational definition of territory in human rights law. I have argued that geographic conceptualizations of territory have the benefit of paying attention to the spatial and material components of state power. For this reason, to

interpret functional jurisdiction as a territorial relation is efficacious for moving beyond the dichotomy between personal and spatial models of jurisdiction under the jurisprudence of the ECtHR. In this sense, my contribution does not constitute a break from functional interpretations of jurisdiction that have been advanced by jurists. Instead, it integrates them with a geographic perspective where territorial interventions are conceptualized as normative components of the relation linking a state to its individual subjects.

The second section of the article demonstrates the advantages of an interdisciplinary perspective when examining border control under the ECtHR, and particularly the case of *N.D. and N.T. v. Spain*. I have made two arguments in this regard. First, a non-territorial model of jurisdiction risks disregarding the territorial organizations that affect human behavior and mobility, with the result of hiding state's responsibility and frustrating the universalist principle of human rights law. In the case of *N.D.*, this is evident when the Court holds the applicants responsible for the manner in which they crossed the Spanish border, while also ignoring Spain's factual hegemony over the territory in question. This logic leads to a scenario where human rights law is applied distinctly at different European borders, thus permitting states to exploit the terrain and escape their obligations under human rights law.

Finally, and to conclude, a few more words must be spent on the political implications of the concept of jurisdiction as it has been discussed here. First, and as mentioned, how jurisdiction is interpreted has immediate effects on the universalistic principles underpinning human rights law. Jurisdiction corresponds to the *political* relation that renders an individual a subject of law, and thus, a human being under human

rights law. In this sense, the interpretive debates over jurisdiction concern the boundaries of humanity as a legal and political status. Progressive interpreters link the applicability of human rights law to the factual relation that subject an individual to the authority of a state. By establishing this very relation as trigger, the goal is to prevent states from exercising their authority without also triggering their obligations under the law, and thus, without acknowledging their subjects as human, meaning as rights holders under human rights law. In other words, one is not born a human, but states make people human by subjecting them to their will (see Besson, 2012, 859). Conversely, an absence of jurisdiction leads to a fracture between one's legal and biological status, with people being reduced to objects, meaning bodies lacking a legal persona under the law (Agamben, 1998; Esposito, 2012). Nothing less is at stake in the interpretive debates concerning jurisdiction (also see Arendt, 1973, 265-302).

Hence, why focus on territory? Simply put, without attention to space, the universalist meaning of jurisdiction is frustrated, as shown by *N.D.* Whatever relation is established between the authority and its subject, this is a spatial relation as well. A gaze where life is never placeless, and space never empty, supports a jurisdictional threshold that states will find more difficult to escape. This would include all those territorial operations where states purposefully avoid contact with the people who they want to control, for example by failing to rescue the victims of shipwrecks, or by redirecting migratory flows into terrains that are likely to stop them (De León, 2015; Slack et al. 2016). Furthermore, attention to territory would involve the careful examination of the terrains to which jurisdiction is extended, because the movements of humans across them are also always *territorialized* mobilities (Brighenti, 2014). This implicates a gaze where

space is never a container, but always a relation which affects law and is affected by it (Braverman et al. 2014; Valverde, 2015). Just like humanity is ultimately the relation between authority and life, territory is the symmetrical relation linking authority and space (Brighenti, 2006; Elden, 2009), and to improve the status of the former requires attention to the latter.

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4. Reassessing the camp/prison dichotomy: New directions in geographic research on confinement.[4]

Abstract

What separates camps and prisons as distinct institutions of confinement? This question has important implications for geographic research, and particularly for current and potential intersections between "camp studies" and other contiguous fields in geography. Here, I conceptualize camps and prisons as historical formations, whose distinction varies at specific junctures. I compare confinement sites in reference to their temporal equilibriums and changes over time, so as to highlight possible convergences among them. To demonstrate my argument, I take legal developments concerning the Guantánamo Bay detention camp as an empirical reference point, and I examine the camp's progressive normalization within the US carceral circuit.

[4] This chapter is forthcoming in *Progress in Human Geography*.

Introduction

Until the 21st century, the field of geography seemingly contributed little to the study of imprisonment and detention (although see Dirsuweit, 1999; Ogborn, 1995; Valentine and Longstaff, 1998). This changed in the last two decades, when a growing number of geographers brought their own distinct frameworks to the study of incarceration, taking their place at a table that until then had been largely reserved for sociologists, anthropologists, and criminologists (for example Gilmore, 2007; Martin and Mitchelson, 2009; Moran, 2016; Moran et al. 2016; Philo, 2001). In retrospect, this development seems natural. The usage of space to incarcerate, and to distribute populations across prisons and camps is a topic that lends itself well to geographic analysis. However, the growth of a discipline is not a natural process but a development that needs the right junctures for it to be possible. Several things had to happen for geography to become invaluable in studies of confinement. Some were more important than others, and one cannot be overestimated: the opening of the detention camp of Guantánamo Bay.

The opening of Guantánamo in January 2002 was an event of enormous consequence, not only for the people who have been detained in the camp since its opening, but more broadly for its symbolic, radical significance in the War on Terror. Among geographers, the camp gained attention as a site of critique, but also as a space for new and radical geographic analysis. Guantánamo could be described as the outcome of a colonial project (Gregory, 2006; Reid-Henry, 2007), a biopolitical technology (Minca, 2005), or an effort to complicate geopolitical boundaries by relying on its extraterritorial location (Kaplan, 2005). Its opening contributed to the spark in popularity of the work of

Giorgio Agamben (2005, 1998), which has since become a mandatory reading for geographers working on the topic (Belcher et al. 2008; Diken and Laustsen, 2006; Giaccaria and Minca, 2011; Minca, 2007 also see Aradau, 2007; Hussain, 2007). Finally, the earliest analyses of Guantánamo informed subsequent attention toward the War on Terror, with geographers focusing on targeted killings, "lawfare," and other topics as well (Amoore, 2006; Gregory, 2011; Jones, 2016; Wall, 2016).

When Guantánamo opened, the earliest application of Agamben's philosophy resulted in its conceptualization as a distinct, exceptional site, which could in no way be conflated with the prison as a modern institution (Minca, 2005). Instead, Guantánamo was interpreted as a "camp," meaning that specific, modern technology of confinement whose origins would not be found in criminal or prison law, but in the widespread usage of concentration camps in Europe and its colonies in the late 19th and 20th century (Netz, 2004; Hyslop, 2011; Mühlhahn, 2010). This idea has persisted in the field of camp studies, and while camp scholars eventually expanded their focus toward camp-forms other than Guantánamo, there remains a lingering sense that camps and prisons should not be conceptualized as continuous institutions or technologies (Martin et al. 2020: 749-50; McConnachie, 2016: 398). Nonetheless, camp scholars' current concern with contemporary practices of (im)mobility and confinement leads them to intersect other geographic fields focusing on incarceration, and especially carceral geography. This hints to the possible exchanges that a greater dialogue among different perspectives in geography could bring forward.

This article reviews separate strands of geographic research on these topics, but particularly camp studies, to suggest that the distinction between camps and prisons may

be less rigid than Agamben originally envisioned. I argue that Agamben adopts a paradigmatic conception of the prison, which does not account for the shifting dynamics that characterize its historical development (Armstrong and Jefferson, 2017). Instead, I propose to focus on camps and prisons as historical formations, whose difference depends on what constitutes a "prison" and a "camp" at specific junctures. I draw from Agamben to propose a reading of its theory that could account for these temporal dynamics.

Importantly, I do not propose the adoption of a "carceral" gaze in the field of camp studies, but rather I engage with the theoretical contributions of camp scholars to examine the possibility of extending their reflection to the study of prisons. To do so, I use the recent history of Guantánamo as an empirical reference point for my analysis, as Guantánamo's progressive integration within the US carceral circuit provides an example of how camps and prisons' boundaries often blur. I draw from the recent attention to time in legal geographic research (Valverde, 2015) to focus on the relation between time, the law, and the camp, and I examine developments in Guantánamo against development in US prison law to highlight the convergence between the two.

To unfold these arguments, I begin with a review of camp studies where I discuss how camp scholars have constructed their characteristic approach to the study of confinement and (im)mobility in geography, while also examining continuities between camp scholarship and carceral geography. In the following section, I offer an analysis of Agamben's work and its most recent applications in camp studies. Here, I draw from Agamben to examine the temporal dynamics underpinning his theory of the exception, and I propose a different approach to time within his theory, so as to examine the shifting nature of camps and prisons as well. In the third section, I discuss Guantánamo's recent

history and I use its progressing normalization in the US carceral circuit as an opportunity to draw from various contributions in the geographic literature on confinement and biopolitics. This leads to my final argument, where I discuss contemporary features of US prison law to argue that prisons could offer a productive terrain of analysis for camp scholars.

I. Camp studies and "the carceral"

The term "camp studies" identifies an interdisciplinary field which developed in the current century in order to analyze the multifaceted concept of "the camp." Guantánamo effectively inaugurated this field (Minca, 2005), but it has since expanded beyond the US-controlled camp in Cuba (see Katz et al. 2018; Minca, 2015). While interdisciplinary, camp scholarship has been characterized by numerous and important contributions of political geographers who have played a large part in its growth and development. Notwithstanding the heterogenous analyses brought by contributors, it is possible to distill three recurring characteristics in the work of camp scholars. First, they owe a large intellectual debt to the work of Giorgio Agamben, who has directly inspired the study of camps from a biopolitical perspective in geography and beyond (see Ek, 2006; Isin and Rygiel, 2007; Rahola, 2006). Second, their work is characterized by a deep engagement with biopolitics, which is a fundamental topic for scholars working across this field (see Minca et al. 2022). Third, camp scholars tend to interpret camps as technologies against populations that are perceived as harmful, and thus, as instruments to detain masses more than single individuals (Martin et al. 2020).

In this sense, camp scholars focus on unveiling those political technologies that are historically central to the subjection and exclusion of certain groups, and primarily through processes of colonization and state-building. In the current scenario, their focus naturally shifts toward those sites and practices that regulate the mobility of unwanted populations, and especially in systems of immigration control (Bashford and Strange, 2003; Kreichauf, 2018). While the field has not directly engaged with the study of prisons, its focus leads it into dialogue with the broader geographic literature concerning modern instruments of coercion and control, of which the prison is a part. Most notably, camp scholars' understanding of the camp as a multifaceted technology, which may assume different forms or be expressed through various arrangements, resonates with the concept of "the carceral" as developed by carceral geographers.

More specifically, the term "carceral geography" identifies a broad set of authors and studies that altogether focus on the carceral as an organizational model to control and govern individuals' mobilities (Moran, 2016; Moran et al. 2018). From this perspective, and while the main focus is on the prison, the carceral encompasses other sites and technologies of control, thus rendering it a "diffuse" mechanism (Cassidy et al. 2019; Martin and Mitchelson, 2009; Villanueva, 2017). Carceral geographers' main contribution to prison studies is precisely their focus on mobility, as the field rejects the idea of the prison as a "total institution" (Goffman, 1961), meaning a bounded site wholly separated from its social and economic surroundings (Gill et al. 2018). Instead, the focus is on networks, circulations, flows, and more generally all those connections that the carceral establishes and reproduces within the prison and across larger scales (Brooks and Beast, 2021; Mincke and Lemmon, 2014; Moran et al. 2012). The history of this approach

to the study of incarceration can be traced back to the seminal work of Michel Foucault (1977), and more broadly to the growth of similar perspectives in critical criminology, with scholars focusing on how prisons maintain, produce, and mold social equilibriums beyond prison walls (see especially Melossi and Pavarini, 1981). For this reason, carceral geographers are entangled in productive dialogues with scholars working in criminology and criminal justice, which are not disciplines that camp scholars usually intersect (Bloch and Olivares-Pelayo, 2021; Moran and Schliehe, 2017; Sylvestre et. al. 2020; also Crewe et al. 2014).

Unsurprisingly, the topics where the two perspectives intersect the most are immigration detention and border control, which have been examined from biopolitical perspectives by a large number of geographers (for example see Pallister-Wilkins 2017; Topak, 2014; Vaughan-Williams, 2010; Walters, 2010). In this case, the governed subject is a person whose exclusion from the political community is determined *a priori* based on race and nationality, and this renders immigration detention an exceptional form of confinement when compared with others that primarily target specific conducts (Bigo, 2007; Prem Kumar and Grundy-Warr, 2004). Camp scholars' recent attention to refugee camps, and particularly "makeshift" camps built by migrants on the move, further leads them to focus on camps as networks that redirect and shape human mobilities (Hagan, 2021; Martin et. al. 2020), which resonates with parallel analysis of immigration detention and forced mobility in carceral geography (Conlon et al. 2017; Gill, 2009; Hiemstra, 2019; Mountz et. al. 2013). Thus, it is not uncommon to find greater cross-pollination among different perspectives and theoretical backgrounds in reference to

immigration detention and migration studies (Brankamp, 2021; Conlon, 2013; Turner and Whyte, 2022).

Additionally, while the distinction between camps and prisons remains understudied in the field, camp scholars have been prolific in examining the relation between the camp and the city, thus focusing on the shifting character of camps built on cities' outskirts, and the process of mutual affection that they establish with their urban surroundings (Abourahme, 2020; Pasquetti, 2015; Picker and Pasquetti, 2015; Sanyal, 2014). The same trajectory is being pursued in carceral geography, where the urban effects of carceral policies are a popular topic of analysis (Shabazz, 2015; Sylvestre et al. 2020; also see Herbert and Beckett, 2010).

Furthermore, just like carceral geographers theorize the carceral as a model encompassing multiple sites and techniques, camp geographers moved from their initial focus on Guantánamo and the concentration camp to eventually shift toward other camp-forms, with refugee camps being the most investigated topic at the moment. This has coincided with a critical reassessment of the work of Agamben, to the point that Martin et al. speak of the current phase as "post-Agambenian" (2020: 753). In practice, camp geographers have found the work of Agamben to be limiting when applied to a diverse range of camp-like institutions. Due to his sole focus on the concentration camp, Agamben does not investigate the alternative functions that could be performed by other camp-forms (Katz, 2016), and how prisoners themselves may play a leading role in shaping the political equilibrium of a camp (Abreek-Zubiedat F and Nitzan-Shiftan, 2018; Katz, 2015; Sigona, 2015). More generally, Agamben's concern with sovereignty leads him to disregard the agency of those who are subjected to it, and this may result in poor

analyses when Agamben is applied uncritically to empirical case studies (see Bailey, 2009; Fischer, 2015; Hall, 2010; Owens, 2009; Puggioni, 2014).

Altogether, these developments in camp studies challenge the idea of camps as isolated enclaves, thus shifting the focus toward mobility in between camps, and toward the connections between camps and their outside (Aru, 2021; Carter-White and Minca, 2020; Weima, 2021). This further increases the dialogue between camp scholarship and carceral geography. Through this process, the "camp" becomes something more complex, a spatio-temporal formation that can assume different forms while also maintaining its historico-political function.

II. Time, law, and the camp

As explained, camp scholars have already begun to examine intersections between camps and other sites and institutions. Thus, to expand their focus onto the prison is a coherent step in this direction. To do so, I now turn to an article by Diana Martin (2015) that exemplifies how camp scholars have engaged with the work of Agamben in recent years, and I take it as a cue to advance further in the same trajectory.

In her essay, Martin describes the evolution of Palestinian refugee camps in Beirut and particularly their dynamic relation with the city surrounding them. Notably, she finds the Agambenian concept of the camp to be limiting when transported to her case study. Due to his excessive legal focus, Agamben does not offer the instruments to account for the camps' changes over time, which span beyond the law. To overcome this problem, Martin develops a less legal understanding of the camp and the exception, which she rearranges into the concept of "campscapes," so as to capture the dynamic transformation

of the camps and the city she is considering. Martin treats the exception as a possibility that opens up to new directions in space and time, which the camp may or may not take. The exception is never understood as one final outcome, and it constitutes a passage instead, which rearranges a specific spatio-temporal formation into multiple directions without losing its exceptional character (also see Ramadan and Fregonese, 2017).

I engage with this essay to make two further arguments. First, Martin's understanding of the exception as a possibility with multiple outcomes could be transported in a more legally focused approach to the camp. In other words, a juridical focus does not necessarily lead to a static conceptualization of the exception. Second, the relation of exchange between the camp and the city that Martin describes offers a framework to investigate the relation between the camp and the prison. I develop the second argument in the subsequent sections of this essay, while I focus on the former below.

As mentioned, the main difficulty encountered by Martin when adapting Agamben to her case study is the philosopher's excessive reliance on law. To account for the camp's complexity, Martin needs a non-legal focus, and she finds it in Foucault. Specifically, Foucault (2008; 2003) avoids a legal conceptualization of biopolitics as he believes that a juridical analysis of biopower could not account for alternative forms of subjectivities than the legal subject of rights. Digging deeper, this position is motivated by his desire to theorize biopolitics as separate and distinct from sovereign power (Esposito, 2008: 24-26). Foucault considers the "law" as inherently tied to sovereignty, because a juridical form of power can only cling to life by establishing a binary relation between the sovereign and an individual human (Hunt, 1992). This results in a system that functions

through binary options, where things are either legal or illegal, and where power operates through punishment. Conversely, biopolitics designates a number of modern technologies and discourses that link power to life itself, with "life" designating a biomedical object that is separate from its individual bearers (see Foucault, 2003: 241-244). Thus, biopolitics relies less on law and more on political economy and biology, through a set of techniques that altogether foster and govern the life of a population.

Agamben (2005; 1998) has a different take altogether. In his work, biopolitics and sovereignty *always* coincide, because the relation that renders one a subject of sovereign power and a subject of law is always biopolitical. For this reason, Agamben disregards the genealogical research that informed Foucault's work, because he treats biopolitics not as a modern invention, but as the very foundation of Western legal and political systems. In this sense, the comparison between the two theories already hints at the implications in adopting Foucault or Agamben for the study of confinement, and camps in this case. An Agambenian focus is naturally led toward those processes that turn an individual into a living piece of a mass, and thus, the de-personalization that takes place inside the camp, where individuals are deprived of their persona and reduced to bare life.

Going back to Martin, it is important to underline that what she wishes to avoid is not a legal focus *per se*, but the reduction of the exception and the rule of law to two outcomes that are mutually exclusive. This characterizes Agamben's work, because in order to theorize a biopolitical sovereignty Agamben is forced to conceptualize sovereign power as a binary relation. First, the relation between the sovereign and its subject, with the latter being reduced to bare life. Second, the relation between the exception and the rule of law, with the former drawing a space outside the juridical order that is

materialized in the camp as a container for bare life. It is this lack of alternatives that renders Agamben inadequate to the analysis that Martin wants to put forward. Additionally, the same philosophy would also fail to capture the temporal dimension of the life of a camp *and* of life in the camp, because the reliance on the binary perspective excludes other configurations that a camp can assume throughout its developments.

But if that is the case, there are possible trajectories to overcome this difficulty while also accounting for the juridical aspects of the exception. Within the purpose of this article, a juridical focus is necessary to examine the camp's legal developments across space and time, which is yet another dimension of change in addition to those considered by Martin. In doing so, I follow the lead of legal geographers who conceptualize law and space as entangled in relations of mutual constitutiveness (Bennett and Layard, 2015; Braverman et. al. 2014; Kedar, 2003), and particularly the work of Mariana Valverde (2015), who stresses how legal geographers must confront law's relation with time, and not solely space. By redirecting the focus on law, I re-engage with Agamben so as to transport his philosophy in contexts that are apt to guide legal geographic research.

Importantly, Agamben's theory is characterized by a peculiar approach to time. For Agamben, the state of exception escapes time, because it breaks with the temporal order of the law. Outside the state of exception, the application of a norm follows the norm in time and it is bound to it, with the norm being a general, abstract rule that may be applied to a range of different cases. Conversely, the state of exception consists in the suspension of the norm, and in enforcement[5] of a norm that has been suspended in order

[5] In Italian, to apply and to enforce the law are translated by the same verb *applicare.*

to preserve it. Thus, in the state of exception the relation between the law and its application, which corresponds to the relation between the general and the particular, attains a paradox. There, the application has lost any concrete reference to the norm, as the norm has been suspended, and yet the two are also weirdly indistinguishable, because every sovereign decision has the same efficacy of a law, meaning the same force-of-law (Agamben, 2005: 32-40). This is best understandable through Agamben's description of the Nazi regime, where the word of the Führer is immediately law once it is pronounced (1998: 142).[6]

Therefore, the state of exception escapes time. In it, the sovereign actor makes decisions that are not bound by any previous ruling, and the binding force of each decision expires at the moment that the decision is made, because it will not bind any decision in the future. This is absolute power, because the sovereign can act or refrain from acting without any sort of constraint, including the constraint of its own previous decisions (see Agamben, 1998, 44-47). My first observation, however, is that Agamben's description of the exception is of less immediate application to the common law. While Agamben discusses his work as valid for "Western"[7] legal systems, it is in fact situated in the civil law tradition, which is understandable given that Agamben is deeply influenced by Carl Schmitt. This is best visible in Agamben's binary conceptualization of the general and the particular, meaning an abstract, general norm and its empirical application. The

[6] More precisely, the word of the Führer possesses the force-of-law, and thus, the same binding power. The state of exception corresponds to the scenario where there is no law any longer, but only acts bearing its force.

[7] Others have criticized Agamben's usage of the term "Western" to refer to his scale of analysis (Hopkins, 2019, 964-66; Bignall and Svirsky, 2012, 2).

relation is a temporal and hierarchical one, with the application being bound by the norm not only due to the fact that it must logically derive from it, but also to the fact that it may only come *after* that a law has been passed. The exception is reached precisely once this hierarchy is subverted, as the application is not bound by the norm any longer, and it coexists with it without following it in time and logic. But the common law presents us with a third possibility, and that is the institution of a new norm based on the application of another. The judge-made law complicates Agamben's theory, because now the norm follows its application, and not the other way around.[8]

Tim Murphy (1994) may help us here. Murphy conceptualizes the distinction between civil and common law by associating the two to different forms of texts. Civil law establishes a void between the empirical and the ideal, with the law being conceptualized as a modernist, scientific model that is exemplified by the code. The code constitutes an abstract manual, impervious to time, whose application owes its legality to the logical connection with the abstract rules from which it derives. Conversely, common law is written as a medieval text, with separate scribes transcribing an original text to which they add notes to the margin, with the note becoming an integral, authorless part of the text in all its future transcriptions. Thus, common law is bound to the passing of time. It does not escape it. The text that is the law can never be visualized abstractly, because at each point in time we will have a different text, which is being commented on with the awareness that others will add to it.

[8] Obviously, here I am discussing this distinction from a doctrinal and historical perspective. In practice, civil law systems also rely on jurisprudence as a source for the correct interpretation of the law.

The common law defies the opposition between the general and the particular, because every judicial decision resembles a comment that is added to a growing text. In this sense, every decision has the form of an exception, because it makes new law by either finding an exception to the application of a previous norm, or by extending a norm to a new case that was not previously included. Importantly, while Agamben does not focus on common law he is aware that even in civil law systems the exception is a necessary part of the judicial decision. This is because the judge *decides* on how a norm must be applied, and thus, part of the judicial decision is the expression of something other than the norm itself, or else the law could not be applied in the first place (2005: 39-40). But while civil law tends to hide and mask this necessary feature, common law embraces it by rendering the application of the norm a binding precedent that constitutes new law. Thus, in the common law an exception is such only *because* it operates on a previous exception that is re-charged as a norm at the very moment that a new exception is extracted from it (see also Esposito, 2012: 79-80).

How may we account for time here? Niklas Luhmann offers a possibility (2004: 280-84). The judicial decision possesses two temporalities: it constitutes the future of a previous norm, and the past of a future exception. This is because the judicial mind must present every ruling as the necessary outcome of a previous ruling that is binding, and the ruling that is so issued is already the past of a future ruling that will be issued eventually. Thus, each exception is a possibility opening to multiple, but not infinite, directions. Importantly, this reading does not stand in contradiction with Agamben's work, and it is also in line with Martin's understanding of campscapes. For Martin, the camp moves in

time and space through multiple exceptions, and across an irregular path. This is common law as well.

What are the implications of an exception of this kind, inspired by common law but valid elsewhere as well? There are several, and I will uncover them in the rest of the article. To begin, it leads us to an understanding of biopolitics where the law is able to produce multiple biopolitical subjects, which correspond to multiple exceptions. This resonates with Aradau and Tazzioli's concept of "biopolitics multiple" (2020), with biopolitics becoming a range of possibilities instead of a dichotomy between the two outcomes of "make live" and "let die" (also Tazzioli and De Genova, 2020; and especially Puar, 2017). Here, the changing exception is not limited to a negative relation of inclusion and exclusion. When reflecting on biopolitics multiple, Claudio Minca wonders whether the Agambenian "sovereign ban" may still find a place in this renewed engagement with biopolitics (Minca et. al 2022, 13-16), and I find that it absolutely can, with Guantánamo being the best example.

III. Guantánamo and its others

Guantánamo's shifting nature over time provides us with the best reference to analyze possible continuities between camps and prisons, due to the camp's progressive integration within the US carceral circuit. Certainly, there would be other valid empirical references to pursue my argument, but the reason for favoring Guantánamo is its importance in camp studies. As mentioned, earliest contributions focused on this site as the perfect exemplification of Agamben's theory. With time, camp scholars focused elsewhere, while the detention camp in Cuba went through changes that have now

rendered these readings outdated. Thus, there is merit in *returning* to Guantánamo, and particularly to question the camp/prison separation that appeared to be so well defined during its early years.

When Guantánamo opened in January 2002, the Bush administration argued that the camp was fully excluded from constitutional jurisdiction, and that prisoners were "enemy combatants" who could be detained at the President's discretion (Kaplan, 2005). But in 2008, the Supreme Court ruled in *Boumediene v. Bush* that Guantánamo prisoners maintain a constitutional right to habeas corpus, thus allowing them to litigate the legality of their detention in court.[9] Since then, hundreds of writs of habeas have been issued and the courts of the District of Columbia in Washington DC elaborated a new law of detention, case by case, using every new case as an opportunity to add to the growing body of law.[10] Importantly, the Supreme Court never determined the extent to which the constitution applies to Guantánamo, as they only gave a right to habeas while remaining vague on the extent of substantial and procedural guarantees that this entailed. Thus, Guantánamo is indeed exceptional, but in a different way than when it was opened.

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[9] This decision was the climax of a legal battle over the right of habeas corpus that the government ultimately lost. Before *Boumediene*, the Supreme Courts had previously extended habeas corpus to the prisoners under statutory grounds in 2004 and 2006, respectively in the cases of *Rasul v. Bush* and *Hamdan v. Rumsfeld.* Congress responded with the 2006 Military Commissions Act, which stripped detainees of their right to challenge their detention in court. In 2008, the Supreme Court reacted by holding that the detainees were entitled to habeas corpus under constitutional grounds.

[10] After *Boumediene*, the first wave of habeas cases saw a number of victories for detainees at the District Court level. With time, however, the Court of Appeals of the DC Circuit reversed many of these decisions.by adopting deferential standards to the government evidence. Several commentators argue that the DC Circuit ultimately reduced habeas corpus to a formal remedy without any effectiveness (see Anderson, 2021).

The judicial decision over a detainee's case constitutes the application of a norm that is suspended, meaning the constitution. And yet, every decision bind future ones, so that the court's work cannot escape time as it is bound by the previous decisions that have already been made. Here, Guantánamo's evolution in space and time is certainly biopolitical, but the construction of the detainee as a subject in law, who may be detained according to shifting grounds and rules, cannot be analyzed through a dialectic between the exception and the rule of law. Instead, every judicial decision constitutes the future of multiple, possible exceptions, while still being one specific outcome of a previous decision which, at the time that it was taken, could have led to multiple results, meaning multiple pasts and futures.

Far from establishing a place outside the juridical order, the work of the courts constructs Guantánamo as a shifting territory where the relation between the camp and domestic law, including domestic prison law, is constantly reassessed, modified, and clarified. In this sense, Guantánamo is pulled into the "normal" carceral circuit while also remaining an exception from other forms of confinement. Often, habeas cases revolve around the exact distance separating Guantánamo's law from the law of other forms of detention, such as immigration detention, civil commitment, and incarceration in a penitentiary (Brenner-Beck, 2020; Resnik, 2010). Furthermore, Guantánamo hosts special military tribunals, the so-called Military Commissions, which have tried a selected number of detainees for their alleged war crimes. But whether these proceedings should be guided by the law of war or international law is another topic of debate (Poulin, 2021).

Thus, one first observation is that the camp does not exist as a bounded enclave, because its features depend on legal networks of which it is part of. As mentioned, this

resonates with developments in camp studies and carceral geography, as both theorize their objects of research as technologies that are expressed by different sites and through different arrangements. While for the courts this is a legal issue, geographers may appreciate the camp's shifting positions while moving beyond a solely legal focus (see again Martin, 2015). In this sense, Guantánamo offers an interesting case study to examine the transitions of a carceral site across its circuit.

A most obvious development is how Guantánamo complicates the boundary between military and carceral circuits. A recent contribution by Moran and Turner (2022) urges carceral geographers to focus precisely on this topic, and they highlight the historical and present links between prisons and military sites. The authors pursue this by focusing on the continuity between their economies, which is a topic that was famously investigated by Ruth Gilmore (2007), but also exchanges in techniques and personnel. Furthermore, the connection between war, the military, and the camp is a frequent topic of discussion in camp scholarship as well (see Netz, 2004; Smith and Stucki, 2011; Tyner and Devadoss, 2014). Guantánamo is an obvious example because of its atypical position between prison law and the law of war, and furthermore for how the camp blurs the boundaries between warfare and incarceration.

Another interesting perspective is to examine the temporal equilibrium characterizing life and law in Guantánamo against those of other forms of confinement. As time passes, it is the very significance of time itself to change within the camp. While most prisoners have been released, others are not and to justify their detention becomes more and more difficult, particularly because it would be impossible for other forms of

detention within the domestic carceral circuit. In other words: how long is too long?[11] Time here is understood as an extension (Bergson, 1960), a homogenous quantity that is distributed through different periods, and whose length is measured differently depending on the specific form of detention and its law. But by adopting its measurements of time, the law hides the intensity of its passing. This is a typical concern for scholars working on incarceration and confinement.

Geographers have focused on waiting as a state of debility that affects asylum seekers or other categories of noncitizens trapped in the immigration system (Conlon, 2011; Hyndman and Giles, 2011). Relatedly, Griffiths (2014) discusses the pain of indefinite immigration detention, as detainees are unable to predict their release date, and this compromises their ability to plan for the future. The debility produced through imprisonment spans beyond carceral sites as well, both on prisoners' families (Katova, 2019; Moran et al. 2017), and through carceral mechanisms such as parole (Massaro, 2020). Camp scholars have similarly focused on temporalities as part of their effort to account for camps' complexity, and to avoid their reduction to blackholes outside the law (Martin, 2015; Ramadan, 2013; also see Sofsky, 1997: 73-93). Thus, how time is measured and partitioned affects the temporal dynamics characterizing different sites, with the result of producing separate temporal equilibriums. For example, Steve Herbert (2019) describes the problem of life sentenced prisoners in the US prison system, where

[11] Specifically, in *Al-Alwi v. Trump* (2018) the detainee's counsel argued that the authority to detain their client should unravel after a certain amount of time. *Al-Alwi* was an effort to extend due process rights to detainees in Guantánamo, as this would likely result in the possibility of arguing that the government's burden to justify their detention should increase with the passing of time. Similar efforts were pursued without success in *Qassim v. Trump* (2019) and *Al Hela v. Trump* (2020).

aging individuals pose significant trouble for the administrators' task of not letting prisoners die under their watch. Carol Rosenberg (2019) reports the same problem in Guantánamo, where the Pentagon plans of turning certain sections of the camp into "hospice care confinement."

To reiterate, the point in adopting this gaze is that of examining the continuities between Guantánamo and its broader circuits, and how these change over time. Guantánamo is isolated, indeed it is located on an island for this purpose, but this does not prevent it from being connected with its network. The dichotomy of insularity and connectivity has been brought forward in the growing field of island studies (Baldacchino, 2008; Hay, 2006; Randall, 2020; Steiberg, 2005; Stratford et al. 2011), and how prison-islands or camp-islands express this tension particularly well has already been noticed by geographers (Andrijasevic, 2010; Mountz, 2015, 2011; Tazzioli and Garelli, 2020). In this sense, carceral geographers and scholars in island studies and camp studies move on the same axis, which is that of avoiding a bounded conceptualization of their object of research to examine its porosity instead, whether this be a prison, an island, or a camp.

Of particular interest here is a recent contribution by Weima and Minca (2022), where they argue that camp scholars tend to focus on the state of camps at a given time and less on the event of their closure, which would require attention to time, and not solely to space. Far from representing the "end" of a camp, closures operate as events within larger networks, by redistributing the population of the camp that is being closed and by affecting other sites. Here, I build on this concept to show how Guantánamo's progressive normalization was made possible by the closure of other camps that were part

of the detention system during the War on Terror, and thus, how Guantánamo shifts not just in one network, but through different networks as well.

During its early years, Guantánamo was the most visible site of a larger archipelago of camps, whether camps managed by the US military or secret facilities managed by the CIA, the so-called "black sites" (D'Arcus, 2014; O'Neill, 2012; Scott-Clark and Levy, 2021). But at the end of his second term, President Bush began abandoning detention and interrogation as military tactics, and Obama continued this process by either shutting down the camps or transferring them under Afghan or Iraqi authority (Hajjar, 2019). Following Weima and Minca, we must examine these closures not for what they terminate, but for the possibilities that they open into the circuit of which they are a part of. Guantánamo changed *because* of the closure of the other camps, as the administration could present the camp in Cuba as an *exception* from the rest of the older circuit. Once closed, the other sites allowed for Guantánamo's normalization, even though the camp would remain exceptional in itself, as an exception both from its older network and the domestic carceral circuit.

Like an exception, a closure is both past and future because the memory of what has been closed is made present elsewhere. In Guantánamo, the closure of the older camps is complicated by the people's histories and bodies, because the evidence against many detainees was obtained through torture in military camps or black sites. Their suffering is made present in Cuba due to the courts' obligation to deal with this awkward reality, which requires it to find a balance between what is admissible as evidence and what isn't (Pradhan, 2021). This process where the older sites are made present in law not despite of, but *because* of their closure, can find fertile ground in legal-geographic works

that explore the non-linear temporalities of legal proceedings and courtrooms (Fisher et al. 2021; Gorman, 2017; Jeffrey and Jakala, 2014; Valverde, 2014).

How can this help to account for continuities between separate sites of confinement, whether in camp studies or elsewhere? In this case I am not treating the different stages of Guantánamo as many different camps, as if I were classifying it according to specific categories. Classifications obscure the fluidity of the concept, not only because one camp may have many goals, but primarily because camps change according to their surroundings. In a remarkable article that touches this issue, Richard Nisa (2019) discusses the development of the Korean carceral system during the Japanese and American occupations, where the constructions of prisons and camps for war prisoners were part of a same strategy, with the two institutions manifesting similar purposes that complicated the apparent difference in their functions (also Loyd and Mountz, 2018; Pieris and Horiuchi, 2022). Here, Guantánamo shifts through a "carceral continuum" (Hamlin and Speer, 2018) that shrinks the distance separating it from the US carceral circuit, and this process is reinforced by the construction of Guantánamo as an exception from its older network.

On one occasion, Circuit Judge Brown described Guantánamo as one branch of a tree that is habeas corpus, with Guantánamo being a new branch that grew after *Boumediene* (*Al-Bihani v. Obama*, 2010: 876). Let us appreciate the meaning of this metaphor. First, the judge binds Guantánamo to all other forms of detention and incarceration in the US, each of them being a branch of the tree (for example civil commitment, immigration detention, pre-trial detention, and imprisonment). But second, he also describes Guantánamo as different, as it constitutes its own branch, so that it may

grow independently but only as long as it remains part of the tree trunk and its roots, and that is, the US carceral circuit. What is also hinted, however, is that the prison itself, just like all other forms of confinement, mutates through space and time, growing as its own branch which may intersect others, Guantánamo included. I take the next section to show how that is the case.

IV. The US penitentiary and its shifting scales

As discussed, camp geographers performed a significant re-assessment of Agamben's theory in recent years, as they acknowledged the need for different frameworks to investigate camps other than Guantánamo and the concentration camp. However, Agamben's conceptualization of the prison and the camp as two sites that remain ontologically distinct held sway, and the expansion of the field has stopped short of reaching the prison. For example, McConnachie (2016: 398) argues that camps function as instruments to manage population and are therefore biopolitical, while prisons are not as they serve disciplinary purposes. Similarly, in their review of camp studies Martin et al. argue that: "Individuals are interned in prisons because they have committed a crime and are therefore subject to the penal system; however, in camps people are normally not interned as individuals but as 'masses,' not because of what they did but because of who they are" (2020: 749-50).

In other words, the distinction concerns *who* is imprisoned, and not necessarily how. The presence of common carceral techniques in between institutions is in fact acknowledged, and certain authors have used the term "quasi-carceral" to refer to the control of non-citizens' mobilities in detention centers or similar forms of confinement

(Altin and Minca, 2017; Felder et al. 2014). However, and regardless of their common carceral practices, camps and prisons remain distinct due to the crucial difference in their function. But this approach to prisons contradicts the more nuanced approach to the study of camps that has characterized the field, and which Martin et al. review in the same piece. Camp geographers have begun treating camps as shifting formations, thus escaping the paradigmatic conceptualization that informed Agamben's work on the subject. However, the prison is still conceptualized as a linear byproduct of criminal law, and without considering how a penal system that punishes people for how they act, and not for who they are, merely constitutes an ideal, liberal model of criminal law (see Ashworth and Zedner, 2014; Ferrajoli, 1989; McSherry et al. 2009). Agamben does the same thing, but this is less contradictory in his work, because he relies on paradigms to describe both camps and prisons. In *Homo Sacer*, he writes that: "The camp, and not the prison, is the space that corresponds to this originary structure of the nomos. This is shown by the fact that while prison law only constitutes a particular sphere of penal law and is not outside the normal order, the juridical constellation that guides the camp is martial law and the state of siege" (1998: 20).

While this quote may be valid from a doctrinal perspective, if our gaze is less abstract Agamben's description of the relation between criminal and prison law is highly simplistic. Specifically, he disregards that prison law possesses an autonomy that varies depending on the concrete regulations of a legal system (Tamburino, 2015). This is true geographically as well, because the two bodies of law concern different subjects, temporalities, and scales (see Valverde, 2009). Criminal law is concerned with the past and the future, and it aims at establishing the truth of an incident that has happened, and

the amount of punishment that would defend society's interest. Conversely, prison law operates in part as an expression of police power, and it empowers prison administrators to incapacitate a threat to the institution at a specific moment (see Dubber, 2005). For this reason, a prison policy does not always work in harmony with criminal law. As an example, a popular critique against solitary confinement in US prisons is that administrators release inmates in crowded areas after years or decades of total isolation, and this raises the likelihood of violent incidents (Lovell et al. 2007; Reiter, 2016: 168-73). However, from the perspective of prison administrators the policy functions quite well, as it is designed to protect the prison, and not society. They are not concerned with what the inmates have done or will do outside the prison, but merely in their behavior for the time that they remain inside.

Unsurprisingly, Agamben has been utilized to analyze the contemporary supermax prison and its policies of solitary confinement (Czajka, 2005; Morin, 2013; also De Dardel, 2016). The issue here is that if prison law can break free from the constraints of criminal law we reach an internal state of exception, where prison administrators begin to operate as sovereign authorities (Reiter, 2016). To give more context, at the moment US prison administrators may regulate their prisons as they see fit, as long as their regulations satisfy a legitimate "penological goal." If that is the case, prisoners cannot contest those regulations under constitutional grounds, meaning that any restriction of their rights is legal as long as the administration is able to justify it as necessary.[12] In *Overton v. Bazzetta* (2003: 133), the Supreme Court explained that the promotion of the prison's

[12] This was affirmed in *Turner v. Safley* in 1987 and strengthened by subsequent decisions.

internal security is "perhaps the most legitimate of penological goals." But if "internal security" is the most legitimate goal, and not rehabilitation, deterrence, or any other social goal, the prison is mutating into something else, and specifically into a site whose means and end coincide, where the constitution is suspended and the actions of administrators are always constitutional precisely for this reason. To readapt Claudio Minca's reflections on the camp, these developments in prison law results in "a geography that continually produces and dismembers spaces within which everything is, literally, possible" (2006: 401).

Importantly, the thesis that only convicted individuals may be subjected to this treatment is incorrect. In *Bell v. Wolfish* (1979), the Supreme Court rejected the argument that detainees awaiting criminal trial in prisons (pre-trial detainees) had a constitutional interest toward being spared the same treatment of those who had already been convicted and sentenced in the same institution. The detainees' argument that they were "innocent" found no sympathy, because the policies that they attacked did not punish guilty people, as they merely kept the prison "secure." Thus, the subject of prison law is not a sentenced individual but a prisoner, and what matters is who is inside the prison at a specific moment and not why. For this reason, prison case law has application to any carceral site in the United States, Guantánamo included. The issue is not that separate sites are governed similarly, but that the legal subjects who are imprisoned share a common, sub-constitutional status (Dayan, 2011; also Reiter and Coutin, 2017). In Agambenian terms (2002, 85), the prisoner is a "biopolitical substance" who must be governed in order to achieve the "internal security" of the institution, but within an understanding of security that excludes death as a possible goal (Puar, 2017).

As an example, a topic that led to public and scholarly attention to Guantánamo during the last decade has been the force feeding of hunger strikers (Ibrahim and Howarth, 2018; Purnell, 2014; Vicaro, 2015). However, force feedings are hardly exclusive to Guantánamo, and they are practiced in almost any carceral facility in the United States (Ohm, 2007). When Guantánamo's hunger strikers sought a court order to prevent their force feeding, the government argued that they could not litigate the conditions of their confinement unlike all other prisoners in the United States. However, the D.C. Circuit rejected this and extended prison law to Guantánamo to improve the detainees' constitutional status. But for this very reason they also ruled against them, precisely because federal prisoners have no right to be protected by force feedings and Guantánamo detainees *are no exception* (see *Aamer v. Obama*, 2014).

Paradoxically, Hannah Arendt who inspired Agamben to look elsewhere than punitive institutions to find his *homo sacer* is proven right exactly by the conditions existing inside US prisons. As Arendt put it: "Jurists are so used to thinking of law in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than the layman to recognize that the deprivation of legality, i.e., of all rights, no longer has a connection with specific crimes" (1973: 295). Indeed, this is correct. Whether prisoners may spend decades in full isolation, be prevented from reading or keeping a picture of their family, has nothing to do with their crimes.[13] These are administrative decisions, and prisoners may not litigate them as a form of excessive punishment because they are not legally punitive (see Zedner, 2016; also Beckett and

[13] These policies were found to be non-punitive by the Supreme Court in *Beard v. Banks* in 2006.

Murakawa, 2012). They are merely the consequence of the loss of constitutional protection that follows the individual's incarceration, whether in a prison or any other carceral facility, Guantánamo included.

Thus, just like Guantánamo pulls inward the US prison pulls outward, and the two are dangerously close to meeting halfway, in the Agambenian zone of indistinction where administrators apply a norm that is suspended. If Guantánamo was pushed toward this direction by the closure of the other camps, the US prison follows an inverse trajectory due to the opening of an enormous number of facilities at the end of the previous century (Alexander, 2012; Gilmore, 2004; Wacquant, 2009). The new penitentiary exhibits preventive purposes that focus on the incapacitation of dangerous subjects, and this pushes it toward judicial structures that enhance its camp-like purposes and features (Dayan, 2014; Harcourt, 2010). The two institutions do not just share the same techniques and regulations, but also common devices of subjection which are the main concern of camp scholars. While mine is a juridical focus, here the law must be interpreted extensively, as a field of power that is entangled in material and spatial relations that span beyond the law's text to affect spaces, bodies, and temporalities (Jeffrey, 2020; Valverde, 2015).

Conclusion

This article examined recent trajectories in camp studies to argue that the field could expand its focus on continuities between camps and prisons as modern institutions. During the last decade, camp scholars rearticulated their field to escape a paradigmatic understanding of the camp, and to expand their focus beyond the concentration camp and

encompass other technologies and sites. This trajectory would benefit by a greater attention to prisons as historical formations, not unlike camps, so as to test their boundaries at different historical junctures. I have taken the detention camp of Guantánamo and the contemporary US penitentiary as my empirical reference points, so as to demonstrate how sites of confinement escape rigid classification and shift through them instead. Thus, I do not argue that camps and prisons are *always* contiguous, but that their relation is subject to vary through time and space. In reference to the specific case at hand, the relation is not of similarity but convergence.

I pursued this argument while retracing the development of camp studies from their original confrontation with Guantánamo to its current post-Agambenian phase. Across this path, camp scholars have critically re-engaged with the work of Agamben, while also keeping many of his intuitions as valid. Following this lead, I drew from Agamben to examine the relation between law and time in the work of the Italian philosopher. As I aimed to account for camps and prisons as spatio-temporal formations, I constructed a reading of the exception that could account for the temporal and juridical dynamics of different institutions of confinement, so as to examine their possible convergence. In doing so, I drew inspiration from recent directions in legal geography (Valverde, 2015).

A purpose of this essay is to examine the possibility for cross-pollination among separate strands of geographic research. Camp scholarship shares many concerns and interests with carceral geographers, and with scholars working on military circuits (Gregory, 2007; Loyd et. al. 2016; Moran and Turner, 2022; Pieris and Horiuchi, 2022), humanitarian complexes of care and security (Anderlini, 2015; Garelli and Tazzioli, 2018;

Pallister-Wilkins, 2017), and more generally all those institutions that blur the distinction between care and control (Philo and Parr, 2019; Rhodes, 2004). Across these literatures, camp scholarship has stood out for its attention toward the historical and political significance of confinement and (im)mobility in processes of subjectivation and construction of identities and communities. To question the boundaries separating camps and prisons is a step forward across this trajectory.

As a final note, an engagement with the prison from within camp studies is also beneficial for examining the "campization" (Kreichauf, 2018) of contemporary penitentiaries. Legally speaking, this phenomenon is bolstered by both a transition toward criminal law models that exasperate its preventive purposes (Ashworth and Zedner, 2014), and the growing insulation of prison administration as a form of unscrutinized police power (Dubber, 2005; Feeley and Swearingen, 2004). For this reason, the reliance on a liberal concept of criminal law in camp studies can obscure the increasing convergence of camps and prisons in their characteristics and function. While the two institutions may have developed across separate trajectories, their current intersection is an alarming development that should not go unaccounted.

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5. When politics are contagious: Covid-19 and political resistance inside an immigration detention center

Abstract

This article examines the hunger strikes that were launched by immigration detainees in the United States to protest their confinement during the first outbreak of the Covid-19 pandemic. I focus on the Otay Mesa Detention Center in San Diego, and I utilize primary and secondary sources to analyze the hunger strikes that unfolded at this facility in between April and June 2020. I argue that the power of the 2020 strikes was a direct result of Covid-19, not only because the pandemic triggered the strikes, but also because it introduced a common condition of vulnerability among the detained population, thus encouraging collective organization. The strikes and the pandemic showed a common form of expansion, which was acknowledged by the authorities themselves, as they adopted the same strategies of lockdown and quarantine to hinder both phenomena. The history of this protest, along with those that erupted across carceral sites globally during the same period, constitutes an important testimony to the political effects of the pandemic, and to the possibility of political resistance in detention.

Introduction

At the beginning of the Covid-19 pandemic, in between the spring and summer of 2020, immigration detainees[1] in the United States rose up to protest against their forced confinement during a global pandemic. As the virus ravaged through the detention system, massive hunger strikes erupted in an effort to gather public attention and put pressure on immigration authorities. This was hardly exclusive to immigration detention, or to the United States. The beginning of the pandemic coincided with protests in carceral facilities all over the world, marking one of the most conflictual periods of prison politics in recent memory (Vera, 2020; García, 2020; Jacquard, 2020; Milella, 2020).

With this article, I focus on one protest in particular: the hunger strike at the Otay Mesa Detention Center (OMDC) in San Diego, California. In analyzing this protest, as well as the strategies that were enacted to suppress it, and the legal proceedings that followed, I have two goals. First, I contribute in the efforts to reconstruct the episodes of resistance inside carceral sites in the spring of 2020, so that we may consider these histories as we start coming to terms with the upheaval brought about by the pandemic (Hanan, 2021; Heard, 2020; Pattavina and Palmieri, 2020; Perilous, 2020). Second, I focus on the role of Covid-19, and I posit the virus as an agent in the strike, and one

[1] There is a disagreement in public society and academia concerning the usage of the term "detainee" due to its potential marginalizing effects. Some advocates for people-first language prefer using terms such as "detained person" or "person experiencing detention." Here I do not touch on this debate, but I clarify that I utilize the term "detainee" with its legal meaning in mind; that is to identify a person who is suffering from administrative detention (unlike someone serving a criminal sentence).

which explains its strength. The protests of 2020 at OMDC and other US immigration detention centers were exceptionally powerful. While hunger strikes are hardly a new phenomenon in immigration detention, rarely has a protest spread across separate facilities in such a short time span, bringing together hundreds, if not thousands of participants in a matter of weeks. This power could not be grasped without acknowledging the role of the virus in giving shape to the protests. Covid-19 did two things: first, it brought people together in virtue of a common vulnerability; second, it allowed the protest to replicate its pace and form of expansion, with the hunger strike following the pandemic and moving across the detention system as a contagion.

To offer a comprehensive analysis of the event, I focus not only on the protest itself, but also on the counter-strategies that were enacted to curtail it, and on the legal litigation that followed when detainees' advocates sought a court-mandated release. To account for the virus' role throughout this process, I conceptualize the protest, the detainees, and the virus itself as a force, through a framework that I borrow from the work of Friedrich Nietzsche (1987) and Gilles Deleuze (1983). Importantly, I do not present this essay as an opportunity to apply an overarching theory to a case study. Instead, I develop my theoretical analysis in reference to the empirical problem of constructing a theory that explains the power of this event.

The article's structure is designed to reflect this. I begin with a description of my methods and the sources of my data. I proceed by discussing the conditions that existed at OMDC prior to the pandemic, and I follow with an analysis of the hunger strike that highlights the changes brought about by Covid-19 to the detention system. In the fourth section, I direct the attention to the authorities managing immigration detention and

OMDC, and to the strategies that they designed to curtail the pandemic and the hunger strike at once. Finally, I conclude by discussing the legal litigation that followed the protest, when legal advocates brought a class action to demand the release of the people detained.

I. Methodology

To describe the events inside OMDC, I pull from secondary sources and my qualitative work, as well as my experience working as a volunteer for various detention advocacy and abolitionist organizations in California. This research project also underwent a rigorous university IRB ethics review, and all of my data sources have been fully anonymized for privacy and confidentiality.

During the period preceding the pandemic I collaborated with a detention visitation program to conduct 15 in-person visitations with individuals who were detained at OMDC. The visits were requested by the visitees themselves as a way to obtain information and legal contacts, or to simply enjoy human company. During visits, I explained to my visitees that besides working as an activist, I was also a researcher, and that I wished to gather anonymized data to publicize conditions inside OMDC. For those who were willing, I initiated mail correspondence, and they shared information concerning the inner workings of the facility and the different equilibriums that existed inside the separate units (for further reflections on qualitative research and visitations in immigration detention see: Bosworth and Kellezi, 2017; Fleay, 2017; also Dowling, 2016).

At the same time, I collaborated with a pen-pal program with people in detention that built a letter archive to document conditions existing inside OMDC and other detention centers. I utilized letters in the archive to corroborate the rest of my information and to examine the conditions existing at OMDC prior to the pandemic (see Nocente, 2021). Furthermore, I eventually interviewed one of my correspondents after their release, which preceded the pandemic. In all, these letters and the interview were the primary source material for the analysis of conditions existing at OMDC prior to March 2020.

During the pandemic, I maintained mail correspondence with some detainees who provided me with information concerning the developments at OMDC. Additionally, I sought the same data in the letter archive, as detainees wrote several letters with the purpose of publicizing the conditions inside to bring media and public attention to the facility. In the same time period, I also volunteered for a national immigration detention advocacy hotline, which detainees could call to obtain legal help and lodge complaints of abuse and mistreatment. Through these calls, I was able to confirm that dynamics at OMDC resembled those of other facilities, and that the authorities' behavior showed continuity across separate detention centers. This background information, along with media reports and court documents, informs my analysis of the authorities' strategies to break up the strike and curtail the pandemic.

As for the dynamics of the hunger strike inside OMDC, I draw from multiple sources. In the summer, I conducted an interview by phone with an ex-detainee who had been deported back to his home country. This person described in vivid detail how people inside his unit gathered together to decide on launching the strike, and how the authorities dealt with that fact. I used media reports, court documents, and the data described above

in cross reference with this interview to corroborate it, and to come up with a clear chronology and description of the event. The court documents came from the case of *Alcantara v. Archambeault*. This was a class action brought by the ACLU representing the detained population at OMDC, and it constitutes the focus of the last section of the article.

In total, the article relies on primary source material that is corroborated by secondary sources. While my description of the internal dynamics of the hunger strike relies on the single interview, the dates and most of the details have been confirmed by separate letters and phone calls with other detainees, and both by media reports and court documents. All the data from the qualitative work has been anonymized and I avoid references to individuals' characteristics to prevent any identification of the people that I spoke with.

II. Humans, viruses, and the political

In the last 15 years, a vast literature has emerged focusing on the possibility for political resistance in detention, where scholars have conceptualized resistance as an instrument to claim a political identity against a system that deprives its prisoners of their agency and voice (Conlon, 2013; McGregor, 2011). Theoretically, these contributions borrow from philosophers who theorize "the political" as a matter of human agency, and as a status that one reaches through action or language, like Hannah Arendt (1998), Jacques Rancière (1999), and Engin Isin (2008). The first two authors in particular have been very influential in the literature (see Fiske, 2016; Vicaro, 2015; Nyers, 2008). Furthermore, scholars have borrowed from Giorgio Agamben and his theorization of bare

life (1998), often using the aforementioned philosophers to find the possibility for politics in bare life (Owens, 2009; Edkins and Pin-Fat, 2005; also Martin et. al., 2020, 753-54).

With some relevant exceptions (for example Campesi, 2015; Fischer, 2015; Conlon, 2013), there are three recurring themes in this literature. First, the political is conceptualized as discourse, and it is conceived as an act to be analyzed for its symbolic meaning, or as a performance (Pellander and Horsti, 2018; Cox and Minahan, 2004). Specifically, hunger strikes or acts of self-mutilations are understood as a form of "speaking through the body" by those who have been deprived of a voice (Puggioni, 2014). Second, the political act is an event that qualifies the actor as a political being, forcing an acknowledgement as such by a human other, and therefore, a dialogic act (see Isin, 2008). Third, the political agency of detainees is understood in terms of free will and self-determination. While this is not always the case (Abrahamsson and Dányi, 2019), this conceptualization of agency is explicit in certain theoretical sources (Arendt, 1998), and it constitutes a logical result of the conceptualization of political action in the terms above.

From a dialogic perspective, the act of resistance is interpreted discursively, and the focus is more on the act's meaning than its power. Furthermore, because the act is only relevant to the extent that it constructs an antagonistic identity, the non-discursive dynamics that affect its range and strength are of less interest to the analysis. Under this framework, every act of resistance possesses the same value as a performance or a speech act, and thus, the distinction between individual or collective strikes is less relevant. Coherently, the political actor that launches the protest is always treated as an individual, and even in the case of a group we would consider it *one* group, speaking with *one* voice, because the mutual relations among the members possess a lesser centrality than the

antagonistic relation between the group and the carceral system. For this reason, this conceptualization of political resistance is inadequate to the present analysis, which seeks to account for the power of the protest more than the meaning of the act itself as a performance. In the case at hand, to adopt a dialogic framework would fail to capture the distinctions between the 2020 hunger strike and other smaller protests that had previously erupted at OMDC or other facilities.

Importantly, this is not a critique of this literature, which remains cogent and efficacious to analyze resistance from its own discursive perspective. However, the same framework is less useful for the question guiding the present work, which aims to investigate the power of the protest. From this alternative perspective, the attention should shift toward those material components that affected the range of the hunger strike, and which contributed to making the 2020 protest exceptionally powerful. In this sense, the strikers' ability to speak, and their attempts to communicate as political actors, inform the present analysis but do not constitute its primary focus. For the same reason, a conceptualization of human agency as free will or self-determination is less cogent to this work, because it would fail to explain how or why people were affected into participating in the protest, and thus, which conditions affected their willingness to associate with others toward a political goal.

For this reason, I begin the present analysis by identifying those changes that occurred at OMDC once the virus entered the facility, but prior to the strike. This is to account for the rupture brought about by Covid-19, and also for the virus' role in this event, which was more complex that one of mere causality as I further discuss below. The beginning of the pandemic altered the conditions existing at OMDC and other detention

facilities, and not only because of the danger to the detained population, but primarily because of the shared condition of vulnerability that encouraged the detainees to associate. In this sense, the strikers' ability to organize politically should not be interpreted as a mere effect of human agency, as if the strikers were exercising their own free will regardless of the context. Instead, their agency was directly affected by the new equilibrium brought about by the virus, which undermined the pre-existing regime.

More specifically, the US detention system is organized and managed so as to prevent political unrest and discourage collective organization. This is achieved by not only punishing and disciplining those individuals who attempt to rebel, but also by dividing the population into different statuses and legal pathways so as to avoid an excessive homogeneity that could facilitate collective organization. More broadly, the entire immigration machine could be described as functioning through statuses that regulate the paths of noncitizens in the United States (see Eagly, 2013, 1137-1139). To move through these paths one transitions between statuses, either above, toward residence and citizenship, or below, toward deportation (Martin, 2005). People in detention are always in a "detainable" status, meaning a legal status that allows authorities to detain them while their removal proceedings are carried out.[2] But while they are all detainable, they are not all equal. Their possibilities for release depend in large part on the status that they are in, and on their ability to take advantage of it by making a case where they stress

[2] In the United States, all noncitizens who have not been legally admitted into the country or have lost their legal status as residents are put under removal proceedings that can result in deportation. While these proceedings are unfolding, the noncitizen can be detained. This implies that detention centers host people in significantly different situations, from long term residents to asylum seekers who just presented themselves at the border.

the positive factors in their life that should convince the authorities to release them (see Asad, 2019; Ryo, 2016).[3]

Within such a system, collective organization is not particularly helpful due to the highly varied situation of people, who navigate it within different, vertical paths. To engage in politics inside detention is a disciplinary infraction that can and will be used against them, as it is treated as proof of dangerousness and lack of discipline. Those who try to organize are punished with solitary confinement, and they are regularly transferred across units so that they don't succeed. Additionally, the population in detention is multinational, and people speak different languages, practice different religions, and come from different cultures. Their treatment can also vary depending on their nationality, race, gender and sexuality, and research and detainees' testimonies indicate that conditions of detention are highly unequal depending on these factors (see Franco et. al. 2022; Reema, 2022).[4] These obstacles do not make collective organization impossible, but they do complicate it, and they require time to overcome. Time however is limited, as people are

[3] For example, under the Immigration and Nationality Act (INA) there are at least three different statuses that regulate the possibility for release of single individuals. Normally, a detainee may seek release through a bond hearing in front of an immigration judge, or by seeking a discretionary release on "parole" (INA §236(a)). However, people apprehended at the border usually lack a right to a bond hearing, and they may only be released through parole (INA §205(b)). Furthermore, the majority of those who are in removal proceedings due to their criminal record are in "mandatory" detention, and they may not be released at all until their proceedings are over (INA §206(c)). Additionally, the possibilities for release or relief from removal are contingent on an enormous number of other factors which render each case highly specific.

[4] Beyond detention, race and nationality are often utilized to distinguish among migrants during asylum proceedings and at the policy level, thus creating racial hierarchies where the most "deserving" nationalities have an easier time being recognized as refugees and avoiding deportation (also see Picozza, 2021; Crawley and Skleparis, 2018).

constantly transferred, deported, or released, therefore maintaining a high turnover inside detention facilities (Hiemstra, 2019). For collective organization to spark within this system, there needs to be an event that can "bend" these vertical statuses and legal paths, so as to expand them horizontally in a way that allows people to come together. There needs to be a common condition embracing several people who can consequently act as a group.

We might be tempted to think of Covid-19 as a danger for the detainees, a danger of such intensity that spurs them into action. However, detainees at OMDC or other detention centers are normally facing greater risks than Covid. They are all in removal proceedings, and many of them may lose their lives if they are deported. For example, a hunger striker who spoke to me after being deported to his country spent several months in hiding upon his return. When we spoke, he couldn't come out of his hiding for fear that members of a local gang would identify him and kill him. Far from exceptional, these risks are common for immigration detainees, and many of them would rather take their chances with Covid than be deported. This also goes for those who have spent long periods of their lives in the United States, possibly since they were children, and for whom deportation is a form of banishment from their families and country (see Zilberg, 2004).

The reason for Covid's disruption is not just the risk in itself, even though it obviously matters, but its horizontal form of expansion. Suddenly, everybody has a common status of vulnerability due to the virus, and to speak of one's case is to speak of them all. Obviously, the risk of infection is not shared equally. Depending on their medical condition or their age, people may suffer greater or lesser risks, but the virus acts

as an equalizer nonetheless, leveling differences and presenting a common problem that encourages collective organization. Here, political agency is not sparked by an a-priori free will that is possessed by each person, but by the mutual relations among them, which are affected by the virus' presence. The virus effectively undermines the pre-existing regime even before the strike is declared, because it breaks through the various legal categories and classifications that discourage collective organization.

Within this context, the political should not be associated with a choice to act that is taken by a human actor that acts independently. Such a humanistic focus[5] risks confusing the scenario that is forcefully enacted by the detention system with a reality that exists a priori,[6] because individuals are only acting alone when the system can successfully separate them and individualize them. In this context, individual actions testify to the strength of the system, which can prevent single actors from affecting others into joining them. Instead, the power of the protest consists in its breaking through individual differences to spark collective organization, so as to defy the boundaries separating each individual actor from others. In this sense, Covid-19 did not simply cause the protest by giving a reason to strike, but it also undermined the existing regime by encouraging organizing, and by creating the possibility for larger resistance.

[5] "Humanism" here does not merely translate as human-centered, but it identifies any philosophical approach that posits the human as a separate subject that relates to others while maintaining its own integrity and identity as a human.

[6] Notably, while the literature concerning the political in detention has primarily focused on human actors, there are scholars working in carceral geography who have expanded their focus to animal studies and human/non-human relations inside prison gates (Moran et. al. 2021; Morin, 2018)

III. The spread of the pandemic and the declaration of the strike

In March 2020, US authorities began to acknowledge the seriousness of the threat posed by Covid-19 to incarcerated individuals, and preventive measures were taken in carceral sites across the country (Federal Bureau of Prisons, 2020). The immigration detention system was no exception, and things inside OMDC began to change. On the 13th, all visitations to detention centers were suspended, and Immigration and Custom Enforcement (ICE), which is the federal agency tasked with managing immigration detention in the United States,[7] initiated transfers in-between facilities so as to avoid overcrowding. The population at OMDC decreased, also because new admissions into the facility were put on hold. Still, in April the ICE section of the center[8] was detaining around 700 people across 11 different units (*Alcantara v. Archambeault*, 2020 May 1, 2). Meanwhile, a sentiment of fear spread across the population. In the month that preceded the strike, detainees began realizing the danger, as authorities did not appear able to stop the virus, and neither did they seem to care. They were unable to conduct testing, it was impossible to respect social distancing, and furthermore, as soon as people began to fall sick they were simply transferred to a "medical pod" where they would not receive adequate medical attention (California AG, 2021, 140-142).

On March 30, an employee at the facility tested positive for Covid-19 (Morrissey and Lopez-Villafaña, 2020). In the days that followed, more and more people began

[7] Beside detention, ICE is charged with monitoring removable immigrants inside the country and coordinating their deportations.

[8] OMDC also detains individuals for the United States Marshal Services in a separate area of the detention center. In this paper I solely focus on the ICE section of the facility.

showing symptoms, and by April 15th, twenty-seven detainees had tested positive, making OMDC the detention center with the highest number of infections in the country. By the end of April, that number more than tripled, with 98 confirmed cases (*Alcantara v. Archambeault*, 2020 May 1, 8). Finally, on May 3rd, OMDC registered the first Covid-19 related death in the national detention system, that of an El Salvadoran man named Carlos Ernesto Escobar Mejía (Morrissey, 2020b). But already by mid-April the medical pod was full, and the situation appeared to be out of control. It was in this period that detainees across the center decided to go on strike (Rivlin-Nader, 2020).

The first hunger strikes were declared in early April, and by the 15th there were active strikers in at least 9 units of the detention center (Morrissey, 2020a). ICE had already put the units on lockdown in an effort to prevent contagions, and detainees could have no contacts with people outside of their pods. Consequently, the hunger strikes began separately. My contacts in this period were in a specific unit which I will refer to as Pod X. In early April, detainees in Pod X began having discussions in the common area of their unit, where they would debate possible courses of action. These were difficult discussions among people who did not always share a common language, and the meetings required work from interpreters to translate. Rivalries, or distances due to cultural reasons had to be set apart, as people acknowledged that this could only work through mutual cooperation. Finally, on April 17th, they decided to go on strike.[9]

[9] The strike would be conducted by alternating periods of starvation ranging from a few days to a couple of weeks, to periods where the strikers would go back to eating. This allowed them to reduce the risk of dying or to weaken themselves excessively in the case of an infection.

The decision to strike was initially motivated by the specific conditions in Pod X, but the detainees were further encouraged after realizing that hunger strikes were already being declared in the same facility and elsewhere in the country (O'Connor, 2020). This information could have come from the televised news, or through phone calls and letters from family members, supporters, and lawyers. Knowledge of these developments facilitated the formation of a network encompassing separate units and facilities, and the strikers were attracted by the possibility of joining a growing movement, as this would have resulted in a more powerful protest than what they could accomplish individually. In this sense, each striker's decision to join was affected by others who had already done so, and also by the awareness that every new participant would have encouraged others into follow, both within their own unit and elsewhere.

Human agency in this case does not consist in an inherent ability to act that is possessed by each striker independently. Instead, agency is produced through affection, so that our focus should switch from the strikers themselves to the mutual relations among them (see Pile, 2010; also Clough, 2012; Bosco, 2007). It is their ability to communicate with each other that fosters political agency, just like their ability to infect each other allows the pandemic to expand. This is a process of contagion, where the strike spreads across bodies and facilities due to the people's ability to transmit it. Hence its formidable pace, with the protest spreading across the two coasts in a matter of days, just like the pandemic.

When looking at the strike in these terms, it is possible to identify those factors that determine its strength. The strike is a virtual possibility whose power depends on its potential to spread. It possesses a specific temporality and spatiality, because it consists

not solely of those who are currently striking, but most importantly to their power for encouraging others to follow in the immediate future and elsewhere. The authorities who fight it will similarly operate in space and time to prevent it from growing, and to keep it contained to the facilities and cells to which it has already spread. For the authorities, the most pressing issue is not to stop the strikers from starving, but to act on those material conditions that permit the strike to travel, because those who are currently striking are always more than their sum, and what matters is their potential for growth.

The strike is led by the desire to escape detention, but there is a fundamental difference between seeking release through this process and doing it "legally," through the pathways that are offered by immigration law. In both cases, the release is contingent upon a change in the subject, but their form is different. Borrowing from Deleuze and Guattari (1987), we may describe the "legal" option as a "reproduction by filiation," which is vertical and works through sudden transitions in between static moments. Similarly, individual detainees who apply for release seek a transition into a different status, which would let them out either on bond or parole. Conversely, the collective strike corresponds to a "reproduction by contagion." This is a process of becoming that disrupts a fixed being by bringing it into relation with others, so to lose its individual subjectivity and become many: "The difference is that contagion, epidemic, involves terms that are entirely heterogeneous: for example, a human being, an animal, and a bacterium, a virus, a molecule, a microorganism" (242).

Simply by gathering, and by cultivating new relations among themselves, the detainees spark a process that makes the label of "detainee" amply insufficient to describe them. They are a multiplicity. The multiplicity is not the sum of the individual strikers,

and neither a mass that could be counted and governed on a macro scale (Deleuze and Guattari, 1987, 8). Why is this relevant? Because the existing regulations of the detention center, and immigration law itself, can only govern subjects who are either individual "aliens" or populations. By forming a multiplicity, the strikers are becoming ungovernable, as they defy scales. This puts the detention system into a crisis.

Is the multiplicity striking? Perhaps, the problem with this question is already evident. The strike constitutes a process involving people coming and remaining together to starve. To interpret it as an act would be just as absurd as considering the pandemic the act of a subject that is Covid-19. Quoting Nietzsche, that would be akin to considering the lightning as producing the flash in a storm. The two are not separable: 'there is no "being" behind doing, effecting, *becoming* [emphasis added]; "the doer" is merely a fiction added to the deed-the deed is everything' (1956, 45; also Feldman, 1991, 3-4). The pandemic is a process whose existence is conditioned on the bodies that spread it, and on a space that is sufficiently open to allow it. The mobilization of strikers resembles it, because it is a becoming-political of the pandemic itself, and furthermore, a becoming-pandemic of the humans detained, who borrow the virus' strength. This protest is best understood as a force, whose strength is conditional on how many people it can affect into joining. The affection is only possible when people get close, when they share, when they touch each other (Arenas, 2015). This political pandemic has a broader spatiality than the detention center, it travels within institutions as soon as somebody brings it in through a phone call, or through a segment on the news. It bends space, shrinking distances and moving fast.

IV. To break up the strike: Counter-strategies within the detention center

For the authorities managing detention, and particularly ICE, the strike and the pandemic posed a significant threat due to their ability to spread across the system at a pace that was difficult to govern. From ICE' perspective, the immigration detention network corresponds to a circuit of different facilities, where each site functions as a node that is interconnected with others (Gill et. al. 2018; also Brooks and Best, 2021). All sorts of goods, people, capital, and information circulate across the routes connecting each node, but ICE must be able to recognize "bad" circulations and to lockdown the nodes that are producing them (Tazzioli, 2020; Foucault, 2009: 325-326). What rendered the pandemic so threatening was ICE's inability to stop it from circulating and affecting the entire network.

Covid-19 connects people and owes its power to the fact that people are connected. ICE's power comes from the opposite: it relies on its ability to separate people to control them. In this sense, the hunger strike-pandemic and ICE owe their strength to opposite spatial organizations. The conflict between the two unfolds across this trajectory, and it constitutes a struggle over spatial control between two forces who battle for their own existence. This is not an overstatement. Had the detainees been able to obtain a mass release, ICE would have been left with empty detention centers, which are not economically manageable. This would cause the private contractors to go bankrupt, and even worse, it could reveal that immigration can be managed without relying on a detention system of this magnitude. We should appreciate how threatening this scenario is for ICE, particularly at a time when calls for its abolition have become mainstream (Ember and Herndon, 2018).

In the previous section, I began the analysis by illustrating the change in human and political relations inside OMDC before and after the pandemic. Here, I do the same by describing how ICE changed its approach toward political unrest once the protest began.

Importantly, ICE does not manage OMDC by itself. It is a privately run facility owned by CoreCivic, which is a private contractor operating in the detention and prison system in the United States (see Hiemstra and Conlon, 2017). ICE charges CoreCivic with the day-to-day management of the center, which includes disciplining violations. In my experience talking with detainees at OMDC, I repeatedly heard that the two organizations are not always on the same page, and that there are often tensions among the two. In general, ICE agents appear to be wary of CoreCivic's officers unnecessarily escalating situations, as this may result in unwanted public or legal attention to the detention center. It is most likely for this reason that ICE takes care of hunger strikes directly. Whenever a detainee stops eating, CoreCivic is under strict instructions to report to ICE, and not to take matters into its own hands (US Immigration and Custom Enforcement, 2019, 108-109). Once the agency is informed, they will generally wait 48 hours before sending an agent to talk with the hunger striker. During my visits, and prior to the pandemic, I met two men who underwent this procedure on separate occasions. The agents who met with them kindly and emphatically convinced them to stop their strike. These men gave up the protest after the meeting, but if they had not, ICE would have sent them to solitary confinement and eventually obtained a court order to force feed them (Stevens, 2019).

During the pandemic, however, ICE did not attempt to reach anybody individually, and the agency made no effort to negotiate with the detainees. The change in strategy corresponded to the acknowledgement that the collective strike constituted a different type of threat. In this case, the most immediate goal was not to break the individual resilience of the single strikers, but to prevent the strike from traveling across the circuit. Similarly, the fear of the pandemic was not due to the strength of each single infection, but to the possibility of having too many infections at once, which would have rendered the situation unmanageable. That this was the case can be inferred from the agency's behavior during the pandemic.

First, in mid-March, ICE began conducting mass transfers across facilities. More than a hundred detainees left OMDC on March 15th, and they were transferred to the detention center of Joe Corley, in Texas. The transfers were obviously not advisable from a medical perspective as they could have spread the contagion, but it eventually became clear that ICE had a different goal: they wanted to reduce overcrowding. This would permit emptying out certain units that could be turned into medical pods to detain the sick. In fact, one of the triggers to the strike in Pod X was the notice of the incoming transfer of people from Pod X to another unit that had already registered positive cases. Obviously, the logic of such a transfer was not to prevent contagions, in as much as to facilitate the management of the incoming outbreaks by reserving an entire unit to the custody of sick prisoners.

Second, all units were put on lockdown, thus preventing people in different pods from visiting the same common areas where they could spread the contagion. However, to lockdown the pods had an additional advantage: it prevented people from contacting

individuals outside of their units. But just like the pandemic, the hunger strike could not be stopped by mere walls. Detainees in Pod X heard about protests in other units through the same channels that conveyed news of developments in other facilities. The virtual channels of communication allowed for a horizontal expansion that could connect the various nodes across the circuit and overcome isolation and distances (Marshall et. al., 2017; also see MacKinnon, 2011). Therefore, ICE adjusted its strategy to the new threat.

The adjustments were designed to close the channels of communication in between the different nodes, so as to increase their isolation. The most delicate channels were phone calls and TV news. These links were sensitive because the information would flow two ways. The protests and lawsuits outside would rely on information coming from the inside, while the detainees would rely on information from supporters to link their struggles to those of others. Thus, to break up this connection could isolate people outside as well, so that their protest and the strike would not become one. This was achieved through retaliation against detainees speaking to the media or to activist groups, and by monitoring the common areas to change the TV channels whenever the news spoke of the protests. In June, ICE went as far as formally prohibiting any phone or letter contact with the activist group Otay Mesa Detention Resistance (Morrissey, 2020c). This strategy was applied nationwide, and supporters countered it by holding demonstrations in front of detention centers, honking horns and chanting so that the detainees could hear them (Kutz, 2020).

Furthermore, the gathering of people had to be hindered inside the pods as well. To do this, CoreCivic established a full lockdown for the strikers, so that they could not leave their cells and access the common area of their units. This was particularly

efficacious in Pod X, because the people there were classified as mid or high risk, and their cells had only two beds for security reasons. Additionally, CoreCivic sent some strikers to solitary confinement in the segregation unit. These strikers were fully isolated from the rest and prohibited any access to phone calls.

When looking at this strategy, I direct attention to how its goal is not to bring the number of strikers or contagions down to zero. That would be impossible, and furthermore, unnecessary. ICE focused on reducing the pandemic's and the strike's ability to spread, and it did so by isolating the population into smaller units that would have more difficulty communicating (see MacKinnon, 2011). Rather than curing the sick or forcing individual strikers to eat, ICE's strategy focused on preventing the strike and the pandemic from growing to a point where they would become unmanageable. After all, the power of both phenomena was not due to the gravity of each infection, or to the resilience of each single striker, but to the transformation of individuals into nodes that could facilitate the "bad" circulation across the circuit. The solution was to focus on each person's ability to affect others, and to reduce it by reaching a certain level of isolation within and between facilities.

V. Representing multiplicities: The class action and its commonality requirement

In this last section, I consider how the protest spilled into the courtroom, and how the existence of legal proceedings that were being brought against ICE affected its broader dynamics. I discuss the legal side of the event in a separate section because it makes for a clearer analysis. But the reader should not take this to imply that what happened in court remained external to the struggle unfolding inside OMDC. Instead, the

possibility of a court-mandated release shaped the dynamics of the protest from the start. My analysis here resonates with the work of legal geographers, and particularly with those scholars who conceive of law and space as mutually constitutive of each other (Bennett and Layard, 2015; Braverman et. al. 2014; Delaney, 2010), and more generally with all those branches of legal studies who approach the law as a field involving not only text, but also bodies, spaces, and viruses in this case (see for example Philippopoulos-Mihalopoulos, 2019).

When detainees at OMDC first gathered to decide whether to strike, they were aware of the need to shape their demands in a form that could be legally feasible. From a legal perspective, to demand a collective release posed two problems. First, the multiplicity of strikers does not have standing in a federal court, as it is not a proper subject of law, unlike an individual detainee. The only possibility for representing all the detainees in the facility is a class action, but this choice is accompanied by several limitations that I discuss below. Second, to demand a collective release constitutes an exceptional request, which is very unlikely to succeed. This put the strikers in a difficult spot: they had to balance their request with the break from the existing regulations that was implied by the demand. How they attempted to do so may be read in a letter that detainees in Pod X sent to the local media on April 17th.

> UNITED IMMIGRANTS OF THE OTAY MESA DETENTION CENTER
>
> On April 17th we joined the hunger strike of our brothers in other units of this detention center [...] we fear getting infected by Covid, as this

detention center already has the highest number of contagions in the entire American nation.

Because of this, we ask the highest boss of ICE, the Attorney General, the Inspector General, and all the Federal Courts of the District and the Supreme Court to please release us on bond or parole so that we can continue our immigration proceedings with our families, because if we keep staying here many lives will be lost because of Covid-19 [...] we are human beings that are asking for an opportunity in this great nation.

We are fathers, sons, brothers, and grandfathers.

Please, we ask you that you let us stay with our families in these difficult times.

Thank you.

GOD BLESS AMERICA [in English in the original] [10]

Someone who is unfamiliar with US immigration law may confuse this text for a demand that is solely written to convey a sense of humanity and dignity against an oppressive system. But this is a document authored by people who are quite familiar with the regulations of detention, and it shows. Specifically, the United Immigrants are using certain characterizations that have value under immigration law. First, they claim to have family members in the United States who are suffering from their detention. Second, they

[10] The translation from Spanish is mine. This letter was sent to an activist group that I worked with, but the authors also sent it to the San Diego Union Tribune, which published a few quotes (Morrissey, 2020a).

show devotion to the country. Both arguments carry weight in bond proceedings, where a detainee can ask to be released on bail, and they are also factors that must be considered when granting a cancellation of removal in an Immigration Court.[11] Third, they express the desire to continue their immigration proceedings at home with their families. This means they have no intention to flee, and that they are willing to remain at a precise domicile while their proceedings unfold. All this is doable under ICE's regulations.

In other words, the law is not a field that the detainees are looking at from the outside, and much less an enemy to destroy (see Reiter, 2014; Bailey, 2009). The United Immigrants are well embedded in the law, and their possibilities for constructing a discursive identity are determined by the existing legal system. They are not writing on a blank page, as they must follow certain rules for their text to be considered. This apparently diminishes the insurrectional character of their protest, and that is exactly their intention.

To bring this claim into court is a lawyer's job, and the instrument to do so is that of the class action. A class action allows the detainees to present themselves as a group, as an exception from the normal rules regulating standing in court, which restricts it to single individuals acting on their own self-interest (see Carroll, 2016). At the national level, the first class action lawsuit concerning immigration detainees during the pandemic was *Fraihat v. ICE,* which was filed in April 2020. The plaintiffs in *Fraihat* were a group of immigration detainees held at separate facilities in the country, and they certified two classes that included every immigrant in the detention system who possessed specific risk

[11] Cancellation of removal is enshrined in INA §240A(b)1.

factors that made them vulnerable to a Covid-19 infection.[12] They argued that medical conditions inside detention centers were so poor that to be detained in those conditions constituted punishment, thus violating their constitutional rights. Therefore, they demanded the Court to issue a preliminary injunction forcing ICE to find immediate solutions.

Notably, the plaintiffs in *Fraihat* did not ask for a court-mandated release because that would not have been realistic. From a legal standpoint, ICE is entitled to a high level of discretion in the management of detention, and for a court to order a release there must be a clear assessment that any alternative solution would fail to prevent a violation of the plaintiffs' rights. Thus, a release could be demanded, but only for a class that is narrow enough to justify it. In this case, and as argued by ICE, the two classes included people who were detained for different reasons, with different levels of vulnerability, and furthermore in separate detention centers, with each center presenting a different level of risk due to the number of people who had tested positive in each one. If the class is too broad, as in this case, the plaintiffs may only demand a solution that is as general as the class itself. Thus, the Court ordered ICE to run proper medical screening, and to consider releasing the detainees who were particularly vulnerable, while leaving ample discretion in this matter.[13]

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[12] The first class included individuals possessing at least one of the "risk factors" that had been identified by the Center for Disease Control as possible vulnerabilities to Covid-19. The second class included every detainee who possessed specific disabilities that placed them at high risk in the case of an infection.

[13] More specifically, after *Fraihat* detainees could file for humanitarian parole to ask for release due to their medical conditions. However, this was a discretionary procedure, and while ICE was bound to consider the parole applications there was no obligation on the agency to release the applicants.

After *Fraihat*, the American Civil Liberties Union (ACLU) filed a class action for detainees at OMDC in May 2020, this time asking for a release. In this case, the problem was to balance two contrasting goals: first, to certify a class as inclusive as possible, so as to be able to represent a larger share of the detained population; second, to certify a class that was narrow enough to justify the request for release. As expected, ICE pushed against this process by attacking the class action under the argument that the classes proposed by the ACLU were too large to show a sufficiently common interest. Specifically, ICE argued that class members possessed different levels of medical risk to an infection, and the releases needed to be assessed individually because of the different interests of each person.

As a consequence, the ACLU had to construct a smaller class than the entire population, which only included detainees who were 45 years or older, or with specific medical conditions. On May 1st, the Court found a compromise and established that the age requirement must be raised to 60 years (*Alcantara v. Archambeault*, 2020 May 1, at 7). This class comprised 134 individuals,[14] but ICE refused to release 34 of its members because of their criminal records (some of them were in Pod X). The ACLU filed for a new court order, but they were eventually unsuccessful, because after a month from the previous decision the Court established that the conditions in the facility had changed enough to guarantee the minimum safety, so that ICE did not have to release aliens "with a demonstrated criminal history" (*Alcantara v. Archambeault*, 2020 May 26, at 1078).

[14] One of the 134 class members was Carlos Escobar-Mejía, who died on May 3rd before he could be released (*Alcantara v. Archambeault,* 2020 May 26, at 1076).

Inside the courtroom and OMDC, ICE adopted two different strategies with the same goal: to break the multiplicity apart. Both strategies converged in their purpose, while relying on opposite descriptions of the pandemic to achieve it. In detention, ICE treated the pandemic as a force spreading across the facility. When looking at the contagion through these lenses, what is significant is the virus' ability to travel across bodies, with each body becoming a node that allows the contagion to accelerate and grow. This ability to circulate and travel may be quantified, and it corresponds to the contagion, or infection rate. Conversely, in the courtroom ICE described the human-virus encounter by focusing on the gravity of each single infection onto the bodies that were being affected. This is another aspect of the contagion, which expresses the gravity for the individual who falls sick, and it may be quantified as well. Based on their medical conditions, people may be assigned a value that describes the risk of long-term consequences, or even death. This value individualizes the human-virus encounter, as it predicts the changes that the virus provokes to a specific body, instead of the body's ability to spread the contagion. Therefore, while inside detention the virus operated as an equalizer, in court ICE could utilize the pandemic itself to classify detainees according to their different medical conditions.

In the courtroom, the pandemic's political effects were obscured by interpreting the contagion as an individual risk, thus excluding its significance for triggering the protest and mobilizing the strikers. Through this process, the political subject inside detention was represented as a sum of agentless bodies to be classified according to their medical conditions, and their requests or their actions were excluded from the final representation of the event. This depiction of the human/virus relation obscures the

political significance of the contagion by constructing it as a quantifiable risk for the vulnerable subjects, whose interest only extended to the biological preservation of their individual health (see Dadusc and Madu, 2020: 8-9; Feldman and Ticktin, 2011: 89-127). Throughout this process, the solidarity and unity of the strikers was rejected as insignificant. Instead, the possibility for demanding the release of some was justified precisely by the exclusion of others, because the more people were excluded the greater the exceptionality of the class.

In the end, the medical classification replicated the same process of separation and isolation that ICE carried inside OMDC. There, the case had tremendous effects. People began being released, but many were left behind. Those who remained inside had trouble maintaining the strike in the face of these releases, which confirmed that their fate was going to be decided by others. Ultimately, the releases, the hunger, and the pressure by CoreCivic and ICE led to a sense of hopelessness and resignation. People began abandoning the strike in May, and the last strikers in Pod X gave up in early June.

Conclusions: The politics of Covid-19

In reading this article, people familiar with immigration detention in the United States have probably noticed how many of the things that happened during these events are not unprecedented. This was not the first protest involving several detention centers, and the authorities' reaction was not surprising, as it constituted an adjustment that did not fully break from prior strategies to quell resistance in detention. And yet, the speed at which this protest expanded, its capacity for involving people of different nationalities

and languages, and ultimately its magnitude, which reverberated outside detention as well, calls for a greater appreciation of Covid-19 as something more than a deadly crisis.

This article analyzed the strike that unfolded at OMDC and other facilities in an effort to account for its power, which I have connected to the pandemic itself. I directed attention to the coming together of human and non-human beings as the proper locus of political agency, an agency that is more than human, and which bore enough strength to undermine ICE's ability to manage its facilities and curtail political unrest. The theoretical framework that I adopted was designed to account for this phenomenon. I utilized the Nietzschean and Deleuzian concept of force to show how the power of the protest lay in its potential for growth, and thus, on the strike's ability to travel and spread throughout the detention network as a contagion, not unlike the pandemic.

This reading of the political should not be interpreted as undermining the sacrifice and efforts of the humans who participated in the strike. Instead, my analysis clarifies that the possibility for political resistance is dependent on specific material conditions, and that the detainees' ability to bore such a strength relied on the pandemic itself, which made it possible for them to express it. Thus, political agency is here understood as a virtual possibility, which can strengthen when conditions are ripe. The very biological vulnerability of the strikers empowered them to borrow the pandemic's strength, and to engage in a powerful mobilization that took the detention system by surprise. The protest blurred the boundary between the human and the non-human, the political and the biological, thus resulting in a biopolitical force that turned Covid-19 into an instrument to attack the detention system from the ground up.

As a final note, my purpose with this essay was twofold. Firstly, to demonstrate how a more-than-human, or posthuman, reading of the political could wield insights when considering the strength of a protest (Braidotti, 2013). Secondly, to offer a detailed account of one instance in the global moment of insurrection in carceral sites at the beginning of the Covid-19 pandemic. At that time, the protests were largely disregarded by the public and political debate, and this lack of attention damaged the ability to recount what happened and register it as an historic event. But while the outside society did not pay enough attention, incarcerated individuals all over the world gave rise to spectacular protests, and carceral sites witnessed a global mobilization of prisoners like no other in recent memory. In many ways, this was a flame that was smothered quickly. However, it remains an event of enormous historical and political significance, which testified to the prisoners' ability to rebel and organize collectively in pursuance of their goals. The 2020 protests are part of the history of the pandemic itself, and they should be remembered as such in present and future efforts to come to terms with the historic and political effects of Covid-19.

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6. Conclusion

In 2017, a seventeen-year-old "Jane Doe" was apprehended by US immigration officials shortly after she crossed the US-Mexico border undocumented. She was but one of thousands of Central American minors who make the long and dangerous trip northbound every year, to escape violence, poverty, and lack of opportunities in their home countries (Aitken et al. 2014; Swanson and Torres, 2016). Under the nomenclature that classifies "aliens" seeking entry at the US border, Jane Doe was a "Unaccompanied Alien Minor" (UAC), and as such she was transferred under the authority of the Office of Refugee Resettlement (ORR) and placed into a "shelter" in Texas.

While detained, Doe discovered that she was pregnant and decided to seek an abortion with the support of an advocacy group that helped her secure a court order authorizing her to do so. However, in 2017 the Trump administration had nominated a new director of the ORR, who had previously declared that UACs could not terminate their pregnancy while in his custody (Siegel, 2017). The government supported this position under the argument that UACs had no right to abortion under the US Constitution. Thus, even though Jane Doe had a court order authorizing her to receive the medical procedure, she was not permitted to leave the shelter to reach the clinic (Ehrlich, 2021).

The ACLU subsequently filed on Doe's behalf with the District Court, seeking a preliminary injunction that would allow her to leave the shelter and undergo the procedure. Doe won at the district level, but the case was appealed and ultimately decided by the DC Circuit sitting en banc. In *Garza v. Hargan* (2017), the DC Circuit established

that Jane Doe had the same constitutional right to abortion as any other woman in the country under the precedent of *Roe v. Wade*, and that the ORR could not block her from exercising this right under the fourteenth amendment. But beyond the succinct memorandum opinion, *Garza* gained attention because of the two dissents from Judge Brett Kavanaugh and Judge Karen LeCraft Henderson.

The two dissents are very different in their logic and ideological context. Kavanaugh relies on the rhetoric and principles stemming from the pro-life movement, which characterizes abortion as a threat not only for the fetus but also the mother herself, thus selectively co-opting feminist rhetoric to oppose the right to abortion (Leach, 2022). Conversely, Henderson's argument does not concern abortion itself, but rather Jane Doe's ability to claim constitutional rights as an "illegal" alien in the country. Her opinion is rooted in the plenary power doctrine, and it exemplifies the anti-immigrant ideology that continues to pervade US immigration law. As argued by Leach (2022), the dissents are the expression of two different ideologies, which follow opposite trajectories to reach the same conclusion. They also speak to the themes and concepts that have been examined in the chapters above, and they give a particularly vivid example of how biopolitics are negotiated and practiced in US immigration law.

Kavanaugh does not dwell on Doe's nationality or legal status, but primarily on her age and on the government's duty to protect her and the fetus. The context of her detention matters to the extent that it makes Doe even more vulnerable, and Kavanaugh suggests delaying the medical procedure until the government can find her a sponsor, so that she could make her final decision in a benign environment. Kavanaugh eventually went on to become a Supreme Court Justice in 2018, and he played a key part in

overruling *Roe v. Wade* and dismantling the constitutional right to abortion in 2022. Despite his attempts to write the dissent in *Garza* in accordance with *Roe,* the opinion reflects the pro-life opposition to abortion being a woman's right, and it only makes sense within this ideological context. The pro-life thesis is clear: the fetus must possess personhood. Accordingly, the fetus is constructed as juridically separate from the body that feeds it, and the limitation of the mother's control over her own body is justified to protect the right to life of the "unborn" baby.

Judge Henderson reaches the same conclusion from an opposite trajectory. For her, the issue is not whether the fetus is a person, but whether the mother is. Through an extreme (and yet historically cogent) interpretation of immigration law, Henderson concluded that "illegal" aliens have no rights under the fifth and fourteenth amendments of the US Constitution. She acknowledged how this is not true for all aliens, because of the partitions and classifications that have historically fragmented the foreign population, and which I have reviewed in Chapter 2. However, she concluded that Jane Doe was not a lawful permanent-resident, or even an illegally resident alien, but "an alien minor apprehended attempting to cross the border illegally and thereafter detained" (*Garza v. Hargan*, 2017: 87). No rights could be claimed by this subject, and that is because "although the panel dissent found 'deeply troubling' the argument that J.D. is not a person in the eyes of our Constitution, the argument is nevertheless correct" (*Garza v. Hargan*, 2017: 88).

How can the two arguments converge? How can an ideology that attempts to extend personhood to fetuses be coherent with another that negates the personhood of the mother? Perhaps, this is because "the essential failure of human rights, their inability to

restore the broken connection between rights and life, does not take place in spite of the affirmation of the ideology of the person but rather because of it" (Esposito, 2012a:5). The pro-life discourse utilizes personhood to construct a new person, which can take over part of the mother's body and reduce her autonomy. The anti-immigrant logic takes a less sophisticated, more direct approach, and it degrades the immigrant mother to an inert matter without any personhood at all. The difference is only one of rhetoric. The pro-life argument is much softer in its design, as it claims to be protecting the mother as well as the fetus (Leach, 2022). Conversely, the anti-immigrant argument is more brutal, and it makes no mystery of its intention.

Particularly in Henderson's opinion, it is easy to identify the link between biopolitics and the border. The body here is effectively a borderland (Ehrlich, 2021), and the excess of those partitions separating Jane Doe from US citizens and resident aliens. At this juncture, biopolitics and thanatopolitics[1] converge, because when the argument is taken to its logical conclusion one can presume that the government could even terminate the pregnancy against the mother's will or sterilize her. Clearly, this is not what Henderson is arguing, and yet the plenary power doctrine underpinning her logic is rooted in the history of eugenics,[2] and Henderson would hardly be able to object if someone decided to push her dissent even further.

[1] As in the politics of death.

[2] More specifically, and as argued in Chapter 2, plenary powers were constructed as a sort of police power possessed by the federal government against those subjects who are not citizens of a State. Police power was also the legal source of authority for state-issued practices of sterilization and eugenics during the 19th and 20th century, and the plenary power doctrine was constructed at a time when eugenics was a particularly popular medical theory in US politics and medicine. In fact, the rhetoric accompanying the extension of plenary power to immigration in the late 19th century co-opted much of the same rhetoric of

The concepts of territory and personhood underpinning the dissents are two sides of the same coin. One latches onto land and bounds it under a transcendental quality, which makes the land the property of the authority governing it; the other encloses the body within its skin and associates it with a person whose autonomy consists in the ownership of the body itself. From this preliminary partition, all sorts of other enclosures may be performed. The body may be split between the mother and the fetus to obtain two persons competing over the same body, or even be expropriated from the mother to cancel her personhood and reduce her to bare life. Similarly, territory may be further split into enclaves for different subjects, or even deprived of any quality and reduced to a no man's land, like the place where Sergio Hernández died after being shot by a Border Patrol agent in 2010.

As examined in Chapter 4, the biopolitics that result from this system is far more complex than the classic dichotomy between "to make live" and "to let die" (Aradau and Tazzioli, 2020). In her analysis of *Garza,* Brittany Leach (2022) underlines how the government's attempts to curtail women's right to abortion coexist with a lack of medical care for those detainees wishing to give birth. Not only are they refused proper medical attention, but they are also subjected to security measures that often result in miscarriages. This hints to "a contradictory logic underlying current policies: immigrant women's fetuses may be neither killed nor born alive and healthy" (Leach, 2022: 117). Here, biopolitics comprehends tactics of abandonment (Aru, 2021), humanitarian intervention (Williams, 2015), induced debility (Puar, 2017), and ultimately pain and suffering that

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the eugenics movement (Black, 2008: 68), with both Native Americans and Chinese immigrants being described as inferior and a possible threat to the body politic of the United States.

regulate life according to multiple axes. These intersect territory, nationality, gender, vulnerability, and all other classification that acquire meaning within the work of partition supporting the immigration system.

When facing these scenarios and judicial opinions, one must wonder whether borders and boundaries are necessarily bound to these outcomes. Do all walls lead to death, or to a life that can only be characterized as the content-less negation of death itself? Against this debate, the essays above take a less absolute position. Instead, I argue that boundaries possess affirmative power, which can be productively employed to find alternative pathways leading to different politics of life and space than those envisioned by Judge Henderson's opinion. This has been the overarching goal here. Not to reject scales, borders, and territory as solely negative concepts, but to find the affirmative politics of difference and coexistence that their alternative usage may inspire. In other words, boundaries are here to stay, and we could not think of space or life without them. They do not, however, inevitably lead to isolation, xenophobia, or politics of death.

I. The generative power of boundaries

This investigation began in the second chapter, where I examined the link between personhood, territory, and law in the US immigration system. There, the question of "who is the alien?" was shown to be answerable only paradoxically. The law can only construct the alien as the negative excess of the political relation linking the citizen to the land, and foreign life is conceptualized as a homogenous, content-less substance to be partitioned across the same categories that divide the domestic space. The dispositive that underpins this system is that of the paradox. The paradox confuses the distinction between foreign

and domestic by leaving open the option of extracting yet another life or space from the negative outcomes of each binary operation. To include the alien, the two poles must meet and produce a new space to contain a new life, so that the system may continue to unfold and maintain its paradoxical validity. The life of the citizen is just as empty as that of the alien, two negative categories that can only exist as the opposite of one another. In this sense, and even though negative, the paradox is also productive, and it exploits the generative tension of the encounter between two spaces that were originally constructed to be mutually exclusive.

The overall trajectory of the chapters that followed was to examine alternative conceptualizations of space and life that could counter the negative structure of US immigration law, and the definitions of territory and life supporting it. In Chapter 3, I critically examined the conceptualization of territory as a transcendent quality of soil; in Chapter 5, I attacked the conceptualization of human life as an autonomous self that is associated to an inert body. In both chapters, the goal was to think space and politics not through transcendence, "but rather into the radical immanence of 'just a life'" (Braidotti, 2013: 132). In terms of territory, this does not equate to a geography without scale, or through a fascination with flows and networks that reject the possibility of walls and boundaries as a matter of ontology (MacKinnon, 2011). Instead, territory is identified here with the effect of practices, a productive construction that materializes power regimes to achieve control (Painter, 2010). Land is not the inert, the non-political to which humans give meaning, but the immanent condition of politics that presents opportunities, obstacles, and possibilities.

Territories are designed to separate, but in doing so they also connect: difference does not necessarily translate to antinomy and war. “We must simultaneously take into account two aspects of the territory: it not only ensures and regulates the coexistence of members of the same species by keeping them apart but makes possible the coexistence of a maximum number of different species in the same milieu” (Deleuze and Guattari, 1987: 320). This quote by Deleuze and Guattari describes a concept that is often lost by those readings that depict them as the philosophers of a relational chaos, where boundaries are rejected by default. Instead, they conceptualize boundaries as the very condition of becoming, the necessary construction that leads to positive difference and coexistence. *A Thousand Plateau* explores the intersections between geography and philosophy to possibly a greater extent than any other work in either discipline, and it is not by coincidence that the authors have found in territory the instrument to do so. Their conceptualization of territory as a form of becoming highlights the generative power of boundaries, and underlines how to think without territory, walls, or difference would lead to a toxic homogeneous wasteland incapable of generating anything.

Chapter 3 approaches the concept of territory through an engagement with Deleuze and Guattari along with some of the most influential geographers working on this topic. Here, territory corresponds to the politics of space. Conventional definitions of territory treat land as the non-political, the equivalent of bare life where inert matter is only meaningful to the extent that it sustains the person or authority that owns it. Instead, an immanent approach finds in land, soil, sea, or air multiple possibilities of power, the material conditions for enacting a political regime. Land, like *zoé*, determines the possibility for different trajectories of becoming.

This is valid for states as well, and states could not be made legally accountable for their actions without acknowledging the territorial dimension of their power. While they may adopt conventional definitions of territory in their efforts to escape accountability under human rights law, their contemporary approaches to border control are anything but conventional. The pressure of immigration has led to creative (and lethal) instruments to deploy terrain as a weapon in the war against foreigners. This includes strategies of deterrence in the Sonoran Desert (De León, 2015), surveillance and rescue operations in the Mediterranean (Marin, 2014), illegal kidnappings and refoulements in the Greek archipelago (Tazzioli and de Genova, 2020), among many others. Here, territory is not an idea but a project, which exploits the physical characteristics of migrants' routes to stop them, immobilize them, and even kill them.

Thus, boundaries never just isolate. This is a theme that I have explored in these chapters, and which is overtly present in the geographic literature. As discussed in Chapter 4, one of the most significant contributions of geographers to carceral studies is their conceptualization of prisons as nodes across circuits, instruments to regulate flows and network and not simply stop them (Gill et al. 2018). Scholars in island studies utilize the same perspective when examining insularity as a geographic quality, thus treating it as a liminal concept that corresponds to neither isolation nor connection, but to the generative tension between the two (Randall, 2020). In this sense, boundaries are there to regulate contact through enclosure, and it is only when isolation is confused for identity that their generative potential is curtailed. Each of these chapters relied on this premise to investigate their respective topics.

Niklas Luhmann is another author who brilliantly examined the generative power of boundaries, and one who significantly influenced the approach to law and space that characterizes the present work. For Luhmann, this was the case when conceptualizing a new approach to the discipline of law and society. In *Law as a Social System* (2004), he relies on system theory to analyze the law "in its own terms," meaning by reaching a definition that is sensical within the very system of thought that the law uses. Within this reading, legal theory does not consist in a definition of law that is external to the legal system, but in the very ability of the system to describe itself and acquire its autonomy throughout this process. But how will the law describe itself? Given that the very purpose of the description is to render the law autonomous, it could not take the form of an identity, or else the law would be identical to something other than itself. For this reason, legal sociologists who seek to study the law from within their own discipline are doomed to fail, because their theorizations of law as a social phenomenon will have no value for the law's internal gaze, where the legal and the social must remain distinct. Instead, the law describes itself through difference, thus making itself autonomous by remaining distinct from any other system that is not law. Therefore, the question leading the legal sociologist should not be "what is the law?", as if we were seeking its nature or essence. Instead, "the worthwhile question that should be asked is: what are the boundaries of law?" (2004: 57).

In Chapter 2, Luhmann's theory guided my analysis of law and space in reference to US immigration law. More broadly, this dissertation incorporates the lesson of Mariana Valverde (2009), who encourages geographers working on law to pay attention to those "legal technicalities" that are so meaningful to jurists, but which remain often untouched

by geographic analysis of law. Valverde's perspective resonates with Luhmann's work to the extent that she also criticizes geographers' attempts to study the law from the outside, thus failing to produce analysis that could be of interest for legal scholars as well. Other authors have moved toward this direction (for example see Coleman, 2012; Forman and Kedar, 2004; Gorman, 2017), and this dissertation shares the same ambition.

II. Zoé, land, and the political

Let us now go back to the case of Jane Doe that opened these concluding remarks. As discussed, there we confronted the dual possibility of personhood as a political technology. On one hand, to make more persons, on the other, to de-personalize. Despite their opposite directions, the two strategies effectively converge in their reduction of life to a negative. Personhood can only affirm the value of life by distinguishing one life from another, so that the "non-person" is an integral part of the dispositive, because its inclusion only makes sense "to the degree to which it marks a limit beyond which there is always someone or something" (Esposito, 2012b: 23). As I have argued in the second chapter, immunity is the telos guiding this structure, in the sense that the foreigner's inclusion into the country as a non-person is a necessary constituent of the national community itself, which acquires its domesticity through the foreignness that is made present in its midst (Esposito, 2011). Thus, just like a vaccine inoculates part of the disease to build up protection, immigration law includes the alien to mask the emptiness of citizenship with a double negative.

And yet, the case of *Garza v. Doe* is illustrative of an additional paradox. The two dissents reach a consensus concerning the mother's status, which is conceptualized as a

lesser person by contrasting her person with that of another. For Henderson, this is the citizen, for Kavanaugh, the fetus. Kavanaugh's apparent concern for the mother's health can hardly hide how the pro-life ideology must conceptualize pregnancy as a conflict, which borders into a war between two beings fighting over the same body, just like Henderson conceptualizes the "alien" as a parasite that threatens the citizens' legitimate claim to the land. In both instances, the politics of life are also politics of death, as they conceptualize life as the eternal conflict against what is foreign or different. And yet, the paradox reaches its peak when it is applied to pregnancy. Because the fetus is indeed a foreigner in the mother's body, whose presence, however, does not result in war:

> "only if the paternal sperm is foreign enough to produce the blocking antibodies will the mother be able to tolerate the foreignness of the fetus by ignoring it… This means that what allows the child to be preserved by the mother is not their 'resemblance' but rather their diversity transmitted hereditarily from the father. Only as a stranger can the child become 'proper.' " (Esposito, 2011: 170).

From this alternative perspective, the separation between mother and fetus does not coincide with two separate personhoods who compete for the same body, but to a process of becoming where two different beings willingly interact with one another to become something different. The body here is not an inert matter supporting a transcendent being, but an immanent possibility of change. What matters is not what a body is, but what it can become, or rather, what is its potential. It is only because of the foreigner's presence, however, that a body can express this potential, because its generative power does not lie in its uniqueness but in the ability

to enter in relation with what is different from itself. The ideal of absolute purity that is affirmed by immigration law, on the other hand, can only lead to apathy and death.

Rosi Braidotti (2013) builds on Deleuze and Spinoza to outline this tension as the dichotomy between *potestas* and *potentia*, meaning power expressed in restrictive terms against power in the affirmative. *Potestas* stands for the negative biopolitics of identity, where boundaries function by enclosing the body and constructing the self as the body's negative other. Conversely, *potentia* refers to the body's ability to enter in relation with others. In *potentia,* boundaries assume a productive function by affirming difference as the condition for coexistence and becoming. The life that results does not coincide with a self that is conceptualized as the mind of an inert body, but with a force that escapes static identities through continuous change. Here, death is included as part of life, as just another possibility of living. In this sense, *this* life possesses a content, and it does not exist as the mere negation of death: "The proximity to death suspends life, not into transcendence, but rather into the radical immanence of 'just a life', here and now, for as long as we can and as much as we can take" (Braidotti, 2013: 132).

In the final chapter, I have built on these themes and concepts to propose a thesis that may explain the power of the 2020 hunger strikes in US immigration detention. I borrowed from Nietzsche (1989; also Deleuze, 1983) to conceptualize the strike as a force flattening the difference between the actor and the act, the body and the mind, the pandemic and the strike. In this instance, the affirmative value of politics is visible due to the diametrical opposition between the strike and ICE's backlash, as two forces guided by opposite wills. While each negates the other, the

strike exists as something more than pure negation, because of the will to life that leads it and empowers it with a substance and creativity that exceeds the conflict itself. In Nietzschean terms, while ICE can only say "no" the strikers can also say "yes." The strike is moved by the desire for release, as a will to power that affirms life and guides it toward alternative becoming(s):

> "Desire as the ontological drive to become (potentia) seduces us into going on living… If the habit becomes self-fulfilling, life becomes addictive, which is the opposite of necessary or self-evident…. Beyond pleasure and pain, life is a process of becoming, of stretching the boundaries of endurance." (Braidotti, 2013: 134)

For this reason, the strikers are neither a sum of individuals acting unilaterally, nor a mass with one voice and one name. Instead, they are a multiplicity of different beings that form a community based on what they have in common, which is their biological vulnerability to the virus. In this sense, their community does not coalesce because of a common identity between its members, but because of the experience of deprivation. Membership into this community does not grant new qualities but the very loss of one's individual subjectivity:

> "what the members of a community share, based upon the complex and profound meaning of munus, is rather an expropriation of their own essence… the community isn't joined to an addition but to a subtraction of subjectivity, by which I mean that its members are no longer identical with themselves but are constitutively exposed to a propensity that forces them to open their own

individual boundaries in order to appear as what is 'outside' themselves." (Esposito, 2010: 138)

The community constitutes a force where each striker stands as a single source of affection that can spread the strike like a contagion. Life here corresponds to the force of *zoé*, and the body does not need language, religion, psychoanalysis, or law to become alive: it just is, and politically.

III. For territory

Throughout the four separate essays, this dissertation advocated the importance of geography for legal and philosophical investigations over the relation between law and life. The question that ties all the chapters together, "who is the alien?", is answered to the extent that I have shown how the question of "who" is always also a question of "where." Politically and theoretically, affirmative politics need to be grounded in space, whereby space here identifies a material, discursive, and metaphorical concept, so as to counter the risk of imagining a spaceless life that fights out of place. Instead, what a life can do or become is contingent on the possibilities that are offered by the space that contains it, restricts it, and connects it with others.

In these concluding remarks I have also argued that the border's deadly effects should not lead us to reject boundaries entirely. The goal should not be to think without territory, but to re-territorialize appropriately. This is where geography can contribute the most to the ethical and political debates concerning the resilience and strength of nationalism in our time. As Paulina Ochoa Espejo has recently argued, territorial politics are not necessarily bound to degenerate in the (thanato)politics of identity. Instead, there

are possible alternatives where “territory, climate, water, and landforms and the way people relate to them take precedence” (2020: 14). Geographers can contribute to move beyond politics of identity but without losing focus on land, and to work toward ethics and politics of belonging that could escape the territorial and identitarian trap (see Agnew, 1994). Affirmative politics must be built toward this direction, and geography offers a meeting ground for different disciplines and voices to do so.

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