

Imaginings of Space in Immigration Law

Leti Volpp

Law, Culture and the Humanities published online 7 March 2012

DOI: 10.1177/1743872111435963

The online version of this article can be found at:

<http://lch.sagepub.com/content/early/2012/02/27/1743872111435963>

Published by:



<http://www.sagepublications.com>

On behalf of:

Association for the Study of Law, Culture and the Humanities

Additional services and information for *Law, Culture and the Humanities* can be found at:

Email Alerts: <http://lch.sagepub.com/cgi/alerts>

Subscriptions: <http://lch.sagepub.com/subscriptions>

Reprints: <http://www.sagepub.com/journalsReprints.nav>

Permissions: <http://www.sagepub.com/journalsPermissions.nav>

>> [OnlineFirst Version of Record](#) - Mar 7, 2012

[What is This?](#)

Imaginings of Space in Immigration Law

Law, Culture and the Humanities

1–19

© The Author(s) 2012

Reprints and permission: sagepub.co.uk/journalsPermissions.nav

DOI: 10.1177/1743872111435963

lch.sagepub.comlch.sagepub.com**Leti Volpp**

School of Law, University of California, Berkeley

Abstract

The law of immigration rests upon the space of the nation-state and on how the movement of bodies in and out of that space is legally imagined. Whether formal legal doctrine recognizes a human body as inside or outside a nation's territory is deeply consequential. Yet this formal doctrine presumes the nation-state to be a natural and innocent space absent of systems of domination. Case studies of concrete spatial locations demonstrate the social production of space. The case of a Danish reform coupling restrictions on forced marriage with a minimum habitat requirement indicates how space and immigration are produced in relation to gendered notions of race, linking the micro-space of the home with the macro-space of the homeland. The case of African Americans and poor relief in late eighteenth century Massachusetts, whereby immigrant origins were invented to evade town fiscal responsibility, shows how governmental space and immigration are produced as legal fictions. The Commentary concludes with a discussion of cosmopolitanism's yearning for an ethical place-lessness, and of the challenge posed to nation-state sovereignty and legal imaginings of space by noncitizens whom the state seeks to cast out.

Keywords

Migration, space, illegality, sovereignty, property, trespass, home

The law of immigration demands attention to how space is legally imagined. Space is constituted through legal language, and then serves as the seemingly natural "ground" for that language. At the most basic level, is a person *inside* particular territorial borders, or is the person standing *outside* at the gates? This might seem a relatively simple inquiry: is the person already here, or is the person at a port of entry, seeking to come in? But a little probing shows the legal doctrines governing this question to be complicated and paradoxical. Immigration doctrine does not treat everyone inside (or outside) the same

Corresponding author:

Leti Volpp, School of Law, 893 Simon Hall, University of California, Berkeley, CA 94720-7200.

Email: lvolpp@law.berkeley.edu

way. “Being here” can mean many different things, depending upon the initial conditions of a person’s presence inside. The same empirical fact – the physical presence of a human body – can be alternatively understood as an *entitlement*, if the person is a citizen; as a matter of *hospitality*, if the person is a legal permanent resident, a lawful temporary visitor, or a refugee; as a *trespass*, if the person is an undocumented immigrant; or as a *nullity*, if the person is a “parolee,” meaning that the person is physically here but is not recognized as having effected an entry. Thus, we can say that physical presence inside the territory is polysemic, in that it does not have the same meaning for everyone.¹

Perhaps the law should treat everyone inside the same way so that, as Linda Bosniak has suggested, we consider the idea of *ethical territoriality*, whereby “rights and recognition should extend to all persons who are territorially present within the geographical space of a national state simply by virtue of that presence.”² This is an idea which, as she notes, has both much to commend it, and serious limitations. As to why we might embrace the idea, ethical territoriality avoids what Michael Walzer described as a perennial metic population. At the same time, unless each individual inside a territory is immediately granted citizenship upon entry, the fact of alien status and its accompanying potential for deportation haunts the enjoyment of rights, so that it is not really possible for rights to actually extend to all persons who are territorially present.³ And ethical territoriality does not explain why one should privilege everyone who manages to get inside a territory and not those left on the other side of the border.⁴

My focus in this Commentary is not so much the normative nature of territoriality but the questions that arise in teasing out how laws governing immigration configure noncitizens in relation to space. In examining these legal imaginings, this Commentary will first highlight a number of contexts in which the recognition of bodies as inside or outside a nation’s territory has proved deeply consequential. One particular legal fiction about space that appears in U.S. immigration law, the entry doctrine, will be the subject of an extended discussion. I will then argue that an understanding of immigration’s spatial dimension is unduly limited when its focus remains formal law, and when it presumes the nation-state to be a natural and innocent space which, in the words of Henri Lefebvre, we could term “abstract space.”⁵ Legal imaginings of immigration and space are, in fact, shaped by systems of domination. When we examine the social production of space, “how bodies are produced in spaces and how spaces produce bodies,”⁶

1. See Peter Nyers, “Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement,” *Third World Quarterly* 24 (2003), p. 1088, describing the border as polysemic, meaning that the experience of the border is raced, gendered, etc.
2. Linda Bosniak, “Being Here: Ethical Territoriality and the Rights of Immigrants,” *Theoretical Inquiries in Law* 8 (2007), pp. 389–90.
3. Bosniak, “Being Here,” p. 398.
4. Bosniak, “Being Here,” p. 403.
5. See generally Henri Lefebvre, *The Production of Space*, trans. Donald Nicholson-Smith (Oxford: Blackwell Publishers, 1991). See also David Delaney, *The Spatial, the Legal, and the Pragmatics of World-Making: Nomospheric Investigations* (Abingdon: Routledge/Glasshouse Press, 2010).
6. Sherene Razack, “When Place Becomes Race,” in Sherene Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002), p. 17.

we see how conceptions of immigration and space are generated by race, gender, and economics. The Commentary thus turns to two case studies, one of a contemporary Danish reform that links restrictions on forced marriage with a habitat requirement, and one of African Americans and poor relief in late eighteenth century Massachusetts. I conclude with some thoughts on cosmopolitanism's yearning for an ethical place-lessness, and describe how noncitizens themselves are challenging legal imaginings of space.

The habeas litigation by prisoners on Guantánamo challenging their unlawful detention sharply raised the question – “Are these persons, in any conventional sense being held ‘outside’ of the United States, entitled to the protection of the U.S. Constitution?” The U.S. government chose to place the prisoners there – instead of on U.S. bases on Midway or Wake, former Pacific Island trust territories included within the federal district of Hawaii, in an effort to place them outside of the nation’s borders and therefore, outside the reach of the Constitution. But in the *Boumediene* (2008) decision, the U.S. Supreme Court held that while the United States does not formally exercise de jure sovereignty, functionally for over 100 years it has exercised complete power and control over Guantánamo Bay, and that as a consequence the reach of the Suspension Clause does extend to those prisoners.⁷ And thus, insofar as the right to Constitutional habeas is concerned, the prisoners are not “outside” in a “legal black hole,” falling into a “space of exception”⁸ – but in some sense “inside” Constitutional guarantees.⁹

Siting prisoners offshore is not the only method used to sequester noncitizens “outside”; the United States (and other governments) also use a policy known as interdiction, or pushbacks, whereby vessels carrying migrants are intercepted and turned away. Since U.S. policy only offers asylum to noncitizens who have arrived at the borders, after the 1991 fall of President Aristide, Coast Guard cutters began intercepting Haitians who were screened either on board ship, or on Guantánamo Bay. With Guantánamo full and the vessels saturated and the number of Haitians sailing to the U.S. increasing, the government decided it had to choose between allowing Haitians into the U.S. for the screening process or repatriating them without allowing them to establish their qualifications as refugees. President George H.W. Bush adopted the second choice, which was continued by President Clinton, and subsequently upheld by the U.S. Supreme Court in the *Sale* decision in 1993, on the basis that the prohibition against returning an alien to a country where his life or freedom would be threatened only applied to aliens who had already reached the United States.¹⁰

7. *Boumediene v. Bush*, 128 S Ct. 2229, 2253 (2008).

8. See Derek Gregory, “The Black Flag, Guantánamo Bay and the Space of Exception,” *Geografiska Annaler* 88 (2006), p. 405; see also Amy Kaplan, “Where is Guantánamo?,” in Mary Dudziak and Leti Volpp, eds., *Legal Borderlands: Law and the Construction of American Borders* (Baltimore, MD: Johns Hopkins University Press, 2006), p. 239.

9. See Gerald Neuman, “The Extraterritorial Constitution after *Boumediene v. Bush*,” *Southern California Law Review* 82 (2009), p. 259; Christina Duffy Burnett, “A Convenient Constitution? Extraterritoriality after *Boumediene*,” *Columbia Law Review* 109 (2009), p. 973.

10. *Sale v. Haitian Center Council*, 509 U.S. 155 (1993).

Sometimes even reaching what appears to be the territorial border may not constitute being “inside.” Under the U.S. “wet foot/dry foot” policy created in 1995, if a Cuban manages to reach shore (dry foot) he or she is given parole (administrative authority to enter) and can automatically apply for legal permanent residency after one year if he or she has committed no criminal or other deportable acts. If the Cuban is intercepted in the water (wet foot), he or she is typically summarily returned. In 2006 15 Cubans, including a two-year-old and thirteen-year-old, set off on a home-made boat and reached an abandoned bridge off the coast of Florida. The bridge is missing several chunks, and the Cubans had the misfortune of reaching pilings of a section that no longer touches land; they were repatriated. In the words of the Coast Guard spokesperson, “The particular structure that they were found upon is not connected to land. The ‘bridge’ is kind of a misnomer.”¹¹

Australia has gone farther than any other country in manipulating its borders to deter migrants through what it terms its “excision policy,” whereby that nation has actually excised, or cut away, some of its own territory for one particular purpose – that of precluding noncitizens who land there from gaining particular refugee protections. Starting in 2001, the government began to “excise” thousands of islands from the rest of the country in order to stop arrivals from using the fact of their having landed upon small islands to apply for asylum in Australia.¹² While Australian citizens and those with valid visas could travel to and remain in excised areas, arriving noncitizens without visas who arrived on excised territory could be removed as if they never actually reached Australia, and had no recourse to Australia’s courts.¹³ Thus, in 2009, when a boat with Afghan refugees exploded, and the most badly injured refugees were taken to an oil rig on excised territory, while those less seriously injured were taken to Darwin (not excised territory) only the latter group were initially told they could apply for refugee status in Australia.¹⁴

11. <http://www.local10.com/news/5978342/detail.html> Hunger Strike Continues; 15 Refugees Sent Back To Cuba.

12. See Migration Act 1958, section 5, defining “excised offshore place” as follows: “‘excised offshore place’ means any of the following: (a) the Territory of Christmas Island; (b) the Territory of Ashmore and Cartier Islands; (c) the Territory of Cocos (Keeling) Islands; (d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph; (e) any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph; (f) an Australian sea installation; (g) an Australian resources installation. Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.”

13. The Australian excision policy does not affect the rights of Australian citizens and permanent residents to travel to and remain in that area, and no documentation is required to travel between these areas and the rest of Australia. Thus, this is an excision of territory only as regards to a certain status of persons (those arriving without legitimate entry documents).

14. <http://jennysrednews.blogspot.com/2009/04/excision-prevents-refugee-status.html> Jenny’s Red News, Excision Prevents Refugee Status, Liberals Dissent (2009). The story of this boat, the SIEV 36, was a huge national controversy – a coronial inquest was held to determine the cause of the explosion since the government alleged that the Afghan refugees or the Indonesian crew had set fire to the vessel so that it would not be towed to Christmas Island, an excised zone where 2,600 asylum seekers are currently held.

In fall 2010, the creation of excision zones was thrown into doubt by a High Court decision that held that the excised zone processing for asylum seekers unlawfully denied two Tamil asylum seekers access to the courts. As a result, in November 2011, the government announced it would end separate processing of arrivals on excised zones. But this does not mean an end to excision. According to Chris Bowen, Australia's Immigration Minister, the excision law will remain, so that offshore processing can be resurrected in the future, should legislation overcoming the High Court ban ever pass the Australian Parliament.¹⁵

The question of whether noncitizens are inside or outside has also been raised by the presence of persons who are physically inside a nation's territory, specifically in the form of the indefinite immigration detention of stateless noncitizens (or noncitizens who are otherwise without a country to return to), ruled lawful in Australia in the *Al-Kateb* (2004) decision,¹⁶ and not lawful (albeit with exceptions for "terrorism and other special circumstances") in the United States in the *Zadvydas* decision (2001).¹⁷ Are noncitizens held in detention after a final order of removal "inside" the United States?¹⁸ Not according to Justice Scalia, dissenting in the *Zadvydas* decision, where he wrote that a "criminal alien" under a final order of removal, being held in indefinite confinement in a detention center inside the United States, had no greater right than an inadmissible alien at the border of the United States to be "released into the country."¹⁹

In each of these examples, noncitizens who surely are in some sense "here" are met by government arguments that they in fact, are not here. They are physically or rhetorically and legally placed "outside" so that the government may unburden itself of them. While nation-states have cartographic borders that are drawn on maps, governments manipulate those borders, at times with an Alice in Wonderland effect, in order to control who has access to entitlements and benefits. As suggested by Ayelet Shachar, the flexible redrawing of the border is done by states "to reassert control over their so-called 'broken' borders in the age of increased international mobility and security risks"²⁰ in what has been called the "age of globalization."²¹

But one must ask, is this redrawing of borders altogether a new phenomenon? Many commentators assert that we are in a suddenly globalized era of fragmenting

15. <http://www.smh.com.au/action/printArticle?id=2798352> Kristy Needham, UN Praises Double Policy Relief for Boat Arrivals, Nov. 26, 2011.

16. *Al-Kateb v. Godwin* (2004 HCA 37).

17. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

18. We could also consider immigrants – including asylum applicants – in detention centers awaiting a determination as "here but not here," see e.g. Leonard Feldman, referring to the proliferation of "little Guantánamos" near airports and other border-spaces within the United States. Leonard Feldman, "Terminal Exceptions: Law and Sovereignty at the Airport Threshold," *Law, Culture and the Humanities* 3 (2007), pp. 320–34.

19. *Zadvydas*, 533 U.S. at 704, emphasis added.

20. Ayelet Shachar, "The Shifting Border of Immigration Regulation," *Stanford Journal of Civil Rights & Civil Liberties* 3 (2007), p. 167.

21. Shachar, "Shifting," p. 167. Shachar notes other examples of this flexible redrawing: expedited removal, biometric regulation, bilateral and multilateral cooperation agreements, and overseas immigration officers along with the excision policy.

nation-states, featuring the novel problem of the attenuation between territorial space and governance, a product of unprecedented, increased movement of peoples and technology. But arguably, the disjuncture between territorial space and governance is not new. The conventional narrative would tell us that this disjuncture is new, because we live in a system where territory, or physical location, is absolutely coterminous with legal rules and protections, premised in the tradition of Westphalian sovereignty, novel in 1648, normative since 1815. The Westphalian model relies upon a territorial notion of sovereignty, whereby a single sovereign controls absolutely a defined territory and its associated enracinated population, and whereby the legal jurisdiction of the sovereign is entirely congruent with its territorial borders.²² This accords with what Kal Raustiala calls “legal spatiality”: the “supposition that law and legal remedies are connected to, or limited by territorial location.”²³ Raustiala notes that, despite this supposition, there have always been specific exceptions to this system in the form of territorial spaces where the territorial sovereign’s power did not reach, with sanctuaries and ambassador’s residences, as well as exceptions in the form of sovereigns that controlled territory outside their own, through colonial governance and extraterritorial jurisdiction.²⁴

But Teemu Ruskola argues that we need to move beyond understanding these practices as “exceptions” – in particular, he asserts that extraterritorial jurisdiction, whereby nation-states exercised jurisdiction *outside* of their autochthonous sovereignty, was in fact the rule for much of the world outside Europe prior to the post World War II decolonization movements. Through the practice of extraterritorial jurisdiction nationals of the civilized states were governed by the laws of their own countries, and not by the laws of the barbaric or semi-civilized countries where those nationals found themselves.²⁵ We could, perhaps, think of extraterritorial jurisdiction as the flip side of immigration law. With the first, the sovereign is governing its *insiders*, *outside* its territory. With the latter, the sovereign is governing its *outsiders*, *inside* its territory. With both forms of governance, then, neither of them new, we see the fracturing of the Westphalian model, through legal fictions, called exceptions.

I. Entry Doctrine

The “entry doctrine” in U.S. immigration law graphically demonstrates how the fact of physical presence of human bodies on U.S. territory is accorded doctrinal legal meaning toward particular political ends. Until very recently, whether one had physically entered

22. Kal Raustiala, “The Geography of Justice,” *Fordham Law Review* 73 (2005), pp. 2508–9. See also David Jacobson, “New Frontiers: Territory, Social Spaces and the State,” *Sociological Forum* 12 (1997), p. 121 (saying the association “of nations and states with fixed, clearly demarcated territories has been presumed to be so ‘given’ or even ‘natural’” that until recently it was a constant and undiscussed).

23. Raustiala, “Geography,” p. 2503.

24. Raustiala, “Geography,” p. 2015.

25. Teemu Ruskola, “Colonialism without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China,” *Law and Contemporary Problems* 71 (2008).

the territory of the United States, or not, resulted in a significant distinction. If a noncitizen stood outside the territory of the United States and was denied entry, and then sought to challenge this denial, the noncitizen was put in what was called an exclusion proceeding. The U.S. Supreme Court very early on decided that it was not the judiciary's role to check what the executive or congress decided to do with noncitizens in exclusion proceedings – in the infamous words in *Ekiu v. the United States* (1892) – “as to such persons, the decisions of executive or administrative officers ... are due process of law.”²⁶ As a result of this early jurisprudence, noncitizens in exclusion proceedings were not guaranteed any Constitutional protections of procedural due process – which correlates with how we understand the limited claim of those standing outside our gates.

If, however, a noncitizen were found within the territory of the United States, and the government then sought her expulsion, the noncitizen was put in what was called a deportation proceeding. In deportation proceedings the U.S. Supreme Court, also early on, in 1903, decided that deportation proceedings would come with the protection of procedural due process.²⁷ The rationale underlying this was the idea that Constitutional guarantees operate within our national borders, and that residence correlates with greater stakes for the noncitizen. Anyone found *inside*, as opposed to *outside*, would be in deportation, rather than exclusion. Being put in deportation, rather than exclusion, was important not just in terms of due process. It was also important because the grounds on which one could be deported were narrower than the grounds on which one could be excluded. In 1996 the U.S. Congress decided to change the dividing line between exclusion and deportation based upon *physical entry* into the territory to a line based upon *admission*, dividing those never admitted from those lawfully admitted.²⁸

While this change was promoted as increasing the rationalization of the system, with one stroke of the pen, a very large group of people were pushed across the new doctrinal line, henceforth to be treated as if they had never entered the country, even though they were physically inside. This is the group of persons who historically were called those who “entered without inspection,” and who today are called “present without admission.” These are the people who are conventionally understood as the “illegal alien,” those who have illegally crossed the border.

But a significant percentage of those who are unlawfully here are in fact *not* border crossers – recent estimates are that between 40–50 percent of persons who are here unlawfully are in fact visa violators,²⁹ in other words persons who entered lawfully on temporary visas but then have continued to be present once those visas expired, or who otherwise violated the terms of their visas.³⁰ Thus, we have now a hierarchy of

26. *Ekiu v. United States*, 142 U.S. 651, 660 (1892).

27. *Yamataya v. Fisher (Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903).

28. Along with the shift of the line from entry to admission came the bundling together of exclusion and deportation into one process, named removal, albeit removal still retaining separate grounds of excludability and deportability.

29. <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=19> Pew Hispanic Center, “Modes of Entry for the Unauthorized Migrant Population” (May 22, 2006).

30. There was never much attention given to visa overstayers until September 11th when this category of noncitizens was suddenly of great interest.

preference whereby the initial terms of one's appearance on U.S. soil, in terms of its lawfulness, determines whether or not one gets put into the box of deportability or inadmissibility, regardless of the length of one's physical presence. Thus, for example, a noncitizen who initially gained entry to the country unlawfully when a child, and is today 60 years of age, will be found removable on inadmissibility grounds, while a noncitizen who initially gained entry to the country one week ago on a tourist visa, but has been discovered to be working in violation of the terms of that visa, will be found removable on deportability grounds. This, we might agree, is a grossly unjust result, but one that correlates with the way in which illegal immigration is marked in popular imagination, as resulting from an initial illegal entry, from a physical crossing into sovereign space.³¹

There are, of course, legal fictions which build upon fictions within the entry doctrine. Today, a returning legal permanent resident who has been gone from the United States for less than 180 days, and has not committed various crimes or other specified activities, will be considered not to be seeking an "admission" to the United States.³² In other words, she will be treated as if she has never left and will be immune to grounds of excludability. At the same time, U.S. immigration law treats certain other noncitizens who are inside the territory, as though they had never entered. These are persons who are "paroled" into the United States – most famously Cubans paroled into the U.S. after the Mariel Boatlift. To be paroled means that a noncitizen is allowed, as an administrative matter, to be physically present, but she is not considered to have entered, nor is she considered to have been admitted, as a matter of immigration law. In other words, she is placed in the box of exclusion and not deportation; even though she is here, she is constitutionally treated as if she was outside. Thus, a noncitizen can be spatially here, but not doctrinally here, in the down the rabbit hole of immigration law.³³

31. On the nonsensical nature of this distinction, see Linda Bosniak, "A Basic Territorial Distinction," *Georgetown Immigration Law Journal* 16 (2002), p. 409 (noting that those who violate the terms of their visas are equally "culpable" in any sort of culpability calculus, as well as the disparate racial impact of the new dividing line).

32. This exception to the rule that the arriving noncitizen is to be placed in exclusion was carved out for the "returning resident" whose departure was not considered a meaningful interruption of long term residence, in the case *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). A meaningful interruption is now codified as a continuous period in excess of 180 days. Immigration and Nationality Act sec. 101(a)(13)(C)(ii). Thus, a legal permanent resident who departs the U.S. for a trip of 180 days or less would face potential removal on grounds of deportability, not excludability, assuming certain conditions have been met.

33. And in fact, when found excludable, she is not "here" for purpose of the greater protections she would experience under deportation, but she is "here" insofar as the state can detain her pending removal. Timothy Zick might refer to this as the "Geography of Membership." See Timothy Zick, "Constitutional Displacement," *Washington University Law Review* 86 (2009), p. 568. Peter Nyers calls detention centers the "mezzanine spaces of sovereignty" – those spaces neither inside nor outside but "in-between the inside and the outside of the state," for example, the airport "waiting area," the immigration detention facilities, the deportation flight. Nyers, "Cosmopolitanism," p. 1080.

II. Race, Gender, and Place: the Spatial Requirements of Danish Forced Marriage Legislation

Let us now turn away from doctrine to examine how the relationship between space and immigration might be figured differently when looking through a gendered and racial lens. Immigration law doctrine treats the space of the nation-state as a form of “abstract space.”³⁴ Abstract space is the space of instrumental rationality utilized by state actors, as opposed to the space of everyday lived experience (which Lefebvre termed “social space”).³⁵ As described by Eugene McCann, abstract space is the “space represented by elite social groups as homogenous, instrumental, and ahistorical in order to facilitate the exercise of state power and the free flow of capital.”³⁶ The abstract space of the nation-state produced by immigration law is characterized by disembodied doctrines that formally and analytically slice through lived experience, as well as by the purportedly innocent and neutral space of the nation-state. Because immigration law presumes an already existing nation-state, with its focus the admission, exclusion or deportation of bodies moving spatially into and out of that preexisting state, the law imagines the state to be innocent and natural, while the bodies that move inside and outside this space are suspect, and increasingly surveilled via profiling technologies that Didier Bigo has described as a “ban-opticon.”³⁷ The past political and violent processes that led to the state’s formation are elided, as is the manner in which the space of the state is continually produced in relationship to these suspect bodies. And these bodies exist within multiple systems of domination; how noncitizens are configured by immigration law is gendered, as well as a “racial and spatial story.”³⁸ To demonstrate this, I now turn to examine how specific spaces are discursively constituted.

Denmark, along with many other European states, has engaged in policy and legal shifts in order to respond to what are perceived as cultural threats by immigrant communities. We can see a transition from multiculturalism towards stronger policies of cultural and civic assimilation across Western liberal democracies, visible, for example, in the citizenship test of the Netherlands, and in the French ban on the headscarf in public

34. On the nation-state as abstract space see Matthew Sparke, *In the Space of Theory: Postfoundational Geographies of the Nation-state* (Minneapolis: University of Minnesota Press: 2005).

35. Lefebvre, *The Production of Space*; Razack, “When Place Becomes Race,” pp. 8–9. Lefebvre was primarily concerned with how abstract space enabled rationalization and commodification for the purpose of capital accumulation; I thus am taking his term and using it for different purposes here in thinking about what it might mean for immigration law.

36. Eugene J. McCann, “Race, Protest, and Public Space: Contextualizing Lefebvre in the U.S. City,” *Antipode* 31 (1999), p. 164.

37. Didier Bigo, “Globalized (in)Security: the Field and the Ban-opticon,” in Didier Bigo and Anastassia Tsoukala, eds., *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes After 9/11* (Abingdon: Routledge, 2008), pp. 10–48; see also Nyers, “Cosmopolitanism” (citing Bigo), at pp. 1069–70.

38. Razack, “When Place Becomes Race,” p. 17 (describing the Canadian nation as a “racial and spatial story”).

elementary and secondary schools. Denmark, the UK, Sweden and Norway have all launched plans to combat the issue of forced marriage among immigrants and would-be immigrants.³⁹

Denmark, in its Alien Act of 2000, removed family reunification as a right, so that each case is now assessed on an individual basis. While the legal age of marriage in Denmark is 18 (or 16 with a letter of approval from the Queen), the age bar for individuals who wish to be joined by spouses from abroad has been raised to 24. Permission will not be granted if there is any doubt that either or both parties has consented to the marriage, reversing what had been the historical burden of proof, in that spouses have to demonstrate that their marriage is freely contracted.⁴⁰ And, perhaps most interestingly, the couple needs to demonstrate three additional requirements: 1) their combined relation to Denmark has to be greater than their relation to any other country in the world; 2) the Danish spouse has to show he or she can financially support his or her foreign spouse from the time of reunification and for three years after; and 3) the Danish spouse has to have access to a home of a “decent size” (specified as 20 square meters per person or a maximum of two persons per room) at the time of the reunification and for at least three years thereafter.⁴¹

In thinking about the relationship between immigration and space, the idea of bounded, sovereign nations, with members and others, obviously produces the idea of my space, my land, my territory, and who truly belongs, with the resulting metaphor of host and (for desired immigrant), guest.⁴² We see this throughout immigration cases which attribute the presence of noncitizens to the hospitality of host nations.⁴³ And thus we see here the importance of the idea of property.

Legal scholar Hiroshi Motomura has made the argument that we should recognize the power of the metaphor of immigration as contract, whereby legal permanent residents who once envisioned as “Americans in waiting” in transition to naturalized citizenship

39. See Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

40. Moira Dustin, “Gender Equality, Cultural Diversity: European Comparisons and Lessons,” The Nuffield Foundation (2007), pp.12–13, available at www2.lse.ac.uk/genderInstitute/pdf/NuffieldReport_final.pdf.

41. Helle Rytönen, “Europe and its ‘Almost-European’ Other: A Textual Analysis of Cultural and Legal Practices of Othering in Contemporary Europe,” Unpublished Ph.D. dissertation, Stanford University, 2002.

42. On the host/guest metaphor see Mireille Rosello, *Postcolonial Hospitality: The Immigrant as Guest* (Stanford, CA: Stanford University Press, 2001).

43. See, e.g., *Harisiades v. Shaughnessy*, 243 U.S. 580, 587 (1952), referring to the “Government’s power to terminate its hospitality” in upholding the deportation of former Communist Party members. On the idea of hospitality to the stranger see Austin Sarat, Lawrence Douglas and Martha Umphrey, “Negotiating (with) Strangers,” in A. Sarat, L. Douglas and M. Umphrey, eds., *Law and the Stranger* (Stanford, CA: Stanford University Press, 2010), pp. 1–20; Pheng Cheah, “Necessary Strangers: Law’s Hospitality in the Age of Transnational Migrancy,” in A. Sarat, L. Douglas and M. Umphrey, eds., *Law and the Stranger*, pp. 21–64; and Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), pp. 25–48.

more recently have been presumed to be entitled to remain in the United States only so long as they abide by the terms of their admission.⁴⁴ I would not dispute the power of contractual metaphors for describing the relationship between immigrant and state – one could, for example, map separate types of deportation grounds onto different reasons to undo a contract.⁴⁵ And Motomura has recently suggested extending the idea of immigration as contract to undocumented immigrants as well, suggesting not that immigrants have broken a contract and deserve to be deported, but that the state implicitly created some kind of contractual promise to migrant laborers that should be understood as leading to a path to legalization.⁴⁶ At the same time, the contract metaphor suggests some semblance of equal bargaining power between immigrant and state, and also emphasizes the idea of voluntary choice and consent. The metaphor of contract thus can travel comfortably with the popular myth of a liberal America, created by individual acts of uncoerced consent. As Bonnie Honig writes, the popular exceptionalist belief is that “America is a distinctively consent-based regime, based on choice ... The people who live here are people who once chose to come here, and in this, America is supposedly unique.”⁴⁷ Thinking of immigration as contract removes from our consideration the presence of noncitizens who are not here through voluntary legal immigration, eliding the history of an America created through genocide, slavery, conquest, and colonial aggression. Thus the metaphor of property (and, particularly absolutist, Blackstonian conceptions of property)⁴⁸ might better capture the power dynamics between nation-state and alien, whereby there is an equation of nation-state with property – whether the property of the state or of its citizenry who imagine the territory as their “own” – positioned in relation to noncitizens whose presence is always provisional.⁴⁹

This property metaphor casts desired noncitizens in the role of guest, and nation-state in the role of beneficent host. The relationship between nation-state and undesired/undocumented immigrants, would seem instead to be landowner and trespasser.

44. Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (New York: Oxford University Press, 2006), p. 36.

45. Stephen Legomsky and Cristina Rodriguez spell out these different analogies between contract and immigration law in *Immigration and Refugee Law and Policy* (Foundation Press, 2009), 5th Edn., p. 518.

46. See Hiroshi Motomura, “Immigration Outside the Law,” unpublished conference paper, Persistent Puzzles in Immigration Law, UC Irvine School of Law, February 17, 2011.

47. Bonnie Honig, *Democracy and the Foreigner* (Princeton, NJ: Princeton University Press, 2001), p. 75.

48. For an explanation of the contrast between absolutist, Blackstonian conceptions of property (property ownership means absolute dominion) versus broader conceptions of property (property ownership as a form of trusteeship, or as part of social relations) see Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009), pp. 30–33.

49. On the relationship between nation and property see Emer de Vattel, *The Law of Nations (Le Droit des gens (1758))*, eds. Béla Kapossy and Richard Whatmore (Indianapolis, IN: Liberty Fund, 2008), pp. 213–14 (describing how a nation comes to acquire both sovereignty and domain). I am indebted to Sarah Song for pointing me to this reference.

This metaphor has been put into practice through attempted local criminal prosecutions. In 2005, two jurisdictions in New Hampshire charged undocumented immigrants with trespassing under state criminal trespass laws, extending the logic of trespass to unlawful presence in the nation-state: since the undocumented immigrants were not licensed or privileged to be in the United States they were thus trespassing both in the United States as well as in the town of New Ipswich.⁵⁰ More recently, Arizona's SB 1070 and Alabama's HB 56 criminalize unlawful presence by undocumented immigrants as a form of "trespass," followed by similar proposals in South Carolina, Texas and Kentucky.⁵¹

But perhaps the most apt metaphor describing the relationship between nation-state and undocumented immigrant is home owner and burglar, since what the immigrant is violating is experienced as the space of the *home/homeland*. Even when the immigrant is considered a guest, she has no right to be present; the guest has only a temporary license to be present; it's a privilege that can be revoked at any time, at the whim of the host (nation). The fragility of belonging of the immigrant is exemplified by the saying that "if you don't like it, you should leave," which suggests that immigrants, and descendents of immigrants, live under a perpetual threat of banishment. States/nations are imagined as homogenous and at risk from alien cultural difference. Different cultures are segregated spatially, in terms of their presumptively belonging at the center of or outside a particular society. But this spatial ordering is not just horizontal. Spatial ordering is also vertical in that cultures are segregated hierarchically as superior and inferior, suggesting that pure spaces are under threat of alien contamination.⁵²

But ideas of the purity of spaces and the threat of their contamination are punctured by the fact that purportedly bounded states have specific historical relationships; boundaries were and are porous, in flux, and invented. The historical relationship between purportedly bounded states is exemplified by the claims "We are here, because you were there," and, "we did not cross the border, the border crossed us." Geographers and others concerned with spatial dynamics have examined how the spatial segregation of immigrants is normalized and justified. For example, both Eric Fassin and Alan Pred describe how immigrants are imagined to refuse modernity and to freely choose to cluster with their own co-ethnics, so that the "social construction of race becomes one with the physical occupation of space,"⁵³ in a mutually building discourse about spatial isolation and cultural difference.

This follows the work of geographers examining the abstract concept of "space," which both contains and shapes social processes, and "place" (or "lived space"), which

50. These attempts were struck down on the ground of preemption as an unconstitutional local attempt to regulate in the area of enforcement of immigration violations.

51. See Karla McKanders, "Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status," University of Tennessee Legal Studies, Working Paper No. 140 (2011).

52. See Verena Stolke, "Talking Culture," *Current Anthropology* 36 (1995), p. 1.

53. Alan Pred, *Even in Sweden: Racisms, Racialized Spaces and the Popular Geographical Imagination* (Berkeley: University of California Press, 2000); Eric Fassin, "Sexual Violence At the Border," *differences* 18 (2007), pp. 1–23.

refers to more concrete, lived locations. To historicize place – how did specific patterns of settlement, boundaries, enclosure come to be? – is necessary to question notions of the legally demarcated national space as primordial, natural, prepolitical, as just the way things are – and that the spatial relation of bodies and places is the product of free choice, rather than of, say, state sponsored discrimination.

Thanks to the dissertation research of Helle Rytönen, we can see how space intertwines in an illuminating way with the Danish forced marriage reforms. Why is space – the habitat requirement – involved with the question of forced marriage?⁵⁴ On the one hand, it could be seen simply as a proxy for economic concerns, alongside the formal requirement of sufficient financial means to support the immigrant, a familiar requirement in times of the constricting welfare state with, for example, the U.S. requirement of affidavits of support on top of the public charge basis of exclusion. On the other hand, there seems to be something more at work here, with microphysical governance over what one would consider an interior physical space.⁵⁵ And here, looking historically at a specific location provides insight.

Rytönen documents the historical impetus for the forced marriage reforms, tracing it to a series of newspaper articles authored by Social Democratic mayors, who complained that some Danish cities were about to be swamped by immigrants. The mayors argued that future family reunifications would only further this development unless it was required by law that each new family had access to their own home. Since there was almost no available affordable housing in cities with proportionally higher immigrant populations, such a requirement would mean that the immigrants would either have to move elsewhere, or not be united with their foreign spouses in the first place. At the same time, two studies were released which projected that in some cities a majority of future babies would be born to mothers with foreign citizenship. In the words of one mayor, there would be more Muslims than “own townsmen in our city.”⁵⁶

Mayors in the suburbs of Copenhagen therefore recommended either ending family reunification altogether or instituting the requirement that sponsoring spouses have access to their own home. In a speech on the issue, the Prime Minister linked ordinary Danes’ experience of alienation, feeling like a minority on their “own staircases, own neighborhoods and their own cities,” with the idea that lots of foreigners do not care a whit about “our values and foundation.”⁵⁷ In other words, ordinary Danes were made to feel like aliens, on what would otherwise be their seamless terrain of home/neighborhood/city and, we can presume, nation, by those foreigners who came from alien spaces.

54. Space is obviously also at issue with the idea that the sponsoring and migrant spouse must collectively demonstrate a greater connection to Denmark than to any other country.

55. Microphysical forms of governance by colonial regimes predated today’s immigration reforms, which have been spurred by the more recent migration of the periphery to the metropolis. On colonial microphysical governance of interior physical and mental spaces, see Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002, 2010), p. xxi.

56. Rytönen, ‘Europe’.

57. Rytönen, ‘Europe’.

In fact, family reunifications in immigrant families often turned out to be based on force, or a relation arranged by the families, and not the couple themselves, according to the Prime Minister. Rytkønen writes: “The debate, which began as a concern over housing shortages in some suburbs outside of Copenhagen was soon so deeply embedded in a gendered and ethnic discourse about the emancipation of immigrant women that it was hard to imagine it differently.”⁵⁸

How did concern about housing shortages transmute into legislation on forced marriage? A link between family and nation, home and homeland suggests an answer. Images of nations are constructed in terms of familial and domestic metaphors, where women are located as the symbolic center and boundary marker of the nation.⁵⁹ The micro-space of the specific home links to the macro-space of the homeland. The English language, which provides double meanings for words like domicile (both household and one’s legal residence) and domestic (both familial household and the space of the nation) helps illustrate this linkage of family and nation. As Amy Kaplan writes:

the idea of foreign policy depends on the sense of the nation as a domestic space imbued with a sense of at-homeness, in contrast to an external world perceived as alien and threatening. Reciprocally, a sense of the foreign is necessary to erect the boundaries that enclose the nation as home.⁶⁰

The perception of the external world – as well as the perception of its representatives in the form of immigrants – as alien and threatening, is facilitated by race. As Etienne Balibar has argued, racism is always part of nationalism.⁶¹

III. The Question of Economics: Making Blacks Foreigners in Antebellum Massachusetts

In an article by Kunal Parker called “Making Blacks Foreigners,” he writes, the dominant historiographical view of immigration is as a spatial movement from “there” to “here.”⁶² This, he argues, fetishizes territorial distinctions. We presume that unwanted immigrants come “here”; the solution to the problem lies in keeping unwanted immigrants “there.” Accordingly, the state devotes energies to “erecting fences to keep potential immigrants out, to patrolling its territory to weed out immigrants who have entered without its permission, to restricting resident immigrants’ access to welfare on the theory that others will be discouraged from coming.”⁶³

58. Rytkønen, ‘Europe’.

59. Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (New York: Routledge, 1993), p. 354.

60. Amy Kaplan, “Manifest Domesticity,” *American Literature* 70 (1998), pp. 581–2.

61. See Etienne Balibar, “Racism and Nationalism,” in Etienne Balibar and Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (London: Verso, 1991), p. 54.

62. Kunal Parker, “Making Blacks Foreigners: The Legal Construction of Former Slaves in Post Revolutionary Massachusetts,” *Utah Law Review* 2001 (2001), p. 75.

63. Parker, “Making,” p. 78.

He argues that because the immigrant is imagined to move spatially from there to here, the immigrants' claims upon the community are thought inferior (to the citizens') and more susceptible to rejection. Unlike members of the community who have no other community to which to turn, immigrants can always go "there" if refused admission "here," always draw upon resources there if denied claims upon resources here, always be sent back there if they are not wanted here.⁶⁴ This assumption appears throughout immigration jurisprudence as well as in philosophical writing justifying the existence of territorially bounded communities, for example in the work of Michael Walzer.⁶⁵

Parker challenges this purportedly natural ground for how we think about immigrants through an unexpected study of African Americans and poor relief in late eighteenth century Massachusetts. It is now often observed that deportation was not initially a federal practice; rather it originated on the local level, following the principle derived from English poor laws, through the deportation of paupers and the law of settlement. Thus, the system of poor relief regulated what we understand as immigration – it "sought to secure territorial communities against the claims of outsiders."⁶⁶ Within this system, individuals were seen as moving in space, typically from one town to another. Legal responsibility for the individual's claims lay with the town from which he came. Accordingly, a person could be denied relief because he was from another town.⁶⁷

After slavery ended in Massachusetts, African Americans threw the system into crisis. When enslaved, African Americans were the fiscal responsibility of their masters. When they emerged from slavery, they suddenly were subjects making claims, but they had not come from another town – they were here, without having a there to belong to.⁶⁸ What Parker found was that town communities assigned African Americans who were elderly or sick and needed financial help to geographic origins outside of Massachusetts, to a place called "Africa," to represent them as foreigners who were the legal responsibility of somewhere else.⁶⁹

As he writes, the state invented immigrant origins to justify refusing their claims upon the community. He argues that this shows that spatial movement may not be the critical thing about immigrants, and that we should not let it be so, because otherwise it allows the presumption that there is always a "there" to where a person can return.⁷⁰ Instead, we should see in his historical study that persons "became immigrants," that the relationship between citizenship and territory emerges as a tactic.

64. Parker, "Making," pp. 79–83.

65. Parker, "Making," p. 80. See Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), pp. 31–63. For a critique of Walzer's writing on membership see Linda Bosniak, *The Citizen and the Alien* (Princeton, NJ: Princeton University Press 2006), pp. 39–76.

66. Parker, "Making," p. 80. See also Gerald L. Neuman, "The Lost Century of Immigration Law (1776–1875)," *Columbia Law Review* 93 (1993), pp. 1833–1901.

67. Parker, "Making," pp. 85–6.

68. Parker, "Making," pp. 90–92.

69. Parker, "Making," pp. 103–105.

70. Parker, "Making," p. 123.

In Parker's fascinating study, the fiscal claim upon the state made one the (retroactive) "immigrant," newly visible "on the landscape of claims." The inverse of this is the already existing immigrant who makes a fiscal claim upon the state which either results in the denial of the ability to immigrate in the first place, or in the deportation of the noncitizen for use of welfare benefits, under the public charge provision. Citizenship has been defined through the power to consume and the abstention from use of welfare benefits, witness former President George Bush's suggestion after September 11th that citizens' patriotic duty was to shop; the inverse of this idea is that use of welfare removes the citizen from full citizenship and divests from the noncitizen the possibility of entering or staying in the national community.⁷¹ We can trace the origins of why Americans rarely speak of social citizenship, but rather regard welfare use and the realization of citizenship as somehow contradictory notions, to, as Nancy Fraser and Linda Gordon suggest, the strength of images of contract, positioned in opposition to ideas of unilateral charity, in shaping American ideas of citizenship.⁷² Thus, the normative U.S. citizen is supposed to be self reliant, independent, and free from government largesse. Making a fiscal claim upon the state subjects a person to banishment, whether in the rhetorical terms described by Parker under Massachusetts poor laws, whether in subjecting the formal status citizen to sociological studies and punitive reform seeking to understand and cure "deviance" and "dependency," or in rendering the noncitizen excludable and deportable.

If with the Danish forced marriage reform we see how multiple systems of domination produce both bodies and space, with Parker's study we see that the abstract state as neutral arbiter of disembodied laws governing the movement of bodies in space is an absolutely fictional notion. Immigrants, immigration, and the state are all legally imagined.

IV. Conclusion

The law exerts a tremendous amount of conceptual work with respect to conceptions of space – made visible in these case examples, of manipulations of the idea of entry in immigration doctrine, of the domicile requirement in the Danish forced marriage laws, and of the refusal of poor relief to freedmen and women in Massachusetts. We find, however, in the theory of cosmopolitanism a championing of the commitment to a universal humanity, regardless of national territory, spatial boundary or place with, what Peter

71. See Inderpal Grewal on consumer citizenship in *Transnational America: Feminisms, Diasporas, Neoliberalisms* (Durham, NC: Duke University Press, 2005), pp. 217–20; see also Aihwa Ong, *Neoliberalism as Exception* (Durham, NC: Duke University Press, 2006), pp. 14–18. On the inverse relationship of welfare use and citizenship see Aihwa Ong, *Buddha is Hiding: Refugees, Citizenship, the New America* (Berkeley: University of California Press, 2003), pp. 1–24.

72. Nancy Fraser and Linda Gordon, "Contract versus Charity: Why is There No Social Citizenship in the United States?," *Socialist Review* 22 (1992), pp. 45–68.

Nyers calls, “its own categorical imperative, taking all humanity, irrespective of place, along for the ride.”⁷³ Thus, the yearning for the ethical place-lessness of cosmopolitanism would seem to underestimate the ways in which the law works to cast out those thought to belong outside.

In critiquing the state of cosmopolitan theory, Nyers conjures the concept of “abject cosmopolitanism.”⁷⁴ In deliberately placing together these two discordant terms, Nyers forces us to consider why we presume these two terms so discordant. He juxtaposes the cosmopolitan, “at home everywhere,” with “an inclusive, sophisticated and worldly demeanor,” speaking in the authoritative, articulate and visible voice of citizenship – against the abject, who have been jettisoned, forced out into a life of displacement and embodying exclusion; “global cast offs” existing in zones of shame, disgrace or debasement in the form of detention facilities, deportation flights, and lives forced underground.⁷⁵ And he then suggests that cosmopolitanism in fact depends on the existence of the abject, asking, what if cosmopolitan’s high value relies on a relationship with an abject non-value for its condition of possibility?⁷⁶ Nyers challenges what both cosmopolitanism and the presumptive apolitical abject are understood to be, and shows how the abject – in particular, nonstatus Algerians fighting their deportation from Canada – take up the cosmopolitan call and engage in practices that recast the possibilities for political life, through asserting speech, and through taking sanctuary.⁷⁷

An engagement in practices that recast the possibilities for political life is also described by Cristina Beltrán in her analysis of the 2006 immigrants’ rights marches. Beltrán, like Nyers, theorizes the political activity of the purportedly apolitical, writing that the marches “challenged familiar scripts regarding the undocumented, unsettling traditional notions of sovereignty and blurring the boundaries between legal and illegal, assimilation and resistance, civic joy and public outrage.”⁷⁸ In her analysis, Beltrán invokes Kevin Bruyneel’s “third space of sovereignty,” developed to articulate an alternative space of indigenous

73. Nyers, “Cosmopolitanism,” p. 1072.

74. In his critique of cosmopolitan theory, Nyers recognizes that cosmopolitanism is best understood in the plural. On this point see, e.g., Bruce Robbins, “Introduction Part I: Actually Existing Cosmopolitanism,” in Pheng Cheah and Bruce Robbins, eds., *Cosmopolitics: Thinking and Feeling Beyond the Nation* (Minneapolis: University of Minnesota Press, 1998), pp. 1–19; James Clifford, “Mixed Feelings,” in Pheng Cheah and Bruce Robbins, eds., *Cosmopolitics*, pp. 362–70. While Bonnie Honig’s “democratic cosmopolitanism” does not appear in Nyers’ initial characterization of cosmopolitanism (when he conjoins it with the term abject), it later appears as a primary theoretical target; he argues that her “democratic cosmopolitanism” is insufficiently attentive to noncitizens “on their way out,” via expulsions, deportations, forced removals, etc. Nyers, “Cosmopolitanism,” pp. 1078–9.

75. Nyers, “Cosmopolitanism,” pp. 1073–4.

76. Nyers, “Cosmopolitanism,” p. 1073.

77. Nyers, “Cosmopolitanism,” pp. 1084–6.

78. Cristina Beltrán, *The Trouble with Unity: Latino Politics and the Creation of Identity* (Oxford: Oxford University Press, 2010), p. 112.

political activity neither inside nor outside the U.S. political system, to argue that the immigrant rights' marchers were reimagining and enacting what Bruyneel has identified as a space of "sovereignty and/or citizenship that is inassimilable to the modern liberal democratic settler-state and nation."⁷⁹ As Beltrán describes, the marchers articulated "a common world in which membership and recognition are not contingent upon citizenship,"⁸⁰ thus refusing the imposition of notions of sovereignty that correlate citizenship with belonging, and undocumented presence with trespass.

Abject cosmopolitanism, a third space of sovereignty: both force a reconceptualization of immigration law and space to think beyond the work the law does, to examine how people negotiate the law. States manipulate spatiality to cast immigrants out. But we could also understand the sovereignty of immigration law to be contested by those the law seeks to cast out, whether through their political activity, through their taking of sanctuary in particular spaces – in religious buildings or zones subject to sanctuary ordinances – or through their mere presence, in spaces where they are not supposed to be, in Susan Coutin's phrase, spaces of non-existence.⁸¹ We have now witnessed the "coming out" of many undocumented youth who attempted to spur passage of the DREAM Act, which would provide them conditional legal residency through federal legislation. Starting in spring 2010, these youth started to encourage each other to come out of the space of the "closet" to disclose their unlawful presence, raising multiple questions, among them the question of "ethical territoriality," and the question whether DREAMers, as "innocent" and "productive members of society," deserve legalization when no comprehensive immigration reform appears forthcoming for anyone else who is undocumented.⁸² Most starkly, through declaring their mere existence,

79. Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007), p. 217.

80. Beltrán, *The Trouble with Unity*, p. 126.

81. Susan Coutin, "Borderlands, Illegality, and Spaces of Non-Existence," in Richard Perry and Bill Maurer eds., *Globalization Under Construction: Governmentality, Law and Identity* (Minneapolis: University of Minnesota Press, 2003), pp. 171–3. On the case of Elvira Arellano who lived for one year in a Chicago church to find sanctuary from deportation, see Amalia Pallares, "Representing 'La Familia': Family Separation and Immigrant Activism," in Amalia Pallares and Nilda Flores-González, eds., *Marcha: Latino Chicago and the Immigrant Rights Movement* (Urbana: University of Illinois Press, 2010), pp. 215–36.

82. The depiction of DREAMers as productive future members of society is built into the proposed legislation, which lifts the conditional status and grants permanent residency after one of the following requirements is met: graduation from an institution of higher learning, two years completed of college, or two years of military service. The depiction of DREAMers as "innocent children," in contrast to their parents who have committed the sin of unlawful entry or visa overstay – echoing the rhetoric of the U.S. Supreme Court decision *Plyler v. Doe*, 457 U.S. 202 (1982), upholding the right of undocumented schoolchildren to access public elementary and secondary education – is one imputed by advocates and legislators and not one that DREAM activists endorse. On how the experience of being undocumented is shaped by generational experiences, see Leisy Abrego, "Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants," *Law and Society Review* 45 (2011), pp. 337–69.

these immigrants who are “inside” when they are supposed to be “outside,” “here” when they have no recognized legal right to be “here,” challenge nation-state sovereignty and spatial imaginings of immigration law.

Acknowledgements

Thank you to Michelle McKinley, who invited me to deliver the first incarnation of this Commentary as a keynote address at the Contested Citizenship Symposium at the University of Oregon, and to Austin Sarat, who invited me to publish it as part of this symposium issue, *Legal Imaginings of Exile and Immigration*. I must also thank, for their helpful comments, Linda Bosniak, Kitty Calavita, Hamsa Murthy, Richard Perry, Sarah Song, two anonymous reviewers for *Law, Culture, and the Humanities*, and audiences at the School of Oriental and African Studies at the University of London, the Center for the Study of Law and Society at the UC Berkeley School of Law, the Warren Institute at the UC Berkeley School of Law, the Public Law Workshop at the University of Minnesota, the Politics Department of UC Santa Cruz, the Law and Society Association Annual Meeting, and the Contested Citizenship Symposium at the University of Oregon. Many thanks to Mina Barahimi, Magdalena Guadalupe, and Rebecca Nichols for their helpful research assistance.