

2014

Restatement of Place

Mae Kuykendall

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Mae Kuykendall, *Restatement of Place*, 79 Brook. L. Rev. (2014).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol79/iss2/15>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Restatement of Place*

Mae Kuykendall†

INTRODUCTION

This article will explore the possible fit for a Restatement project of a large domain of human perception that pervades legal reasoning as an unstated background assumption. The domain is that of *place*, a term that deserves clarification for this article by comparison with related terms, such as territory and space. Place as a legal subject brings forth thoughts of the nation-state, jurisdiction, sovereignty, and the norms in international law affecting the reach of a sovereign into the territory of another sovereign. Those concerns are necessarily touched upon in this article, but the chief objectives are to (1) illustrate, through a survey of place's effect in several very different legal contexts, how ideas about place have influenced legal reasoning, and (2) evaluate the possibility of making place a topic around which Restatement principles could be fashioned. Place, as a factor that is present in law but often not fully seen, has not been recognized for its theoretical importance as a viewpoint from which to understand the functioning and implications of many areas of the law. For example, place may be present in a legal regime for transactions that have escaped the hold of any physical place, while the regime is still rationalized

* © 2014 Mae Kuykendall. All Rights Reserved.

† Professor of Law, Michigan State University College of Law. Director, Legal E-Marriage Project, <http://www.law.msu.edu/marriage/index.html>. I am indebted to the intellectual vitality brought to the topic of place within law by the Workshop: The Spatial Constitution (convened by David Delaney at the National Science Foundation, Arlington, Virginia, June 13–14, 2013), about which workshop participant Professor Marc Poirier has kept me informed. Professor Poirier has been a valuable source of information for me since early summer 2013 about these scholarly efforts. The workshop brought together a number of geographers and legal scholars in an attempt to spark awareness, communication, and potential collaboration among an emerging set of scholars and disparate disciplines concerned with the investigation of the influence of ideas and conceptions of place with legal doctrine at macro and micro levels. I wish to thank Ruth Mendel, who has been consistently a good source of insight and encouragement. I would also like to extend gratitude to Professor Anita Bernstein, Professor Brian Kalt, Professor Mark Totten, Mary Elizabeth Oshei, Yassaman Hajivalizadeh, the University of Michigan Law Library (special thanks to Seth Quidachay-Swan), Barbara Bean and other Michigan State law librarians.

by an imaginary framework of physical location. Conversely, as place fades from importance in a given domain of law, place-based views of the subject of those domains can remain a source of moral framing or legal answers to ambiguous issues.

The law of chattel slavery in the South exemplified the conceptual complications of place in a period of transition in cultural arrangements and modes of exchange of property. Slavery, in particular the American version, was first rationalized in a place-anchored world, in which masters acting out purportedly feudal ideals exercised dominion over inferior beings to whom they provided direct care and the moral guidance owed by a master to a servant.¹ Writings in support of slavery imagined personal connections between master and slave, with duties of stewardship justified in moral understandings drawn from ancient practices and Biblical precepts.² The legal treatment of slaves wavered, however, because the legally abstract right of property, in ordinary cases, was absolute, and there could thus be no duties between a master and a slave who lacked legal personhood.³ Thus, some states imposed duties and prohibitions on slave owners, while others did not. Simultaneously, however, the law of commercial transactions made of the slave's body an un-situated commodity, implicitly priced in the Liverpool trading market that set a going price of

¹ JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* xi-xii (1982) (explaining paternalism as a blend of strict stratification with a goal of organic unity in a social order).

² GEORGE W. FREEMAN, *THE RIGHTS AND DUTIES OF SLAVE-HOLDERS: TWO DISCOURSES DELIVERED ON NOVEMBER 27, 1836, IN CHRIST CHURCH, RALEIGH, NORTH CAROLINA* 5-7 (Reprinted ed., 1837), available at <http://archive.org/stream/rightsdutiesofsl00free#page/n5/mode/2up> (explaining that slavery is "one of the penal consequences of sin" in the requirement of labor and the necessity of apportioning supervision of labor to the father, as the head of families who would emulate his relationship with God in his mastery over his children and inferior beings made to labor). George M. Frederickson explains religion-derived rationalizations used by whites to overcome Christian universalism, with the related idea of "one blood," and how these whites see themselves as "the natural masters of Africans." GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* 46-7 (2002).

³ Many writers have described the evolution over time of the legal treatment of slaves, with Southern law wavering between a conception of slaves as nothing more than absolute property to whom no duty could be owed, and as human beings accountable for their own crimes and potentially protected from willful killing, except in defined circumstances. See generally THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW: 1619-1860* (1996). For a meticulous account of the early recognition of slaves' humanity and the gradual movement of the law toward denying all protections to slaves, see generally MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2003) (analyzing the law's struggle to explain the premises of slavery).

cotton and other slave-produced commodities and intensified the demand on the slave's body for rapid production of commodities.⁴

The struggle of the law to reconcile the claimed moral underpinnings of slavery with the concept of property, within a partly feudal society, existed alongside the full development of the laws underpinning these global commercial transactions. And the law of commerce ultimately rendered place, and the sentiments that can hold sway within conditions of proximity and community, a lost detail in a world of accelerated communication, market quotations, and the capacity to transmute a human life into a tradable commodity across distances. Thus, the logic and law of slavery was bifurcated within the South between the premises of a place-anchored order that drew upon fading paternalistic values and a fluid system of mobile capital that priced slaves as a mobile commodity, available for sale pursuant to impersonal market logic and with no humane regard for their embodiment in any place at all.⁵ The tension between human beings as property and as intrinsically human began to be unmanageable and irretrievably incoherent. The conceptual confusion could not be solved.

Marriage procedure in the early twenty-first century exhibits a similar logical tension between the moral sway of physical proximity over a legal arrangement and the sweeping cultural transitions in marriage meaning and ceremonial practices that render the place-centered legal regime for marriage access flawed. As a presumed anchor for creating and regulating the marital status in law, geography has lost its grounding in the decisive effect on “community” of physical proximity and limited mobility. Yet marriage law continues to embrace a literalist

⁴ WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 249 (2013). Indeed, as Johnson explains,

By 1820, the daily practice of slave traders—gathering information about the economy by inquiring into the price of cotton in New Orleans, New York, and Liverpool and the price of slaves in the Upper and Lower South, comparing them, and making a bet about whether the “market” would rise or fall—was sufficiently developed to ensure that slave prices in Richmond, Charleston, and New Orleans would track both one another and the price of cotton (and to a lesser degree that of sugar) with a remarkable precision. The daily practice of the slave trade . . . knit a territory that stretched from Louisiana to Maryland into a single slave economy.

Id. at 41-42; see also OAKES, *supra* note 1, at xiii (asserting “the profound impact of the market economy on the nature of slavery”).

⁵ OAKES, *supra* note 1; see also JOHNSON, *supra* note 4, at 11 (describing “the tension between ‘the South’ as a region of the global economy and ‘the South’ as a region of the United States of America—by the tension between the promiscuity of capital and the limits prescribed by the territorial sovereignty of the United States”).

approach to the claim of territorial jurisdiction over the solemnization of marriages. At the same time, the culture increasingly embraces marital connections arising from mobility, cross-cultural interactions, and marriage ceremonies severed from a local context. Despite the changing cultural context of marriage ceremonies, states fail to modify the tie of the marriage ceremony to physical presence by a couple. States fail to use their existing power to confer marital status remotely, which they possess to authorize marriages valid in their jurisdiction and in as many others as raise no policy objection to the marriage itself.⁶ Thus, any prudent procedure to grant marriage status remotely is as effective as the universal practice of allowing couples who make a brief visit to a state and who marry during that visit the benefit of that state's marriage licensing law.⁷

Yet the existing geography-based rule requires the use of a marriage license within the territorial limits of the issuing state. Exploring the nature of that literalism reveals other marriage literalisms, including the obsolete use of a creaky "state interest" in denying marriage comity. The Supreme Court's recent rejection of a federal interest in denying recognition to same-sex marriages for federal law purposes⁸ reveals the thinness of any claimed interest by states in territorial control. The sense that requirements of physical presence in the state that issues a license somehow protect, for example, a local culture of marriage, or vulnerable individuals, ignores the widespread mobility associated with marriage ceremonies performed away from a home location of the couple.

A geographic skepticism, and awareness, queries the fading logic of state marriage procedure, which dates from the early twentieth century. With a skeptical view of stale procedures that tie marriage formalization to temporary physical presence in a specified locale, states might experiment with a marriage regime that lets couples choose their preferred marriage law, much as corporations elect a governing law for internal affairs at the time of incorporation. Yet there is little reason for states to innovate, given the current legislative incentives. States compete for marriage tourism, and have little motivation or guidance to devise procedures for their marriage law to be consumed

⁶ Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J. L. REFORM 735, 737 (2011).

⁷ *Id.* at 795-96.

⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding that the federal law denying recognition for federal purposes to valid marriages served "no legitimate purpose").

remotely. Lawyers do not have practices connected with entry into marriage by couples, so there is no natural lobby to seek law improvement and efficiency. Thus, the assumption that place and marriage are tightly intertwined continues to be a default intuition, despite fading logic. An undertaking for general law improvement through examination of the role of place in generating legal procedures that do not achieve useful purposes and impose needless cost provides a template for innovation to benefit couples who may need access to marriage law from a distance. An antiquated, unreflective assumption about place could be removed from the framework of law with careful attention to the actual benefit of place-anchored marriage licensing law.

With these examples affecting slave law and marriage procedure, and as I develop in the body of this article, I maintain that much of law contains some element of place as either an overt topic (jurisdiction, justifiable use of deadly force, regulation of spontaneous roadside memorials), as an unnoticed intuition, or as a metaphor used without the rigor of close scrutiny for its capacity to bear analytic weight. First, however, a concession should be made for the hazards of attempting to organize and analyze for practical applications in law the domain claimed by “place” in the human imagination. I am also on warning of the risks of tautology.⁹

Insofar as I claim a wide domain for place in law, I risk either triviality, by confirming something obvious, or analytic sprawl that defies organization or focus for failure to exclude any part of the universe. My effort might be thought the opposite of the originally announced ALI plan of restating the law as an attempt at simplification.¹⁰ But the material in which place is either an overt or unreflective topic in legal thought is broad, so the effort to recognize its reach into law, through a partial but broad set of examples, seems a reasonable effort at assessing its manageability as a feature of law that could be translated into a set of principles.

In effect, the undertaking challenges the assumption that the common law is fundamentally sound as an empirical result of

⁹ I thank Prof. Bernstein for her stern but kind tutorial on the need for exclusion of some legal subjects from a vast universe of place-influenced topics and the need for practical utility of any potential restatement project. Telephone Interview with Anita Bernstein, Anita and Stuart Subotnick Professor of Law, Brooklyn Law School (July 13, 2013).

¹⁰ Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 644 (1933) (citing Radio Program of the American Bar Association announcing President Wickersham’s address on May 7, 1933, on *Restating the Law; an Attempt at Simplification*).

trial-and-error reasoning with cases, and that the restatement undertaking properly resists the creation of statutory free-hand abstractions or novel concepts which are necessarily subject to the cross currents of political contestation and untested by judicial application and refinement.¹¹ Various topics that have not lent themselves to restatements and instead have fostered Principles or Model Codes exemplify the potential for producing principles of the law of place. Though often controversial,¹² Principles projects create baselines for debate and norms for consideration as approved by ALI members after wide vetting. Saul Levmore has offered an excursion into the possibilities of new categorizations within common law by exploring whether “deception” might be distinguished as an area of the law, considering what utility there might be in developing a theory of deception, and discussing how “natural” categories of law could be identified.¹³

¹¹ David A. Logan usefully compiles the rationales and summaries offered by leading figures in the intellectual provenance of the ALI Restatement project. David A. Logan, *When the Restatement Is Not A Restatement: The Curious Case of the “Flagrant Trespasser”*, 37 WM. MITCHELL L. REV. 1448, 1475-78 (2011) (capturing the sentiment for incrementalism, avoidance of restatement topics that do not arise from experimentation by judges, and willingness to tolerate an incomplete answer to a complex problem). Professor Marc Poirier suggests that in an instance of an unnoted category in law, a statement that adopts advocacy is a good approach. E-mail from Marc Poirier, Professor of Law, Seton Hall University School of Law, to author (Aug. 30, 2013, 7:11 EST) (on file with author).

¹² Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 577-79 (2011) (praising the Principles of the Law of Aggregate Litigation as “a remarkable achievement,” but suggesting there is continuing conceptual confusion regarding issue preclusion); William J. Carney, *The ALI’s Corporate Governance Project: The Death of Property Rights?*, 61 GEO. WASH. L. REV. 898, 898 (1993) (referring to the final approval of the ALI Principles of Corporate Governance: Analysis and Recommendations as “the most controversial event in the history of American corporate law”); Joel Seligman, *A Sheep in Wolf’s Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 328 (1987). For a review of critiques of the ALI project, as well as specific controversies affecting the Restatement of the Law of Restitution, see Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE L. REV. 933, 933 (2008) (concluding that the ALI attains “consensus doctrine that is accurate and legitimate, yet not frozen in time”).

¹³ Levmore states:

Deception is a regular feature of matters that give rise to legal conflict, and yet we do not think of cases with deception or fraud as a common element as doctrinally related. I will suggest here that they can, in fact, usefully be thought of as a group. From that observation there follows the more abstract question of why judges have not thought of these cases as related. The common denominator of “deception” has not often motivated them to decide cases in ways that take into account decisions rendered in other deception cases. My aim here is to explain this sort of narrow judicial focus, or brand of “minimalism” as I will sometimes call it, and to argue that the reason for this selective minimalism is an important and unrecognized part of the common law process. Deception is hardly the only window to this observation about the common law process, but it is one such opening and, in any event, the one inspected here.

So my task in this piece is to provide demonstrative examples of the presence of place in the construction of law; to suggest how a rigorous analysis of its presence across dimensions of law might proceed; and to suggest the manner in which principles might be shaped to guide law-making or the application of common law. To avoid the risks of rhetorical tautology, I will suggest an area of the law in which place is not a presence, and try to suggest the level of abstraction at which common principles might be articulated in certain domains of place to advance sound legal use of place logic. I will also propose a small number of articulations of principle in a concrete subject area to suggest how “place” principles might be given form.

Section I of this article will discuss the meaning of “place,” by juxtaposing it with similar terminologies: territory and space. In order to begin identifying place as a key component of legal reasoning, Section II will give a brief overview of place within a legal context. Section III examines buried assumptions that emerge over time as an overt category for legal management and classification and reviews some of the emerging scholarly interest in place as a background cultural assumption in flux. Section IV considers metaphors of place that orient perception, and then does a limited first cut at cataloguing specific uses of place in law.¹⁴ The cataloguing undertaken in Section IV will use relatively broad characterizations of legal applications of place reasoning, with tentative labels: micro-identity-intensifying settings, place-modified citizenship rights,¹⁵ and so forth. The initial listing is meant to invite further theoretical work, devising the most usable levels of abstraction for organization of a treatise

Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359, 1359 (2007).

¹⁴ Other cataloguing precedes my effort. For example, the chapters in *LEGAL GEOGRAPHIES* are an implicit catalogue, but they do not overtly claim a cataloguing mission. They are provided as a topical exploration of the unexamined category of space as an entry point into recognizing and “mapping” the deep but unacknowledged presence of assumptions about space that give law a sense of coherence and stability. *THE LEGAL GEOGRAPHIES READER: LAW, POWER AND SPACE* xix (Nicholas Blomley, David Delaney & Richard Ford eds., 2001). I intend to do a tentative and incomplete cataloguing as a means of tying this attempt to my own direct review of legal materials and cultural commentary, with a hope to enrich the available thinking on the ubiquitous presence of place as an element of law and to stimulate and provoke interest in further classification and analysis of place across dimensions of its use.

¹⁵ See *infra* note 155 and accompanying text; see also Barack Obama, President of the United States, Remarks at the National Defense University (May 23, 2013), *video and transcript available at* http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?_r=0 (explaining the rationale for lethal strikes on U.S. citizens abroad). Though President Obama argues in the speech that internal processes of legal review provided due process, one may surmise that no such claim would be made concerning a citizen present in the United States.

on place as a legal topic and for further work on the viability of place assumptions in a world of increasing “displacement,” through remote communication and digital creations of physical settings and characters, of literal place as a grounding feature of lives. Sections V and VI of the article present examples of particular areas of legal reasoning in which place has figured particularly prominently, and Section VII provides some suggestions for statements of principle affecting these place topics.

I. PLACE: WHAT IS THE MEANING OF THE TERM AND WHAT IS IT LIKE AND UNLIKE?

A. *Distinguishing Place from Space from Territory*

This Part examines the related ideas of place, space, and territory, all of which overlap but have distinct connotations. In a primer on place, Tim Cresswell explains that place is seemingly such a familiar idea that little care is taken to define its meaning; “Place is a word that seems to speak for itself.”¹⁶ In comparison with space, place is material while space is not. “Spaces have areas and volumes. Places have space between them.”¹⁷ Even nonexistent place takes on an “imaginary materiality.”¹⁸ For some geographers and their allies however, space is treated as blank and unarticulated, while place is given a human quality by its function as a site for (re)producing culture. For others, by contrast, space might be seen as discursive, and place as physical, or they may be thought to overlap.¹⁹ There is some lack of consistency in the use of these terms.

Territory, unlike either place or space, has some overt legal associations. Place and space, by comparison, frame much legal reasoning, but are not concepts that are themselves infused with a formal claim about legal authority. They play background

¹⁶ TIM CRESSWELL, PLACE: A SHORT INTRODUCTION 1 (2004).

¹⁷ CRESSWELL, *supra* note 16, at 8.

¹⁸ *Id.* at 7.

¹⁹ E-mail from Marc Poirier, Professor of Law, Seton Hall University School of Law, to author (Aug. 30, 2013, 7:30 PM EST) (on file with author); *see also* Marc Poirier, *Gender, Place, Discursive Space: Where Is Same-Sex Marriage?*, 3 FIU L. REV. 307, 313-14 (2008) [hereinafter *Discursive Space*] (citing *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000)). The New Jersey Supreme Court rejected the argument that the Boy Scouts were not a “place” within the meaning of New Jersey public accommodations law, refusing “to construe ‘place’ so as to include only membership associations that are connected to a particular geographic location or facility.” *Dale*, 734 A.2d at 1208-10. As state law, the New Jersey holding is undisturbed by subsequent Supreme Court review.

roles, but territory generates the framework of law. David Delaney emphasizes the social production of territories and their contentious roots,²⁰ citing work on the derivation of the word “territory” that connects its roots to *terra*, or earth, and *terrere*, or to frighten.²¹ He concludes with a definition meant to be stripped to descriptive essentials: “As a first approximation, a territory—regarded in isolation, as is often the case in definitions—is a bounded social space that inscribes a certain sort of meaning onto defined segments of the material world.” A simple territory marks a differentiation between an “inside” and an “outside.”²²

B. Place as “Situatedness”

Place, or in its meaning as a material or imaginary factor of human awareness, “situatedness,” is basic to human cognition and self-definition. As with the human body, place seems a given: fixed, uncontrived, and objective. As a result, a general challenge to place as definitive for one’s legal person is not readily stated or understood. Place, as a measure of “situatedness,” always shapes the facts law mediates, and as such, place claims a central role as the background assumption of law.

Reviewing some of the subtleties and ramifications of embedded suppositions about human situatedness may allow for recognition of illusions of order concealing complexity. Such complexity, if disaggregated and organized into defensible rationales, might yield its mysteries to some progress toward the goal for which a restatement strives—“comprehensive, rationalist, universal, and general compilation”²³ Talking about a Restatement of place can refocus the ALI’s attention on how to bring coherence and rationality to an unstable underpinning of much legal doctrine.

Place, for example, defines citizenship,²⁴ and citizenship defines prospects. In tyrannical countries, place defines a

²⁰ DAVID DELANEY, TERRITORY: A SHORT INTRODUCTION 94 (2005). While conceding that territories provide security to those on the “inside” from those on the “outside,” Delaney also notes that ideas of territory have led to hundreds of thousands of deaths in recent years. *Id.* at 3.

²¹ *Id.* at 14.

²² *Id.* at 14 (elaborating further on the defining powers of a territorial line).

²³ Anita Bernstein, Restatement (Third) of Torts: *General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1370 (2001).

²⁴ Complications disrupt the simple association of place with citizenship. Citizenship can be inherited. For a discussion of the means of gaining citizenship, and a conception of citizenship as property, see Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 POL. THEORY 253, 253 (2007) (calling for increased critical scrutiny

boundary between human rights and danger. Arbitrary, life-ending power, imposed without recourse for its targets, arises from the vagaries of one's place in a moment of time, and from constellations of power controlling a place and blocking exit or safe resettlement. Tyranny, war, and famine are features of the brute power of man or nature to end lives within the confines of a place, while the outside world, transcending place, views the endings with concern.²⁵

The stakes place imposes in a federalist nation—such as the United States today—are less dramatic than the risks and rewards of one's assigned place on the global map. They come in milder forms. Place in the United States means variations in legal cultures and legal regimes moderated by national commitments to individual rights.²⁶ The variation in legal rights can be substantial, as with water and property law across the United States. By contrast, the domain of contracts is substantially consolidated as a result of the Uniform Commercial Code. And procedure varies considerably, as any student studying for a bar exam is aware.

In addition, some rights do not follow the person in a federalist system, as has been the case with marriages that are not portable from one state to another because of a state's claim to

of *jus soli* (territoriality) and *jus sanguinis* (parentage) as a basis for allocating citizenship, and noting that citizenship is a critical factor in life chances). Further complications arise where a culture defines citizenship tribally rather than by place; see DELANEY, *supra* note 20, at 44-45, or where a group is stateless and homeless, as are those called colloquially Gypsies, or, more correctly, Roma. For advocacy relating to their precarious status, see RESTLESS BEINGS, <http://www.restlessbeings.org/projects/roma-gypsies> (last visited Nov. 19, 2013). I thank Marc Poirier for pointing to the need to account for variant means of gaining citizenship.

²⁵ Judith Butler, Neale Wheeler Watson Lecture: Precarious Life and the Obligations of Cohabitation (May 2011) [hereinafter Butler Speech]. For further mediations on the political and ethical implications of human vulnerability, see JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* (2004).

²⁶ The just-decided case of *U.S. v. Windsor* provides the germ of an idea about the limitations of place in marriage: though the federal government through Congress "can make determinations that bear on marital rights and privileges," *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013), territorial sovereignty does not allow it to do so in a way that targets a class of people to diminish their rights. *Id.* at 1292. States may directly control the definition of marriage within their boundaries, but, like the federal government, states are restrained in their territory-based claims of control by the requirement to "respect the constitutional rights of persons." *Id.* at 2691. Somehow state territory rules marriage as part of a presumed natural order in which the Constitution allocates control of marriage to states in accordance with a map and in which the federal government may play a supplementary role. But within the entire territory of the United States ideas about individual rights supersede claims based on assertions of any scale of territorial "final say." The level of U.S. protection for rights of persons gradually places marriage outside of the logic of place as the author of personal fate.

a policy interest in negating the marriage.²⁷ With the recent announcement by the Obama administration that federal recognition of marriage will be based on a couple's choice of a place of celebration, without regard to non-recognition treatment in their state of residence, the iron control of place over marriage status is waning, with relatively little recognition of the extent of the sea change in the local, place-based hold over the incidents of marital status.²⁸

At various times, place in the United States meant a lack of basic rights for African-Americans—to move to a state as a free black citizen, to vote, to own property protected by law, to call upon law enforcement for protection, or, when slavery existed, to have a fair chance at forming an autonomous life with family and friends. In many Southern states, place meant the power to banish freed slaves;²⁹ place, as comprehended as territory, and control of territory as control of culture, was incompatible with their presence.³⁰ Today, place can mean subjection to harsh laws, harshly enforced. Or it may mean subjection to violence unchecked by police intervention or unpunished by retrospective accountings.³¹ Place in the United States can still be dangerous to the flourishing of life.

²⁷ Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377 (2012).

²⁸ For a piece pointing to a future for forms of marriage portability that overcome place in our federalist system, see Mae Kuykendall, *The Converging Logic of Federalism and Equality Logic in Same-Sex Marriage Recognition*, AM. CONSTITUTION SOC'Y (Sept. 2012), <http://www.acslaw.org/publications/issue-briefs/the-converging-logic-of-federalism-and-equality-in-same-sex-marriage-recog>. For a distinctive examination of the theme of localism in *United States v. Windsor*, see generally Marc Poirier, "Whiffs of Federalism" in *United States v. Windsor: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. (forthcoming 2014).

²⁹ KENNETH M. STAMPP, PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 94 (1989) (describing a master's offer to free his slaves contingent on their leaving both the state and the United States), 232-33 (enumerating state provisions restricting manumission and requiring freed slaves to leave the state within a specified period and, in some instances, the United States).

³⁰ A transition in sovereignty can result in the elimination of property rights and the right to dwell, often worked out against subject populations along lines of race and ethnicity. See, e.g., MARÍA E. MONTOYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-1900 107, 113, 128 (2002) (explaining ejection suits).

³¹ Frank Perez, *After UpStairs Lounge Fire, Gay and Straight New Orleans Changed*, TIMES-PICAYUNE (June 22, 2013 8:55 AM), http://www.nola.com/opinions/index.ssf/2013/06/after_upstairs_lounge_fire_gay.html (describing the "cruel" media coverage and the "dismissive police response" to an arson of a gay New Orleans club that caused 32 deaths, mainly of gay men).

II. THE LEGAL LOGIC OF PLACE: PLACE AS A FUNCTION OF LEGAL CONSTRUCTIONS OF ORDER, SEPARATENESS, AND CONTROL

A broad conception of the Restatement undertaking would be engaged by examining place as a topic for legal classification. Place does not present itself as a legal domain in the manner of the overtly legal doctrine with which the Restatement project bears an association.³² An attempt to catalogue, and then restate, the uses of place as a basis to define legal rights and obligations challenges the boundaries of the Restatement world of *contained* abstraction about pre-labeled bodies of legal concern³³ brought together by a simple conceptual grouping: injury, promises, ownership, family forms—that is, areas of common law. Restatements, nevertheless, confront what Professor Anita Bernstein has called “a wilderness of Nature,” a mass of material that lacks the manifest rationalizing force of “comprehensive, rationalist, universal, and general compilation.”³⁴ Place is the wilderness of human cognition left at a loss for guiding principles that assign a moral weight to considerations of distance, exclusion, and proximity across virtually all dimensions of law.

Legal scholarship on place has sought to identify the role of the nation-state as a critical influence on legal conceptions of place, in which a nation-state asserts a power coextensive with territory yet operates in a complex conceptual framework that allows for competing narratives for addressing specific legal problems.³⁵ Law and geography scholarship has focused on the authority of the nation-state and on the capacity of territorial logic to properly “scale” problems of justice. “Scaling” proposals seek to draw legal boundaries relationally, and deny that territory is only spatial. Rather, “relationship” is posed as “the conceptual core” of territory.³⁶ The normative goal is to achieve just resolutions for those not neatly located in a legal space defined by territory as a controlled space, with a concern for social justice for

³² Bernstein, *supra* note 23, at 1369-70 (suggesting, in connection with the Tort General Principles draft, that “the premise is that once accurately perceived, an object of gaze—for the ALI mainly decisional law, with statutes and scholarship occasionally included—will reveal its inner logic and coherence” (footnote omitted)).

³³ *Id.* at 1389-90 (noting the tradition of drawing restatements from a narrow band of decisional law in an area of law, as well as a trend toward a diversity of sources for Restatements, or “[p]luralistic materials”).

³⁴ *Id.* at 1370.

³⁵ Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law*, 13 VILL. L. REV. 117, 120-21 (2008).

³⁶ Andrea Berghenti, *On Territory as Relationship and Law as Territory*, 21 CANADIAN J. L. & SOC’Y 65, 67 (2006).

those classified as “other.”³⁷ At the same time, broader efforts at classification have emerged.³⁸

The simplest conception of place as an element of lawful force and control—a dominant sense of reality—is of an inert, bounded physical territory subjected to a state’s assertion of control over its governance.³⁹ As recently renewed and re-emphasized by the Supreme Court, the sovereign claim over a territory is heavily presumed to be incompatible with the exercise of jurisdiction by another sovereign to enforce a norm of international law that occurred in the other sovereign’s territory.⁴⁰ Intrusions into the territory are subject to the sovereign’s control and limited international norms, such as safe passage and security for diplomats.⁴¹ That simple conception has become a strong understanding in the law of nations, despite a complicated historical evolution in claims of authority over large expanses.⁴² Challenges to the naturalness of territorial conventions affecting sovereignty have become commonplace in scholarship, but remain relatively marginal in law. A powerful example is contained in the writings of David Delaney, one of a group of imaginative scholars who examine anomalies of geography, identity, and law:

Greater attention to discourse and discursive practices . . . would complicate the (more or less) transparent model of communication that informs [Robert Sack’s classic 1986] *Human Territoriality*. It complicates our understanding of how territorializations give expression to the relationships between power, meaning, and experience. Attending to

³⁷ Osofsky, *supra* note 35, at 118-19.

³⁸ See THE LEGAL GEOGRAPHIES READER: LAW, POWER AND SPACE, *supra* note 14, at xiii (referring in the preface, *Where is Law?*, to “how far removed we are from the spatio-legalities of the century before last”).

³⁹ LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400–1900 1-39 (2010) (bringing a new perspective to the understanding of mapping and law). As is suggested throughout this article, that dominant influence of place, meaning location, as an element of law loses much of its intuitive force with telecommunications. Many puzzles arise in the absence of clear grounding on the physical earth. Where did an act of fraud occur? Where did defamation occur? What community should be understood to apply community standards? Specific answers can be devised for selected questions, as a sort of *ipse dixit* of the controlling law-giver/applier, but a general logic of community would provide a hope for coherence in legal control over accountability.

⁴⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 1664-67 (2013) (emphasizing the presumption against extraterritorial application of a U.S. law or international law by a U.S. court in the absence of clear indication in the statute of intended extraterritorial reach and citing Blackstone on the limited offenses that existed against international law at the time the Alien Tort Act was passed). See CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 53 (2008) (referring to an aspiration for justice without the constraints imposed by territorial borders).

⁴¹ *Kiobel*, 133 S. Ct. at 1666 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723 (2004)).

⁴² See BENTON, *supra* note 39, at 1-39.

discourse in this sense allows us to regard territorial complexes—such as those through which race and gender are expressed—more in terms of their cultural and historical particularities, and to situate specific practices, such as segregation, deportation, eviction, or confinement, less in terms of intentional strategies of rational actors and more in terms of cultural performances.⁴³

In this vision, the formal, logical reasoning that apports sovereignty between territorial domains, creating presumptions between sovereigns whose will is understood as derived from something more grounded and core to legal authority than “cultural performances,” becomes peripheral to the human stakes in a world of “precarity” of the human condition.⁴⁴ In a world organized by territorially inscribed “cultural performances,” rules created by the identification of territoriality with sovereign legal dignity⁴⁵ ignore human stakes of the sort that newer scholarship and political forces attempt to advance and protect.⁴⁶ Casting his vote with the human beings put at risk by

⁴³ DELANEY, *supra* note 20, at 94.

⁴⁴ Butler Speech, *supra* note 25 (referring to “every political effort to manage populations [as involving] a tactical distribution of precarity”).

⁴⁵ The idea of the “dignity” of a sovereign has made an appearance in American federalism as explicated by the Supreme Court. Justice John Roberts has introduced into the vocabulary of federalism the term “equal dignity” of the 50 states, awarded to them on the basis of sovereign status. Indeed, there is a brewing clash within the Supreme Court. Even as Justice Roberts develops a concept of the “dignity” of state sovereigns, see *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (emphasizing the constitutional right of states to equal dignity), Justice Kennedy is working to develop a core notion of personal dignity that might overcome the claims of states to control the definition of marriage and thus to exclude same-sex couples in the name of the dignity of the state. See *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692-94 (2013). The sense that Justice Kennedy is more poetic than legal in fashioning a doctrine of personal dignity gains its strength from the intuition that preservation of the sovereign dignity of law-giving states is superior to, and more grounded in something with solidity, than a theory of the personal dignity of persons under the United States Constitution. I am grateful to Marc Poirier for prompting this comparison. For a discussion of the novelty of the comparative dignity rubric for states, see generally Joseph Fishkin, *The Dignity of the South*, 123 YALE J. ONLINE 175 (2013).

⁴⁶ A good example of such a critique, in a recent specific context, concerns the use of the logic in *Kiobel*, 133 S. Ct. 1659 (2013), regarding extra-territoriality and sovereign dignity:

Rather than obsessing about the bounded nature of state sovereignty and hiding behind self-interested concerns to avoid interference in the internal affairs of sovereign competitors, local communities who suffer from transnational environmental harms understand the reality of global interconnectedness, both ecological and economic. Permanent sovereignty over natural resources, sustainable development and the “e-word” [meaning extra-territoriality] are concepts invoked to solidify the ability of host states in both north and south to exploit resources ostensibly for the good of their peoples. Yet, if we are truly concerned with sovereignty of the people, we must as a global community encourage if not require our courts to provide a space for local communities who wish to both prevent and remedy intra-territorial environmental harm with a chance to voice their concerns. This is something that the ATS was clearly not

territorial-based sovereignty, Delaney dedicates his book: “For those who are unjustly excluded, expelled, confined, or invaded.”⁴⁷

Today place is increasingly understood as having multiple meanings, and proximity as posing as many puzzles as paths to insight. Both contemporary scholarship about the evolution of sovereignty⁴⁸ and the manipulability of place perception by technology pose questions about the organic connection of law’s domain to the physical earth.

Place as an implicit presence in much of law attracts ethical concerns by critics of the nation-state. In their view, states claim a territorial imperative that facilitates and may even promote population displacement and occupation, resulting in recurring crises that allocate the “precarity” of the human condition to some groups while insulating others.⁴⁹ At a micro level, place situates embodied expectations and group behavior, some of which are enforced by legal rules.⁵⁰ The privilege in some states of “standing one’s ground” with lethal effect allocates rights and inflicts loss, defining the micro-parameters of control over place in public. Hence, place constantly allows for settlements of ambiguities and anomalies that might foster legal loss of nerve if

designed to do. *Kiobel*, due to its problematic invocation of the “e-word”, encourages us to pretend we live in a world built around impermeable sovereign borders, thus inhibiting our ability to take responsibly [sic] across borders as members of a global community sharing one earth.

Sara Seck, *Kiobel and the E-word: Reflections on Transnational Environmental Responsibility in an Interconnected World*, LAW AT THE END OF THE DAY (July 5, 2013, 11:25 AM), <http://lbackerblog.blogspot.com/2013/07/sara-seck-on-kiobel-and-e-word.html>.

⁴⁷ See DELANEY, *supra* note 20, at dedication page.

⁴⁸ *Id.*

⁴⁹ Butler Speech, *supra* note 25. The extent of insulation can vary by place. In her book meditating on geography and identity, novelist Mary Gordon, in considering her security in a life, and a place, given to her by a university by admitting her and then fostering her career, describes the withdrawal that place can provide from the hazards faced by the less fortunate, and the smugness that may go with insulation from “precarity”:

How do I speak of all of this? How, without incurring the suspicion that, accompanying the joyous click of the tongue in the lock’s groove of a beloved New York apartment, is an automatic sense of triumphalism? A smug “I’m here, therefore you’re not.” A satisfaction, like the ripple of an ocean breeze, of possession and exclusion.

MARY GORDON, *SEEING THROUGH PLACES: REFLECTIONS ON GEOGRAPHY AND IDENTITY* 254 (2000).

⁵⁰ See generally ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* (1971).

place did not appear natural and inevitable as a driving rationale for much of law.⁵¹

Conceptually, place is of increasing interest to a variety of scholars.⁵² Historians have long studied the connection between perceptions and mapping of territory and the establishment of empire and the development of law.⁵³ In the last 30 years, place as an anchoring feature of identity, cognition, and grounding in the world has been in flux. Puzzles about place in a world of wide mobility and disembodied life on the internet attract attention from a wide variety of disciplines. For example, architects and artists have noted the malleability of space and, in art, the “waning” of the human body from representation. One scholar has led tours through museums to demonstrate the “absence” of the body in one outlet for the human impulse to portray the critical visual components of the world as perceived.⁵⁴ Architects examine the increasing manipulation of design to channel behavior by shaping environments to conceal the forms of control being exercised.⁵⁵ Psychologists investigate the commonality between the patterns of stalking in the physical world compared with cyberstalking.⁵⁶ Ethicists and “transhumanist thinkers” address the implications of re-configuring the human body with machine parts, thus moving toward a “posthuman” future.⁵⁷

That flux’s form and effects on human culture are difficult to capture and evaluate. In many venues, the “displacement of place” is portrayed as a positive, transformative linking of

⁵¹ For a provocative argument that the “expressive topography” in American life, meaning physical areas widely open to expressive liberty, is shrinking under the force of sovereign control of the spatiality of expression, see TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 2-3 (2008).

⁵² An indication of growing interest in the legal academy can be detected in the forthcoming program of the American Association of Law Schools (AALS). The Conflicts Section of AALS will present a program on “The New Territorialism and the Supreme Court.” The program will include talks “across a range of substantive and methodological fields,” including extraterritorial financial regulation, territorialism’s history, status and place in transnational tort, and governance in cyberspace. General e-mail from Louise Weinberg, William B. Bates Chair for the Administration of Justice, University of Texas School of Law, to Federal Courts listserv (Dec. 13, 2013 10:58 AM EST) (on file with author).

⁵³ See BENTON, *supra* note 39, at 1-6.

⁵⁴ Taylor Marsh, *Figuring Absence: The Waning of the Body in Contemporary Art* (Dec. 15, 2012) (Gallery Talk at the Arthur M. Sackler Museum, Cambridge, Mass.).

⁵⁵ Lee Tien, *Architectural Regulation and the Evolution of Social Norms*, 7 *YALE J.L. & TECH.* 1, 5-7 (2005)

⁵⁶ L. P. Sheridan & T. Grant, *Is Cyberstalking Different?*, 13 *PSYCHOL. CRIME & L.* 627-40 (Dec. 2007).

⁵⁷ Editorial, *Ethics: The Questions Posed by Our Bionic Bodies*, *OBSERVER* (June 15, 2013), <http://www.theguardian.com/commentisfree/2013/jun/16/observer-editorial-biotechnology-ethics> (suggesting science is pushing us to a “posthuman future”).

humanity and empowerment of individuals. In other views, the loss of place and the technological transcendence to a boundary-less space is criticized as a new source of danger: loss of grounding in a human context, anonymity as a means of harassment and targeting minorities, and potential for increased authoritarian control over the entire population of the globe.⁵⁸ Additionally, there is intuitive concern that core celebratory moments lose constitutive and spiritual force if they are not embodied in moments of shared physical presence.⁵⁹ If law is for the purpose of lending order and fairness to human activity, legal principles would benefit from a basic re-examination of place as a driver of law reasoning and law-backed power. The law surely has a role to play in sorting the legitimate role of place in protecting human welfare and the oppressive role of mere proximity over vulnerable humanity.

III. THE EVOLUTION OF UNNOTICED ASSUMPTIONS ABOUT PLACE IN LEGAL REASONING: FROM INVISIBILITY TO CONTESTATION AND CLASSIFICATION

Putting aside contested visions of a less “rooted” world, place simply recommends itself as a study of legal anomalies and unexamined organizing precepts that enable law to appear plausible without the need of deep ongoing inquiry into the metaphysics or phenomenology of legal rules.⁶⁰ Place is the

⁵⁸ The recent book by Eric Schmidt and Jared Cohen, *THE NEW DIGITAL AGE: RESHAPING THE FUTURE OF PEOPLE, NATIONS AND BUSINESS* 3-4 (2013), typifies the visionary, optimistic view that the partial “displacement of place” is empowering and transformative. The response by Julian Assange to the book, *The Banality of ‘Don’t Be Evil’*, N.Y. TIMES, June 1, 2013, at SR4, captures the sense that control of the internet is control of human liberty.

⁵⁹ In fact, one scholar posed queries about the importance of “rootedness to place”:

One way to approach this is to think about the parameters of place—in what situation is place imperative? I cannot envision a funeral without place—a service by satellite alone. Could a jury preside without a jury box? Could you empanel a jury who served in front of their individual computers, watching the proceedings and deliberating by video conference? It seems wrong. Does the right to confrontation mean the right to confront . . . on a video screen? If we balk at the concept of any of these proceedings without “place,” then the question is where the boundary is? How far can we move beyond the rootedness to place and still survive intact, being torn asunder?

E-mail from Ruth Mendel, Independent Scholar, to author (June 1, 2013, 11:03 PM) (on file with author) (paragraphing omitted).

⁶⁰ The “Who Am I” or the “What Are We” or “What Is Reality” questions of literature and philosophy are beyond the capacity of law to divine or incorporate, yet they lurk in the imposition by law of a core yet unreflective understanding of the world, with unstated reference to place as the key element in pragmatic deployment of comprehensibility and justification in law. See *THE LEGAL GEOGRAPHIES READER: LAW,*

strongest example of a deep orienting assumption that lacks a cohesive rationale other than metaphors embedded in basic, relatively unreflective thought. Its claim over the apportionment of legal authority, or jurisdiction, even where extraterritorial governmental action affecting rights protected by domestic law is involved, is “tenacious.”⁶¹ As one scholar has written, an approach to rights that “privileges territorial sovereignty as the primary organizing principle of legal and political relations” remains highly influential in the conduct of sovereigns and the courts within them, despite scholarly recognition that “the reality of human interaction is chafing against the strictures our current conception of legal jurisdiction imposes.”⁶² She concludes that judges are unlikely to abandon a primary conception of territory as determining what domestic law constrains governments when they act outside their territory, while indicating that judges may occasionally seek to find a just resolution without overtly challenging the conceptual sway of territory.⁶³ A deeply original and sophisticated examination of the historical relationship between geography and law, by Laura Benton, disrupts the narrative of law and territory as wedded through the assertion of sovereignty by empires, with law and cartography developing together as a rationalizing force.⁶⁴

With the passage of time, certain buried assumptions become less fixed than in a period when social understandings and practices obscured them. The example of marriage statutes written without specification of the sex of the participants is a simple example. Sexual difference as a requirement was unexamined and barely even assumed. Reproductive pairings were sufficiently

POWER AND SPACE, *supra* note 14, at xiv-xv (relating *Where is Law?* to *Who are We?* and noting “[u]nacknowledged assumptions about space that work to stabilize the validity of seemingly obvious propositions, identities”).

⁶¹ Courts resist the invitation to extend rights defined domestically beyond their borders:

The factors affecting a national court’s willingness to find that domestic rights reach beyond national borders in a particular case are, indisputably, multiple and complex. That said, this study reveals the perhaps surprising tenacity of country-based reasoning that privileges the role of territory, even in an age of “globalization.” Scholars, advocates, and policymakers would be well advised to take into account the stickiness of territorially based conceptions of domestic rights and obligations in proposing more expansive interpretations.

Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. 55, 58 (2011) (indicating “the entrenched political and legal significance of national boundaries”).

⁶² *Id.* at 63 (quoting Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 543 (2002)).

⁶³ *Id.* at 57-58.

⁶⁴ See BENTON, *supra* note 39, at xi-xii.

pervasive as a social pattern seemingly driven by basic biology—gender as a binary associated with reproduction—that the legal grounding of marriage in gender went unnoticed. The potential malleability of the gendered body and of sexual attraction was not available for examination by lawmakers or judicial decision-makers.⁶⁵ For history, the implicit gender arrangements can be analyzed using a variety of interpretive approaches with elements of theory about power and the like, but the legal rules have needed little deeper theory or classification in connection with the binary assumptions about marital pairs.

Until the assumption of sex as an organizing category for marriage was disturbed, the deeply embedded feature could bear the moral weight that, unexamined, it readily supported. After changes in technology made the variety in human sexual and family connections visible and open, the unstated parameter began to weaken, to require heated defense, and finally, to lose the moral force that made it persuasive. The disruption of an unseen part of legal rules has opened up the marriage category for new taxonomic work. Today, the gender feature of marriage plays a role at the entry stage that varies across jurisdictions⁶⁶ and has placed in flux the mediating rules about obligations within marriage.⁶⁷ Hence, the gender component of marriage can now attract a larger project to create a taxonomy of the role of gender, or gender replacements, in marriage. The universe of variation, however, remains contained within the category of marriage.

Could place experience a similar exposure of its weakening logic in a world of mobility, instant communication severed from embodiment of the human person, newly understood historical complexities associated with the conquest of place and the assumed authority of a legal hierarchy over the local inhabitants,⁶⁸ and skeptical treatment by scholars of control over territory as a basis for asserting authority?⁶⁹ Is place amenable to refreshed taxonomic work in law that guides legal applications of logic relating to embodiment, location, or place metaphor? And is

⁶⁵ JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* xxv (1995) (referring to heterosexuality as a “suppressed parameter” of the meaning of marriage in the modern West).

⁶⁶ PETER NICOLAS & MIKE STRONG, *THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS)* 9 (3d ed. 2013).

⁶⁷ See James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923, 923 (2001) (asserting that “[t]he task of bringing coherence and consistency to family law is truly daunting”).

⁶⁸ RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKE REGIONS, 1650-1815* xxv (2d ed. 2011).

⁶⁹ See BENTON, *supra* note 39, at 30-33.

the fact that much of the mediation and reading of place arises from legislation rather than the development of common law an obstacle to a search for principles on which law can be rationalized and improved? This article seeks to answer these questions with an unequivocal yes, yes, and no.

IV. PLACE AS METAPHOR: IDENTITY, PERCEPTION, MEMORY, POWER

In contrast with assumptions about the gendered nature of marriage, place is both ubiquitous, as an unanalyzed background for legal doctrine, and nonobvious in the form of its various applications to law. Its influence is pervasive but unanalyzed as a category outside the specific topics in which it plays a role. Recognizing place as a feature of legal doctrine, incorporated without critical scrutiny or reflection, and thus, inconsistent in its logical role in different doctrines, invites an initial effort at taxonomy. One may, without an attempt to fashion a deep theory of place as an organizing perceptual or morally relevant category, begin to “map” the occurrence of place in law and to detect the way that place serves to allocate identity, blame, reward, movement, and haven.

As brute fact, place is, as part of our cultural memory, a fact that dominates any vision of the human subject. As metaphor, it carries meaning associated with hierarchy (“power and place,” “high place,” “first place,” “a woman’s place is in the home”), social fit within a structure or in circumstance (“out of place,” “above one’s place,” “the wrong time and place,” “stay in your place,” “another place and time,” “place in the sun”), ownership or control (“my place,” “our place,” “holding a place,” “place holder”), and perspective (“Put yourself in my place,” “in a bad place”).⁷⁰ Place, by means of design, is subject to alteration in ways that are subject to human agency while seeming not to be a product of agency. Hence, place molds the human subject by its totality and seemingly fixed character, even as the construction of place by agency and its unstated domination of legal categories is marginal as an overt subject of law.

This role of place in affording comprehensibility renders it central to much legal doctrine. Its centrality is opaque, providing grounding for the legal imagination from hidden nooks in the abstractions that grow from assumptions of physical proximity or

⁷⁰ Cresswell notes similar conversational uses of place. CRESSWELL, *supra* note 16, at 1-2.

distance, “meetings” of minds, proximate cause, a duty to retreat, an arm’s length negotiation, or a right to stand your ground. Here I attempt an orienting statement about place in legal materials: Place connects human perception to basic features of existential, or concrete, contact with an outside actor, force, or location, ordinarily through physical proximity but, possibly, through imaginary proximity.⁷¹

A. *Staking Claims of Sovereignty*

Place grounds views about sovereignty, moral claims over territory, the status of the occupants of a claimed territory, and nationhood as defined by physical expanse. Today, affinity groups often have stronger bonds of loyalty and commonality than do collections of human beings who share a physical location. Yet citizenship and nationhood remain defined by location in much of the contemporary imagination. The online game Cyber Nations unreflectively announces:

Cyber Nations is a free persistent browser-based nation simulation game. Create a nation and decide how you will rule your people by choosing a government type, a national religion, tax rate and more. Build your nation according to your choosing by *purchasing infrastructure* to support your citizens, *land to expand your borders*, technology to increase your effectiveness, and *military to defend your national interests*.

Develop *improvements for your nation such as harbors* to enhance your ability to trade with other nations, build clinics and hospitals to increase your total population, and invest in schools and universities to increase your people’s literacy rate. *Finance national wonders like great temples and monuments* for your citizens to marvel at, develop movie industries to increase your population’s happiness, or *expand beyond the confines of this world by building colonies on the moon and mars* [sic] to open up rich opportunities for your nation. It’s all up to you.⁷²

While nations are mainly physical and bounded, metaphor has helped to define the human in terms of place. The fifteenth century mystic and jurist Nicolas of Cusa used a metaphor of man as a cosmographer, or mapmaker, and his mind as a city⁷³ with gates through which the senses entered.⁷⁴

⁷¹ Note that Creswell describes “imaginary place” as having “imaginary materiality.” *Id.* at 1.

⁷² CYBER NATIONS: A NATION SIMULATION GAME, <http://www.cybernations.net/> (last visited July 5, 2013) (emphasis added).

⁷³ VICTORIA MORSE, THE MAP AS A METAPHOR FOR ACCESS TO KNOWLEDGE BY NICHOLAS OF CUSA (1999) (translating and commenting on NICHOLAS OF CUSA,

As a mystic, Cusa had a larger goal than theorizing sensory input,⁷⁵ but his core idea depended on an understanding of a human being as a situated “city” with gates, indicating proximity to something that could enter the gates, and dependent on the senses to process the world. Place was dominant for such a conception of the human subject.

The American mystic Ralph Waldo Emerson similarly focused on the organ for sight—the transparent eyeball. Unlike Cusa, Emerson began to hover above the situatedness of the single sense that he named as primary to the human soul. Emerson anticipated, with his experimental treatment of something he called the Over-soul, the fragmentation and simultaneous expansion of human subjectivity from grounding in a physical place. Emerson evoked an abstracted location created by a common human access to thought, transmitted without direct contact yet defining of the human subject. Rather than Cusa’s city with gates, Emerson imagined a universal eye, roaming across time and place. Emerson’s writing is devoid of writing about law. Yet his conception of the possible form human connection might take prefigures the impact of technological change on human consciousness as an unembodied merger of minds.⁷⁶

The Over-soul may not have legal problems, but the hovering Cloud of the late computer age brings collisions of legal interests that would dismay the genteel Emerson’s aspirations for a unified human understanding without direct contact among the human composition of the unity. At the same time, Emerson’s preference for abstraction had implications for how the concrete world, in its physical proximities, could establish embodied institutions meriting respect or direct engagement. In his sense of removal from engagement, Emerson foreshadowed a possibility of place receding as a guiding concept for legal obligation or moral imperative.

Finally, a second American “mystic,” President Abraham Lincoln, offered a reading of a nation that relied on an insistence on a deep moral component of territorial bounding:

COMPENDIUM ch. VIII (1464), *available at* <http://www.geography.wisc.edu/histcart/broadsht/brdsht7c.pdf>.

⁷⁴ NICHOLAS OF CUSA, COMPENDIUM ch. VIII (1464), *available at* <http://www.geography.wisc.edu/histcart/broadsht/brdsht7.html>.

⁷⁵ *Id.*

⁷⁶ RALPH WALDO EMERSON, THE OVER-SOUL (1841), *reprinted in* SELF-RELIANCE AND OTHER ESSAYS 51-64 (Stanley Appelbaum ed., 1993).

A nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability. "One generation passeth away and another generation cometh, but the earth abideth forever." It is of the first importance to duly consider and estimate this ever-enduring part.⁷⁷

Such a claim must be evoking/invoking the part of historical memory that is thought a defining feature of a place; for Lincoln, a claim of memory must have been implicit, yet the memory Lincoln invoked was of a duration that commenced with conquest and then with a compact.⁷⁸ So the background legal and mystical phenomenology of nations relies upon a sovereign power that places a boundary around the claims of place-memory and clothes that power in moral garments and legal order.⁷⁹

Dissents from such claims take legal, cultural, and literary forms in terms of assertions of individual rights, indigenous rights, guerilla warfare, treaties that give indigenous peoples partial status as nations within nations, the designation of sacred places (evoking memory), and subtle analyses of what gives a person "a human claim" to a place.⁸⁰ The assertion that settlers

⁷⁷ Abraham Lincoln, President of the United States, Second Annual Message to the Senate and House of Representatives (Dec. 1, 1862), available at <http://millercenter.org/president/speeches/detail/3737>; ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 676 (Roy P. Basler ed., Da Capo Press 2001).

⁷⁸ GEORGE M. FREDERICKSON, THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION 130-50 (Illini Books ed., 1993) (concerning competing theories of the nation as an organic body or a product of consent subject to the withdrawal of consent).

⁷⁹ Perhaps Lincoln's meaning about time and place can be translated by a contemporary European thinker:

As legal norms are posited from the first-person plural perspective, they situate human behaviour in the temporal arc spanning the past, present, and future of a collective. These modes of time are irreducible to calendar time. The unity of calendar time manifests itself as the continuum of a before and an after; by contrast, past, present, and future only appear as a unity to the extent that the members of a collective mutually engage in action with a view to realising their common interest: we now "y" to be able to "z" later on, given that "x" took place. Past, present, and future are sutured into the history of a "we" through mutual interaction in the framework of a common project. Because a determinate common interest manifests itself temporally in the form of a determinate common project, historical time is common in the twofold sense of a time that is shared by, and distinguishes, the members of a collective. Precisely for this reason, legal orders unfold a *bounded* temporality. In this fundamental sense of the term, the bounded time of a polity conditions its use of calendar time when setting dates, and in that sense temporal limits, to human action.

Hans Lindahl, *A-Legality: Postnationalism and the Question of Legal Boundaries*, in GLOBAL DEMOCRACY AND EXCLUSION 123 (Ronald Tinnevelt & Helder de Schutter eds., 2010).

⁸⁰ Adam Gopnik, *Facing History: Why We Love Camus*, NEW YORKER, Apr. 9, 2012, at 70-76.

have a “human claim” to a place challenges the views of the left about the moral significance of place as the property—perhaps even sacred property—of native peoples. Yet, illegal immigrants to America and other places are in the class the left favors, while such “settlers” are accused of trying to colonize America. Illegal immigrants are treated in rhetoric as “invaders,” engaged in conquest,⁸¹ and, by contrast, as persons with a moral right to mobility.⁸² For the purposes of immigration by the impoverished, the right treats immigration in large numbers, if unauthorized, as a form of invasion of the kind of sovereignty invoked by duration-defined place-memory exemplified in Lincoln’s Second Inaugural. The left sees such mass movements as the inherent human right to movement and the shelter of place, and the asylum place can afford, from menaces made by nature and by sovereign power.⁸³ In a switch of perspective, the right sees the settling of America as a heroic story of conquest of the unknown, followed by a manifest destiny to control territory, and the left sees the founding of America as steeped in blood, savagery, and theft of land.⁸⁴

Contemporary doubts and early European debates about the status of a nation, expressed in the language of interdisciplinary probing of the theoretical basis for authority,⁸⁵

Camus felt as deeply for the seeming oppressor as for the oppressed. He grasped that the great majority of the settlers in any country, and in Algeria in particular, were as much victims of the circumstances as the locals, and made the same claims on decency and empathy. They were for the most part not rootless colonists who had come for the main buck—and those who were would be replaced by a local boss class. Colonialism is wrong, but the human claims of the colonists are just as real as those of the colonized. No human being is more indigenous to a place than any other. This remains an unfashionable, even taboo, position; one feels it still, for instance, in the condescension that American leftists offer white South Africans.

Id. at 76.

⁸¹ Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 296, 336-37 (2009) (describing anti-immigrant sentiment in Oklahoma and citing stories using the terms “invaders” and “colonize”).

⁸² See, e.g., Francis A. Gabor, *The Immigration Reform and Control Act of 1986: An Analysis in the Light of Contemporary International Law*, 23 INT’L LAW. 485, 485-86 (1989) (discussing the fundamental human freedom to “move across national boundaries”).

⁸³ See McCormick, *supra* note 81, at 296, 337.

⁸⁴ For a critical treatment of the versions of the past embraced by writers who celebrate the settling of areas by an “invading population” that overwhelms, destroys, and colonizes the indigenous peoples, see DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* 3-15 (1992).

⁸⁵ There is a large body of interdisciplinary material subjecting ideas about sovereignty and territory to skeptical exploration and simple conceptual probing based upon the growing complications of describing authority as single and comprehensive in a world that produces law-like norms and systems of governance not tied to territory.

have counterparts in nineteenth century debates about nationhood. In Lincoln's time, there was open contestation of the claim to a territorial imperative that made the United States a union that had to be indissoluble. Nathaniel Hawthorne did not accept the idea of one nation for which blood should be shed to maintain its territorial form.⁸⁶ Further, Americans in the nineteenth century faced confusion about the kind of territorial claim that could be maintained over a landmass in which the idea of an organic nation based on tradition and kingly power has been supplanted by the consent of the governed.⁸⁷ The consent of the governed placed individuals acting collectively in charge of their destiny as part of a nation; how could a government formed in revolution and with a theory of consent by its inhabitants claim a right to the loyalty of citizens in a region that no longer wished to maintain the tie?⁸⁸

For an intriguing exploration of the increasingly global complexity in sources of legal mandates, see Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 TILBURG L. REV. 177, 177 (2012) (asserting that “[g]lobal law can be understood as the systematization of anarchy, as the management of a loosely intertwined universe of autonomous governance frameworks operating dynamically across borders and grounded in functional differentiation among governance communities”).

⁸⁶ For Hawthorne's generally disdainful attitude toward the importance of preserving the Union in its territorial form, see DANIEL AARON, *THE UNWRITTEN WAR: AMERICAN WRITERS AND THE CIVIL WAR* 41-55 (Harold M. Hyman ed., 1973). Aaron, seeing through Hawthorne's eyes, refers to the Union as “that manmade, unnatural contrivance.” *Id.* at 42.

⁸⁷ FREDERICKSON, *supra* note 78, at 130-50, explores the debate among adherents of “an essentially liberal” view of the prerogatives of the state, typified by Francis Lieber; the theorists of a contractual view of the establishment of the Union typified by John L. O'Sullivan, with the seceding states withdrawing the consent of “the great mass of population” in those states; and revived conservative views on loyalism that appealed to a “divine right” view of government, typified by Horace Bushnell and derived from an “instinct which attaches us to our native country.” Lieber sought to capture the idea of a difference between a people, which was “merely the aggregate of the inhabitants of a territory without any additional idea” and a nation, which “implies a homogenous population, inhabiting a coherent territory; a population having a common language, literature, institutions, and ‘an organic unity with one another, as well as being conscious of a common destiny.’” CHARLES EDWARD MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 297 (1903) (characterizing and quoting Lieber). Merriam explains that, though not always clearly expressed, this view became dominant as an intellectual rationale for the Civil War, with a sense that, despite American revolutionary origins, “the nation [was] an organic product, the result of an evolutionary process.” *Id.* at 297.

⁸⁸ In *McCulloch v. Maryland*, 17 U.S. 316, 403 (1819), Chief Justice Marshall contemplated how the mass of individuals who consented to the Constitution related to place, in a manner that offered an overt theory of the necessity and simultaneous unimportance of place as critical legal fact:

This mode of proceeding [to adopt the Constitution] was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in

Nineteenth century thinkers struggled with finding a rationale for the use of force to prevent a region's secession from the constitutional order that claimed a territorial domain.⁸⁹ The previous lack of a sense of nationhood became apparent, with the result that theories about loyalty as a first requirement of citizenship were developed, and organizations such as the Union League Club were formed, to articulate and reinforce the idea of union.⁹⁰ The narrative of nationhood became unreflective. The territorial definition of the United States as a nation consisting of a landmass with subunits that were permanent in political and geographic form became an unshakeable and unremarked assumption. The formerly sovereign nations of the native peoples were subsumed by the territorial sovereignty that permitted treaties to be adjudged by only one party to the treaty, that is, the party in control of the entire landmass.⁹¹

Today, new visionaries and individualists look for the Over-soul in the virtual world, in which states, defined and measured by landmass, lose relative power over small populations that do not consent to the territorial basis of the laws imposed on them, where territory is determined by defined portions of the physical world.⁹²

Place potentially moves more decisively into the imagination, a collective vision that can take form online in symbolic form; the place is the collective mind of those who envision a City liberated from power created by the brute physical world. The city is occupied by the input of its self-selected inhabitants, who fill it with the meanings and laws that might

Convention. It is true, they assembled in their several States—and *where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.* Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

Id. (emphasis added).

⁸⁹ See FREDERICKSON, *supra* note 78, at 76-77 (contrasting Bushnell's conservative views critical of the Declaration of Independence as a wrong democratic principle conducive to the Civil War with Wendell Phillips's fears that the war was justifying anti-democratic, authoritarian impulses).

⁹⁰ See FREDERICKSON, *supra* note 78, at 131.

⁹¹ See Osofsky, *supra* note 35, at 129 (explaining that a Western Shoshone family whose lands are being expropriated by the United States "are trapped inside a legal system in which the expropriator evaluates and validates its own expropriation with minimal responsiveness to external condemnation of its behavior"). Osofsky refers to the rejection by the United States of international treaty-based interventions as a claim to control a "distinct sociolegal space." *Id.* at 149.

⁹² See SCHMIDT & COHEN, *supra* note 58, at 101.

govern a secessionist physical location. A virtual world claims a place as an alternative to physical place, inhabited by emigrants from the literalism of authority based on physical proximity, and, today, by claimed sovereignty over bounded territory, to the voluntarism of a chosen citizenship in a nation assembled within the virtual reality lodged in the Cloud. The visual and sensory connection to the world suggested by Cusa's metaphor of the human being as a city with gates has been⁹³ and will be increasingly undercut by technology that separates human beings from un-chosen sensory input and allows them to create a sensory environment from the virtual world, or from avocations that supplant the need to observe one's surroundings. In the twentieth century, skyscrapers severed their occupants from contact with nature or street life and placed them in controlled environments that had little that was supplied by the spontaneous and random events of an urban place. It was a cliché of twentieth century writing that the occupants of such towers lost contact, in their work life or their transportation from work to home, with poverty or urban chaos. They used superhighways or trains to go from a tower to a suburb, which was designed to give controlled contact with nature and refuge from contact with different classes.⁹⁴ Yet the city of collective perception can be reconstructed in an imagined place, a factor that keeps the metaphor of place a strong presence in conceptions of shared experience.⁹⁵

B. *Place in Motion*

The car has simultaneously connected drivers to the physical world and created means of escape from place as primary.⁹⁶ The inside of a car is a place that can influence or even define one's identity. "Automobility" has helped Americans to equate the idea of freedom with mobility, or, more pungently, to

⁹³ See NICHOLAS OF CUSA, *supra* note 74.

⁹⁴ A review of the comic treatment of New York City in the 1980s in TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1987) captures the sense of insulation purchased in the city. Frank Conroy, *Urban Rats in Fashion's Maze*, N.Y. TIMES (Nov. 1, 1987), available at <http://www.nytimes.com/books/98/12/06/specials/wolfe-bonfire.html> (reviewing Bonfire and summing up the main character, an investment banker who "lives in the middle of New York City without knowing New York City").

⁹⁵ See *infra* notes 116-36 and accompanying text (discussing place conceptions relating to abortion regulations).

⁹⁶ For a darker view of the cultural significance of cars, see Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 711 (1995) (suggesting that a woman's sharing of space in a car with a man is viewed as automatically consenting to sex).

“assert[] motion to be the epitome, and not simply one possible dimension, of freedom.”⁹⁷ Ambiguities about the evolution and cultural meanings of place converge with the car. Cars connect people to place but also sever them from place because they are always moving.⁹⁸ But cars are becoming more self-contained, and as the trend toward driverless cars continues, cars are more and more their own place. The car is a microcosm of a transformation of place, complete with legal and cultural consequences.⁹⁹

For automobility, or the experience of freedom understood as autonomous motion, the next phase in automobile technology and user behavior will render the body passive while in motion and in private transportation. The process of simultaneously escaping place and choosing and seeing place will become distant from the human subject. Driverless cars will carry human

⁹⁷ COTTEN SEILER, REPUBLIC OF DRIVERS: A CULTURAL HISTORY OF AUTOMOBILITY IN AMERICA 149 (2008).

⁹⁸ In one passage, CRESSWELL, *supra* note 16, at 7 says that a place is a space, or location, “which people have made . . . a meaningful location.” The relationship of the car to much of “space” is highly impersonal and transient. Superhighways long ago severed car travel from a strong connection to place, even disrupting local understandings of a meaningful location. Railroads have had similar effects on a large scale. Richard White has argued that a premature development of railroads reconfigured space, created a hitherto unimagined “spatial politics,” and gave motion pride of place over the senses that dwell on the local. “The railroads made space political by making the quotidian experience of place one of rapid movement. A railroad train in motion was a snorting, smoking, roaring thing; for all the beauty of its movement, it was an assault on the human senses, which registered that it was the train’s movement that mattered.” RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 141 (2011).

⁹⁹ For a striking evocation, by contrast, of the impact of modern forms of travel in both exploring space and concealing the texture of places, see GRAHAM ROBB, THE DISCOVERY OF FRANCE: A HISTORICAL GEOGRAPHY FROM THE REVOLUTION TO THE FIRST WORLD WAR (2007). As a purported expert on France, Robb discovered “the uncharted interior” that is another, undiscovered and incompletely mapped France compared with the image of France “pieced together” in political transitions and from a perspective dominated by images of Paris and “a few powerful individuals.” *Id.* at xv-xvii. The means of his discovery, and then historical exploration of, a *terra incognita* of France was the bicycle. Traveling by bicycle, Robb discovered a France that maps have not been capable of capturing—“the more accurate the map, the more misleading the impression.” *Id.* at 6.

A bicycle unrolls a 360-degree panorama of the land, allows the rider to register its gradual changes in gear ratios and muscle tension, and makes it hard to miss a single inch of it The itinerary of a cyclist recreates, as if by chance, much older journeys: transhumance trails, Gallo-Roman trade routes, pilgrim paths, river confluences that have disappeared in industrial wasteland, valleys and ridge roads that used to be busy with pedlars and migrants. Cycling also makes conversation easy and inevitable—with children, nomads, people who are lost, local amateur historians and, of course, dogs

Id. at xvi.

subjects¹⁰⁰ immersed in the virtual world at their fingertips and confined to a space that lacks sufficient sensory input to assert the claims of a proximate physical place over subjectivity or one's experience of physical vulnerability.¹⁰¹

In addition, unanticipated effects will reorder features of public policy, such as revenue sources for cities.¹⁰² In such horseless and driverless carriages, the brute fact of place as a source of legal obligation, self-definition, or limitation will fade. The legal ramifications of design that relieve human actors of the risks attendant on personal agency in physical place will gradually emerge from policy making and legal reasoning, as fewer unguided autonomous actions are necessary to accomplish basic tasks.¹⁰³ As suggested by analysts of system architecture, some forms of legal regulation and retrospective accountability can recede as forms of choice disappear from the transparent and undesigned physical world.¹⁰⁴

Thus, an attempt to organize a Restatement of law around place is both a rich entry point into law and elusive to capture as a legal topic. Unlike the study of special collections of standard subsets of law, such as sports law or construction law, the law of place is not a set of standard doctrines affecting an activity. Rather, place is the unstated premise of much of law. Places organize the operative parts of a legal question; locutions take forms of place metaphor or they overtly use measurements of space to define duties and rights, and find facts of legal import. Courts now take judicial notice of Google maps as a basis for a

¹⁰⁰ Nick Bilton, *Disruptions: How Driverless Cars Could Reshape Cities*, N.Y. TIMES (July 7, 2013), <http://bits.blogs.nytimes.com/2013/07/07/disruptions-how-driverless-cars-could-reshape-cities/> ("I could sleep in my driverless car, or have an exercise bike in the back of the car to work out on the way to work." (quoting Bryant Walker Smith, a fellow at the Center for Internet and Society at Stanford Law School and a member of the Center for Automotive Research at Stanford)).

¹⁰¹ See Paul Stenquist, *Nissan Announces Plan to Release Driverless Cars by 2020*, N.Y. TIMES (Aug. 29, 2013), <http://wheels.blogs.nytimes.com/2013/08/29/nissan-announces-plans-to-release-driverless-cars-by-2020/> (noting the questions of driver loss of skills and apportionment of liability between manufacturers and "vehicle occupants").

¹⁰² Nick Bilton, *The Money Side of Driverless Cars*, N.Y. TIMES (July 9, 2013, 1:36 PM), <http://bits.blogs.nytimes.com/2013/07/09/the-end-of-parking-tickets-drivers-and-car-insurance/>; see also Assemb. B. 511, 2011 Leg., 76th Sess. (Nev. 2011), available at http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB511_EN.pdf (defining autonomous vehicles and providing for their regulation).

¹⁰³ "Neither human error nor human nature will interfere with your gratingly perfect morning." Janet Maslin, *Formatting a World with No Secrets: 'The New Digital Age,' by Eric Schmidt and Jared Cohen*, N.Y. TIMES, Apr. 25, 2013, at C31, available at <http://www.nytimes.com/2013/04/26/books/the-new-digital-age-by-eric-schmidt-and-jared-cohen.html>.

¹⁰⁴ See Tien, *supra* note 55, at 5-7.

fact finding about distances.¹⁰⁵ Law assumes how a human subject operates, and in turn assumes there is a formative influence that gives comprehensibility to the subject on which the law imposes its commands. Place is the always-lurking formative influence, arraying critical meanings around the legal subject.

V. RESTATING PLACE: CONSIDERING POSSIBILITIES

Evolving understandings of place are a source of orientation to the features of the world that organize perceptions. These evolving understandings, as well as abstract meanings of place in dimensions of personal definition, underlie moral domains and suggest that place can be an organizing topic for a Restatement. This Restatement would serve to both capture features of existing law and propose avenues for law reform and adaptation. The question to explore, then, is the utility of undertaking such a compilation. Is place too abstract a concept to merit special attention to its range, its place in law, and its applications? Does a compilation reveal a larger theme about place that calls for systematic examination, analytic challenge, and reconfiguring the assumptions on which law rests concerning the physical configuration of the world and its metaphorical extensions into claims of legal force? How might it be organized?¹⁰⁶

The rules that demand measurement of distances and the doctrines that configure persona, and the tropes that conjure a location for a legally relevant act or regulation (the public square, the marketplace, standing one's "ground"), draw upon unelaborated uses of ideas about real proximity and ideas about

¹⁰⁵ See *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 n.1 (9th Cir. 2012).

¹⁰⁶ LAW AND GEOGRAPHY (Jane Holder & Carolyn Harrison eds., 2003). LAW AND GEOGRAPHY contains the following parts (aside from introduction): Boundaries; Land; Property; Nature; Identity, People, Persons, and Places; Culture and Time; Knowledge. In *Spatial Dimensions of Private Law*, contributors Nick Jackson and John Wightman attempt to narrow the scope of the factor in law of space by excluding "rights . . . [that] are defined in a wholly spatial way," such as, in their view, "chattels, the personal rights to bodily integrity in the tort of negligence and the intentional torts, and intellectual property rights." *Id.* at 35. Given the fluid meanings of space and place, and their metaphoric character in the cultural and legal imagination, such an exclusion is not manageable for reducing the scope and abstractness of the whole topic. Jackson and Wightman seek to identify and "explore the spatial dimensions of private law which are detectable in the law itself . . ." *Id.* For this article, the suggestion is that some topics that might be restated present themselves overtly as about little but a place: the law of garages, rules about minimum space in a prison cell, property lines, zoning, and so forth. Those are the parts of a restatement of place that are the most straightforward for compilation from existing treatises, but not the defining limit of the law to be understood and analyzed.

aspects of the world that require a conception of place as the forum in which acts occur and may be assigned significance.

A. *Legal Subject Status: Who Are We?*

At a macro-level, territory imposes identities on the occupants that vary according to the assertion by some claimant over the landmass to possession of legal authority. Benton describes the effects of colonization by conquest on the development of an order that does not depend on the creation and enforcement of a uniform law,¹⁰⁷ but which has the capacity to re-define the identity of the inhabitants of the landmass¹⁰⁸ and to lead some of them to become bureaucratic mediators between the law of the claimant and the local customs in specific locales.¹⁰⁹

1. Mapping Moral Inches

In *Gonzales v. Carhart*, the Supreme Court sought to determine whether a form of abortion that requires the exit of a fetal head from the birth canal before surgical destruction of the fetus could be banned, though destruction of the same fetus would be legal if done before the fetus had emerged from the birth canal.¹¹⁰ Issues included an “undue burden” on pregnant persons for whom the contested form might be a preferred alternative for preserving child-bearing capacity, and adequate notice to a physician regarding the criminal prohibition of the legally disfavored method. In his opinion, borrowing a term from anatomy designed to trace the common ancestry of organisms in different species, Justice Kennedy analogized the female body to mapped terrain.¹¹¹ “Marks” on a map define the prohibited and the permitted on the basis of physical enclosure; one may commit an act legally within the bounded space but not inches outside that space. “Anatomical landmarks” read into the interior of an abstracted body, a body existing in a judicial text with an evocation of geography absent from physical embodiment, a meaning about activity within and outside the boundaries of a place. The interior of a female body is given legal meaning as a place, within which acts may be legal though mediated by legal

¹⁰⁷ BENTON, *supra* note 39, at 9.

¹⁰⁸ *Id.* at 14-15.

¹⁰⁹ *See generally id.*

¹¹⁰ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹¹¹ *Id.* at 147 (holding that the ban is not void for vagueness and does not impose an undue burden).

regulation and without which the same act is homicide. The difference in inches is given heavy moral significance to justify the altered legal definition¹¹² of an act otherwise the same except for a small difference in the place it occurs.¹¹³ Yet the difference appears to rise to the level of a demarcation of state jurisdiction; if a fetus is destroyed within a female's body, neither the state nor the citizenry has "seen" the act, and thus the state has a weaker claim to jurisdiction.¹¹⁴ Further, the mapping of the female body, using "anatomical landmarks," provides adequate notice to a physician of the territory of the state's jurisdiction; the physician may plan an excursion within a bounded space with sufficient precision to remain securely inside the boundaries of a less regulated domain. Yet the female body produces ambiguities that make mapping legal boundaries uncertain, as it once made a medieval treatise, *On the Secrets of Women (De Secretis Mulierum)*, problematic for the form of discourse in the Middle Ages about secrecy and monsters.¹¹⁵

The terminology of anatomical landmarks, though used as a claim about "due process" for physicians and thus about "undue burden" for pregnant persons, nonetheless echoes a conception of the mind as a city¹¹⁶ with gates through which the senses enter.¹¹⁷ The visibility and entrance into the mind's gate of a fetus by its passing an anatomical landmark defined by the boundary of the female body render the circumstance of an aborted birth a legal moment different from the less fraught legal moment that might occur fractions of an inch earlier in the interior of the female body. Place supports the mapping of moral inches, with the severest legal consequence driven by moral condemnation arising from the passage, through the gate, and into the senses. Indeed, Justice Kennedy is keen to protect the physician from the reputational effects¹¹⁸ of doing an act that can be imagined as being in a quasi-public space that most of the alarmed "observers" would never enter for direct observation or

¹¹² *Id.* at 141.

¹¹³ *Id.* at 139, 147-48.

¹¹⁴ *Id.* at 181 (Ginsburg, J., dissenting) (citing *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000)) Comparing the disallowed procedure from the permitted one, Justice Ginsburg writes, "The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."

¹¹⁵ SARAH ALISON MILLER, *MEDIEVAL MONSTROSITY AND THE FEMALE BODY* 56 (2010) ("Although the disclosure of women's secrets depends on the legibility of the female body, the instability of its corporeal borders and the ambiguity of its superfluities trouble the text's claim over this semantic field.")

¹¹⁶ See NICHOLAS OF CUSA, *supra* note 74.

¹¹⁷ See *supra* Part IV.

¹¹⁸ *Gonzales*, 550 U.S. at 157.

even witness by remote visual means. Thus, place assumes a role as a public space by virtue of the hypothetical witnessing of an act not hidden within the physical female's bodily domain.

The glimpse afforded by a citizen's imaginary viewing of an event in an exterior space becomes legally dispositive. Presumably, even if the physician allowed no other direct witness of the act, and used techniques that obscured his own glimpse of the critical legal moment, as it is obscured by abortions completed within the now-zoned space of the body, the space outside the body demarked by an anatomical landmark would be imagined as one in which events occurring in it are visually disturbing and hence an odious presence in the "city" of the legal and layman's mind. For the fraught moment mapped by Justice Kennedy's exploration of the female body, the interior of the female body is left as an unobserved "non-space." Recent shifts in legal regulation have sought to reclaim that space for the "city."¹¹⁹

In the concluding part of the article, I will propose a concrete approach to a statement of principles to guide law-making in the context of regulating reproduction. My approach will address place as the primary subject of such regulations in the broader context of the provision of medical services to a patient.

2. More Moral Inches

Recent efforts at opening a new space within the female body that is observable within the city have occurred with the enactment of mandatory sonogram laws that require pregnant women to view a sonogram of a fetus before an abortion can be provided. Such a law seeks to relocate the concealed space of the female body into a public zone of possible observation, and render it potentially disturbing to the compelled viewer and to the constructed imagined gaze of the citizenry on both the compelled viewer and the contents of the female interior. The female interior becomes a new site of exploration, depiction, narrative, and claims of sovereignty by means of discovery and report. Technology allows the reclaiming of the territory as interior, as by the use of a morning-after pill or a pill that induces a medical abortion. In the most aggressive reclaiming of place as concealed and private, some women order the pill online for mailing to their homes.¹²⁰

¹¹⁹ See *supra* note 73 and accompanying text.

¹²⁰ Dawn Stacey, *Women Are Buying Home Abortion Pills Online . . .*, ABOUT.COM (Dec. 3, 2009), <http://contraception.about.com/b/2009/12/03/women-are-buying-home-abortion-pills-online.htm>.

The respect for privacy in a home is a factor in the cultural willingness to evade restrictive laws by initiating a medical abortion in their homes.¹²¹ But the home is not a fully private site for women who abort; there is no protective doctrine allowing termination of a pregnancy in the privacy of the home comparable to the constitutional doctrine that protects the possession of pornography in the home.¹²² Yet, in the past, the practice of abortion was heavily private. Abortion discussions substantially occurred in private spheres such as the home or a medical office and recognition was common that women grounded their claim to a need in a direct, unmediated experience of their own bodies.¹²³ In a self-protective maneuver, however, the medical profession in the twentieth century began to report cases of women who sought help for infections brought about by home or underground abortions.¹²⁴

Today, place has been reconfigured to allow for (1) discursive mapping of the female body by judicial mandarins for the gaze of readers, (2) opening the interior of the female body as a public venue for enforced viewing by individual women and an imagined collective, and, finally, (3) some recovery of privacy of and autonomy over the female body, through the availability of pills that induce medical abortions.¹²⁵ The female body is, in the modern-day equivalent of medieval texts, a site of “semantic indeterminacy”¹²⁶ for which solutions are sought based on conceptions of place—“anatomical landmarks,” enforced

¹²¹ *Id.* To warn that the home use of the pill can create a risk of an incomplete abortion and possible infection, women explain to other women that seeking medical attention for a miscarriage should be routine and reliable.

¹²² For a treatment of the exposure of pregnant women to criminal sanctions, including a case arising from a spontaneous abortion or miscarriage in the privacy of a home, and restraint of physical liberty to relocate a pregnant woman to a place in which she lacks all privacy, including a right of bodily integrity, see Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 308 (2013); see also *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (constitutional protection for possession of obscenity in the home, though the material was legally obscene under state law).

¹²³ LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE AND LAW IN THE UNITED STATES, 1867–1973* at 8 (1997) (explaining that “the popular ethic regarding abortion and common law were grounded in the female experience of their own bodies”).

¹²⁴ *Id.* at 60, 120 (explaining how the American Medical Association began to recommend that women seeking abortions be handed over by physicians to the police and how physicians were pressured to report and obtain evidence from women patients suffering from a badly done abortion).

¹²⁵ Place in the nineteenth century provided ample opportunity for privacy by women seeking to avoid a pregnancy before quickening. REAGAN, *supra* note 123, at 9 (describing herbs used by women to create an abortion).

¹²⁶ MILLER, *supra* note 115, at 71.

sonograms to make the female interior readable by a pregnant woman who becomes the primary participant in a shared viewing, and, most directly and literally, the alteration of the physical enclosures in which an activity protected as “private” can occur. The alteration is meant to render the exercise of a right of privacy less secluded and to expose the “patient” in need of regulated service by placing her in a space that is designed¹²⁷ to prevent seclusion.¹²⁸ Laws enacted by legislators with male majorities, such as The Health Insurance Portability and Accountability Act of 1996,¹²⁹ constitute a re-shaping of place—not merely that of the female body as a private interior, as assumed and implicitly conceded by Justice Kennedy, but of the places for the rendering of service to the anatomic female¹³⁰—and an interpreting of a body through the gate of shared, legally privileged perceptions that situate observation, disapproval, and regulatory scope.

In this conception of place, the female body is made a part of a “semantic field” that a “text” would claim¹³¹ a “place-centered” text of a kind for which the male body lacks a counterpart. This use of place as an unreflective intuition is a

¹²⁷ Tien, *supra* note 55. Tien explains that much design that asserts control over conduct is concealed and hence a means of enforcing legally relevant preferences through design. The effort to “redesign” the available spaces for legal abortion is not hidden, but, should the effort succeed, the capacity of architecture to reshape cultural possibilities would gain force, as the locations in which women may exercise their right of “privacy” become state architecture, monitored and controlled. The outcome may well be shaped by culturally vigorous counter-conceptions of “women’s” space and the malleability of place—internet communication, mobility, subterranean markets, self-help in places shielded from the domain of a claimed public place—as well as by political mobilization to restore a law of women’s place for control of their reproductive capacity. The idea of place is potentially a useful rubric for counter-mobilization under the banner of the home, and extensions of a home atmosphere, as a private place for control of the sexed body. The feminist concern with “safe spaces” is a natural rhetorical response, built around place as a legally relevant construct, to the movement toward legal re-imagining of place to remap the female body for regulation of female reproduction.

¹²⁸ For example, Idaho enacted a set of statutory criminal prohibitions forbidding “any person,” read by a prosecutor to apply to self-abortion, to perform an abortion without strict adherence to regulations designed for physicians. Idaho Code section 18-606, directly applicable to pregnant women, subjected “[e]very woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth” to felony charges. IDAHO CODE ANN. § 18-606 (2013). The exception was if the abortion were performed as permitted by the remainder of title 8, chapter 6 of the Idaho code, including Idaho Code section 18-615. *Id.* § 18-615; *see McCormack v. Hiedeman*, 694 F.3d 1004, 1025 (9th Cir. 2012) (sustaining preliminary injunction against enforcement of Code Section 18-606). The abortion services that McCormack had sought, for reduction of cost, were medications prescribed over the internet. *Id.* at 1008.

¹²⁹ HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 and 42 U.S.C. (2012)).

¹³⁰ *See supra* note 128.

¹³¹ *See MILLER, supra* note 115, at 56.

problematic presence in law, insofar as law is meant to be rational and consistent in its claims to jurisdiction and authority and, by the element of rationality and consistency of law, capable of bearing a moral weight proportionate to the coercion the law brings to bear on human conduct. Thus, the places made critical for the female body shift over time. The home has been capable of conferring anonymity and autonomy over reproduction (though often analyzed as a place of female imprisonment, domination, and domestication).¹³² The interior of the female body has allowed concealment from a demarcation of a private space.

In response to the availability of legal abortion outside the privacy of the home through female collective efforts to gain access to low-cost medical services, private/public space in hospitals and clinics responsive to pregnant women's needs have become the next place subject to attempts at control over female autonomy and privacy. Onerous regulations on the dimensions of hallways and the availability of expensive equipment relocate abortion services to full service hospitals, many of which do not in fact generally offer abortion. Laws regulating abortion clinics out of existence through micro-management of place are now being enhanced to limit entry by doctors into places left intact for service to women's reproductive health. New legislation in Texas is expected to reduce the number of clinics offering abortion from a few dozen to approximately five.¹³³

Control over place is being further asserted by laws forbidding the ingestion of an abortion pill outside the presence of a physician.¹³⁴ The conventional rhetoric criticizes such a law as interfering with the relationship between a woman and her physician, but of more significance is the effort to erase places in which women can claim autonomy once available to them through

¹³² The home is heavily associated with marital privacy, which has been critiqued as a danger to women. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 975 (1991) (asserting that, "The notion of marital privacy has been a source of oppression to battered women and has helped to maintain women's subordination within the family"); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 888-94 (1992) (enumerating statistics on the prevalence of domestic violence and the danger to a pregnant woman of notifying her husband of her intent to have an abortion).

¹³³ Anna M. Tinsley, *Restrictive Law Could Force Most Texas Abortion Clinics to Close*, FORT WORTH STAR-TELEGRAM (July 6, 2013), <http://www.star-telegram.com/2013/07/06/4985451/restrictive-law-could-force-most.html>.

¹³⁴ Tara Culp-Ressler, *Five States Working to Limit Women's Access to the Abortion Pill*, THINKPROGRESS (May 14, 2013, 10:50 AM), <http://thinkprogress.org/health/2013/05/14/2007751/five-states-restrictions-abortion-pill/>. A Louisiana law, enacted in June 2013, provides that doctors qualified in obstetrics or gynecology must be in the same room and in the physical presence of the pregnant woman when the drug or chemical inducing an abortion is initially administered. A doctor who violates the new rule could be fined \$1,000, imprisoned for two years, or both"). La. Rev. Stat. Ann § 40:1299.35.2.1 (2013).

the politely legal practice of abortion by physicians in the late nineteenth and early twentieth century and the long tradition of self-help in the home by women consulting one another.¹³⁵ Thus, recent trends in the legal *assertion* of jurisdiction over and the legal *mapping* of both the female interior and permissible locations of the female body for the receipt of reproductive services expand the place within the body subject to regulation—sonograms and monitoring—and reduce the space available to female embodiment for receipt of services.

The disappearance of place as a physical presence that enables regulation is being countermanded by a legal attempt to restore and expand place as a factor in control over the female body. Such a trend is seemingly counter to other trends that the malleability of place empowers, allowing for a reduction of regulation that relies on literal place. Efforts in law to restore place as a decisive factor for the fate of women who have reproductive capacity betray an anxiety associated with the fluidity of place and the consequent autonomy that the waning hold of place over some human hazards produces. Indeed, with the movement toward enforced sonograms, the reconceptualization of a hidden place as public confronts and refutes the mapping logic used by Justice Kennedy to distinguish protected medical procedures from procedures that can be criminally punished.¹³⁶ If Justice Kennedy is a geographer of the female body, legislators are the master map makers whose cartography of the female persona would, if allowed to stand, render his mapping as obsolete as any fading atlas forgotten on a bottom shelf in a neglected room of dusty volumes.

3. Mapping More Than Inches

For jurisdiction based on territorial logic, moral inches expand to feet, yards, and “rods” in certain criminal buffer statutes that permit forum shopping by prosecutors.¹³⁷ In this example, place is allowed to be fluid, with prosecutors allowed to treat space as trivial for qualifying a locale in which to

¹³⁵ REAGAN, *supra* note 123, at 28 (describing mothers’ determination to help daughters, with occasional collusion to hide an abortion from the father).

¹³⁶ See *supra* notes 110-14 and accompanying text.

¹³⁷ Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271, 279 (2005) (“The width of the buffer zones established by these statutes ranges from 100 feet (in Louisiana) to a mile (in Arizona, Michigan, and Oregon); the median and most common distance is 1500 feet. Befitting the anachronistic nature of the statutes, some define the buffer width in rods, an archaic measure equal to 5 1/2 yards.”).

prosecute a defendant. A boundary loses its magic as a source of sensory input; an act that could not be visible to any person in the prosecuting jurisdiction¹³⁸ is nonetheless sufficiently relevant to the sensibilities of the “vicinage”¹³⁹ that will assess legal blame to allow its juries to impose legal liability for an act well outside its point of entry and in the interior of another legal space. Brian Kalt argues that the difference matters because the juries in counties next to a county where a crime occurred may well have different local sensibilities.¹⁴⁰ Different counties receive different sensory input, in part from their demographic composition, so that the “minds” of the neighboring geographic areas may not be the same. Kalt argues that the difference in the “minds” is of sufficient moral weight to support legal protections for anyone accused of a crime in a buffer zone outside a neighboring county in which the state criminal buffer zone permits prosecution. Might a theory of place as a legal factor reduce the need for cosmic gambles created by line-drawing for which little rationale, except a shrug of the shoulder, can be offered?

At the same time, a matter of 227 feet¹⁴¹ can bear the moral weight to determine whether a crime can be punished by death. The jurisdiction of the federal government over crimes in national forests is general and includes murder.¹⁴² In a case involving a murder in which the victim’s body was found in a lake in a national forest in Michigan, the court ruled, at the request of the parties, on subject matter jurisdiction issues, including issues of whether the United States had accepted jurisdiction over the forest when it accepted its transfer from Michigan and whether murder in national forests has been made criminal by the federal code.¹⁴³ The defendant additionally argued basic constitutional infirmities in the “patchwork” or “checkerboard” nature of the existence of federal criminal jurisdiction in the Manistee National Forest, including due process (notice), equal protection (arbitrary

¹³⁸ Brian Kalt notes that jurisdiction and venue are sometimes used interchangeably in cases or statutes, so here there is no fine distinction. *Id.* at 276.

¹³⁹ *Id.* at 276.

¹⁴⁰ *Id.* at 321.

¹⁴¹ *United States v. Gabrion*, 648 F.3d 307, 316-17 (6th Cir. 2011) (“His counsel wanted to offer in mitigation and argue to the jury that in our legal system Gabrion’s trial would have had to take place in state court where life imprisonment was the maximum punishment, instead of in the federal court, if the victim’s body had been found outside the Manistee National Forest, just 227 feet away from where it was found inside the National Forest. His counsel wanted the jury to choose life imprisonment, rather than the death penalty, because the State of Michigan had abolished the death penalty and had not executed anyone for more than 160 years.”).

¹⁴² *United States v. Gabrion*, 517 F.3d 839, 845 (6th Cir. 2008).

¹⁴³ *See id.* at 839-44 .

and irrational scheme of geographical categorization of jurisdiction), and the Eighth Amendment (concerns in *Furman v. Georgia* about arbitrary enforcement of the death penalty).¹⁴⁴ For equal protection, the Supreme Court had already reversed a Ninth Circuit holding that “geographic and thematic” checkerboard jurisdiction in Indian country “lacked a rational basis and violated the Equal Protection Clause.”¹⁴⁵ The Sixth Circuit quotes the Supreme Court’s conclusion that the lines the Ninth Circuit thought irrational are standard for the place called Indian Country: “The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction.”¹⁴⁶

In a concurrence, Sixth Circuit Judge Moore addressed the due process arguments in an earnest effort to rationalize the moral weight of minute mapping of territorial jurisdiction:

[T]he fact that the federal government has criminal jurisdiction over some but not all of the parcels in the Manistee National Forest and that these are arrayed in a patchwork fashion does not mean Gabrion had no notice that death might be the potential penalty for first-degree murder within Manistee. Even if the federal government had criminal jurisdiction over the entirety of the Manistee National Forest, at some seemingly arbitrary geographic point a person would cross over from the area of Michigan’s criminal jurisdiction to the area of concurrent federal jurisdiction. If that person committed first-degree murder on one side of the line, he could not receive the death penalty; if the same person committed first-degree murder on the other side of the line, he might receive the death penalty. The jurisdictional consequences of committing first-degree murder within or outside of the Oxford Lake parcel is in no significant respect more arbitrary than the jurisdictional consequences of the same act were there no patchwork jurisdiction within the Manistee National Forest. In conclusion, I do not think the patchwork jurisdiction in the Manistee National Forest violates Gabrion’s right to due process or equal protection under the Fifth Amendment.¹⁴⁷

For due process and the vagaries of geography, Judge Moore echoed the Supreme Court’s *so it goes* view about the patchwork woven into territorial logic, with the fillip of a tie to place-derived forms of ethnic identity.¹⁴⁸ Indeed, to buttress her argument that one arbitrary effect of geography is not worse than

¹⁴⁴ *Id.* at 867 (Moore, J., concurring).

¹⁴⁵ *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979); *Confederated Bands & Tribes of Yakima Indian Nation v. Washington*, 552 F.2d 1332, 1335 (9th Cir. 1977).

¹⁴⁶ *Gabrion*, 517 F.3d at 868 (Moore, J. concurring) (citing *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 502).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 866-69.

another, Judge Moore took refuge in a rule that Professor Peter Smith has classified as “a new legal fiction,” meaning any instance “when (1) the court offers an ostensibly factual supposition as a ground for creating a legal rule or modifying, or refusing to modify, an existing legal rule; and (2) the factual supposition is descriptively inaccurate.”¹⁴⁹ Specifically, Judge Moore cited authority on ignorance of the law: “The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”¹⁵⁰ As Smith notes, the saying, “ignorance of the law is no excuse,” is the extent of the law that most people know.¹⁵¹ Thus, the mysteries of small differences in the geographical moment of a concealed act of brutality, made to determine large differences in the penalty for a near madman,¹⁵² are brought to rest upon a legal fiction with little application to the average man and surely none to a brutish killer with a post-crime interest in the boundaries of a national forest.

The need for a legal fiction to establish the moral defensibility of patchwork jurisdiction is no surprise. Justice Brennan wrote of “painful conversations,” when a lawyer must tell a client that the race of his victim in Georgia provides a strong indication of the probability of his receiving the death penalty upon conviction.¹⁵³ Perhaps a killer’s learning that his exposure to capital punishment depends upon the morally insignificant happenstance of an uncertain few feet one way or the other in a national forest is less painful. It is bad luck of a cosmic size to have been on the wrong side of an arbitrary jurisdictional line in a poorly mapped and empty forest, but the lawyer can tell the client that line-drawing is always necessary in law. Here, the doctrine of place confesses the limits of moral reasoning in law, confronts and accepts the arbitrary nature of some lines, and asks those to whom the line points to death to appreciate the inevitable roll of the jurisdictional dice.

¹⁴⁹ Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1441 (2010).

¹⁵⁰ *Gabriel*, 517 F.3d at 869 (Moore, J., concurring) (citing *Cheek v. United States*, 498 U.S. 192, 199 (1991)).

¹⁵¹ Smith, *supra* note 149, at 1459 (citing GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 405 (1978)); see also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 645-46 (1984) (“If one were to take a poll and ask about the legal significance of ignorance of law, most nonlawyers would answer, I believe, by citing the maxim that ‘ignorance of the law is no excuse.’”).

¹⁵² *Gabriel*, 517 F.3d at 869.

¹⁵³ *McCleskey v. Kemp*, 481 U.S. 279, 345 (1987) (Brennan, J., dissenting).

Moral inches may seem like the framework of a mystic or medieval theologian, or of a strangely high-minded pettifogger, or the ending point for the capacity of logic to supply fit distinctions. But Justice Kennedy was not really reasoning about the moral significance of place on a general level, and neither are the justices and judges who agree that one instance of using small measures of space for large legal effects is no more unconstitutional than another. Extending his relaxed approach to place as a metric of birth and criminal penalty, Justice Kennedy also relied upon place, i.e., the location of a fetus in a female body, to create an identity—that of mother—and even to ascribe to the woman, imagined as containing a mystical “place,” with generative powers, the act of creating life.¹⁵⁴

Perhaps it is for the Restatement of Place to find the inner logic of laws that measure law’s domain and attendant personal accountability and standards of conduct by rulers, or yardsticks, or the surveyors’ instruments for mapping rough terrain.

B. *Nonplace*

Some parts of the world, which is to say some places, are not places. They do nothing that place ordinarily does. They do not confer or intensify identity as might a gay bar in the 1990s or a private club in the 1880s; they empty the occupant of identity, plunging the person into a zone of distance from any but a core self in an anonymous world.¹⁵⁵ By contrast, some geographic sorting creates enclaves of intensified identity.¹⁵⁶ “Nonplaces” are deserts of human connection, despite the presence of human beings. A nonplace makes strangers among strangers. Unlike a place, in which a stranger may begin to assert personal meanings through encounters amenable to reconstructing identity through personal exchange, query and

¹⁵⁴ Cf. *Gonzales v. Carhart*, 550 U.S. 124, 151-55 (2007).

¹⁵⁵ For an extreme contrast, a person can have an identity attach in one discursive space and then be imposed on her in another discursive space. I have suggested gay bars as an example. Once a person enters a bar of the sort that, at least until recently, was a gathering spot for gay people to reveal by their presence in the bar their possible availability for gay social life, an identity attached over which the person lacked control in a different discursive environment. Marc Poirier explores the attempt by the Boy Scout, James Dale, to separate the discursive environments of his college campus, where he was openly gay and activist, and his local Boy Scout troop, in which he sought to retain, unaffected by his presence in another discursive space, an unmodified identity as a Boy Scout. Poirier analyzes the means by which the law read his presence in one discursive location as attaching permanently to his body. See Poirier, *Discursive Space*, *supra* note 19, at 315. The term I offer for this phenomenon is identity-forming/intensifying place.

¹⁵⁶ See Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955 (2012).

displays of need, the nonplace offers no hope of socially constructed comprehensibility supplied by residents with memories and “ownership.” The following description captures the texture of a nonplace:

[A] “nonplace” [is] “a space which cannot be defined as relational, or historical, or concerned with identity”; defined by what it lacks, a nonplace effects a certain detachment between it and the people traversing it. Nonplaces, such as freeways, airports, supermarkets, and even ATMs—all planned, sterile, and transient—are not conducive to the expression of collective contractual obligations based on shared values and beliefs, [sic] such obligations would be better expressed for example in nonplanned neighborhoods with a history. Haifa’s Central Bus Station lacked any such historical contexts; the six-lane highway, the concrete buildings, and the harsh, angular shape of the station itself were alienating (not to mention plain ugly). The area was designed to be passed through, not to encourage people to linger around nor to convey (or to be receptive to) messages based on “collective contractual obligations.”¹⁵⁷

Law’s function in a nonplace is minimal. Laws against crime are in effect, though many nonplaces may be less defensible than places. Random crimes with no motive and no witness were once very difficult to detect. Today, ubiquitous video cameras¹⁵⁸ can capture the moment of a crime and provide leads to apprehend criminals who take advantage of a nonplace to inflict harm or exploit others. But nonplaces are not defined by any law that mandates such precautions. The territory for a nonplace to exist is limitless, and only dense, commonly used nonplaces are likely to have video monitoring. Roadside memorials occupy small nonplaces that are created by the serendipity of tragedy that brings survivors to mark the nonplace as place with memory. But

¹⁵⁷ Sharon Halevi & Orna Blumen, *What a Difference a Place Makes: The Reflexive (Mis)management of a City’s Pasts*, 37 J. URB. HIST. 384, 389 (2011).

¹⁵⁸ See Adam Schwartz, *Chicago’s Video Surveillance Cameras: A Pervasive and Poorly Regulated Threat to Our Privacy*, 11 NW. J. TECH. & INTELL. PROP. 47, 47 (2013). Schwartz notes with some concern for privacy, civil liberties, and a paucity of regulation, that “[t]hese cameras have powers that greatly exceed ordinary powers of human observation, including automatic tracking of cars, and magnification of small objects at great distances.” *Id.* at 48. Schwartz further describes Chicago’s system of video surveillance: “Chicago’s system of video surveillance cameras has three critical features: their vast numbers, their tight integration, and their powerful abilities to gather and analyze information. Together, these features empower City government to monitor anyone automatically, quickly, easily, inexpensively, and surreptitiously, in all public places and at all times.” *Id.* The attempt to provide the capacities of human presence to places where direct observation may not occur has the effect of altering the limitations of human perception and transforming the texture of situated life, with its omissions of observation on which place-bound humanity has long relied for the unimportance of some ephemeral moments. The loss of ephemera, meaning the preservation of moments otherwise fleeting in human memory and lost to history, as a feature of living implicates legal rules, which must seek a means of discounting the observed, which once would have lacked the staying power to raise a legal concern.

the memory is private and not capable of marking the character of the isolated nonplace anything more than “planned, sterile, and transient.”

There are tentative attempts at creating laws to regulate nonplaces, such as regulation of roadside crosses, but no conceptual glue to bring together a legal theory of the nonplace. There are virtually no regulations covering the use of surveillance cameras to monitor public places.¹⁵⁹ The widespread acceptance of videotaping of commercial establishments is reflected in television entertainment consisting of taped incidents in retail establishments.¹⁶⁰ Viewers can observe behavior undertaken as though the place exclusively defines the interaction as one of unilateral power with no traces in place memory; part of the fascination is in seeing what was once unseen—visceral power exercised in a place that permits opportunistic violation of social distance and legal order. The camera permits a view of the remaining power of place as determinative through the brute “reality” of human fate and attempts to rebut the power by a clinical observation of the wrongdoer. The camera simultaneously enforces the domain of law and documents the domain of unseen, hidden place as transient power in an unprotected location.

A possible function for legal mandates could be a theory of the public’s obligation to give the nonplace a degree of “placeness,” supplemented by standards requiring, for example, video monitoring, or imposing rules on private owners to avoid

¹⁵⁹ The critical concept for all monitoring with a “beeper” that reveals evidence that could have been discernible visually to the naked eye is the existence, or not, of “an expectation of privacy.” *United States v. Knotts*, 460 U.S. 276, 280-83 (1983). “Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.” *Id.* at 282; *see also* *United States v. Karo*, 468 U.S. 705, 713-16 (1984) (distinguishing the expectation of privacy from a beeper in an object carried through the streets and various private locations from the expectation of privacy in an individual’s home). On public streets, no such expectation exists. Thus, video monitoring of a street by commercial entities is as unregulated as is video monitoring by police agencies. For the interior of businesses, there is legal advice to owners to post notices that the site is subject to video monitoring, thereby deflecting by the theory of consent any objection by customers about violation of privacy. *How to Legally Use Security Cameras to Avoid Breaking Privacy Laws*, EHOW, http://www.ehow.com/how_2040855_legally-use-security-cameras-avoid.html (last visited June 19, 2013). The permission to enhance what can be detected with human senses, were the human positioned to use his senses, seemingly opens most activity outside the home to detection and recordation by powerful video equipment. The expansion of the reach of the senses in part redefines place, which has a deep association with the reach of the human senses. In contrast, it also helps to regulate unplaces, affording some possibility of enhanced security, or punishment of wrongdoers when deterrence fails.

¹⁶⁰ *Caught on Camera* (MSNBC television broadcast 2008–2013) presents miscellaneous videos that show store robberies and, occasionally, home invasions.

the menacing features of a nonplace. Laws requiring the cleanup of blighted properties are an example.

C. *Imaginary Place As Stand-in for Power*

Indeed, the lack of a representative record of events in a place is increasingly seen as an erasure of place, a masking of a shareable imprint of meaning in a place by an anarchic moment that requires admission into the city gate of collective perception, else depriving the physical world of the feature of place in which we live: representations that give place textual weight to study and re-experience. The Boston bombing established itself as a comprehensible event in a place—once the video cameras delivered the visual record of action in a *place* to our collective perception and allowed a cartography of mass murder to form through our shared glimpse of a moment in a physically recognizable Boston location.¹⁶¹ The drive to see the video of the crime was not merely to find the culprits, but to read the text of the place and time and help make it a collective cultural moment—in a place. The video does not just help nab the bombers; it creates a place memory with a narrative. For the place to be as real as place can be, its recreation with avatars would be ideal. Chance recordings that lack staging by a director and thus editing for continuity are not a satisfying depiction of an iconic moment in a place. Reconstructed reality can provide the “realism” that small glimpses in a camera aimed incidentally at the event do not convey.¹⁶²

In the aftermath of the San Francisco plane crash, captured by chance on video, there have been puzzled questions about the absence of cameras to capture all aircraft landings.¹⁶³ The

¹⁶¹ See NICHOLAS OF CUSA, *supra* note 74.

¹⁶² Courtrooms are increasingly assisted by technology to simulate events visually to persuade juries more effectively of a favored narrative of an event. See, e.g., Jeff Aresty, Daniel Rainey & James Cormie, *State Courts and the Transformation to Virtual Courts*, 39 LITIG. 50, 52 (2013) (“With the ubiquity of high-resolution flat-screen televisions, litigators employ dramatic reconstruction of accidents and distill complex issues with simple video explanations. Today’s lawyer does not need words to explain his or her theory of the accident. Instead, the lawyer can present a dramatic video interpretation with computer generated actors and digitally recreated scenes. Add to this the advancements in multimedia programs and the litigator’s ability to convince a jury increases dramatically.”).

¹⁶³ See Daro Felch, Comment to *2 Killed, Many Injured as Plane Crash Lands at San Francisco Airport*, BUZZFEED (July 6, 2013, 4:11 PM), <http://www.buzzfeed.com/adriancarrasquillo/fire-rages-as-plane-crash-lands-at-san-francisco-airport> (“How come there are no cameras where planes take-off and land[?]”); Eric Lee Shively, Comment to *Horriying Raw Video: Asiana Flight 214 Crash Landing Caught on Film*, BLAZE

realization dawns that airport landing strips are deserts for perception yet locations of fraught moments that call for place to be created and preserved—by cameras. Once the landing of an airplane was seen as an incongruity in its apparitional appearance in a remote place; now the failure to assure the “placeness” of the moment of landing, that is, to make it meaningful and not merely transient, is remarked upon as a strange failure of human connection. Legal obligations to record certain unobserved moments of critical importance address the demand to infuse nonplaces with the possibilities of human memory—and enhanced legal accountability and risk management.

VI. SELECTED PLACE-RELATED LEGAL SUBJECTS: A PARTIAL COMPILATION¹⁶⁴

A partial review of treatise-style compilations of doctrine on manifestly place-infused topics provides a beginning listing of the types of standard Restatement treatments that could be reorganized to catalogue a ground level review of place in the law of proximity, location, space, and boundary. From the most abstract foundations using place to organize a structure of law (e.g., sovereignty, citizenship, territorial dominion), to a referent to something tangible yet linked to an existing domain (e.g., rights of coastal areas to the adjacent sea), to a concrete referent for a simple legal obligation (e.g., the definition of “garage” in an insurance contract), one can begin to frame the range of concerns that share the commonality of reasoning about place, territory, proximity, geography, and so on.¹⁶⁵ Within the scope of this article,

(July 7, 2013, 2:29 PM) (“Whats [sic] sad [is] that there are no cameras at our airports . . . TSA has no cameras or videos at our airports . . . Sad[.]”).

¹⁶⁴ A more thorough yet still non-comprehensive list also includes: Food & Agriculture Law; Criminal Law and Defense of Home; Place and Moral Significance; Overlapping Places; Nonplace Regulation; Place-Literal Jurisdiction, Arbitrary Place Consequences; Place-Literal Rules: Marriage; Place-Modified Citizenship; Conquest-Modified Place; Metaphorical Place-Defined Enclosures; Place-Enforced Disassociation; Law-Stipulated Place Lines; Identity-Forming/Intensifying Place; Sacred Place; Lost Place; and Ruin Porn. This list is a product of the author’s lengthy deliberations on the subject.

¹⁶⁵ Allan Ebersen provides a starting point for analyzing spatial concepts in the Constitution by examining textual references to spaces that create a formal typology of space, while noting the overlaps that arise between multiple constitutional spaces and a given physical space. See Allan Ebersen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1168-69 (2011) (indicating that his “analysis shows that many discrete problems on which scholars have focused—such as the rights of U.S. military detainees abroad and the extraterritorial reach of state law—are manifestations of a broader phenomenon that exists because of indeterminacy in the Constitution’s typology of spaces”). In Ebersen’s words, “The Article . . . provides a foundation for future scholarship addressing a wide range of constitutional questions linked to the

it is not possible to create a comprehensive list, but a beginning selection can suggest the richness of place as a presence throughout legal materials, at every possible level of abstraction or specific use. Besides grasping the range implicated in legal materials by place ideas and topics, one can begin to identify and analyze consistency and inconsistency in the logical constructs for handling identity, obligations and rights, and the scope of the “law of place” by examining how location as a concrete measurement or a conceptual frame constructs doctrine.

A. *Maps and Cartography as a Source of Legal Issues*

The enterprise that deals with place as its primary concern is cartography, or map-making. Because place is the basic feature that orients people to the world as a physical fact, and a form by which the configuration of nations, counties, and towns are imposed and sovereignty announced, maps are a natural source of conflict. Mistakes in maps, or simple disagreement about the traditional lines to be captured in a map, can generate long-term sovereign conflict, or neighborhood disputes.¹⁶⁶ They can also generate tort litigation if the misplacement of a tower on an aviation map causes an aviation accident.¹⁶⁷

Map-making is a close partner to physical reconfiguration of communities, re-engineering of ecology, and imposing the layout that defines a region. Mapping is the means by which transportation is laid out to make the far near, and the near far.¹⁶⁸

B. *The Workplace Landscape*

Puzzles affecting the logic of law arise and call for refreshed compilation, as with the regulation of the workplace: what rules of employer responsibility apply to the workplace when it is

boundaries and status of discrete spaces.” *Id.* at 1169. Thus, Ebersen has provided one template for the development of a set of “boundary” principles by an ALI project.

¹⁶⁶ John D. Sutter, *Google Maps Border Becomes Part of International Dispute*, CNN (Nov. 5, 2010) (concerning possible mistake in Google map and subsequent dispute between Nicaragua and Cost Rica), <http://www.cnn.com/2010/TECH/web/11/05/nicaragua.raid.google.maps/>.

¹⁶⁷ *Reminga v. United States*, 631 F.2d 449, 450-51 (6th Cir. 1980).

¹⁶⁸ WHITE, *supra* note 98, at xxix (2011) (referring to making “the far near” but also to “render[ing] . . . space radically unstable and seemingly subject to the whims of distant corporations”); *see also id.* at 140-78 (describing in comprehensive detail the development of “the politics of space” as a result of the ability of the railroads to impose maps and create pricing that altered practical distances for towns); JOHNSON, *supra* note 4, at 11 (“Rather than inhabiting space, merchant capital made it, fabricating connections and annihilating distances according to rates of interest and freight . . .”).

transferred by technology to the home?¹⁶⁹ What of injuries to workers that arise from the physical re-creation of a work environment away from direct employer control? Does the convenience of work from home privatize the risks of employment? Does it effectively transfer the costs of work risk and office design to the worker? Might it become part of a trend to relieve employers of obligations to workers?¹⁷⁰ If so, could work in the home provide not only flexibility, but a return to greater autonomy for workers of the kind that was reduced and even eliminated by the movement of work into industrial and office settings and away from farms and cottage industries? Is regulation of the home-work environment a good form of protective law that disciplines bargaining, or is bargaining, and common law apportionment of risk, acceptable outside the context of nineteenth century mechanization and large-scale on-site work?

The grand project for thinking about these issues of rationalizing doctrine in a new configuration of the place for work is not merely one of picking and choosing policy answers derived from regulatory schemes to protect workers in an industrial or cubicle setting. Rather, creating a new ontology of social space¹⁷¹ as it relates to law is the scope of the project; the worker—a physical being in a physical space that produces products and awards the right to its owners to structure and even to control his movements, monitor his time and productivity in directly observable units, control the manner of the “sheathing of his body,”¹⁷² and test his bodily emissions for

¹⁶⁹ For this question, I am grateful for my conversations with a staff member of the A.L.I.

¹⁷⁰ The Labor Department provides a review of questions and answers about legal issues for at-home work that considers issues of liability for workplace injuries, non-discrimination in assigning or not assigning employees to at-home work placement, requirements for paying wages, rules on reasonable accommodations for disability, limitations on imposing business costs on workers with the effect of reducing wages, and so forth. See *Pandemic Flu and the Fair Labor Standards Act: Questions and Answers*, WAGE & HOUR DIV., U.S. DEPT OF LABOR, http://www.dol.gov/whd/healthcare/flu_FLSA.htm (last visited June 14, 2013). In addition, the ordinary rules of tort could apply if the at-home work site is not safe and the employer has failed to take measures to protect home workers.

¹⁷¹ Delaney, in analyzing assumptions about territoriality as the basis for legal jurisdiction and for the assumed “containment” of social phenomena within borders, draws attention to the work of Jan Art Scholte, who has argued that “globalization calls into question the prevailing territorialist ontology of social theory” and has described a need for “a new, non-territorial cartography of social life.” See DELANEY, *supra* note 20, at 68 (quoting J.A. Scholte, *Beyond the Buzzword: Towards a Critical Theory of Globalization*, in GLOBALIZATION: THEORY AND PRACTICE 48-49 (Eleanore Kofman & Gillian Young eds., 1996)).

¹⁷² *Id.* at 66-69 (citing ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 38 (1971) (on the sheathing of the body by skin, and by a layer of clothing as a form of “egocentric territoriality”).

drugs—recovers and re-configures his control over personal movements and bodily boundaries in home settings for work.

Additionally, consider the developments of workplace spaces for white-collar workers. The designers of workspaces for white collar work sought efficiency in the uses of space, and set up workplaces that lacked privacy. The legal system generally did not intervene to establish norms for white-collar workspaces. Yet studies have shown that the type of workspace that enables white collar workers to concentrate and be productive is one that mimics a well-designed home, with nooks for privacy, individual spaces for each family member's avocations and interests, and a comforting feeling of enclosure.¹⁷³ For white-collar workers, the dimension of time has been regulated to protect their welfare, within limits,¹⁷⁴ but space is not a legal subject.¹⁷⁵ By contrast, occupational safety emerged as a concern in the United States as a result of the labor movement, responding to a history of disasters caused by the use of space to maximize profit with no regard for worker safety or simple human needs. Disasters now associated with the third world garment industry were once a factor in the United States.¹⁷⁶ As

¹⁷³ WITOLD RYBCYNSKI, *HOME: A SHORT HISTORY OF AN IDEA* 226-32 (1986); see also *Home Sweet Office: Comfort in the Workplace*, HERMAN MILLER, <http://www.hermanmiller.com/research/research-summaries/home-sweet-office-comfort-in-the-workplace.html> (last visited Nov. 22, 2013) (summarizing studies of the advantages of perceived comfort for worker satisfaction and productivity).

¹⁷⁴ 29 U.S.C. § 207 (2011). For compliance guidelines, see *Compliance Assistance Materials*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/laws/comp-flsa.htm> <http://www.dol.gov/compliance/laws/comp-flsa.htm> (last visited Nov. 22, 2013).

¹⁷⁵ *But see infra* note 178.

¹⁷⁶ Nineteenth century American diarist George Templeton Strong provided a vivid impression of the disastrous implications of an unregulated industrial workplace during the Industrial Revolution in the Northeast United States:

News today of a fearful tragedy at Lawrence, Massachusetts, one of the wholesale murders commonly known in newspaper literature as accident or catastrophe. A huge factory, long notoriously insecure and ill-built, requiring to be patched and bandaged up with iron plates and braces to stand the introduction of its machinery, suddenly collapsed into a heap of ruins yesterday afternoon without the smallest provocation. Some five or six hundred operatives went down with it—young girls and women mostly. An hour or two later, while people were working frantically to dig out some two hundred still under the ruins, many of them alive and calling for help, some quite unhurt, fire caught the great pile of debris, and these prisoners were roasted. It is too atrocious and horrible to think of.

Of course, nobody will be hanged. Somebody has murdered about two hundred people, many of them with hideous torture, in order to save money, but society has no avenging gibbet for the respectable millionaire and homicide. Of course not. He did not want to or mean to do this massacre; on the whole, he probably would have preferred to let these people live. His intent was not homicidal. He merely thought a great deal about making a large profit and very little about the security of human life.

a result, some overt regulation of place is an outgrowth of a workers' rights movement.

But for neither industrial workers nor white-collar workers is the insight gained from knowledge accumulated by architecture and design work for the middle class incorporated into legal rules for the workplace. The aspiration is minimal standards that avoid harm to health, but not for the design of places for work with sufficient attention to reproducing the comfort and benefits of a well-designed home.¹⁷⁷ The concerns for workers primarily relate to basic physical needs: enough room to move around and store tools, sufficient lighting, prevention of loud noise and vibration, a reasonable temperature, protection from second-hand smoke, access to toilets and break rooms, and access to first aid.¹⁷⁸ Some architects seek designs that inspire collaboration and solitary work, in a mixture of spaces conducive to spurts of intensity, relaxation, creativity, and focus,¹⁷⁹ but the standard for the workplace does not seek to alleviate the problems identified in the twentieth-century literature emphasizing how the configuration of assembly lines and office cubicles alienates and damages workers. Law has not sought to regulate and shape space for work to protect the human spirit. The dystopian view of long halls with closed doors containing isolated office workers does not attract legal regulation of the nuances of space for work life or human satisfaction. The market, not law, addresses the part of human flourishing within space as a means of increasing the return on investment.

Yet law has some role in “architectural regulation,”¹⁸⁰ the term devised by Larry Lessig to describe the capacity of law to regulate by reconfiguring standards for physical spaces and setting design specifications for processes and technologies that, unnoticed by the user, structure her interactions with other users and services. Architectural regulation has a mission opposite to the visibility described by the figure of the city gates and imputed to the “moral inches” of child birth. Sensory

THE DIARY OF TEMPLETON STRONG: THE CIVIL WAR 1860–1865 4 (Allan Nevins & Milton Halsey Thomas eds., 1952).

¹⁷⁷ RYBCZNSKI, *supra* note 173, at 228.

¹⁷⁸ Loos, *Noise, Heat, Light . . . Six Things You Need to Know About Workplace Rules*, LAW DONUT, <http://www.lawdonut.co.uk/law/health-and-safety/loos-noise-heat-light-six-things-you-need-to-know-about-workplace-rules> (last visited May 19, 2013).

¹⁷⁹ Piers Fawkes, *Your Next Office Will Look Like a Pop-Up Shop (Future of Work)*, PSFK.COM (Feb. 3, 2013), <http://www.psfk.com/2013/02/pop-up-office-future-of-work.html>.

¹⁸⁰ See Tien, *supra* note 55, at 1 (citing Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998)); see also LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

impressions come randomly through the city gates to all, and are constructed for wide receipt by inclusion in a legal text verbally mapping the female body. By contrast, the unseen structure that channels daily activities allows for law to alter the spaces around which evolving habits and behaviors shaped by design choices are clustered. These “architecturally regulated” spaces are not understood by users of the structured setting to be a product of design. They seem a natural environment insofar as they attract notice. They channel behavior by altering apparent choices, hence reducing the need for regulation to control behavior. Design is decisive. The architecture metaphor recognizes that place as a social context is manipulated and presented as natural, both in the physical world and in the unseen world of technology.¹⁸¹ The alteration of place by forms of manipulation and by technology design, and by the mere existence and use of technological methods, has effects that cancel physical place as a brute fact but also overcome the sheltering features of physical place.

Imagining a shift in the “cartography of social life” invites systematic reasoning about the worker’s relation to a space that shapes his identity, to his own bodily “territory and boundaries,” and to the autonomy of labor. The new technology permits distance health treatment, including psychotherapy that utilizes avatars in “immersive virtual reality.”¹⁸² Practicing therapy remotely raises numerous legal issues, including the geographic control over professional licensing, encryption to secure patient confidences, and numerous telehealth laws and regulations.¹⁸³ Aligning legal doctrine in accordance with a

¹⁸¹ Tien, *supra* note 55, at 11 (“The metaphor of ‘architecture’ suggests that architectural regulation possesses a structural nature, i.e., it is built into or embedded in the practical conditions of everyday life. Two obvious candidates for architecting are the things we use – equipment – as well as social settings, most of which contain equipment. This metaphor also suggests the important role of architects: those actors or groups, or successions of actors, who designed or shaped equipment and social settings.”).

¹⁸² Tori DeAngelis, *A Second Life for Practice?*, 43 AM. PSYCHOL. ASS’N MONITOR ON PSYCHOL. 48 (Mar. 2012), available at <http://www.apa.org/monitor/2012/03/avatars.aspx>.

These virtual environments are computer-simulated interactive spaces that appear and feel to users like they’re inhabiting a relatively real setting. They are often populated by avatars that interact, talk, gesture, walk and “teleport”—travel to any location they choose. Virtual environments create a feeling of person-to-person presence and immersion—the sense of actually sharing a space with others.

Id.

¹⁸³ Tori DeAngelis, *Practicing Distance Therapy, Legally and Ethically*, 43 AM. PSYCHOL. ASS’N MONITOR ON PSYCHOL. 52 (2012). For the level of legal contract protections for a free online 3D virtual world called Second Life, see the extended legal provisions posted as *Terms of Service*, SECOND LIFE, <http://secondlife.com/corporate/>

coherent conception of the effects of newly fluid notions of the site for work demands new efforts at compilation and rationalization.

If place for work is privatized, is law's domain reduced?¹⁸⁴ If place is transcended, as with DNA tests that overcome the need for place-tied embodiment and hence reduce the limitations of place for capturing the physical proofs of crime, are the rules of search and seizure so altered as to undermine core understandings about the protections of the Fourth Amendment?¹⁸⁵ Should place as brute fact be privileged as the natural order permitting concealment or should the tools of detection be accepted as a means of overcoming the power of place to inflict unaccountable harms?

C. Place and the Dead: Parks, Crimes, and Remains of War and Terror

The dead remain with us and also have a claim on place. The dead alter place even when they are forgotten by later residents in the same place. Most churches in English villages are said to sit below ground level.¹⁸⁶ Simple math explains why. In a small English village of about 250 people, one might expect 1,000 deaths in a century. Over a period of centuries, the number of bodies becomes as many as 20,000, a mass which causes the ground to rise.¹⁸⁷

State statutes contain regulations of cemeteries with norms and standards for the relationship of the remains of the dead to place. Though the centuries over which the dead occupy a place effaces all memory of their presence or who they are, the presently living seek to protect the connection of the dead to a place. One purpose of the regulations is to assure the continuing respectful treatment of the remains of the dead and their connection to a place, within a measured proximity.¹⁸⁸ The

tos.php (last visited Oct. 9, 2013) (addressing various topics that vary from time to time, such as Online Service, Content License and Intellectual Property Rights, Eligibility to Use the Service, Privacy and Your Personal Information, Dispute Resolution and Arbitration).

¹⁸⁴ Marc Poirier comments: "Well, yes. Federal regulation of the workplace, as of the First Amendment—public/private matters tremendously." E-mail from Marc Poirier, Professor of Law, Seton Hall University School of Law, to author (Aug. 30, 2013, 7:30 PM EST) (on file with author) (paraphrasing omitted).

¹⁸⁵ See *Maryland v. King*, 133 S. Ct. 1958 (2013).

¹⁸⁶ See BILL BRYSON, *AT HOME: A SHORT HISTORY OF PRIVATE LIFE* 4-5 (2011).

¹⁸⁷ *Id.* at 5.

¹⁸⁸ MICH. COMP. LAWS § 128.44 (2013) ("That when any cemetery shall be vacated as provided in this act, the said trustees or common council shall cause all the dead bodies and remains buried in such cemetery to be re-interred in the cemetery of such city or village, if they have one, and if not, then in some suitable cemetery not more than 6 miles from the nearest corporate limits of said city or village in a prudent,

insistence of proximity is for the dignity of the dead, but is entombed within an expectation of memory by the living—a memory connected to place, yet presumed to matter for the living wherever relocated and outside of the limits of time and memory. When the dead experience motion in transport, the hearse carrying them slows and other drivers do as well. When they travel alone, as in an urn, someone must sign a receipt acknowledging their welcome to a place with an address.¹⁸⁹

Traumatic deaths in a previously ordinary place trigger powerful emotions about the liminal sacredness of places defined by the instant of death. If remains cannot be reliably removed to the custody of survivors, the place remains the emotional center of grief and contestation over its return to secular uses.¹⁹⁰ Emotions about the significance of the place of the moment of dying have gravitated to a practice of “communally and anonymously created” spontaneous shrines in proximity to the place of unexpected death.¹⁹¹ Roadside crosses are a manifestation of private focus on the place of a loved one’s death, although they are rarely a point for

careful and respectful manner, and shall cause to be removed and again erected over the proper remains, all permanent fences around graves and lots, all tombstones and monuments, with as little injury as the case will admit, Provided, That no removal of said bodies and remains shall be made during the months of June, July, August or September, such removal, and the costs of the proceedings under this act, shall be at the expense of and paid by the city or village in which such cemetery is located.”)

¹⁸⁹ *DMM Revision: Mailing of Cremated Remains*, U.S. POSTAL SERVICE (Aug. 23, 2012), http://about.usps.com/postal-bulletin/2012/pb22344/html/updt_002.htm (“Human ashes (cremated remains) are permitted to be mailed provided they are in a strong and durable container and packaged as required in 9.2. The identity of the contents should be marked on the address side. Mailpieces sent to domestic addresses must be sent via Express Mail® or Registered Mail® service.”). Concern for place and human remains extends to hesitation to permit human burials in pet cemeteries, and produces warnings and regulations if the desire for interment in a pet burial ground is allowed. Kristen Seymour, *With Fido Forever: Owners Who Want to Be Buried in Pet Cemeteries*, TODAY (Jan. 27, 2012, 11:22 AM), http://www.today.com/id/46044474/ns/today-today_pets/t/fido-forever-owners-who-want-be-buried-pet-cemeteries/#.UdsKQ7HD_rc (“New York pet cemeteries may not advertise or charge for the burial of cremated human remains, and humans wishing to be interred in a pet cemetery must receive written notice that their remains will not be covered by the protections and legal rights granted to human cemeteries.”).

¹⁹⁰ Frazier Moore, *‘Sacred Ground’ Charts a Stormy Planning Process to Rebuild at Ground Zero*, FLORIDA TIMES-UNION (Sept. 1, 2004), <http://jacksonville.com/apnews/stories/090104/D84QE56G2.shtml>; see KENNETH E. FOOTE, SHADOWED GROUND: AMERICAN’S LANDSCAPE OF VIOLENCE AND TRAGEDY 335-45 (rev. ed. 2003). Foote identifies a trend, in light of rapid development of a memorial to the victims of the Oklahoma bombing and plans for a 9/11 living memorial, to acknowledge the connection of places to trauma. “Explicit in the planning [for the Oklahoma site] were efforts to anchor memory in a specific site, interpret the meaning in nearby exhibitions, preserve evidence of the trauma in archival collections, and disseminate knowledge of the event . . .” *Id.* at 341.

¹⁹¹ See Sylvia Grider, *Spontaneous Shrines and Public Memorialization*, in DEATH AND RELIGION IN A CHANGING WORLD 246, 248 (Katherine Garces-Foley ed., 2006).

strangers to pause or gather.¹⁹² Roadside crosses attract controversy, with strong criticisms, fervent defense, and legal regulation.¹⁹³ Some jurisdictions ban them, some enact legal protection, and some create standardization.¹⁹⁴ Because those who place the crosses ignore the law's efforts to ban or limit them on state property, the crosses return if removed and thereby "creat[e] a dialog between the vernacular process and official attempts at control."¹⁹⁵

Claiming space as sacred and communally available outside the purview of legal entitlements is a microcosm of the mysteries of place as core to defining meanings in the world, elusive to logical exegesis, and persistently present in the claimed domain of law. It should be possible to frame principles to guide law in responding to the ways in which ordinary space, or even a nonplace, assumes a sacred/secular meaning to which dignitary interests attach. The permanent withdrawal of spaces from ordinary regulation is unrealistic, so principles could be fashioned to address the temporal claim on markings and preservation while disciplining the reach of such claims. As the purely physical conception of the world recedes, and the physical and the imaginary mingle in new ways, law confronts a need to formulate doctrines that respond to evolving human perceptions of place's significance.

*D. Place as Touchstone for Secular/Sacred Function:
Folktales of Place and Justice*

On a meta level and a micro level, place grounds a claim to exclusive control over certain functions. Because nations are always defined with respect to landmass, only a sovereign with authority over a landmass can make the claims associated with sovereignty. Among these is the critical monopoly on justice explained by Robert Cover in *Folktales of Justice*.¹⁹⁶ Cover quotes President Charles DeGaulle, in refusing permission to Sartre to hold a tribunal on French soil for judging American

¹⁹² *Id.* at 259 (noting that "[f]ew passers-by . . . ever stop and look carefully"). Indeed, these roadside shrines create a moment of reflection for the motorist on physical proximity, anonymity, and the capacity of the sacred to sustain its meaning where personal movement, or "automobility," is the dominant motif.

¹⁹³ For a debate about their contested nature, see *Room for Debate, Should Roadside Memorials Be Banned*, N.Y. TIMES (July 12, 2009, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/>.

¹⁹⁴ Grider, *supra* note 191, at 259.

¹⁹⁵ *Id.* at 260.

¹⁹⁶ Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

war crimes in Vietnam, instructing the philosopher about the state monopoly over the dispensing of law: “I have no need to tell you that justice of any sort, in principle as in execution, emanates from the State.”¹⁹⁷

For Sartre, justice transcends place; most injustice occurs in the physical world, where harm can be made destructive of life, limb, and shelter. But imposing justice need not be confined to the claims of place; knowledge is outside of place. The possibilities for assembling evidence, advocates, and judges are factually beyond the limitations of place; today, since Sartre, the means of constituting a capacity for judgment, condemnation, and rebuke, with moral effects, is relatively unconfined by the claims of physical place, though the sovereign tied to State control over place does not lack means to respond.

The salient example of the ability to overcome state control over territory is the success of Wikileaks in exposing government secrets that subject governments to public accountability for activities leaders wish to conceal.¹⁹⁸ The quest for justice for events located in time and place that Sartre attempted to pursue, necessarily in a physical place, now occurs in the reconstituted public location that no sovereign can disassemble.¹⁹⁹ Sovereigns can block dissemination in a locally controlled web, but cannot expunge from the “world wide web” information obtained by remote means and used to expose a sovereign power’s rights and wrongs.²⁰⁰

¹⁹⁷ *Id.* at 201 (quoting letter from DeGaulle to Sartre, Apr. 19, 1967, in *AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL* (John Duffet ed., 1968)).

¹⁹⁸ See, e.g., Elizabeth Heron & Stephen Farrell, *The War Logs: Newly Disclosed Iraq War Reports*, N.Y. TIMES (Oct. 22, 2010, 5:03 PM), <http://atwar.blog.nytimes.com/2010/10/22/iraq-war-reports/> (second cache of documents from archives of wars by U.S. in the Middle East, published by the New York Times after consulting with the Pentagon). The ability of the sovereign to push back can be seen in the confinement of Julian Assange to the London embassy of Ecuador, the imprisonment of Bradley Manning, and the exile of Edward Snowden in Russia, all in places over which sovereigns determine their status. John F. Burns & Ravi Somaiya, *In Embassy Drama, Eyes of Police (and Public) Focus on Assange*, N.Y. TIMES, Aug. 19, 2012, at A12, <http://www.nytimes.com/2012/08/19/world/europe/julian-assange-under-watch-at-ecuadorean-embassy.html>; Charlie Savage, *Manning Is Acquitted of Aiding the Enemy*, N.Y. TIMES, July 30, 2013, at A1, available at <http://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html> (describing acquittal of Bradley Manning for releasing classified documents but Manning’s conviction for violation of the Espionage Act of 1917); Steven Lee Myers & Andrew E. Kramer, *Defiant Russia Grants Snowden Year’s Asylum*, N.Y. TIMES, Aug. 1, 2013, at A1, <http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html>.

¹⁹⁹ Cover, *supra* note 196, at 121.

²⁰⁰ The material released by Edward Snowden had multiple custodians able to prevent its destruction in any one place, yet the British government engaged in the futile exercise, enabled by control of physical location but frustrated by the unphysicality of information on the path to becoming viral, of physically destroying hard

The traditional power of the sovereign to suppress information through control over place—offices, paper files, secured communications—begins to dissolve when determined insiders-turned-outsiders can duplicate and scatter digital copies of state secrets.²⁰¹ The state's monopoly of lawful physical force within land boundaries is no longer sufficient to impose an information blackout on official secrets.

VII. SUGGESTIONS FOR STATEMENTS OF PRINCIPLE AFFECTING CERTAIN PLACE TOPICS

The following are tentative examples of principles that might be drafted to address issues affecting the role or regulation of place in specific legal areas.

A. *Place in the Provision of Medical Treatment*

Regulation of place in connection with the provision of medical treatment should be fashioned to support patient privacy, to facilitate consultation with medical personnel authorized to provide advice in a confidential setting free of outside monitors, to allow maximum patient autonomy without non-medically indicated intrusion on home settings in which patients may privately administer prescribed medications with adequate access to remote communication in the event of complications, and to avoid medically unnecessary technological depictions of the internal organs of the body that violate the normal physical boundaries of the human anatomy.²⁰² The patient should enjoy

drives at the Guardian newspaper. See Julian Borger, *NSA Files: Why the Guardian in London Destroyed Hard Drives of Leaked Files*, GUARDIAN (Aug. 20, 2013, 1:23 PM), <http://www.theguardian.com/world/2013/aug/20/nsa-snowden-files-drives-destroyed-london>.

²⁰¹ James Risen, *Snowden Says He Took No Secret Files to Russia*, N.Y. TIMES (Oct. 17, 2013), <http://www.nytimes.com/2013/10/18/world/snowden-says-he-took-no-secret-files-to-russia.html> (explaining his concern about secret spying programs and his view that the only means of expressing opposition to the spying program was to go outside the control over employees by the National Security Agency).

²⁰² This statement of multiple purposes in the law regulating the provision of medical care bears some resemblance to the mixture of purposes in criminal law discussed in Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). Hart suggested certain modifications, at a level of generality that sought to capture humane principles, in the Statement of Purposes contained in the first draft of the Model Penal Code, e.g.,

(a) To foster the development of personal capacity for responsible decision to the end that every individual may realize his potentialities as a participating and contributing member of his community:

(b) To declare the obligation of every competent person to comply with (1) those standards of behavior which a responsible individual should know are

the maximum control over the space which he/she occupies for the medical treatment required, in the medical judgment of an attending physician satisfactory to the patient, for prudent administration or provision of medical service. Care should be taken in prescribing minimal standards for a facility in which medical services are provided to avoid the imposition of unnecessary cost if it is reasonably foreseeable that such cost may impair access to the service for which a facility is intended. Cost-benefit analysis may be used to assess the need for specified standards for a facility, with experiential data utilized to achieve an objective assessment of cost and benefit. Providers of medical services should be encouraged to utilize technology to increase access to medical services by persons in need of medical service in remote locations. Remote consultation with patients, as by teleconferencing and like technology, should be deployed in the interests of patients located at a distance from a physical facility and in the interests of patient privacy and confidential receipt of medical services.

The regulation of the place in which medical services are provided, or of the human body itself as a place, should have no purpose other than protecting and advancing the safety and autonomy of the patient. Viewing the internal organs should be a matter of patient choice, and technology creating images of the internal organs should be used only with patient consent or as a result of medical necessity. Place in connection with medical services should consider the deeply rooted tradition of privacy originating in the home, a traditional site for autonomous care of individual medical needs under conditions of autonomy. Medical facilities should provide an emotionally supportive setting for all patients, with reasonable access to patients by volunteers providing psychological comfort and group support for patients who wish to have their presence. Patients should be given full access to information kiosks and other forms of full disclosure of the array of support groups available to advise, counsel, and comfort them. Restrictions on medical procedures should not depend upon a non-medical mandate relating to anatomical features of the body but to commonly accepted protocols on

imposed by the conditions of community life if the benefits of community living are to be realized, and (2) those further obligations of conduct, specially declared by the legislature, which the individual either in fact knows or has good reason to know he is supposed to comply with, and to prevent violations of these basic obligations of good citizenship by providing for public condemnation of the violations and appropriate treatment of the violators[.]

Id. at 440-41.

prudent medical methods for the preservation of the patient's life and health.

B. Place in the Practice of Psychiatry and the Provision of Psychological Counseling

Working with professional associations, states should develop protocols for the practice of psychiatry and the provision of psychological counseling using commonly approved techniques involving remote technology, experimentation with online simulations, and writing medical prescriptions across state lines. Such protocols should avoid imposing restrictions on the use of technology across state lines if they are permitted in-state. In addition, states should seek to advance knowledge of techniques that can reduce cost to clients, improve therapeutic results with forms of sound technological innovation that creates virtual interactive experiences, and, in the delivery of services through remote connections, protect privacy. Professional associations should incorporate the most advanced protective features into technology that protect patient privacy, with periodic audits of the security of existing client protection.

C. Place in Access to Marriage

Principles that are anchored to systematic thinking about the rational weight that place can bear in arranging legal rights have the potential to move forward one area of mixed common law doctrine and statutory law. Today, statutory marriage law in the form of licensing regimes has a large impact on the ability of couples to marry without regard to their current physical location, either apart from one another and unable to travel, or in a jurisdiction that denies them marriage rights.²⁰³ Typically, marriage licensing statutes require the physical presence of both parties to the proposed marriage in the state that issues the marriage license to the couple.²⁰⁴ A handful of states permit proxy marriage, but confine it to limited categories of person (soldiers in a war zone, the moribund).²⁰⁵ The rationale for permitting it for some who need distance access but denying it to others is weak and unarticulated.²⁰⁶

²⁰³ Candeub & Kuykendall, *supra* note 6, at 742.

²⁰⁴ *Id.* at 736-37.

²⁰⁵ *Id.* at 758-60.

²⁰⁶ Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377, 431 (2012) (citing *Obama for Am. v. Husted*, 697 F.3d 423 (6th

With the emergence of same-sex marriage in a subset of states, same-sex couples are beginning to undertake high visibility efforts to overcome barriers of distance from a favorable marriage legal regime. Healthy couples routinely travel to states to marry, and these states make some efforts to become a marriage tourism destination. Other couples, however, require the extraordinary aid of air ambulances contributed by supporters to permit an ill partner to be present on the tarmac of a marriage-friendly state long enough to enter a legal American marriage.²⁰⁷ Now that such marriages will be recognized by the federal government,²⁰⁸ couples have strong estate planning reasons to desire to marry, as well as symbolic concerns.

For marriage law, an appropriate treatment of place should recognize the waning importance of physical location to the values that marriage, as a legal construct and as an expression of individual autonomy, is designed to support. The place-sensitive *principle* of marriage law could be proposed for reform of marriage procedure as follows.

Jurisdictions enacting marriage laws should design the laws to afford access to their citizens, and to non-citizens for reasonably defined needs, for access to their marriage entry laws. States traditionally offer their marriage laws to any couple present in their state, however briefly, with no inquiry into the personal history of the non-residents who are provided with marriage solemnization services. States should seek to provide comparable access to couples who may marry under their marriage laws even if they are out of the state. States should experiment with safeguards relating to identity verification and with the conditions making a couple eligible to marry remotely under the state's laws. Factors to consider are inability of an ill partner to travel, presence in a foreign jurisdiction with procedural barriers to timely provision of marriage services or problems in recordation of marriages, and lack of means to travel to a jurisdiction in which marriage services are available to them. Jurisdictions should consider offering more extensive remote access to their marriage law, but

Cir. 2012)) (rejecting state interest in enforcing an earlier deadline for voting by non-military personnel compared with military voters and explaining that, "while there is a compelling reason to provide more opportunities for military voters to cast their ballots, there is no corresponding satisfactory reason to prevent non-military voters from casting their ballots as well").

²⁰⁷ Julie Zimmerman, *To Get Married, They Left Ohio*, CINCINNATI ENQUIRER, (July 14, 2013), <http://news.cincinnati.com/article/20130714/NEWS10/307140009/>.

²⁰⁸ Annie Lowrey, *Gay Marriages in All States Get Recognition from the I.R.S.*, N.Y. TIMES, Aug. 30, 2013, at A12.

should, at a minimum, seek to offer their marriage law on an equitable basis to individuals not able to pass through their state but who are precluded by their location elsewhere from receiving the benefits of marriage law for those able to be present in the jurisdiction. Additional charges for a remote service are justifiable, but should not preclude access to couples of average means. Note that the principle specifically identifies place as lacking the weight afforded it by states who permit marriage tourism as a means of gaining access to their marriage law but deny access to those unable to be physically present.²⁰⁹

This proposed principle recommends states create some remote access to marriage for couples with defined needs, and suggests room for states to experiment with fee structures to provide portable marriage law as a state service appropriate to contemporary understandings of the receding importance of physical location for consuming marriage law. The principle attempts to give place a realistic influence in marriage law in light of couples' practices and needs, to encourage states to expand the availability of their marriage law through experimentation with safeguards and fee structures. It is a principle that asks for states to consider more creative uses of sovereignty in a world with legal spatiality that is growing beyond the bounds of physical spatiality. The principle urges states to offer law capaciously in light of the power of a humanely conceived sovereignty to transcend the mixed legacy of sovereign authority conceived as arising from force-control over bounded land. This principle posits that states have a moral obligation to conceive of the governing authority as an asset that should be deployed to extend the aid of law across

²⁰⁹ Today, with the increasing number of states that offer same-sex marriage, there is a compelling logic to "marriage-equality" states' relaxing the requirement of physical presence by the couple in the state before the officiant. A critical consideration is the ability to use marital status for the taxation of an estate if a same-sex couple has been legally married in a jurisdiction that authorizes same-sex marriage. The Author has personally advised a lawyer for a couple, one of whom was too ill to travel, concerning a United States jurisdiction which had judges willing to enter orders requiring a clerk to record a marriage done with one party available by phone and one party present before the judge. The couple successfully entered a marriage through a similar means. E-mail between Mae Kuykendall, Professor of Law, Michigan State University College of Law, and a Person Who Wishes to Remain Anonymous (Fall 2013) (as part of phone and e-mail contact regarding the means of combining same-sex marriage and remote marriage). Because the couple does not want publicity, it is not possible to cite correspondence. Nonetheless, the example of combining the existence of same-sex marriage with a judicial work-around in a state that does not authorize remote marriage indicates the propriety of and the need for explicit legislation guided by principles of fair marriage procedure that afford to place its appropriate weight for granting and regulating marriage access and recognition.

space and time and expand its beneficial functions of ordering legal rights and providing forms of protection and dignity to those who are not physically proximate, but whose needs are known and remediable with a larger imaginative scope for law-making by states.

CONCLUSION: PLACE AND LAW

A. *Does Theorizing Place Disrupt the Quest for Law as Conceptual Order?*

Could a Restatement of place have a plausible chance as a means of further developing a coherent account of place in legal doctrine? Or is recognition of place as an orienting feature of law too disruptive to a claim of orderly reasoning and justification of legal force to be compatible with a positive account of the law? Bromley has summarized a conception of the state and law as both deeply geographic, with the development by elites of formalized systems of precedent as the means of imposing centralizing authority over loosely organized villages and communes.²¹⁰ The notion is that law, with its centralizing, territorial drive, is the enemy of social connectivity that arises in small communities and replicates itself in similar communities across time and space if not captured by the territorial logic of systems of formal law.²¹¹ Does probing the logic of place lead to critique only and not to construction and improvement of defensible legal doctrine? Or, in contrast, might success in a project to restate and rationalize place in the law only deepen the grasp of precedent over the nuances and connections in social life that wither under the force of formal logic, the bureaucratic system, and legal authority? Is place so deeply political and so central to law that a project to restate law cannot absorb a direct treatment and formal rationalization of its conceptual logic?²¹² Restatement attention to place might augur an approach authorizing smaller scale projects, tethered to manageable subsets of the larger domain, and taking multiple forms: Restatements, Principles, and Model Codes.

²¹⁰ NICHOLAS BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* 37-38 (1994) (explaining the work of Peter Kropotkin, a nineteenth century geographer/anarchist who used imagination about geography to critique social arrangements).

²¹¹ *Id.*

²¹² Duncan Hollis, *Breaking News: The Fourth Restatement on the Foreign Relations Law of the United States*, *OPINIO JURIS* (Oct. 23, 2012 4:18 PM), <http://opiniojuris.org/2012/10/23/breaking-news-the-fourth-restatement-on-the-foreign-relations-law-of-the-united-states/>.

The pervasiveness of place in intuitive thinking counsels against understanding the effects of probing the logic of place in law as purely disruptive or dangerously consolidating. With the flux in the brute power of place, and the place metaphor nonetheless continuing to serve as an orienting concept for physical reality and the new mobilities transcending place and time, law should seek a deeper account of the place “place” merits in legal reasoning, the assignment of rights, and the understanding of facts.

B. Summing Up: A Plan?

One can readily conclude that place, at this point in legal history, is most suited to a statement of principles, or, for subsets of “the law of place,” model codes that capture the principles that should guide the making of law in connection with a subject for which place is a critical influence. Place as a component of law, either overtly or implicitly, is amorphous and uncategorized. The task of stating principles is daunting. But the distinctive feature of criminal law was amorphous before the ALI Principles succeeded in giving it coherence and shape.²¹³ Despite being understood as a loosely delineated area of legal concern, its “aims” were insufficiently specified, which called for decisions about the scope of an ALI treatment of criminal law, as well as a choice about the purpose of principles to guide it.²¹⁴

For place, the first cut at an attempt to define and organize the dimension of its role as a legal category would be dividing up the legal universe into arenas that directly involve the regulation of place as a legal problem. Examples might include scheduling the use of a facility, such as a park; making rules for the construction or regulation of buildings for habitation; determining which legal regulator controls boundaries, such as shorelines where loading and unloading ships occurs; defining and regulating the physical workplace in a world of

²¹³ Hart, *supra* note 202, at 401 (asserting the complexity of the purposes animating criminal law and the need to create a statement prioritizing them).

²¹⁴ Herbert Wechsler discussed the complications of bringing academic attention and suggested principles to a body of law neglected by scholars and featuring “accidental or fortuitous” differences among the states. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1101 (1952). As to scope, he set out the need to address threshold definitional issues affecting the coverage of criminal law, considerations in varying sanctions for different behavior, and a group of questions about treatment methods, extent of discretion, and administration. *Id.* at 1104-45.

telecommuting. A raw listing of such topics would permit a search for commonalities that produce a theory of decision.²¹⁵

One would then turn to the formulation of principles for identifying place as a substantial presence in a topic area that is not manifestly about place. For example, I have argued that place has become the critical feature in the regulation of reproductive health, or, more particularly, abortion. I have made tentative suggestions for recognizing that the topic of abortion has shifted to a regulation of place, and even to a conception of the interior of the female body as a place. It thus makes sense to formulate principles addressing the acceptable treatment of abortion as a phenomenon now heavily affected by place regulation, and to shape a legal model for a rational use of law to support reproductive health and underlying norms for any state control over a human body. Such a legal principle might well rule out the treatment of the interior of a human body, because it is observable with new technologies, as a place subject to regulation. It might further acknowledge that regulations of the body intended to confine its possessor to restricted locations for receiving services or self-help, with the goal of controlling the bodily interior, are not permitted. The shifting meaning of place has growing significance for an area of law created by a law review article—privacy.²¹⁶

Perhaps the overarching question to ask to identify place-infused legal subjects is, “In this area of law, in what way are legal rights affected by images of, or facts about, proximity, enclosure, fixed location, or comparative claims on first presence in a location?” One practical method would be a comprehensive review of existing legal treatises, Restatements, Principles, Model Codes, cases and codes, and regulations, to tease out the presence of place in each subject matter. Leading edge computer techniques are under development to study the interconnectedness of the law, seeking semantic connections and clusters that reveal patterns of citation and evolution in legal doctrine.²¹⁷

²¹⁵ For deception, Levmore concludes: “I have suggested that even though judges do not think of this [deception] as an area of law, the cases, though found in disparate recognized areas, can be rationalized with a single theory, in this case the cost-benefit or hypothetical bargain theory.” Levmore, *supra* note 13, at 1381.

²¹⁶ Levmore, *supra* note 13, at 1383 (citing Samuel W. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

²¹⁷ Michael J. Bommarito II, Daniel Martin Katz & Jon Zelner, *Law as a Seamless Web? Comparison of Various Network Representations of the United States Supreme Court Corpus (1791–2005)*, PROCEEDINGS OF THE 12TH INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW (June 14, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1419525.

Next, the question might be, “Is the image one of brute fact, or is it structured by a metaphor of place or a hypothetical visualization of something as situated in an observable place?” The first set of questions should probe the presence and logic of place in the determination of legal rights and obligations by breaking down the components of a doctrine, using a search for some clue about the role of situatedness, observableness, and primary claims over space. Contract law has addressed place to minimize its incoherence; the ability in contracts to specify the applicable law, without regard to the place of contracting, recognizes that place does not carry a substantial weight in creating a workable contract understanding. So contract law in its general doctrine controls place by permitting it to be stipulated and thus deprived of its unconsidered sway in imposing obligations based on location. The next set of questions should probe the rational connection of the conception of place to the legal matter it resolves. The candidates for evaluation are utilitarian or rights-grounded. It seems unlikely that all aspects of place could be considered under one overriding utilitarian or rights-concerned principle. As an example, Hart analyzed a curative–rehabilitative framework for punishment as focusing on the individual rather than general commands, and thus both potentially undermining the general command and visiting cruelty upon an individual for who he is rather than what he did.²¹⁸ Such fine-grained consideration of one purpose in one context complicates the use of one overriding principle.

For place, many questions might be organized using the principles that are present in other legal categories relevant to the particular place-affected problem. For example, theories of contract freedom could be a presence in place conceptions of the workplace. For the trend of working in the home for an employer, the focus is on the reclassification of a home as an extension of the workplace, and thus in a reclassification of the workplace in connection with employee autonomy and the qualities of the home as a place of repose and shelter. The question arises whether unbundling the employer’s relationship from the employee by severing physical presence and direct physical control over the workplace fundamentally reorders the relationship in ways that revitalize nineteenth century conceptions of the employee as a freely contracting individual who assumes risks of work-related injuries and is responsible for his own welfare. The overall context for evaluation is existing

²¹⁸ Hart, *supra* note 202, at 407.

labor law and workplace safety regulations. The decision about the correct response would require extensive consideration of the costs and benefits of existing employee-employer regulations if transferred to the home as a worksite. A decision would call for some evaluation of the cost benefits of current regulations for workers physically situated in the employer's work site. It would also call for empirical data on the actual work environment in homes for types of off-site work. What kinds of abuses might be occurring? Are freely contracting technology workers effectively absorbing the social costs of the workplace and thus benefitting individually in ways that enhance general social welfare? Is shifting costs and pricing of labor externalities to internalized employee-contractor personal arrangements efficient by avoiding over-regulation and providing greater worker control over allocating compensation between workplace welfare and income? Should regulations be shaped for the type of worker and the associated risks? The overarching question is how our conception of the social problems of the workplace is altered by the flux in the imagined physical structure of the typical workplace as a site of employer control and physical presence. Does work in the home change the understanding of the worker as subject to the physical supervision of the employer, and thus so deprived of autonomy as to require high levels of employer responsibility to worker welfare? Or does it enhance the need for worker protection by regulation and legal accountability?

At the end of his treatment of deception as a possible category of legal doctrine amenable to constructing a theory of its principles, Levmore concedes that it is "unlikely that the theory of deception sketched here could smoothly incorporate all, or nearly all, the known cases in which deception plays some role" but argues that the proposed theory "does gather in a number of cases not previously connected and not intentionally made consistent with one another."²¹⁹ For the role place should have in formulating laws, regulations, and rules, there need be no comprehensive theory tested by its capacity to explain all cases in which place can be detected. Initial efforts at typology and detection of core moral and logical precepts could form one avenue to propounding model laws or principles. For certain, the nature of place as a relatively unseen presence in legal materials calls for careful attention to the weight it is capable of bearing in a universe in which law supports the goals of order, fairness, and consistency.

²¹⁹ Levmore, *supra* note 13, at 1382.