Chapter I

Territorial Language in Law: An Introduction

Péter D. Szigeti

> "'When I talk to Umbertino I have the impression that hell is heaven seen from the other side.'
> I did not grasp his meaning. 'From what side?' I asked.
> 'Ah true,' William acknowledged the problem. 'It is a matter of knowing whether there are sides and whether there is a whole. But pay no attention to me.'"
>
> Umberto Eco, The Name of the Rose

> "No one, wise Kublai, knows better than you that the city must never be confused with the words that describe it."
>
> Italo Calvino, Invisible Cities

1.1 The Basic Liberal Formula

There is a bright red thread that winds through discussions of ethics, politics and the law, a question that comes up every day in a hundred variants, in thousands of situations. The question is basic to all conflicts between the self and others: how to ensure that one can make the choices that matter for themselves, and live by the values that they consider important, without imposing choices and values upon others? To ask the same question from the opposite perspective, how does one limit the influence of others on their life choices, while maintaining social ties and living in the same society? Implicit in the question is the assertion that different people have different values and interests, and looking for a common yardstick to measure them all is a dangerous, uncertain and possibly futile endeavor.

Deep differences in values and lifestyles are obvious to all observers of modern societies; this observation extends to the meaning of morality as such. "It is true that our morality is contracting in some ways; extramarital sex, suicide, and divorce, for instance, are beginning to be exempted from moral censure. But in other ways our morality is expanding because animal experimentation, smoking, spreading AIDS, and advertising are becoming moral issues."[1] Reconciliation of these different attitudes also seems to be a failed endeavor: "even in [the] rare cases when there is sufficient common ground to begin to argue, the argument is bound to end in an impasse, because there is no moral authority, no value, that both sides are willing to accept."[2]

[1] JOHN KEKES, THE MORALITY OF PLURALISM 6 (1993).
[2] *Id.*

It is easy to have doubts in the mere possibility of dialogue. "For what can a right-to-life advocate say that would persuade a militant feminist, a gay liberationist to a moral majoritarian… a Mormon to a hippie, a marine to a transcendental meditator, or, for that matter, a philosophy professor to a junkie?"[3]

At the same time, it also clear that this supposed decay of morality is taking place in the most peaceful places and periods of world history.[4] John Kekes may capture a mood when he writes that "if the issue is pressing, there will be a contrived legal or political compromise, but it will leave everyone dissatisfied."[5] Yet the fact that such a contrived compromise can even come into existence is quite extraordinary, all things considered. As Kekes himself claims and many others agree,[6] this in itself is good evidence for asserting that morality, while transforming, is not disappearing at all. What makes relative peace between deep-seated moral conflicts possible?

According to liberal political theory, the answer is a set of higher procedural values, which allow for a limited flourishing of all other values. The nature and status of these procedural values are contested, even between liberal philosophers. The proposed supreme procedural values include equality, freedom, human rights, neutrality of the state and justice. Rawls claims that freedom is the highest value, followed by equality.[7] Dworkin, to the contrary, claims that equality is the highest value, and liberty only flows from equality.[8] Utilitarians propose a common measure of values instead of a fixed hierarchy of values, whether it be personal pleasure or simply money, to let everyone set their own changing hierarchy.[9] Pluralists and relativists go even further towards accepting an anarchy of values, claiming that many values are incommensurable (thus defeating utilitarians' attempts to gather them all under a common metric), and "it often happens that incommensurable values are also incompatible and conflicting."[10]

In practice, these debates have relatively minor significance, as most participants subscribe to a general formula of justice that seems to unite all the debated procedural values in an ideal whole. I shall call this formula "the basic liberal formula" – it has also been called "the first principle of ethical science"[11] or "the first principle of justice,"[12] "the sum of the right of nature"[13] and "the second law of nature."[14] Most famously, Kant called it the "universal principle of justice."[15] There are many similar formulations of this formula. Herbert Spencer's formulation is "the general proposition, that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man."[16] John Rawls, somewhat

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[3] *Id*.
[4] STEPHEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2012); Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 52 INT'L ORG. 215 (2001).
[5] KEKES, *supra* note 1, at 6.
[6] *Id*., 7-8; ???
[7] JOHN RAWLS, A THEORY OF JUSTICE 52-56 (rev. ed. 1999).
[8] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 266-278 (1978).
[9] *E.g.* John Stuart Mill, On Liberty ???!!!
[10] KEKES, *supra* note ???, at 57
[11] HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM ELABORATED 75 (1851).
[12] RAWLS, *supra* note ???, at 53.
[13] THOMAS HOBBES, LEVIATHAN Ch. XIV, 4. at 87 (John C. A. Gaskin ed., 1998) (1651) [hereinafter: LEVIATHAN]
[14] *Id*., 5. at 87.
[15] KANT, *supra* note ???, § C, at 30.
[16] SPENCER, *supra* note ???, at 78. *Cf*. Immanuel Kant, *On the Proverb: That May Be True in Theory, But is of No Practical Use*, *in* IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 61, 72 (Ted Humphrey trans.

more succinctly, calls for "each person … to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."[17] Richard Bellamy, even more concisely, defines the principle as "accommodate[ing] difference by protecting each person's capacity to pursue his own good in his own way to the extent that is compatible with the similar pursuits of others."[18]

Political thinkers who are somewhat antithetical to liberalism nevertheless often support and affir m the basic liberal formula. Communitarian thinkers such as Michael Walzer, who deny liberal thinkers' atomistic individualist starting point, and insist upon the natural and inherent connectedness of persons, nevertheless uses the formula as applied to the rights of groups vis-à-vis each other, and within the "spheres" or market relations, or basic rights.[19] Likewise, moral relativists and pluralists,[20] while protesting the assumption that values can be universal, comparable, and compatible (within and/or across cultures), nevertheless use the formula as the sole possible general normative statement for guiding relations between groups with different values.[21]

The basic liberal formula, in its many applications and formulations, is omnipresent not only in political thought, but also in legal philosophy and legal doctrine.[22] It is pervasive in property law, constitutional law, torts, and rights-language in general, as well as aspects of criminal law and public international law.[23] The origins of the formula and its extensions into the varied legal domains where it is today entrenched are the subjects of Chapter 2 of this book. Below, I shall enquire what makes the formula so adaptable and what are the drawbacks of its omnipresence.

1.2 Boundaries and Areas: Territoriality In and Beyond the Basic Liberal Formula

Anything more than a cursory glance shows that the basic liberal formula is inherently territorial. The compatibility of each subject's maximal freedom with others' similar freedom is usually expressed in a language of areas, fields and domains that are separated by limits or boundaries. Herbert Spencer writes about "[the] *sphere* of existence into which we are thrown not affording *room* for the unrestrained activity of all, and yet all possessing in virtue of their constitutions similar claims to such unrestrained activity…"[24] Karl Marx, critiquing the same concept, writes that "the *limits* within which each person can move without harming others is defined by the law, just as the *boundary between two fields is defined by the fence*."[25] In Isaiah Berlin's definition, "political liberty… is simply the *area within which* a man can act unobstructed by others … and if this *area is contracted* by other men *beyond a certain minimum*,

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1793/1983): "*Right* is the limitation of each person's freedom so that it is compatible with the freedom of everyone… and *public right* is the totality of *external laws* that makes such a thoroughgoing compatibility possible." (emphases in the original).

[17] RAWLS, *supra* note ???, at 53.

[18] RICHARD BELLAMY, LIBERALISM AND PLURALISM: TOWARDS A POLITICS OF COMPROMISE 1 (1999).

[19] *E.g.* MICHAEL WALZER, SPHERES OF JUSTICE 95-164 (1983).

[20] Here used in the sense of relativists towards both relativism and liberalism: *cf.* KEKES, *supra* note ???, at 199-217.

[21] *E.g.* JOHN RAWLS, THE LAW OF PEOPLES 35-39 (1999); ???

[22] For a sketch of the roles and differences between legal philosophy and legal doctrine, see Martti Koskenniemi, Hierarchy in International Law: A Sketch, 2-3 ???!!!

[23] See infra Chapter 2, at ???; also Richard A. Epstein, *The Harm Principle – And How It Grew*, 45 U. TOR. L. REV. 369 (1995).

[24] SPENCER, supra note ???, at 74 (emphases added).

[25] Karl Marx, *On the Jewish Question*, *in* KARL MARX, SELECTED WRITINGS 46, 60 (David McLellan ed., 2nd ed. 2000).

I can be described as being coerced, or, it may be, enslaved."[26] In another essay, he writes that "Political liberty… is a historical growth, an *area bounded by frontiers*."[27] John Stuart Mill tries to define "the appropriate *region* of human liberty."[28] And so forth. As we have seen, this is true for the liberal tradition, but just as much for communitarian, pluralist and in certain cases even Marxist thought.[29]

I argue that all of this is more than just colorful language. The basic liberal formula is in fact *inherently territorial*: for the formula to work, it *must* either create or imagine lines of separation and areas of mutual freedom. In some cases this is self-explanatory. Application of the formula often involves physical separation, and there the geographical aspect is obvious. Real property and statehood are inherently territorial. Territorial sovereignty is designed to allow different nations to live under different laws and traditions, without disrupting each other. Zoning allows different neighborhoods to cater to the lifestyles of different parts of an urban population, without interfering with each other. Property creates the conditions for "the sanctity of a man's home and the privacies of life."[30] One step closer to the mixture of abstract and geographic territoriality stand rights *in rem*, which are modeled on property rights. These rights demand non-interference, and this usually includes, though is not limited to, keeping a certain spatial distance from the rights-bearer. Individual freedom is also closely tied to the freedom of movement, as most human actions require at least some displacement.[31] Even criminal law uses spatial separation to end conflict, with tools as varied as restraining orders, incarceration, exile, or deportation.

But the formula is applied to a host of situations that have no physical-geographical aspect, and using the same territorial language. The concepts and tools of property law are applied just as easily to intellectual property, or property over immaterial goods such as stocks or bonds. There have been published articles on mapping the boundaries of disputes,[32] mapping negotiation strategies,[33] mapping the digital public domain,[34] mapping the limits of skepticism,[35] and even citizenship law[36] and private law as a whole,[37] to cite but a few. Susan Drummond self-consciously uses the layout and often the language of a travel guidebook in her discussion of marriage law in Spanish Gitano communities.[38] Lawrence Tribe has written about "how to 'map'

[26] Isaiah Berlin, *Two Concepts of Liberty*, *in* ISAIAH BERLIN, LIBERTY 166, 169 (Henry Hardy ed. 2002) (emphases added).
[27] Isaiah Berlin, *Five Essays on Liberty: Introduction*, *in id*., 30.
[28] JOHN STUART MILL, ON LIBERTY 22 (1859).
[29] Cf. Vladimir Lenin, *The Right of Nations to Self-Determination*, available at https://www.marxists.org/archive/lenin/works/1914/self-det/. *But see* Deborah Whitehall, *A Rival History of Self-Determination*, 27 EUR. J. INT'L L. 719 (2016).
[30] Griswold v. Connecticut, 116 U.S. 479, 486 (1965).
[31] *E.g*. HILLEL STEINER, AN ESSAY ON RIGHTS 16-17 (1994).
[32] Robert Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989).
[33] Kimberly Kovach & Lela Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).
[34] Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147 (2003).
[35] Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996).
[36] ANUPAMA ROY, MAPPING CITIZENSHIP IN INDIA (2010).
[37] WADDAMS, *supra* note 62.
[38] SUSAN G. DRUMMOND, MAPPING MARRIAGE LAW IN SPANISH GITANO COMMUNITIES 3-25, *esp*. 13-16 (2006).

the text and structure of our Constitution onto the texture and topology of 'cyberspace,'"[39] and about "the curvature of constitutional space."[40] Talk of the boundaries of legal doctrines[41] and the dimensions of property law[42] abound, and discussing the structure, foundations or divisions of law is so common as to be unremarkable.

In its most encompassing form, territorial language can provide a complex unity between descriptions of a social structure and normative justifications for its rightness. Michael Walzer, again, provides the perfect illustration:

> I suggest that we think of liberalism as a certain way of drawing the map of the social and political world. … [In feudalism,] church and state, church-state and university, civil society and political community, dynasty and government, office and property, public life and private life, home and shop: each pair was, mysteriously or unmysteriously, two-in-one, inseparable. Confronting this world, liberal theorists preached and practiced an art of separation. They drew lines, marked off different realms, and created the sociopolitical realm with which we are still familiar. The most famous line is the 'wall' between church and state, but there are many others. Liberalism is a world of walls, and each one creates a new liberty.[43]

Separations provide freedom, because freedom consists of doing what one chooses without the fear of interference of others. "Others" would be more powerful institutions and the people leading them:

> Religious liberty annuls the coercive power of political and ecclesiastical officials. … Academic freedom provides … protection to autonomous universities, within which it is difficult to sustain the privileged position of rich or aristocratic children. The free market is open to all comers, without regard to race or creed; … and though it yields unequal results, these results never simply reproduce the hierarchies of blood or caste or, for that matter, of 'merit.'[44]

Boundaries also protect equality, regardless: "we can say that a (modern, complex and differentiated) society enjoys both freedom and equality when success in one institutional setting isn't convertible into success in another, that is, when the separations hold, when political power

[39] Lawrence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (March 26, 1991), *in* READINGS IN THE PHILOSOPHY OF TECHNOLOGY 309, 309 (David M. Kaplan ed., 2009).
[40] Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).
[41] *E.g.* Al Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFF. L. REV. 383 (1979); Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 REPRESENTATIONS 162 (1990); Richard Devlin, *Mapping Legal Theory*, 32 ALBERTA L. REV. 602 (1994); CULVER & GUIDICE, *supra* note 70.
[42] *E.g.* Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L. J. 1075 (1997); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 16-34 (2003); Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015 (2008).
[43] Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 315 (1984).
[44] *Id.*, 320.

doesn't shape the church or religious zeal the state, and so on."[45] Under Walzer's theory, justice requires the setting up of "spheres" of social goods, and policing the boundaries between them.[46] My aim here is not to defend a particular separation, or Walzer's theory as a whole, but rather to note that geographical language is nigh inescapable in Walzer's theory of distributive justice. Talk of "drawing maps of the social and political world,"[47] or of "[drawing] lines, [marking] off separate realms"[48] abounds. Due to legal and institutional separations, "the university takes shape as a kind of walled city,"[49] and "our homes are our castles."[50] Simony and bribery are described as "people sneak[ing] across the boundary of the sphere of money."[51] Walzer would like his analysis to yield "not an ideal map or a master plan, but, rather, a map and a plan appropriate to the people for whom it is drawn, whose common life it reflects."[52]

In Walzer's grand description, lines, boundaries, separations and walls are both physical and theoretical: they exist first as abstract moral distinctions, but then take shape as institutional divisions and finally as cartographically marked real-life boundaries. The metaphor of the map turns quite fast into a real map. And Walzer is definitely not alone in using such elaborate, even flamboyant territorial analogies in political philosophy. Joel Feinberg takes the analogy between sovereign states and sovereign individuals as literally as possible:

> Personal autonomy similarly involves the idea of having a domain or territory in which the self is sovereign. … [W]e might enlarge our conception of the personal domain to include not only one's body … but also a certain amount of 'breathing space' around one's body, analogous perhaps to offshore fishing rights in the national model.[53]

The two general characteristics of the employment of the basic liberal formula in political and legal theory, then, is (1) the variable scale of the formula – is widely engaged to address conflicts at any scale, from individuals' personal integrity to nations in disagreement with each other; and (2) the mixed abstract-geographical applications of the formula. Writers and texts employing openly make use of these two characteristics to create an ever-expanding matrix of self-referential uses, in an almost bewildering pattern and generality. Feinberg above compares individuals to sovereign states, whereas Vattel famously compares sovereign states to individuals: "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom. … A nation then is mistress of her own actions so long as they do not affect the proper and perfect rights of any other nations…"[54] Territorial jurisdiction works (or rather, doesn't work[55]) in the same way regardless of whether we are faced with the jurisdictional claims of localities, federal entities or nation-states. Property protects privacy, and privacy includes ownership over information relating to the extended self. The power of the sovereign

[45] *Id.*, 321.
[46] In more detail, *see* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).
[47] Walzer, *supra* note 4, at 315.
[48] *Id.*
[49] *Id.*, 316.
[50] *Id.*, 317.
[51] WALZER, *supra* note 7, at 98.
[52] *Id.*, 26.
[53] JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. 3, at 52, 53-54 (1986).
[54] VATTEL, *supra* note 227, Preliminaries, § 18, § 20, at 75.
[55] *See* Peter D. Szigeti, *The Illusion of Territorial Jurisdiction*, 52 TEX. INT'l L. J. 369 (2017), and *infra* at ???.

over the territory is comparable to the power of the owner over her land,[56] while the Castle Doctrine compares each houseowner to a small sovereign over their own plot.[57] The conclusion is that the human mind has no problems in treating concepts and abstract properties as if they were physical objects in stable geographical or geometric relationships with each other.

1.3 The Nuts and Bolts of Spatial, Territorial and Geographical Language

This treatment of abstract concepts as if they were physical entities extends beyond the basic liberal formula and its applications to legal descriptions of the structure of rules, doctrines or the legal system as a whole. It is reflected in the characteristics of the exact spatial terms we use to describe concepts. Certain phenomena are discussed using exclusively one-dimensional spatial terms; others exclusively two-dimensional spatial terms; yet others using both two- and three-dimensional terms.[58] There is in fact substantial geometric content embedded in many terms that can be used to describe both physical and abstract or imaginary spaces.[59] "In" and "out" imply a division of the relevant space into two fields, one smaller and enclosed, the other larger and more open.[60] "In" can refer to a two-dimensional or a three-dimensional field; "on" can only refer to a two-dimensional field. "Across" and "along" refer to two one-dimensional objects which are perpendicular or parallel to one another.[61] "All over" refers to a mostly uniform distribution of events, materials or effects on a strictly two-dimensional plane. "All along" refers to a similarly uniform distribution on a one-dimensional line, and "throughout" in three dimensions. The terms "all over / all along / throughout" have to be used for any type of distribution – there is no abstract alternative in the English language that does not have a spatial-dimensional meaning component as well.[62] These terms are used for the distribution of geographic phenomena ("torts are being committed in similar numbers all over the United States"; "throughout Northwestern Alberta, petroleum extraction is increasing") as well as temporal and narrative events ("throughout her lecture, she made references to Hegel"; "all along, we knew what was happening") and conceptual ones ("throughout the Civil Code, one can find allusions to an ethic

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[56] Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 13 (1927); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

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> That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose… but if thieves come to a man's house to rob him, or murder and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.

Semayne's Case, 5 COKE REP. 91a, 93b (1604). The analogy is implied and functional, but the content of the doctrine is that the sovereign monopoly on legitimate violence is transferred to the homeowner. The right is territorial, in that the exceptionally low burden of proof regarding self-defense is tied to the physical space of the property being invaded.

[58] Investigation of these distinctions was inspired by theories of meaning attached to verb microclasses, in BETH LEVIN, ENGLISH VERB CLASSES AND ALTERNATIONS: A PRELIMINARY INVESTIGATION (1993) and explained in STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 52-87 (2007).

[59] Ray Jackendoff & Barbara Landau, *Spatial Language and Spatial Cognition*, *in* RAY JACKENDOFF, LANGUAGES OF THE MIND 99-124 (1992).

[60] Charles J. Fillmore, *May We Come In?*, 9 SEMIOTICA 97 (1973).

[61] Talmy, *supra* note 900, at 234-235.

[62] *Id*., 102-103, 111-116.

of self-sufficiency"). Territorial language thus creates a connection between geographic and abstract spatial occurences.[63]

For example, the phrase "*along* the spectrum of left-wing thought" requires us to imagine left-wing political ideas as if on a one-dimensional line that is arranged by increasing or decreasing difference ("distance") from centrist and right-wing ideas. Because the spectrum is one-dimensional and flat, the phrase "*on top of* the spectrum of left-wing thought" does not really make sense. because only two- or three-dimensional objects have tops (and bottoms). "*Outside* the spectrum" is nevertheless intelligible, but that expression then situates or frames the ideas that are "outside" the spectrum in a two- or three-dimensional "field" or "box." For the image to remain coherent, the extra dimensions must refer to aspects of the ideas in question that are not captured by the left/right spectrum.

Most prepositions are applied equally to physical space, time and more abstract domains such as states of mind.[64] *Behind*, for instance, can be used spatially ("standing behind the tree"), temporally ("I'm running behind") and psychologically or sociologically ("children left behind"). *Over* can similarly be used in all three domains of meaning ("Flying over Maine" vs. "Over the course of the next ten months" vs. "I'm over the pain"). But in addition to prepositions, many verb structures are also identical between spatial contexts and temporal, possessive, identificatory and some other meaning types. Ray Jackendoff has named this phenomenon the Thematic Relations Hypothesis, according to which "the semantics of motion and location provide the key to a wide range of further semantic fields."[65] The way we use *stay* and *go* to express spatial information ("we stayed in Chicago"; "he went from Guam to Yap") are identically transferable to time relations ("we stayed until nine o'clock"; "he went on from 6 to 10"), to moods ("we stayed happy"; "he went from bored to exuberant"), to personal properties, identities or identifications ("we stayed Presbyterians"; "he went from a miser to a spendthrift"), to material possessions ("Ravenholm Inc. stayed with the founding family"; "the family heirlooms went to the eldest daughter").[66] A few other verbs, such as *keep* ("he kept working until 1 am"; "the river keeps on winding until reaching the plains"; "they kept the car"; "she kept her youthful look"); *range* ("Falcons range from the Middle East to Scandinavia"; "lectures range from soporific to riveting"; etc.), *start*, *stop*, *remain* and *leave* (as in leave something or somebody in a certain state) are similar in semantic structure. And expressions such as "on your way to", "on the verge of", "getting close to", "far from" and "towards becoming" are similarly flexible in their applicability.[67]

Other spatial terms do not bridge the physical/abstract divide nearly so smoothly. *Distance* exists as a measure both physically and socially. However, physical distance is continuous, describable in numeric units („Washington DC is 80 miles further from New York than Boston is"), whereas social distance is binary, expressible only through pairs of opposites such as *near* and *far* or *close* and *distant*; and further qualifiable only through rough adjectives (e.g. "the distance between the managerial class and the working class has closed considerably, but is

[63] *Cf.* RAY JACKENDOFF, SEMANTICS AND COGNITION 95-106 (1983).
[64] For a fuller investigation, *see* ANDREA TYLER & VYVYAN EVANS, THE SEMANTICS OF ENGLISH PREPOSITIONS: SPATIAL SCENES, EMBODIED MEANING AND COGNITION (2003).
[65] JACKENDOFF (SEMANTICS AND COGNITION), *supra* note ???, at 188. *See also* Jeffrey S. Gruber, Studies in Lexical Relations (Ph.D. dissertation, MIT, 1965) (on file with author);
[66] Id., 188-210.
[67] Id., 201.

nevertheless far from disappearing").[68] *Angles* and other ways of expressing orientation are another realm where the physical and the abstract expressions divide, even if they do not disappear. Physical and mathematical lines can be expressed numerically with degrees and graphically with arrows; on the other hand, abstract directions (as applied to intentions or goals, for example) can only be *opposing*, *parallel*, *facing* each other or occasionally *at right angles* or *at a crossroads*. This relative poverty of spatial expressions will have particularly important consequences regarding the use of spatial language in legal theory and structural analysis.[69]

To be mindful of the dimensional distinctions and the transferability of expressions between physical and abstract uses, throughout the book, I shall distinguish between the terms "spatial," "geographical" and "territorial," with slightly different meanings. *Spatial* is the term with the broadest meaning, referring to any word, phrase or concept that can be constructed to apply to, or also apply to, an extension in space, whether abstract, physical or imaginary, in any number of dimensions. *Geographical*, by contrast, will refer to terms that have a locatable, measurable application in the physical space of the Earth. *Watershed*, *massif* or *Thalweg* are exclusively geographical concepts, without any abstract or imaginary applications. *Boundary*, *domain* or *limit* are spatial terms that may be geographical if they refer to a certain specific, geographically locatable line or area. *Territorial* language is the subset of spatial language that refers to two-dimensional objects – objects, whether real or abstract, that are constructed out of *areas* created by *boundaries*. Territorial concepts may or may not be geographical; and they may also be incomplete, i.e. without all necessary boundaries. They are nevertheless always two-dimensional. How this intermingling of abstract and physical phenomena works out in law and political theory is the subject of this book.

1.4 Two Views of Metaphor: What is the Significance of Spatial Language?

In order to take my claim about the implicit territoriality of moral formulas and legal doctrines at full value, one must be convinced that spatial formulations are a substantial matter – that we use territorial expressions as more than just shorthand for precise but lengthy and complicated jargon, or than just rhetorical flourishes for embellishing more technical terms. In other words, we must be convinced that territorial language is not a series of mere metaphors. Certainly, the basic liberal formula exists without the language of boundaries and areas, although not as commonly as with that language. One may use a slightly different set of metaphors, such as Jack Balkin's "crystalline structure," [70] or write in functionalist terms ("exclusion," "modules"), like Henry Smith does.[71] The *harm principle* is a traditional non-territorial way to describe the limits to freedom: "freedom is the right to perform and do what does not harm others."[72] The *will theory* is another: the idea that the principal purpose of law is the protection of

[68] "Another way that spatial language comes up short is that its distinctions are digital – indeed, usually binary… as in *here* and *there*. The distinction is relative, not absolute; as Stephen Levinson points out, *Put it there* has a very different meaning to a crane operator and to a brain surgeon." PINKER (STUFF OF THOUGHT), *supra* note ???, at 179.
[69] See infra part 1.5 and Chapter III.
[70] Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986).
[71] "The exclusion strategy defines what a thing is to begin with. … Many important features of property follow from the semitransparent boundaries between things. Boundaries carve up the world into semiautonomous components — modules — that permit private law to manage highly complex interactions among private parties." Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1703 (2011).
[72] Marx, *supra* note 16; *also* MILL, *supra* note 19, at 17; SPENCER, *supra* note 15.

the parties' individual free wills.[73] Yet another is the term *negative liberty*, or "freedom from the state."[74] All of these formulations nevertheless describe the same normative concept, and the most famous users of the terms "will theory" and "negative liberty" made copious use of territorial language as well.[75] Functionalist and territorial language are also very easy to combine.[76] Indeed, the pervasiveness of territorial language, exhibited throughout the book, serves as one indicator that territorial language is not a question of the drafters' poetic sensibilities, but are examples of systematic or conceptual metaphors – not really metaphors at all.[77] I invite the reader to go through the listed spatial expressions in other languages, if they are familiar with the relevant legal terms; I wager they will find a remarkably similar list of expressions.

This pervasiveness of territorial language, even in works that also use non-territorial terms and descriptions, can still be compared to quite a few other "sticky" metaphors in legal discourse, such as the "marketplace of ideas" and the "chilling effect" of regulation.[78] These metaphors have been alive for centuries and are still being evoked constantly despite how clichéd they have become, without anyone mistaking them for literal descriptions. We may add Cardozo's famous caveat: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[79]

To dispel this view, we have to ask what a metaphor is, in the end – or perhaps vice versa, what makes literal language literal? Ray Jackendoff and David Aaron's answer is that a term cannot be called metaphorical if there is no literal alternative to the expression: what they call the "of course, X isn't… but if it were…" test.[80] To wit: "suppose one were to claim (counterintuitively) that 'My dog ran down the street' is metaphorical, on the (dubious) grounds that the predicate *run* only applies 'literally' to humans."[81] We can test our intuitions by coining the following sentence: "Of course, the [source of the metaphor] is not the [genus of the target of the metaphor] – but if it were, then we might say that [source] is [target]." As applied to the

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[73] Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 115 (2000); *more generally*, DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

[74] *E.g.* HOBBES (LEVIATHAN), *supra* note 20, Ch. XIV., 4-6., at 79; GUIDO DE RUGGIERO, THE HISTORY OF EUROPEAN LIBERALISM 350-51 (R. G. Collingwood trans. 1959); *also* Berlin, *supra* note 17; JEREMY BENTHAM, OF LAWS IN GENERAL 253 (Herbert L. A. Hart ed. 1970) (1782).

[75] ??? See Mill and Berlin, supra notes ???

[76] *E.g.* "A system is nearly decomposable if a set of boundaries can be found such that interactions are much more intense within these boundaries than across them, but the pieces function together to do what the system is supposed to do." Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L. J. 1742, 1748, 1761-66 (2007).

[77] *Cf.* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 4 (1983):

> Metaphor is for most people a device of the poetic imagination and the rhetorical flourish—a matter of extraordinary rather than ordinary language. Moreover, metaphor is typically viewed as characteristic of language alone, a matter of words rather than thought or action. … We have found, on the contrary, that metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.

[78] HAIG A. BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (1992); Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007).

[79] Berkey v. Third Avenue Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

[80] Ray Jackendoff & David Aaron, *More Than Cool Reason: A Field Guide to Poetic Metaphor by George Lakoff and Mark Turner*, Review Article, 67 LANGUAGE 320, 326 (1991).

[81] Id., 326.

intuition about dogs and running, "Of course, animals aren't people – but if they were, you could say my dog ran down the street."[82] This sentence, Jackendoff and Aaron argue, "has the curious flavor of a *non sequitur* or perhaps a bad pun. The incongruity of treating dogs as humans is acknowledged, but the relevance of this mapping to the expression *my dog ran down the street* is totally unclear."[83] By comparison, this type of test works well with conventional metaphors ("Of course, Juliet is not a celestial body – but if she were, you could say she is the sun.").

How does Jackendoff's and Aaron's test work out when applied to territorial language in a legal context? "Of course, free speech is not a territorial entity – but if it were, we could say that it has boundaries (or limits)." I argue that this sentence is just as garbled as the example about dogs and running. Accordingly, the use of territorial imagery in legal discourse is not metaphorical, but closer to literal. Legal concepts and geographical areas do not share some common characteristic which allows us to make clever analogies between the two. Rather, I propose that we do in fact imagine rights as bounded areas. Even if we speak about the harm principle or negative freedom, there are no alternatives to using *boundary*, *limit*, *extent*, *restriction*, or frontier to describe the – well, limits, extensions etc. of rights.

The view opposite to the one that holds that metaphors are ephemeral or perilous (the structural metaphor view) therefore holds that discussion about whether these terms are literal or metaphorical, abstract or geographical, loses its sense, because the two become the same. Lakoff and Johnson describe the phenomenon through the series of structural (non-)metaphors that connect arguments and war:

> It is important to see that we don't just *talk* about arguments in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own. We gain and lose ground. We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of the things we do in arguing are partially structured by the concept of war. Though there is no physical battle, there is a verbal battle, and the structure of an argument—attack, defense, counterattack, etc.—reflects this.[84]

There is ample support for this view as well, with regard to territorial language and systematicity in general. Talk of limits, bounds, and distinctions of inside and outside are central to categorization, and "there is nothing more basic than categorization to our thought, perception, action and speech."[85] Discussions of group membership seamlessly become discussions of "boundaries," "inclusion" and "exclusion," through the vocabulary of categorization.[86] The vocabulary of boundaries and inside vs. outside is central not only to other social sciences such as sociology, but also, for example, set theory in mathematics. The translation of abstract categories into geometric "maps" such as Venn diagrams, charts or graphs is also evidence of the centrality and universality of the implicit territoriality of categorization. Cognitive linguistics also provides some evidence for the claim that we use territorial concepts to organize a range of abstract topics: time relations, possession, abstract properties all use territorial language to signal

[82] *Id.*
[83] *Id.*, 327.
[84] Lakoff & Johnson, supra note ???, at 5.
[85] GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 5 (1987).
[86] *E.g.* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 7-11 (1990).

states and changes.[87] Many pervasive metaphors in law are examples of territorial thought themselves, such as the "wall of separation between church and state" and the "piercing of the corporate veil."[88] The 19th century descriptors of freedom as a bounded area whom I cited above[89] spoke of it as a first principle, or basic law of ethics, more in the way of laws of nature than a convention.[90] There is also an increasing amount of legal scholarship that posit the centrality of metaphoric expressions as the explanations of doctrinal outcomes.[91]

On the other hand, one must stress that the equivalence between the source domains (war, territory, etc.) and the target domains (argument, legal/political structure, etc.) is only true up to a certain point. This is where most legal scholars who embrace Lakoff's view on the identicality of cognitive metaphors and literal speech fail. Most of them come only to moderate, often vague and inconclusive findings regarding the impact of metaphors on legal reasoning.[92] But sometimes, surprisingly extreme accounts emerge. Stephen Winter gives the example of the trademark infringement case between the NAACP and its offshoot organization, the NAACP Legal Defense and Education Fund.[93] The NAACP Legal Defense Fund was created by the NAACP in 1940 for tax reasons, but soon became a completely independent organization with significant conflicts with the NAACP. In 1983, the NAACP sued the NAACP Legal Defense Fund for trademark infringement over the name "NAACP", and won in the D.C. District Court, but then lost on appeal at the D.C. Circuit Court. Winter recounts that the brief for the appellant Legal Defense Fund began thus:

> Once upon a time there was a parent and the parent had a child, and the parent was very proud of the child and gave the child its name. Then there came a time when the child grew up and exceeded the parent in wealth and fame and good fortune and deeds, and the parent got jealous and sued to get its name back.[94]

According to Winter,

> The case is over at this point, right? It does not matter what the rest of the facts are. It does not matter what the law is, right? Once you see the dispute as that kind of

[87] RAY JACKENDOFF, SEMANTICS AND COGNITION 188-211 (1983); RAY JACKENDOFF, LANGUAGES OF THE MIND 37-38 (1992); STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 192 (1998).
[88] BOSMAJIAN, *supra* note 42, at 73-95.
[89] Supra notes ??? and accompanying text.
[90] *E.g.* KANT (METAPHYSICS OF MORALS), *supra* note 20, at 7-22; SPENCER, *supra* note 15; MILL, *supra* note 19.
[91] *E.g.* F. Stephen Knippenberg, *Future Nonadvance Obligations: Preferences Lost in Metaphor*, 72 WASH. U. L. Q. 1537 (1994); STEPHEN WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND (2001); JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW (2011).
[92] *E.g.* "[W]hat actually stands behind the majestic curtain of Law's rationality and impartiality is nothing other than ourselves and our own, often unruly social practices." STEPHEN WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND xiv (2001); "To say that legal rules and doctrine are metaphoric constructs… is to say only that their measure is not an objectively verifiable set of formal propositions, but the degree to which they advance our purposes." F. Stephen Knippenberg, *Future Nonadvance Obligations: Preferences Lost in Metaphor*, 72 WASH. U. L. Q. 1537, 1601-1602 (1994).
[93] NAACP v. NAACP Legal Defense and Education Fund, Inc., 753 F.2d 131 (D.C. Cir. 1985).
[94] *Using Metaphor in Legal Analysis and Communication: A Symposium of the Mercer Law Review*, Friday, November 10, 2006: Question and Answer Period, Prof. Steven L. Winter's reply, *in* 58 MERCER L. REV. 1021, 1024 (2007).

> internecine warfare, right, unfairly by a parent against his or her own child, the case is over. But it was brilliant. So, that is an example of framing by a story.[95]

To put it mildly, most lawyers would be surprised and incredulous to hear that the use of a family metaphor in the appellant brief means that "the case is over at this point" and the law no longer matters. Although there are a few references to the family metaphor in the appellate judgment,[96] the text analyses institutional history, trademark law, the doctrine of laches, and the lack of a licensing agreement. If the case was over upon the first evocation of the "quarreling family" frame, how did the judge not notice that? Why did the judges and the attorneys from both sides waste almost three years with legal arguments between the initial filing in May 1982 and the final judgment in January 1985?

If metaphors and framing decide cases, then consequently legal language is irrelevant. If legal language and rationality is irrelevant, then there are only two ways to (rationally) explain the veneer of argumentation and the apparent desire to convince in legal and academic practice. One is to look at metaphors as subliminal messages that influence listeners without their recognition. The other is to look at metaphors as secret codes which contain the true information, hidden by a mass of irrelevant facts. Both claims deny even the possibility of rational and democratic discourse. George Lakoff claims as much, in a way analogous to Steven Winter:

> The myths [believed by liberals and progressives] began with the Enlightenment, and the first one goes like this: The truth will set us free. If we just tell people the facts, since people are basically rational beings, they'll all reach the right conclusions. But we know from cognitive science that people do not think like that. People think in frames. … To be accepted, the truth must fit people's frames. If the facts do not fit a frame, the frame stays and the facts bounce off.[97]

Lakoff directs his claims towards critiquing and exploiting weaknesses in the current-day U.S. political process.[98] But if his analysis were true, both the legal process and scholarly debate would be pointless at best, and a hidden exercise in manipulation at worst. Most other cognitive scientists, of course, vehemently deny that this is the case. As Steven Pinker notes, "In preparing for a debate, I can imagine how to shoot down someone's argument and defend my own, but I had better not worry about guarding my supply lines, issuing war bonds, or dealing with peaceniks at home."[99] The wider corollary is that despite similar or even identical structures, "people could not analyze their metaphors if they didn't command an underlying medium of thought that is more abstract than the metaphors themselves. Nor, for that matter, could they use

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[95] *Id.*

[96] NAACP v. NAACP Legal Defense and Education Fund, Inc., *supra* note 925, at para. 10: "During this initial period, the LDF was under its *progenitor's* direct control;" para. 38: "These two great organizations, *like brilliant but quarreling family members*, must continue to share the NAACP initials with which they were born;" uses of "parent organization" in paras. 35-36 (emphases added).

[97] LAKOFF (DON'T THINK OF AN ELEPHANT!), *supra* note ???, at 16-17.

[98] Id.; GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2nd ed. 2002); GEORGE LAKOFF, WHOSE FREEDOM? THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA (2006); GEORGE LAKOFF, THE POLITICAL MIND: A COGNITIVE SCIENTIST'S GUIDE TO YOUR BRAIN AND ITS POLITICS (2008).

[99] Pinker (The Stuff of Thought), supra note ???, at 250.

a conceptual metaphor to *think* with."[100] Structural metaphors may have no alternatives in speech, but thought seems to "work" through a medium different from either speech or metaphorical images. People can easily challenge or disregard metaphors – otherwise, there would be no point, indeed no possibility of pointing out metaphors and asking us to change our frames. Otherwise, of course, we could not even conceive the difference between abstract/metaphorical and physical/geographical space. The existence of mixed metaphors, malapropisms,[101] and jokes that take metaphors literally[102] also point to the fact that we can select and judge frames. Gregory Murphy adds to these objections, by remarking that many conceptual metaphors, including the "argument is war" family of metaphors, rely on sources that are at least as complex and abstract as the targets.[103] Marina Rakova remarks that sensorimotor experiences and cognitive-emotional ones are processed by different neurological systems, undermining Lakoff's and Johnson's claims that simple conceptual metaphors are founded upon sensory experience.[104] Michael Smith and Michael Boudin cite dozens of cases where judges have dismissed metaphors embedded in legal doctrine.[105]

Is there a coherent middle view between denying structural metaphors' relevance and asserting their identity with structural thought? Instead of searching for a general theory of metaphoric language and thought, I will attempt to further the debate through an investigation of context and history in the use of spatial language in law, and a description of the effects of territorial language in law. If territorial thought is truly omnipresent and therefore immutable and possibly biological in origin, one would expect it to be unchanging, an ever-present element in the history of legal and political thought, confined to the same range of examples and applications. If territorial thought is a simple metaphor, on the other hand, we would expect examples for it to appear in and out of legal history, in all sorts of contexts, without continuity or consistency.

1.5 The Range and History of Territorial Language in Law

Spatial and territorial language in legal texts that is deeper and more consistent than the occasional metaphor is used in three separate contexts, which I shall call the ethical, the epistemological and the geographical. The ethical use of territorial language is essentially the story of the basic liberal formula: the conviction that "good fences make good neighbors,"[106] that better delimitations and demarcations can increase freedom, harmony, tolerance, independence and the flourishing of culture at both the individual and the collective level. The genealogy and spread of the basic liberal formula are the topic of Chapter II of this book. The current-day omnipresence of the formula, which I have given a taste of at the beginning of this chapter, should not obscure the fact that it is a historical invention. Ancient and medieval conceptions of freedom were radically different, and the basic liberal formula was assembled in the 18th and 19th

[100] *Id*., 249-250.
[101] *E.g.* "An oral agreement isn't worth the paper it's written on," attributed to Samuel Goldwyn.
[102] "If all the world is a stage, where is the audience sitting?" Steven Wright, quoted in PINKER (THE STUFF OF THOUGHT), *supra* note ???, at 249.
[103] Gregory Murphy, *On Metaphoric Representation*, 60 COGNITION 173, 181-182 (1996).
[104] MARINA RAKOVA, THE EXTENT OF THE LITERAL: METAPHOR, POLYSEMY AND THEORIES OF CONCEPTS 28-32 (2003).
[105] Smith (Levels of Metaphor), *supra* note ???, at 923-928; Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L. J. 395 (1986).
[106] Robert Frost, *Mending Wall* (1915).

centuries, from roots in Roman property law, medieval Catholic theology, Protestant Reformation conceptions of morally neutral action, and consolidations of these ideas by Bentham and Kant.[107] Since then, adaptations of the formula have spread like wildfire; yet the historicity of the formula should remind us that other definitions of freedom are possible.

The effects of the spread of the basic liberal formula are also well-noticed and widely debated. They include the adoption of the nation-state as the sole political form on the international level;[108] the spread of individualism and capitalism; the claim that property rights, economic development, democracy and individualism go hand in hand.[109] The spread of territorial thought in politics is generally applauded and encouraged by right-wing politics, and viewed more cautiously or disparagingly on the Left.[110]

The epistemological uses of spatial language are different. Spatial terms are used not for fortifying or proliferating political values, but for organizing the world into categories, and defining the relationships between these categories. The epistemological use of spatial terms in law is evident in the structures that lawyers have established to avoid or mend conflicting rules: the existence of *higher* and *lower levels* in norms and institutions; endeavors to *map* a certain legal *domain*; debates about the *scope, reach* and *limits* or *boundaries* of rules; or about *overlaps* and *gaps* in the law. The same phrases and structures are extended beyond the "internal structure" of law to consider the relationship between rules and other social practices, such as when people talk about "mapping antidiscrimination law onto inequality at work"[111] or the "overlap between interpretation and gap-filling"[112] or "overstepping the boundaries" between two domains[113] or other such formulations. Strikingly similar language is used everyday legal arguments to assert or challenge interpretations of specific words or phrases – whether a specific word *covers* the fact pattern in question, or whether it is interpreted in an overly *broad* or *narrow* fashion. Finally, the same approach is extended to the law as a whole, whereby legal theorists construct elaborate quasi-spatial models of the legal system. The most influential examples are Kelsen's pyramid of norms and the Pandectists' concentric structures of law based on the amount of private autonomy afforded.[114] The role of spatial language in organizing knowledge – creating "systems," essentially – is best described by Saussurean structuralism, which posits that meaning is created through the relationships that words have with each other, instead of a correlation between words and physical (or social) objects.[115] Chapter III will thus begin by offering an introduction to structuralist thought.

The effects and historicity of the epistemological uses of spatial language are much more convoluted than the comparatively straightforward origins and rise of the ethical use. This convolutedness is quite standard for structuralist explanations, which are in general unable to

[107] See infra ???; on the history of rights-language specifically, see WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 3-85 (2004); JAMES GRIFFIN, ON HUMAN RIGHTS 9-14 (2008)
[108] ???!!!
[109] Niall Ferguson, Empire; Hernando de Soto, The Mystery of Capital; ???!!!
[110] See reviews of de Soto ; Nathaniel Berman, But the Alternative is Despair (on alternatives to secession and state-formation that were offered by international lawyers at the beginning of the 20th century) ???!!!
[111] Colleen Sheppard, *Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law*, 151 INT'L LAB. REV. 1 (2012).
[112] Nicholas R. Weiskopf, *Wood v. Lucy: The Overlap Between Interpretation and Gap-Filling to Achieve Minimum Decencies*, 28 PACE L. REV. 219 (2008).
[113] Sanette Nel, *Social Media and Employee Speech: The Risk of Overstepping the Boundaries into the Firing Line*, 49 COMP. & INT'L L. J. S. AFR. 182 (2016).
[114] See infra ???.
[115] See Chapter III, infra ??? in depth.

answer challenges regarding historicity, individuality and authorship.[116] Contributions to legal methodology and the debates on the structure of the law can be dated, of course, and presented in various histories about the evolution of legal thought.[117] But historical change is much more intense on the macro-level of theories about sources of the law or the structure of the legal system as a whole, than on the micro-level of interpretive techniques and methods. For instance, canons of legal interpretation have hardly changed from ancient Hindu law through Talmudic law to Roman law to modern U.S. practice.[118] Structural interpretation based on the delimitation of "the *domain* of politics and discretion [and] the *realm* of legal right"[119] was vividly alive and present in *Marbury v. Madison*,[120] which was supposedly decided in an era of natural law arguments, almost 30 years before positivism started gaining traction due to John Austin's work.[121] Viewed more broadly, arguments concerning the *limits* or *extent* of sovereign power have been a perennial concern of legal and political thinkers, going back to the ancient Greeks, even before sovereignty as a term was first coined.[122]

Even on the macro-scale, there is a strange circularity or staticness to methods of legal interpretation. Natural law, which after millennia of continued existence, seemed to have decisively fallen out of favor as an approach between the 1830s and the 1940s,[123] made a comeback after 1945[124] to become once more a permanent feature of the legal landscape via human rights law. The same is emphatically true of skeptical scholarship regarding the power of structural explanations. The *Freirechtschule*, legal realism and critical legal studies have launched near-continuous attacks against any pretension that deduction and formalistic reasoning can yield singular correct answers in all but the most simple cases.[125] Karl Llewellyn demonstrated how canons of interpretation can be arranged in pairs of opposites which basically allow decision-makers to pick and choose among them.[126] Duncan Kennedy demonstrated how opposing arguments reassemble at lower levels of argumentation, even once a question was thought to be settled.[127] Felix Cohen called into question the use of legal concepts that do not have empirical grounding.[128] Some of this critique had been absorbed by mainstream legal practice.[129] Nevertheless, as Martti Koskenniemi mused, there has been no fundamental change

[116] E.g. Thomas Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 147-155 (1984); Justin Desautels-Stein, *Structuralist Legal Histories*, 78 L. & CONTEMP. PROB. 37, 42-47 (2015).
[117] E.g. David Kennedy, Primitive Legal Scholarship; Garcia-Salmones Rovira, The Project of Positivism in International Law; Martti Koskenniemi, The Gentle Civilizer of Nations ???!!!
[118] Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183-1191.
[119] James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 243 (1992) (emphasis added).
[120] 1 Cranch 137 (1803).
[121] *Cf.* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1832/1995)
[122] ???!!! For the medieval and early modern period, see QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT I-II (1978).
[123] E.g. EDMUNDSON, *supra* note ???, at 61-74.
[124] Gustav Radbruch ; John Finnis; "modern consensus" on positivism-nat. law mixture ???!!!
[125] The literature is enormous. See infra ??? for a more detailed exposition.
[126] Karl Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Constructed*, 3 VAND. L. REV. 395, 401-406 (1950); *also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1686 (1976).
[127] Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRAC. L. REV. 75 (1991).
[128] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-821 (1935).
[129] "In *International Shoe Co. v. Washington*, Chief Justice Stone… [acknowledged] Cohen's critique, [arguing]: 'Since the corporate legal personality is a fiction, although a fiction intended to be acted upon as though it were a fact…'" Stephen Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U.

in legal practice despite critiques about the indeterminacy and political motivations of the judicial process that (in my opinion as well) have been swept aside rather than answered by legal theorists.[130]

The persistence of both critique and "traditional methods" should give us a tentative answer to the question of contingency versus necessity (or in other words, freedom of creation versus determinacy of thought-structure) regarding the use of spatial language and structuralist thought. We can posit that territorial thought is unavoidable for all structural argumentation, even if some of the language used is not clearly territorial (e.g. division, exclusion, separation etc.). We can also posit that territoriality engenders more territoriality: more qualifications and exceptions, additional boundaries and further sub-domains, which go towards explaining the explosion of territorial language in the last 200 years.[131]

Finally, we can posit that while territoriality is unavoidable, its contents are highly variable. Constant as it is, abstract spatial vocabulary is extremely skeletal, never giving more information than dimensions and directions, and sometimes transforming radically between texts. While talk of boundaries in legal doctrine is ubiquitous, no such discussion translates into a geometrically describable area of law. This is so because of the split between continuous quantification regarding physical distance and geometric angles but only binary distinctions regarding abstract spaces, as discussed above.[132] Maps of the law are therefore always speculatory, because there is no way to quantify or prescribe how "close" tort law is the criminal law, and what exactly is on the other side of tort law – or even how many sides tort law has. This leaves discussions open to mid-topic transformations and abandonments of spatial vocabulary. Preemption doctrine in U.S. constitutional law, for example, is concerned with when and whether federal law on a certain subject precludes, prevents or preempts member states from enacting legislation on the same subject. It is a predominantly two-dimensional discourse, looking at the boundaries of certain expressions in federal statutes, or the limits of the "field" (or subject-matter) when discussing field preemption (e.g. U.S. immigration law, where the entire "field" of immigration law is preempted by federal law). However, at the drop of a hat, the discourse can shift to a three-

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PENN. L. REV. 1105, 1165 (1989) (citations omitted); *also* Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (Roland Pennock & John W. Chapman eds., 1980). (claiming property had become a concept without any inherent meaning); more generally, Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

[130] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 564 (2nd ed. 2005):

> Little seemed to be gained by thinking about international legal argument as being 'in fact' about something other than law. Had I responded to my superiors at the Ministry when they wished to hear what the law was by telling them that this was a stupid question and instead given them my view of where the Finnish interests lay, or what type of State behavior was desirable, they would have been both baffled and disappointed, and would certainly not have consulted me again. Reducing international law to its objectives or likely consequences would have given no sense whatsoever of what it was to produce a legal opinion, or of the significance of the legal service for people who continued to think of it as not only a distinct, but also an apparently valuable, service.

[131] *See infra* Chapter II. This explanation is consistent with structuralist histories more generally, where "time is bifurcated into two qualitatively different types: intrastructural and extrastructural. The former is the time that creates the illusion of passage and innovation, but which in fact offers only transformations within the structural order. … Extrastructural time, on the other hand, exists in the abyss of disorder that defines the boundaries of a particular system." Heller (Structuralism and Critique), supra note ???, 153-154.

[132] See supra notes ??? and accompanying text.

dimensional spatial discourse about the setting of federal "floors" (minimum requirements) and "ceilings" (maximum requirements), or abandon spatial language altogether to discuss Congress' aims and objectives. In this way perhaps more than any other, spatial language in law poses a puzzle through its constant (re)assertion and (re)abandonment. The variability and instability of territorial language will be the final topic of Chapter III.

The most significant effect that spatial language has on law is therefore not the way it organizes , epistemological uses but through the ways in which it clashes with geographical space – the topic of Chapter IV. Law regulates geographical space as well. The boundaries between tracts of real estate, between administrative units of the state and between nation-states are set down in contracts, regulations and treaties. The consequences of crossing physical boundaries without permission are collected in the laws on trespass, nuisance, unauthorized border crossings, breaking and entering, and violations of privacy. Property, immigration law and the law of the sea deal primarily with boundaries; and criminal law, constitutional law, administrative law, public international law and environmental law have important boundary-related aspects as well.

However, for all of its importance, laws that deal with geographical phenomena are strangely un-geographic. Geographic information is irrelevant for creating and enforcing boundaries: we can draw perfectly legal boundaries without any attention to geological, migratory, climate-related or biological boundaries between plots, counties, regions or nations. The traditional English common law view is that property in land is in fact an incorporeal right:

> A piece of land is not usually taken to be identical with the soil and rock etc. at a given location. If anything, the land is identified with the *location* itself: it is, so to speak, a region of three-dimensional space rather than the sort of material object that one might locate *in* space.[133]

Real property thus exists irrespective of what exists, or what changes in the location. Likewise, statehood requires territory,[134] but any miniscule amount of territory, anywhere in the world suffices: not even stable boundaries are required.[135] Like property, sovereignty over territory can be sliced and diced: it can be "ultimately" reserved for one country while control or jurisdiction is exercised by another.[136] Territory can be leased, shared, lost or gained, none of which affects the personality or sovereignty of the state whose territory grows or diminishes.[137]

Clearly, the ethical and epistemological approaches to territoriality take precedence over geographical approaches – the focus of respect and attention to boundaries in law are the boundaries of personhood and semantics, respectively. The lack of attention to geographical

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[133] Jeremy Waldron, *What is Private Property?*, 5 OX. J. LEG. STUD. 313, 324 (1985) (emphases in the original; citations omitted) and sources cited therein; also reprinted in JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 36 (1988).

[134] See e.g. Montevideo Convention on the Rights and Duties of States, Art. 1 (b), Dec. 26, 1933, 165 L.N.T.S. 19; Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 838-871 (Apr. 4, 1928); LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. 1: PEACE, at 217-18 (1906).

[135] See the case of Israel: Malcolm N. SHAW, International Law (6th ed. 2008), at 199-200.

[136] *E.g.* Agreement for the Lease of Lands for Coaling and Naval Stations (U.S.-Cuba) (Guantanamo Bay Lease Treaty), Feb. 23, 1903, 6 Bevans 1113.

[137] *E.g.* Convention Respecting an Extension of Hong Kong Territory (U.K.-China), June 9, 1898; SHAW, *supra* note 8, at 538-40.

truths result, on the one hand in complex doctrinal maneuvers to negotiate geographical phenomena, and on the other hand, in ignoring important ecological truths.

The doctrinal complexity is evidenced by the way in which legal doctrines that relate to geographical boundaries usually come in pairs. One of them regulates strict geographical violations of boundaries, while the other prescribes violations are difficult to set down geographically. In property law, trespass regulates physical violations of boundaries, while nuisance regulates disruptions through noise, smoke or odors – disruptions which do not have clear geographical boundaries.[138] Privacy law protects from disruptions that are even less amenable to geographical framework, while still using the vocabulary of boundaries and areas. In public international law, the principles of territorial sovereignty regulate the acquisition and the "exclusive sovereignty" of territorial states, while the principles of jurisdiction regulate the exercise of state power beyond and despite state borders. As with nuisance, "territorial" and "extraterritorial" jurisdiction deals particularly with exercises of power that cannot be placed in a specific geographical spot in a straightforward manner.[139] The attempts to shoehorn clearly non-geographical phenomena such as intentions, effects or events into a geographical frame results in grotesque doctrines of territoriality as applied to physical phenomena and a general lack of clarity about what is and what is not "territorial."[140]

There is a more serious result to the overrunning of geographic boundaries by abstract ones: the loss of (possible) ecological boundaries. There are two complementary accounts of the misalignment of property boundaries. The more well-known one is the tragedy of the commons, defined as "a dynamic in which resource users overexploit a [commonly owner or unowned] resource that is rivalrous in consumption so that they jointly reduce the long-term potential for exploitation."[141] The most commonly suggested solution to the tragedy of the commons is the establishment of property rights, whereby owners take pains to exclude others from the resource in question and to maintain the resource in a productive state.[142] A complementary resource-tragedy is anticommons property, "a property regime in which multiple owners hold effective rights of exclusion in a scarce resource."[143] Anticommons emeges from the eternal divisibility of property boundaries, whereby "an owner may have a relatively standard bundle of rights but too little space for ordinary use."[144] In both cases, the tragedy results from a misalignment of resource use rights with the boundaries of a resource. Past solutions to the tragedies of the (anti)commons placed a premium on the (re)establishment of property rights;[145] however, few

[138] Thomas W. Merrill, *Trespass, Nuisance and the Cost of Determining Property Rights*, 13 J. LEG. STUD. 13, 15-20 (1985); Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1332-35 (1993).
[139] Peter D. Szigeti, *The Illusion of Territorial Jurisdiction*, 52 TEX. INT'L L. J. 369, 373-379 (2017).
[140] Id., 387-393, 398-399.
[141] Shi-Ling Hsu, *What* Is *a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 89 (2005).
[142] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).
[143] Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 668 (1998); *also* James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J. L. & ECON 1 (2000); MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).
[144] HELLER (GRIDLOCK ECONOMY), *id.*, at 160.
[145] Demsetz, *supra* note ???; but see Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 Duke L. Rev. 1 (comparing alternative pollution control strategies, such as public access limitations and extraction method limitations, to the establishment of private property).

proposals have suggested limiting possible property lines according to ecological criteria.[146] If only ecological units (river basins, forest areas, microclimate areas, etc.) could be the indivisible objects of property or state territory,[147] then polluting the commons would be less of a prisoner's dilemma game, and incentives to minimize pollution would be greater.

There are some exceptions, of course. Both property law and international law feature rules on river boundaries: changes wrought about by the river changing course or eroding the shore or depositing sediment become changes to the legal boundaries (both property boundaries and international boundaries).[148] Changes to the coastline similarly result in changes to maritime boundaries. The early modern rules on discovery and acquisition of territory provided that whoever discovered or settled a river mouth acquired the entire river basin, and that settling any part of an island brings with it sovereignty over the entire island.[149] The jurisdictional area of the Convention for the Conservation of Antarctic Marine Living Resources is tied to the Antarctic Convergence.[150] This is ecological definition of a jurisdictional area: the Antarctic Convergence is the meeting of very cold but oxygen-rich water from the Antarctic Ocean with the warmer nutrient-filled ocean currents surrounding the Antarctic Ocean, which provides the ideal breeding- and feeding-ground for plankton and all the organisms that feed on it. Attempts to generalize such purely geographical approaches to jurisdiction and (non-)boundaries will be the subject of the second half of Chapter IV.

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[146] But see for example, Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COL. L. REV. 533, 558 (2007): "Any property boundaries that encompass something less than the entire original commons (i.e., the entire ecosystem) will still be leaky such that externalities remain. … In general, in order for the private property solution to work, private property boundaries must be drawn to match the scope of the relevant externality."

[147] *Cf.* "Among juridical territories, only countries are appropriate candidates for statehood. A country is a juridical territory that has achieved a certain level of *resilience*. Resilience is an ecological concept denoting the capacity of a system to bounce back to an equilibrium." AVERY KOLERS, LAND, CONFLICT AND JUSTICE: A POLITICAL THEORY OF TERRITORY 4 (2009) (emphasis in the original).

[148] ROBERT Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 12 (1963).

[149] J. Peter A. Bernhardt, *Sovereignty in Antarctica*, 5 CAL. W. INT'L L. J. 297, 343 (1975):

> On the basis of estuarine occupation, the former American colonies, having attained independence, claimed sovereignty over the entire area in which the rivers, tributaries, and estuaries ran to the watersheds of such rivers, often including areas in the Appalachian and Blue Ridge Mountains several hundred miles inland. In similar manner the United States, in registering territorial claims with Spain after the Louisiana Purchase, forwarded the proposition that in demarcating portions of the Louisiana boundary, settled coastline areas extended inland up to the watershed of all rivers emptying into the coastline.

[150] "This Convention applies to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem." Convention for the Conservation of Antarctic Marine Living Resources, art. 1 (1), 33 UST 3476 (Canberra, May 20, 1980), available at http://www.ccamlr.org/en/organisation/camlr-convention-text