

Of Minds and Bodies and the Legal-Spatial Constitution of Sanctuary

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Examination of the notion of sanctuary, whether invoked in reference to persecution, refugees, and asylum or as encountered in less extraordinary contexts as a function or fruit of privacy, offers insights into the pragmatics of fashioning connections between space, power, and experience. Seemingly built into the term are culturally significant conceptions of space. A sanctuary is, of course, a kind of place and what distinguishes it from other places is its central but anomalous relation to power. It is a space of protection, a zone of safety. It is a bounded space which, to the extent that it exists experientially, is the product of a certain sort of spatialization wherein the meaning of the line constituting sanctuary effects a protected inside, outside the normal circuits of power. The meaning of sanctuary follows from the meaning of the line.

In this paper I examine episodes in the construction and revision—or, as my title suggests, the constitution and reconstitution—of sanctuary in the two seemingly disparate settings alluded to above: the relatively extraordinary setting of refugees fleeing persecution and the more ordinary settings suggested by conceptions of privacy. Juxtaposing these contexts draws our attention to the spatial (territorial) conditions of experience and the role of legal practices in shaping the spatial conditions of experience. In describing specific events, this study reveals something of the politics of spatial constitution. Contending interpretations of law result in divergent spatializations; read one way, the spaces of sanctuary are opened up, read another way they are closed off. In a given case one reading is authorized as the correct reading while others are dismissed. The study also reveals the ambiguity, indeterminacy, and instability of the legal categories that are used to constitute legal spaces, it therefore also reveals the ambiguity of social space and the experience of social space vis-a-vis power.¹ This ambiguity is most immediately seen in the circular reasoning that characterizes some of the cases. More fundamentally, though, it is rooted in the radical indeterminacy of the metaphysical

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retaining complete discretion on how to interpret it.

The United States adopted the UNHCR definition by acceding to the U.N. Protocol Relating to the Status of Refugees in 1968. This definition was codified in the Refugee Act of 1980.⁸ In passing the Refugee Act, Congress changed the meaning of the line that defines the U.S. as a place of asylum and what it means to cross the line. But while Congress significantly revised the category “refugee,” its meaning nevertheless remained, in certain respects, ambiguous. In terms of the present discussion, certain aspects of space-power created by the Act are unclear. One way in which interested parties attempt to clarify or resolve such ambiguities is through legal argument or litigation.

Politically speaking, there are forces that have as their objective the establishment of more generous asylum practices in the U.S., perhaps especially so with respect to events for which the U.S. government is, in part, responsible.⁹ There are also forces that advocate more restrictive policies because of their concern with alleged abuses of the asylum process. These contending forces meet, from time to time, in litigation. Here interpretive work is done on the relevant categories in order to justify opening or closing the border or to justify raising or lowering barriers to asylum. That is, in litigation, political actors manipulate legal categories in order to refashion the connections between space and power. Quite simply, a “narrow” construal of the category “refugee” closes the border to some, while a “broad” construal means that more people fit the definition, more people are found eligible for asylum, and some who otherwise would have been excluded or expelled are allowed to stay.

Procedural Framework

According to the Act, there are two paths open to claimants of refugee status or two statutory paths into the U.S. as a space of protection from persecution. These are provided by Sec. 208 and Sec. 243(h). Sec. 208 concerns requests for asylum.¹⁰ It is based on the “well-founded fear of persecution” standard adopted from the UNHCR definition. Sec. 243(h) concerns the request to withhold deportation. In contrast to Sec. 208, it requires the finding of “a clear probability of persecution” on account of the stated reasons. The standards seem to be different. The question addressed by advocates and judges was: what is the difference? My question here is: how was the difference made?

There is a procedural and institutional setup that constrains interpretation. Typically an alien gets caught up in the system after being apprehended by the Immigration and Naturalization Service, which then initiates deportation proceedings.¹¹ Often an alien makes claims—through an attorney—under both statutory provisions. That is, he or she requests both asylum and the withholding of deportation. Claims are initially assessed by special immigration judges. Most claims are rejected.

distinctions that serve as the primary justificatory bases of decisions. In the following illustrations, situated social actors—federal judges—are described as deploying a metaphysical schema centered on the objective/subjective distinction that seems to unproblematically refer to the contents of mental states such as beliefs, fears and expectations.² These claims about “mind” are then translated into claims about space that are used to justify the exercise or withholding of physical violence (deportation, arrest, and incarceration) on embodied human beings. Thus, the legal constitution of space—the spaces of sanctuary embedded within the spatialities of the nation state (asylum) and property (search and seizure)—can be described as mediating the representational practices of metaphysical jurisprudence and the play of violence on human bodies.³

Of Space, Place, and a Well-Founded Fear

The first illustration concerns refugees. A refugee is a person whose most salient attribute is his position in a geography of dislocation.⁴ In international law and in the law of asylum of particular nations, a refugee is not only displaced but, by definition, outside of her country of origin. The reason for her trans-boundary displacement, again by definition, is a fear of persecution. But there is frequently a disjunction between refugee as an experiential state of being and refugee as a recognized legal status.

The most important legal definition of the category, and therefore of the conditions according to which membership is assigned or denied, is found in the 1951 Statute of the United Nations High Commission for Refugees (UNHCR).⁵ For the sake of exposition, I’ve broken the definition into five main clauses:

- 1) any person who is outside any country of such person’s nationality
- 2) and who is unwilling or unable to return to ... that country
- 3) because of persecution
- 4) or a well-founded fear of persecution
- 5) on account of race, religion, nationality, membership in a particular social group or political opinion.

These “add up,” so to speak, to the category “refugee” and serve to distinguish “refugee” from the category “deportable alien.” If a person fits, he is eligible for asylum; if not, not. Recent developments have focused on the last two clauses. Each of these conditions is also, of course, a category in itself. What counts as “a well-founded fear”? and what counts as a “political opinion”?⁶

The international definition was established in order to clarify the mandate of the UNHCR in the post-World War II world. Individual states may have their own definitions, and the authority to grant or withhold access to asylum is one of the main territorial prerogatives of sovereignty.⁷ Nonetheless, many states have adopted the UNHCR definition while

were different. Significantly, what made the difference was that “clear probability” focuses on objective evidence while “the obvious focus” of well-founded fear is the claimant’s “subjective beliefs.” In Justice Stevens’ words:

The linguistic difference between “well-founded fear” and “clear probability” may be as striking as that between a subjective and an objective frame of reference.

This follows from “the ordinary and obvious meaning of words.”¹⁶

The Court’s ruling in *Cardoza* was regarded as a clear and substantial victory for the forces favoring a more open and generous policy of asylum in America.¹⁷ In effect, by creating a distinction between the interpretive standards, the Court broadened the category “refugee.” This move was not, however, without critics. Indeed, the first to criticize the rulings were Justices Lewis Powell, William Rehnquist, and Byron White, who dissented. The dissenters found “no meaningful distinction” between the two standards, and “no clear cut instances in which such fine distinctions can be made.”¹⁸ Given the deep ambiguities of the statutory language, they felt that the Court should defer to the expertise of the INS which deals with such cases on a daily basis and eschew such “semantic niceties.”¹⁹

In subsequent cases—and in the context of changes in Court personnel pushing it toward more restrictionist views—interpretive contests shifted to other clauses of the definition. In particular, the question of what constitutes “political opinion” was used to close off what the well-founded fear ruling had seemingly opened up. In these cases restrictionists recognized that even if an alien has a well-founded fear of persecution she might still be excluded or expelled from the U.S. if the feared persecution was not “on account of” political opinion. They, therefore, went about the task of neutralizing the concept “political opinion” by depoliticizing the notion of neutrality.

In the 1980s, a number of cases concerning claimants who were targets of forced recruitment by insurgents in Nicaragua, El Salvador, and Guatemala reached the Circuit Courts.²⁰ Under the political conditions of the time we might expect that people claiming to be the victims of persecution by leftist revolutionaries would get favorable treatment but that was not the case. The focus of these cases were young men who resisted forced recruitment because they wished to remain neutral in the civil wars and revolutions of the region. The key question that emerged was this: does neutrality count as a political opinion? The position of the Board of Immigration Appeals was “no.” They viewed neutrality as passivity or indifference. In a civil war there are only two “political opinions.” Pro and con exhaust the possibilities. Again, the Ninth Circuit Court of Appeals adopted a more generous view.

The case of *Elias-Zacharias v. INS*,²¹ decided in 1990, involved a young

However, appeal is available through the Board of Immigration Appeal. If the claims are again rejected—and if the attorney thinks it is worth the time and effort to pursue—appeal is made to the U.S. Circuit Court of Appeals. If the claims are again rejected, or if they are accepted and the Board of Immigration Appeals is dissatisfied with the ruling, the U.S. Supreme Court may hear the case. Obviously, the number of cases drops precipitously at each stage.

Drawing the Categorical Boundaries

I would like now to examine the trajectory of some key contests over the scope of the category “refugee” since the passage of the Refugee Act of 1980. The focus of these arguments concerned the meaning of “well-founded fear” and of “political opinion.”

Recall that of the two statutory paths to protection Sec. 208 speaks of a “well-founded fear of persecution” while Sec. 243 (h) speaks of a “clear probability of persecution.” Until 1984, immigration judges and the Board of Immigration Appeals treated these standards as synonymous. In 1984, the Supreme Court suggested, in the case of *U.S. v. Stevic*,¹² that the standards were different and that claims based on these standards required different analysis and imposed distinct evidentiary burdens. This ruling precipitated various skirmishes in lower courts. In 1985, the Ninth Circuit Court of Appeals stated firmly that the standards were distinct.

The case of *INS v. Cardoza-Fonseca*¹³ concerned the experiential geographies of Luz Marina Cardoza-Fonseca, a Nicaraguan who claimed to fear persecution by the then-ruling Sandinistas. The immigration judge found that she had not established a “clear probability” of persecution should she be returned, and therefore her fear was not “well-founded.” The Board of Immigration Appeals affirmed. The Ninth Circuit, relying on *Stevic*, reversed, holding that the immigration judge and the Board of Immigration Appeals had applied too strict a standard of interpretation. For while the claimant may not have established a clear probability of persecution to entitle her to a withholding of deportation, her fear may nonetheless have been well-founded. The Court determined that, “the term “well-founded fear” refers to a subjective state of mind while “clear probability” refers to an objective fact.” More specifically, and with the appearance of objectivity that quantification confers, the court found that “ ... the term “clear probability” requires a showing that there is a greater than 50 percent chance of persecution.” In contrast, “the likelihood of persecution need not be greater than 50 percent to satisfy a finding that someone’s fear is ‘well-founded.’”¹⁴ In fact, the U.S. Supreme Court suggested that a 10 percent chance would do.¹⁵

The Supreme Court agreed to hear the case and, in 1987, affirmed the Ninth Circuit’s distinction. Justice John Paul Stevens found that Sec. 208 was broader and more generous than Sec. 243 (h). That is to say, they

people are not refugees in either the experiential or legal senses of the term. But the sorts of maneuvers that make and unmake refugees are not as remote from more quotidian occurrences as they might appear. For most people, at least in places like the U.S., sanctuary as experienced or violated is bound up with conceptions of privacy. And though privacy is itself a complex and contestable notion, one core concern, in the words of Supreme Court Justice Louis Brandeis, is " ... the right to be left alone," which he also called, "the most comprehensive of rights and the right most valued by civilized man."²⁶ In the words of one commentator, "the ideas championed by Justice Brandeis gave concrete expression to the concept of an impenetrable zone of sanctuary (at least vis-a-vis the government.)"²⁷ Privacy is often inextricably bound to conceptions of space; often, if not always, the spatiality of privacy is centered on ideas of home and property. Two years before the Declaration of Independence, John Adams articulated common knowledge when he said, "an Englishman's dwelling house is his castle. The Law has erected a fortification around it."²⁸ One element of this fortification is the right to exclude, a crucial component of liberal property law given expression in common law doctrines concerning trespass. Another element is given Constitutional expression in the Fourth Amendment, which states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported under oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.²⁹

Property, then, is commonly conceptualized as inscribing boundaries in the social world, creating "inner" zones of privacy and liberty set off from the "outer" world of the public. The Fourth Amendment more particularly inscribes a boundary which limits the state's power to intrude or invade that zone.

Constitutionalizing the Space of Privacy

The Fourth Amendment protects a person's zone of sanctuary by mandating procedures that must be followed before the state can invade property.³⁰ In requiring a warrant before a search, it theoretically establishes a level of oversight in that warrants must be justified by probable cause and the target of the search must be rather specific. Fear of "unreasonable" searches—invasions—is such that, in most cases, the evidence of a crime gained through warrantless searches may be excluded from any prosecution resulting from the search and convictions overturned. This rule is called the exclusionary rule.³¹ There are, as we'll see, exceptions to the warrant requirement and many of these exceptions turn on

man who claimed to be the target of forced recruitment by guerrillas in Guatemala. If forcibly returned to his homeland he feared persecution. The immigration judge and the Board of Immigration Appeals rejected his request for asylum because, while his fear may have been well-founded, it was not “on account of political opinion” because neutrality is not a political opinion. The Ninth Circuit framed the issue this way: “there is no dispute that Elias ... satisfied the subjective test for eligibility for asylum. The dispute is over whether he satisfied the objective test.” Finding that he had satisfied that test as well, the court reversed. The court reasoned that “the persecution is properly categorized as “on account of political opinion” because the person resisting forced recruitment is expressing a political opinion hostile to the persecutors and because the persecutor’s motive in carrying out the kidnaping is political.”²² So while Elias did not establish a “clear probability” of persecution, he did satisfy the well-founded fear standard of Sec. 208 and was eligible for asylum.

The Supreme Court took up the case and, in 1992, reversed.²³ The majority, speaking through Justice Antonin Scalia, considered that political opinion was not ordinarily expressed by the act of not taking sides. Neutrality more likely reflected “indifference, indecisiveness or risk-averseness.” The claimant, in Scalia’s view, might resist forced recruitment for any number of apolitical reasons, for example, “a desire to earn a better living in civilian life.”²⁴ In any case, even if Elias had a political opinion and even if he had a well-founded fear of persecution, he hadn’t sufficiently established a causal link between the two.

Justice Stevens, who had enlarged the standard used to assess persecution in *Cardoza*, wrote a strong dissent which was joined by Justices Sandra Day O’Connor and Harry Blackmun. He held that “neutrality has to be seen as a political decision whether taken by a state or an individual” and that “political opinions can be expressed negatively as well as positively.” Stevens also criticized the majority’s “narrow, grudging construction of the concept “political opinion.”²⁵

In effect, the expansion of the standard of persecution that was accomplished in *Cardoza* by distinguishing between objective and subjective frames of reference was offset in *Elias* by distinguishing between positive and negative modes of expression. As a result, the U.S. as a space of sanctuary was again—in small, but significant ways—reconstituted. Those who might otherwise have avoided the experience of forced removal are resituated within the “normal” circuits of power.

Of Space, Place and Reasonable Expectations

The Spatiality of Privacy

The second illustration concerns the law of search and seizures. Most

privacy is not isomorphic with that of property. Another landmark case that opened the gap further was *Katz v. U.S.*,⁴⁰ a Warren Court case that overturned *Olmstead* and imposed a warrant requirement for wiretapping on public pay phones. In the words of Justice John M. Harlan II, "The Fourth Amendment protects people not places."⁴¹ Another important feature of *Katz* is that it based the scope of protection on whether a defendant had "a reasonable expectation of privacy."⁴² Taken together, these two moves seem to indicate a shift from analyzing privacy from an "objective" standpoint, such as might be provided by location, to a more "subjective" standpoint rooted in a person's "expectations" or beliefs. While this view is accurate to some extent, determination of whether a person's expectations of privacy are "reasonable" is still, in part, a function of (interpretations of) space and place. The reason why the Fourth Amendment doesn't extend to "open fields" is because it was not deemed "reasonable" to expect privacy there. Conversely, as we'll see, what allows a place to be categorized as "an open field"—even if it is really, experientially, a locked barn—is neither "openness" nor "fieldness," but the absence of a reasonable expectation of privacy. The circularity of the relationship between claims about space and claims about states of mind is inescapable.

Opening the "Open Fields" Doctrine

In the 1980s, a number of cases involving these issues were addressed by the Supreme Court. One important case was *Oliver v. U.S.*⁴³ The underlying facts that gave rise to the dispute were these: two Kentucky state troopers went to Ray Oliver's farm near Jamestown, Kentucky, to investigate a claim that marijuana was being grown there. According to the Court report, "they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards." After passing a barn and a parked camper and being told, "No hunting is allowed, come back here," they "resumed their investigation ... and found a field of marihuana over a mile from petitioner's home." Oliver was arrested but after a pre-trial hearing the evidence was suppressed:⁴⁴

Applying *Katz v. U.S.* ... the [District] court found the petitioner "had done all that could be expected of him to assert his privacy in the area of the farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm The field itself was highly secluded and the District court concluded that this was not an "open" field that invited casual intrusion.⁴⁵

The Sixth Circuit Court of Appeals reversed the order suppressing the evidence stating that Oliver's field was legally, if not experientially, "open" and that, "the legal principles that protect privacy do not protect desert islands, the mountaintop, or the open field The human relations that

interpretations of space, place, and the meaning of boundaries.

Fourth Amendment jurisprudence creates a complex spatiality of privacy—or privacy expectations—as the degree of protection varies across homes, public places, businesses, automobiles, packages, garbage, and so on. As the saying goes, “geography matters!”³² One important generic place in this geography of expectations is the curtilage that, in one formulation, is “the area to which extends the intimate activity associated with “the sanctity of a man’s home and the privacies of life,” and therefore has been considered part of the home for Fourth Amendment purposes.”³³ For practical purposes this often means the backyard. Another important type of legal space is “the open fields.” As we’ll see, a crucial ingredient in the spatialization of power by Fourth Amendment analysis is where (and on what basis) the line between the curtilage and the open fields is drawn.

Fourth Amendment jurisprudence is largely a creature of the twentieth century.³⁴ Accretions and transformations of doctrine, and therefore, of the spatiality of sanctuary are, broadly speaking, a function of changing technologies of surveillance (wiretapping, infrared photography, aerial searches, computer searches, and so on); the path of the politics of drugs (prohibition, the war on drugs); and the vicissitudes of official regard for civil liberties (for convenience, the pre-Warren, Warren, and post-Warren Court eras).³⁵ Over time, there have developed a number of doctrines that may significantly affect the experience of space-power. In an important sense, every Fourth Amendment case addressing the question, “what counts as a search?”—and therefore, which police actions require a warrant and which do not—illustrates the micro-spatiality of power; every interpretation requires an analysis of the micro-spatiality of power as framed by the antinomies of property/state. Every determination effectively, if provisionally, draws the line and inscribes the boundary. As in the asylum cases, we’ll look at how the line is drawn and what it means to cross it.

Among what are conventionally seen as key moments in the judicial constitution of sanctuary by way of the Fourth Amendment are *Weeks v. U.S.*,³⁶ in which the Supreme Court announced the exclusionary rule; *Olmstead v. U.S.*,³⁷ which held that wiretapping did not constitute a search; and *Hester v. U.S.*,³⁸ in which it was determined that unlawful activity, though occurring on private property, did not deserve protection if it took place in “an open field.” This “open field doctrine” figures prominently in the cases I’ll be examining. For our immediate purposes it has been glossed by subsequent courts as the notion that “The Fourth Amendment has never been extended to require law enforcement officers to shield their eyes when passing by a home on a public thoroughfare.”³⁹

One important consequence of *Hester* is that it opened up a gap between the spatiality of property and that of privacy. To put it another way, the spatialization of the public/private distinction with respect to

Amendment as not having been intended to be read, "with "precision." The framers intention was, "to identify a fundamental human liberty that should be shielded forever from governmental intrusions."⁵⁵ As for the test of the reasonableness of one's expectations of privacy, this, for Marshall, is best accomplished with reference to basic conceptions of property and ownership.

[P]roperty rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable. Posting "No Trespassing" signs is an expression of an expectation of privacy. Statutes punishing trespassing are a society's way of recognizing the reasonableness of those expectations.⁵⁶

Refuting the demotion of expectations to the status of the merely subjective and as overridden by the clearly objective, Marshall stated, "by marking the boundary of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires."⁵⁷

Oliver presents two conflicting readings of "open fields" and yields divergent interpretations of the spatiality of sanctuary. The majority view is that "open fields" include everything outside of the curtilage; the dissenting view is that "open fields" are defined with reference to public view or the "view-shed" of private lands from public space. Each reading, in turn, generates in a given situation a different spatial configuration of (the expectations of) privacy and so, a different spatial configuration of power. The inescapable circularity of the majority's interpretation renders the meaning of the line ambiguous if not meaningless and, as Marshall noted, effectively vests power to interpret the location and significance of the line in the hands of those who are supposed to be restrained by it.

Oliver was not the only significant case in this period that involved marking the boundary between curtilage and open fields (and so, between the spaces where expectations of privacy are deemed reasonable and those where they are not; or, between the spaces into which state intrusions must be made with prior oversight and those into which prior oversight in the form of a warrant is not required). The 1987 case of *U.S. v. Dunn*,⁵⁸ for example, found that a closed barn surrounded by three fences that the police had to climb over counted as an "open field." In 1986, the Supreme Court in *California v. Ciraolo*⁵⁹ upheld the denial of a motion to suppress evidence, in a case involving marijuana plants that were growing in the defendant's backyard, that is, in his curtilage. Acting on an anonymous tip, but before getting a search warrant, police in Santa Clara, California, "secured a private plane and flew over the house at an altitude of one thousand feet." This was not an unconstitutional search because, again, the expectation of privacy here was unreasonable. And it was unreasonable because the police were merely "traveling in public

create the need for privacy do not ordinarily take place in open fields."⁴⁶ Because it was open, his expectations of privacy were not reasonable. By a vote of 5 to 3, with one concurrence, the U.S. Supreme Court agreed.

Justice Lewis Powell made a number of interpretive moves that are relevant for understanding judicial participation in the constitution of the spatiality of sanctuary.⁴⁷ The first was the rather formalist one of reading the text of the Fourth Amendment as "indicating with some precision the places and things encompassed by its protections."⁴⁸ These are persons, houses, papers, and effects. Clearly, a field does not fit into any of these categories so it is not protected against warrantless searches. Justice Powell simply asserted that the field in question was not part of the curtilage and was therefore "an open field." Acknowledging the disjuncture between legal category and experiential reality, he mentioned in a footnote that "it is clear, that the term "open fields" may include any unoccupied or undeveloped area outside the curtilage. An open field need be neither "open" nor a "field" as these terms are used in common speech."⁴⁹

More significant for my present argument is that Justice Powell articulated a two-prong test with which to assess the legitimate connections between space and power in the contexts of Fourth Amendment protections. As in the asylum cases, one prong is "subjective" the other "objective." Likewise the posited relationship between subjective and objective is deemed determinative of reality. But the relationship of these two elements is different. "Since Katz ... the touchstone of Fourth Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy,"" wrote Justice Powell. However, "[t]he Amendment does not protect the merely subjective expectations of privacy" but only those "expectation[s] that society is prepared to recognize as reasonable."⁵⁰ That is, they were not objective in the sense that contrasts with individual idiosyncratic beliefs.⁵¹ Because the Amendment only protects "certain enclaves" from "arbitrary governmental interference associated with "the sanctity of the home," and since "open fields" do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance," it follows that, "the asserted [subjective] expectation of privacy ... is not an expectation that "society recognizes as reasonable," that is, it is not objective."⁵² Powell's reading of the spatiality of sanctuary is inescapably circular. Spaces (curtilage/open fields) are defined and distinguished according to subjective "expectations" but the reasonableness of those expectations are defined and distinguished according to the spaces.⁵³

Justice Thurgood Marshall offered a different reading of space—power in his dissent. As a preliminary move, he critiqued both Powell's understanding of the open field/curtilage distinction as unexplained in general and as a radical departure from accepted practice in its application.⁵⁴ He also challenged the majority's formalist reading of the Fourth

Among the moves I have focused on are those deploying the subjective/objective distinction. Deploying this distinction seems to entail making claims about “mind” or mental states, for example, about fears, beliefs, opinions, and how to categorize them. Because space-power is at the center of these analyses, the deployment of the subjective/objective distinction can be seen as an element in spatial interpretation. But the various judges are not simply interpreting space-power. They are actively constituting it by working the meaning of the (categorical, conceptual) lines and inscribing the reworked meaning onto lived-in landscapes.

I examined how this worked out in two very different settings. And while there are important similarities, there are also crucial differences with respect to how the distinction was deployed. In the asylum cases, the subjective/objective distinction was used to pry apart two standards or to distinguish two rules. The subjective strand of “well-founded fear” was offered as a lower barrier than the objective strand of “clear probability.” It modified the meaning of the line and opened up a space of sanctuary. The subjective strand here was given primacy over the objective strand. In so doing, a majority of the Court in *Cardoza-Fonseca* seemed to be taking the experiential reality of the subject more seriously. The dissent would have collapsed the distinction, denied the experiential reality, and closed off the space. In the Fourth Amendment cases a different relationship between the subjective and objective strands was used to open up a space for expanding state power. Here the objective strand was given primacy over the “merely” subjective strand, thereby repudiating the experiential reality of the subject. The dissents here would have given primacy to the experiential reality of defendant property owners as made manifest on the landscape (“No Trespassing”). The dissents and reversals in all cases reveal that they could have rather easily gone the other way. The results were by no means necessary or compelled by “the plain meaning of words” or the force of a neutral, apolitical logic.

Another important contrast between the two contexts concerns their engagement with space. In the asylum cases, there is no question about where the line in question is. The space of sanctuary is coextensive with U.S. territory. The questions debated were: “what does the line mean?” and “what does it mean to cross the line?” These were answered, initially, by reference to the question “what is a refugee?” Exclusion from the category yielded an exclusion or expulsion from the territorial space. Again, this question was answered with reference to claims about mental states. In the Fourth Amendment cases, the spatiality of power is a more explicit concern. Not only are legal actors asking what it means to cross a line, they are arguing about where the line is. Filtering doctrinal categories such as curtilage and open fields through the subjective/objective distinction (and vice versa) results in actually moving the line between protected and unprotected; warranted and unwarranted; excluded or not excluded (police or evidence). It results in the expansion and contraction of spaces

airways" observing "what is visible to the naked eye."⁶⁰

In these cases, we see instances of the interpretive restructuring of the space of sanctuary. Silas Wasserstrom has written of the "incredible shrinking Fourth Amendment."⁶¹ In the terms developed in the present piece, these interpretive events yield the incredibly shrinking spatiality of sanctuary and the incredibly expanding spatiality of state power. The experience of privacy as sanctuary depends on the boundary between "the state" and "the citizen," a boundary that is not isomorphic with that between "public" and "private" as indicated by property lines. The boundary is rendered with reference to the open fields/curtilage distinction which, in the case of Ciraolo, has reached the vanishing point.

As in the asylum cases, spatialities are marked with reference to both "subjective" and "objective" elements. The subjective element refers to states of mind, to beliefs, opinions, desires, and expectations. The objective element seemingly refers to some supra-individual or "societal" fact of the matter. As in the asylum cases, the terms are organized in such a way as to provide a reading of the spatiality of experience based on the validation or invalidation of the "merely subjective" by the clearly objective. That is, claims about objectivity are marshaled to render beliefs—mental states—unreasonable or mistaken or wrong. To put it another way, official readings of the spatialities of power seem to follow from claims about mind. The arguments are characterized by an inescapable circularity. As was also the case in asylum law, arguments about space and mind (whether one's fear is well-founded or whether one's expectations of privacy are reasonable) issue in consequences for embodied human beings. As a result of judicial mindreading, people are physically deported, expelled or not. They are arrested, convicted, sentenced, and jailed or not. But, of course, judges do not have access to other minds, they only have access to representational categories such as objective/subjective and body/mind through which the social-material world is rendered intelligible.

Concluding Remarks

This paper presented a study in the constitution of space-power in the context of the spatiality of sanctuary. I examined episodes in the interpretive restructuring of space. Space is described as a mediating term in the circulation and experience of power, mediating the ways in which a form of social power (ultimately, what counts as the "legitimate violence" of states) is realized on the bodies of human beings. In legal cases, divergent renderings of space-power-experience are justified and challenged by recourse to meaning, to reasoning, and to the practical maneuvers of drawing or denying legal distinctions. There is a rather direct transmission from the micro-moves examined here to the effects on real bodies.

1. The conception of space-power that I use derives from the work of Henri Lefebvre, *The Production of Space* (Oxford: Blackwell, 1991); Michel Foucault, "Space, Knowledge and Power," in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon, 1984); and Doreen Massey, "Politics and Space/Time," *New Left Review* 196 (1992): 66-84, among others. While I recognize serious incompatibilities among these approaches, these are not relevant to the present discussion.
2. While it is possible to read the cases under discussion as instantiating broader cultural-epistemic tensions between objective and subjective perspectives on place, or even as attempts to merge or balance them in a manner suggested by Nicholas Entrikin in *The Betweenness of Place* (Baltimore: Johns Hopkins University Press, 1991), that is not my intention here. In the first place, in the events to be examined "objective" and "subjective" do not refer to distinct positions from which to view place (or space) but rather are given to refer to the quality or contents of mental states themselves, such as fears, beliefs, and expectations. More importantly, though, I do not assume that "objectivity" and "subjectivity" are things in the world that can be "balanced." My interest here is in the tactical deployment of the metaphysical distinction itself as a justificatory move in meaning construction and in the legal-political constitution of social space. Among geographers who have dealt with this theme are Steve Pile and Nigel Thrift, *Mapping the Subject* (London: Routledge, 1995), who articulate a position much nearer the one assumed here.
3. In drawing attention to embodiment, it is not my intention to reduce human beings to the status of material objects. Embodiment is so obvious that its significance is often overlooked, and conventional legal discourse may be particularly adept at overlooking it. My point in emphasizing embodiment here is to highlight the fact that law is not only or merely a set of representational practices. The representational practices associated with mentalistic processes such as "reasoning" or "interpretation" take place in and with reference to the material world. Among the ways that legal meaning is materialized—given material form—is through spatialization (the inscription of legal meaning onto segments of material landscapes) and what might be called incorporation (the inscription of meaning onto bodies). In addition, while it seems correct to argue that the very idea of sanctuary is focused on the psychological experience of fear—or its absence—the fears themselves often refer to aversion to physical pain and, perhaps, death. Sanctuary creates spaces that protect bodies and therefore (theoretically) lessen the fear of immediate physical pain. The denial of sanctuary often results in the involuntary removal of embodied subjects, and the infliction of pain.
4. David Kennedy, "International Refugee Protection," *Human Rights Quarterly* 6 (1986): 1-69.
5. Guy Goodwin-Gil, *The Refugee in International Law* (Oxford: Oxford University Press, 1985).
6. On "well founded fear" see Mark Gibney, "A Well Founded Fear of Persecution," *Human Rights Quarterly* 10 (1987): 109-21; Chris Hayes, "Comment—International Law—Standard for Asylum: Well Founded Fear of Persecution Established Solely by Subjective Proof," *Suffolk Transnational Law Journal* 14 (1990): 314-24. On "political opinion" see Deborah Anker, Carolyn Blum, and Kevin Johnson, "Comment: *INS v. Zacharias-Elias*: Is Anyone Out There?" *International Journal of Refugee Law* 4 (1992): 267-75; Mark Artlip, "Neutrality of Political Opinion," *University of Chicago Law Review* 61 (1994): 559-85; Paul Hunker, "Conflicting Views of Persecution on Account of Political Opinion: the Ninth Circuit and the BIA," *Georgetown Immigration Law Journal* 5 (1991): 505-18.
7. Kennedy, "International Refugee Protection;" Goodwin-Gil, *Refugee*.
8. Deborah Anker and Michael Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," *San Diego Law Review* 19 (1981): 9-89.
9. Mark Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (New York: Greenwood, 1988); Gil Loescher and John Scanlon, *Calculated Kindness: Refugees and America's Half-Open Door: 1945-Present* (New York: Free Press, 1988).
10. Gibney, "A Well Founded Fear of Persecution." The cases that serve as my illustrations are from the 1980s and early 1990s. Asylum procedures have subsequently been dramatically revised—to the detriment of asylum seekers—by the Immigration Reform and Immigrant Responsibility Act of 1996. For a brief, critical discussion of these changes see Carolyn Blum, "A Question of Values: Continuing Divergence Between U.S. and International Refugee Norms," *Berkeley Journal of International Law* 15 (1997): 38-50.
11. Thomas Aleinikoff and David Martin, *Immigration: Process and Policy* (St. Paul: West Publishing Co., 1991).
12. 467 U.S. 407 (1984).
13. 767 F.2d 1448 (1985).
14. *Ibid.*, 1452.
15. 480 U.S. 421, 432.
16. *Ibid.*, 431.
17. For discussions of the politics of immigration see David Reimer, *Unwelcome Strangers: Ameri-*

of sanctuary and power.

Part of the value of a critical legal geographic perspective on social phenomena is seen in the detailed description of episodes in the social production of space. Studies such as this focus on the politics of meaning, or the ways in which meanings of a peculiar but highly significant sort are inscribed on the material world. They focus on how the meaning of power is given material form. The present paper also demonstrates how cultural artifacts such as the objective/subjective distinction and the body/mind distinction are deployed in the structuring and restructuring of social space. More normatively, examining the political practices involved in the legal constitution of space can contribute to the larger project of ideological critique and, if one wishes, the venerable tasks of delegitimation (and/or legitimation).

Looked at from the other direction, a critical geographic perspective on legal phenomena might also contribute to a retheorization of law itself as more and other than discourse; categories; or the representational practices associated with reasoning, argument, or interpretation. In particular, it draws attention to the physicality of law. In "Violence and the Word,"⁶² Robert Cover raised fundamental questions about the physicality of law. Among the arguments in this work are, first, "that neither legal interpretation nor the violence it occasions may properly be understood apart from each other."⁶³ Law is not just about word, it is about "the visible tie between word and deed."⁶⁴ Violence necessarily implicates bodies. Cover also argued that the denial of this link between word and deed—the denial of law's violence—is a constitutive element of law and its self-presentation. In conventional views, law per se is centered on mind, on word. Law, properly speaking, stops at the utterance: the verdict, the sentence, the decree. "It is so ordered." The "effects" of law are commonly seen as extrinsic. They are externalized. The notion of the physicality of law allows us to examine this background assumption, to consider the idea that law does not stop at the utterance, but continues on through causal chains into the world of stuff. Actually, it was never anywhere else. The violence that law authorizes or blocks happens on bodies and elsewhere in the material world. And the bodies in question are not generic bodies but the bodies of individual human beings such as Luz Marina Cardoza-Fonseca, Jairo Jonathon Elias-Zacarias, Ray Oliver, Dante Ciralo, and the thousands of others caught up in the metaphysical categories of asylum law, the law of search and seizure, and all of the other ideological nuggets with reference to which space is shaped. This physicality is not separable from law, nor are these simply "effects." Violence is the very realization of law.⁶⁵ It is no less a precinct of Law's Empire than are reasoning, rights, rules, and rhetoric.⁶⁶

- can Identity and the Turn Against Immigration (New York: Columbia University Press, 1998); Nicolaus Mills, ed., *Arguing Immigration* (New York: Touchstone, 1994).
18. 480 U.S. 421, 458.
 19. *Ibid.*, 460.
 20. Hunker, "Conflicting Views."
 21. 908 F.2d 1452.
 22. *Ibid.*, 1256.
 23. 502 U.S. 478 (1992).
 24. *Ibid.*, 482.
 25. *Ibid.*, 487.
 26. *Olmstead v. U.S.* (177 U.S. 438, 1928, 478, Justice Brandeis dissenting); Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.
 27. Gary Bostwick, "A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision," *California Law Review* 64 (1976): 1447-83.
 28. L. Kinvin Worth and Miller Zobel, eds., *Legal Papers of John Adams* (Cambridge, Mass.: Belknap Press, 1965).
 29. U.S. Constitution, Amend. IV.
 30. Charles Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts*, 3rd ed. (Westbury, N.Y.: Foundation Press, 1993); Christopher Slobogin, "A World Without a Fourth Amendment," *UCLA Law Review* 39 (1991): 1-107; Anthony Amsterdam, "Perspectives on the Fourth Amendment," *Minnesota Law Review* 58 (1974): 349-477.
 31. The exclusionary rule bars the use of evidence obtained in violation of the Fourth Amendment. First announced in *Weeks v. U.S.* (232 U.S. 383, 1914) with respect to federal prosecutions it was made applicable to state prosecutions in *Mapp v. Ohio* 367 U.S. 643 (1961). For a general discussion see Yale Kamisar, "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?" *Juridicature* 62 (1978): 66-84.
 32. Doreen Massey and John Allen, *Geography Matters!* (New York: Cambridge University Press, 1984); see also Tracey Maclin, "The Decline of the Right to Locomotion: The Fourth Amendment on the Streets," *Cornell Law Review* 75 (1990): 1258-1337.
 33. *Oliver v. U.S.*, 466 U.S. 170 (1984), 180 quoting *Boyd v. U.S.* 116 U.S. 616, 630, (1886).
 34. Tracey Maclin, "The Central Meaning of the Fourth Amendment," *William and Mary Law Review* 35 (1993): 197-249; Nelson Lasson, *The History and Development of the Fourth Amendment to the Constitution of the United States* (Baltimore: Johns Hopkins Press, 1970).
 35. John Mitchell, "What Went Wrong with the Warren Court's Conception of the Fourth Amendment," *New England Law Review* 27 (1992): 35-59; Tracey Maclin, "When the Cure for the Fourth Amendment is Worse than the Disease," *Southern California Law Review* 42 (1994): 1-72.
 36. 232 U.S. 383 (1914).
 37. 277 U.S. 438 (1928).
 38. 265 U.S. 57 (1924).
 39. *California v. Ciraolo*, 467 U.S. 207 (1986), 211.
 40. 389 U.S. 347 (1968).
 41. *Ibid.*, 351, Justice Harlan concurring.
 42. Brian Serr, "Great Expectations of Privacy: A New Model for Fourth Amendment Protections," *Minnesota Law Review* 73 (1989): 583-642; Laurence Brenner, "Diminishing Expectations of Privacy in the Rehnquist Court," *John Marshall Law Review* 22 (1989): 825-42.
 43. 657 F.2d 85 (1981), 686 F. 2d 356 (1982).
 44. 466 U.S. 170, 173.
 45. *Ibid.*, 173-74.
 46. 686 F.2d 356, 360.
 47. 466 U.S. 170 (1984).
 48. *Ibid.*, 176.
 49. *Ibid.*, 180.
 50. *Ibid.*, 177.
 51. I might note that each of the terms "objectivity" and "subjectivity" has a range of specifications, and there are many contending views about what each refers to and about how their relationship is best understood. Jeanne Schroeder, for example, states unequivocally that, "the word 'objectivity' is given so many different and contradictory definitions, sometimes even by the same author in the same essay, that most discussions as to its possibility or desirability in law or philosophy are worthless" ("Subject: Object," *University of Miami Law Review* 47:4 (1992): 1-119). The same is true of "subjectivity," which is often simply the opposite of "objectivity." If this is so then the spaces—and experiences—made meaningful by reliance on these terms will be no less ambiguous, contradictory and unstable. This, in an important sense, is what the present essay seeks to demonstrate. Schroeder provides a useful guide to some of the differ-