

THE GEOGRAPHY OF CRIMINAL LAW

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ABSTRACT

When Westerners explain the causes of actions or outcomes in the criminal law context, they demonstrate a strong tendency to overestimate the importance of dispositional factors, like thinking, preferring, and willing, and underestimate the impact of interior and exterior situational factors, including environmental, historical, and social forces, as well as affective states, knowledge structures, motives, and other unseen aspects of our cognitive frameworks and processes. One of the situational factors that we are particularly likely to overlook is physical space—that is, landscapes, places, natures, boundaries, and spatialities. Our shortsightedness comes at a great cost. Spatial concerns shape legal structures, order interactions, and influence behavior.

To understand these dynamics, this Article establishes the foundation for a new spatial analysis of criminal law. By casting a wide net and capturing data across a diverse set of fields, this Article uncovers unappreciated but vital parallels, connections, and patterns concerning the ways in which physical space—and the meanings that we attach to spatial elements—affect (1) the proximate decision to commit a crime, (2) the likelihood a given person will become a criminal, (3) the experience of victimization, (4) the way in which policing is conducted, (5) what a crime is and how it is prosecuted, and (6) the consequences of being convicted.

As the first Article in a broader project, this systematic spatial analysis provides the basis for future work dedicated to understanding the origins of our criminal system and assessing whether our current legal structures—from the laws on the books to the practices of police officers to our approaches to punishment—align with our societal needs and values, and, thus, whether the structures we have in place ought to be changed. Instead of building its normative conclusions on geographical analysis alone, the project employs the lens of the mind sciences—including social psychology, social cognition, evolutionary psychology, and related fields—to investigate and explain identified spatial dynamics. This research offers the best hope for unlocking,

among other concerns, why our justice system has focused on physically isolating criminals from society; why laws are frequently structured around protecting the physical boundaries of the body, home, and community; why more police shootings occur in certain areas than others; and why we have spatially-embedded laws that become inoperative when an individual leaves a jurisdiction.

TABLE OF CONTENTS

I.	Introduction: Actors on a Stage.....	825
	A. The Case of John Charles Green.....	825
	B. Project and Article Overview: A Spatial Analysis.....	831
	C. Four Initial Clarifications.....	834
	1. What Is Meant by “Physical Space”?.....	834
	2. Does This Project Assert that All Implicated Spatial Elements and Dynamics Reference the Same Process or Set of Processes?.....	835
	3. Does This Project Suggest that Space Is the Only Thing That Matters?.....	836
	4. Does This Project Assert that Humans Always Ignore—or Have Always Ignored—the Role of Physical Space in Criminal Law?.....	836
II.	Staging the Actors.....	837
	A. The Decision to Commit a Crime.....	837
	1. Spatial Incursion.....	837
	2. Physical Barriers.....	839
	3. Spatial Characteristics and Meanings.....	841
	B. The Criminal Identity.....	846
	1. The Neighborhood.....	846
	2. The Home.....	848
	3. The Body.....	849
	C. Victimization.....	850
	1. Victim Identity.....	851
	2. The Relationship Between the Victim and the Criminal.....	852
	3. The Location of Victimization.....	853
	4. The Experience of Victimization.....	855
	D. Policing.....	856
	1. Individual Discretion.....	856
	2. Police Policy, Practice, and Procedure.....	859
	E. Prosecution and the Law.....	865
	1. Issues of Jurisdiction.....	866
	2. Criminal Definitions.....	870
	a. The Model Penal Code.....	871
	b. Rape.....	875
	3. Criminal Defenses.....	878
	a. The Sacred Body.....	878
	b. The Sacred Home.....	881
	4. Subtle Cues.....	885
	F. Sentencing.....	888
III.	Questions and Implications.....	891
	A. The Potential for Mind Sciences Research.....	892
	B. Normative Tensions: Preliminary Insights.....	897

I. INTRODUCTION: ACTORS ON A STAGE

A. *The Case of John Charles Green*

In November 1966, John Charles Green was convicted of burglary and sentenced to three years in prison.¹ During his first six months at the Missouri Training Center for Men, Green was gang raped twice.² Prison administrators, learning of the attacks, advised him to “fight it out, submit to the assaults, or go over the fence.”³ On April 14, 1967, after being approached by five inmates who said they would sodomize him that night or, if he resisted, kill or seriously injure him, Green absconded from the prison.⁴ He was picked up the next day and charged with felony escape, to which he claimed a “necessity” justification.⁵

As with most criminal law cases, when we approach a fact pattern like this and begin the attributional work to determine causal responsibility, our focus is primarily on acts and actors.⁶ We want to know the characters and we want to know the plot.⁷ We are interested in dispositions, choices, and consequences, and we tend to make assessments based on an extremely simplified, commonsense model of human thinking and behavior.⁸ That model presumes—*incorrectly*—

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¹ State v. Green, 470 S.W.2d 565, 566 (Mo. 1971).

² *Id.*

³ *Id.* (internal quotation marks omitted).

⁴ *Id.*

⁵ *Id.* at 567.

⁶ In this Article, the focus is on the attributional proclivities of those living in individualistic Western cultures (particularly, the United States) and on Western legal structures. Extensive research has demonstrated that non-Westerners do not exhibit the same tendencies when it comes to making sense of behavior. See, e.g., RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* (2003); Michelle Gabler et al., *Latin American, Asian, and American Cultural Differences in Perceptions of Spousal Abuse*, 83 PSYCHOL. REP. 587 (1998); Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991); Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949, 964 (1994).

⁷ Among other things, we want to know whether Green injured anyone during his escape, whether he tried to turn himself in when he reached safety, and whether he fought back when he was subsequently apprehended. See PAUL ROBINSON, *WOULD YOU CONVICT?* 97 (1999).

⁸ Social psychologists use the term “folk psychology”—or “naive psychology”—to refer to

that behavior is shaped primarily by disposition rather than by situation⁹: In general, (1) people take actions of their own accord; (2) their choices imply a set of stable preferences that implicate self-identity; (3) resulting outcomes can be controlled; and (4) as a result—absent some explicit source of coercion, like a gun to the head—people are (and should be) held responsible for their choices and any associated results.¹⁰ We tend only to acknowledge the role of situational elements¹¹—that is, external forces or unappreciated

the “implicit theory that growing up in society has provided us.” ALEXANDER ROSENBERG, *PHILOSOPHY OF SOCIAL SCIENCE* 19 (2d ed. 1995); see also Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 173 (1977).

⁹ The proclivity, described by Gustav Ichheiser in 1949, see Gustav Ichheiser, *Inner Personality, Image, and Social Role*, 55 *AM. J. SOC.*, Sept. 1949, at 57, and later expanded by Lee Ross, see Ross, *supra* note 8, at 174 (labeling the tendency the “fundamental attribution error”), has been documented in thousands of experiments over the last decades. For reviews of some of the best studies, see, for example, ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 428-32 (1999); LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* 125-33 (1991); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 *PSYCHOL. BULL.* 21 (1995). As Lee Ross and Donna Shestowsky summarize:

One of the most important and coherent contributions of contemporary social psychology has involved exploration of the strategies that people employ and the systematic biases they show in explaining or “attributing” the actions and outcomes of their peers. Several lines of research converge to suggest that when called upon to account for the past behavior of other individuals or to make predictions about the future behavior of those individuals, we tend to underestimate the impact of situational or environmental factors and overestimate the importance of “dispositional” factors. Due to this bias, laypeople are prone to overestimate the degree of stability likely to be manifest in a given individual’s behavior over time and across different contexts, and to underestimate the extent to which changes in the particular circumstances or environment confronting that individual might produce significant changes in his or her behavior.

Lee Ross & Donna Shestowsky, *Contemporary Psychology’s Challenges to Legal Theory and Practice*, 97 *NW. U. L. REV.* 1081, 1092-93 (2003) (footnote omitted). Several law review articles have investigated the strong prevalence—and impact—of dispositionism in criminal law. See, e.g., Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 *VAND. L. REV.* 1383 (2003); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 *GEO. L.J.* 1, 18-20 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]; Mona Lynch, *The Truth of Verdicts? A Social Psychological Examination of a Theory of the Trial*, 28 *L. & SOC. INQUIRY* 539 (2003); Craig Haney, Comment, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 *GOLDEN GATE U. L. REV.* 131, 162-63 (2006).

¹⁰ Alan Page Fiske, Shinobu Kitayama, Hazel Rose Markus & Richard E. Nisbett, *The Cultural Matrix of Social Psychology*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 915, 920 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998) (“The person is believed to consist of a set of ‘internal,’ ‘personal’ attributes such as . . . personality traits, preferences, subjective feeling states, beliefs and attitudes. . . . Taken together, these attributes define each person as an autonomous, freely choosing, special individual.”).

¹¹ It should be noted that, in line with *critical realist* (law and mind sciences) scholarship, see *infra* note 23, I use the term “situation” to encompass a broader set of influences—including environmental, historical, and social forces, as well as affective states, knowledge structures, motives, and other unseen aspects of our cognitive frameworks and processes—than some academics interested in the fundamental attribution error who focus only on elements “external”

psychological proclivities—in shaping behavior when those elements are very salient or when we are motivated to identify and acknowledge them.¹²

In Green's case, part of the situation was, in fact, quite explicit—Green's decision to escape seemed to be compelled by something like a gun to the head: the threat of being raped. For eight justices on the Missouri Supreme Court, however, this situational factor was not potent enough to alter dispositionist presumptions about Green's actions.¹³ According to the majority, Green was not entitled to a "necessity" defense because he was not "being closely pursued by those who sought by threat of death or bodily harm to have him submit to sodomy" and because he had other choices. He could have avoided the need to escape by simply telling prison administrators the names of those making the threats.¹⁴ Put differently, for the majority, Green's act of

to the person.

¹² For example, we are more likely to acknowledge the importance of situational factors when making sense of our own behavior or members of our ingroups than when we are when making attributions about outgroup members' actions. See ROSS & NISBETT, *supra* note 9 (surveying studies that show that hardcore dispositionism is avoided when the self is implicated); Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 297, 298 (1987) ("[P]eople tend to make dispositional attributions for their successes and situational attributions for their failures."). As Justin D. Levinson and Kaiping Peng summarize:

When perceivers attempt to attribute cause in situations where the actor is a member of another cultural group, or "out-group," the ultimate attribution error may apply. According to the ultimate attribution error, perceivers grant members of their own group the benefit of the doubt when making attributions (e.g., she donated because she has a good heart). Yet when they explain the acts performed by members of out-groups, perceivers often assume the worst, using stereotypes to help them make attributions (e.g., he donated to gain favor). Likewise, positive behavior by out-group members is more often dismissed. It may be seen as a "special case," as due to luck or some special advantage, as demanded by the situation, or as attributable to extra effort.

Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195, 218-19 (2004) (footnote omitted).

¹³ See *State v. Green*, 470 S.W.2d 565, 568 (Mo. 1971) (affirming, in an eight-to-one decision, Green's three-year sentence for escape).

¹⁴ *Id.*; see also *id.* at 568 n.3 ("But, to constitute a defense to a criminal charge, the coercion must be present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. Threat of future injury is not enough. Nor can one who has a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily injury invoke the doctrine as an excuse." (quoting *State v. St. Clair*, 262 S.W.2d 25, 27 (Mo. 1953))).

In general, defenses to crimes reflect the engrained nature of dispositionism. See, e.g., Dripps, *supra* note 9, at 1389 ("The legal indifference to the defendant's intoxication, the widespread doctrine that reckless or negligent mistake about the facts supporting a defense bars that defense completely, and the abandonment of the behavioral prong of the insanity defense, all reflect the judgment that the individual, rather than the situation, caused the harm the law aims to prevent."); Hanson & Yosifon, *The Situational Character*, *supra* note 9, at 19 (With respect to the defense of duress, "the only kind of situation that is recognized is a threat of force, a highly palpable situational influence. An actor will be excused only for those situational forces that a

absconding was freely chosen—reflecting his bad disposition—and justifying his punishment.¹⁵

Although judges, juries, law professors, and law students may sometimes consider situational factors beyond the defendant's mere disposition—as a result of particular structures or settings that provide evidence not easily accommodated by the dispositionist model, encourage unconventional interpretation, provide adequate time and opportunity to consider the role of situation, and hold individuals accountable for the accuracy of their attributions—those with legal training still exhibit a strong tendency to view criminal law cases in dispositionist terms.¹⁶ Any situationism that they do demonstrate tends to be tightly constrained.¹⁷ We might be willing to consider that the

reasonable person, that is, a dispositional person, would see as overtaking free will.”).

¹⁵ By contrast, the dissent in *Green* saw the situational elements as playing a far more powerful role in shaping Green's actions. For Judge Robert E. Seiler, Green “was confronted with a horrific dilemma” in which he had no other realistic options besides escape. 470 S.W.2d at 571 (Seiler, J., dissenting) (“[A]s a practical matter, self defense was impossible.”). According to Judge Seiler, “[T]he coercion and necessity were not remote in time, but present and impending, and, if Green had told a prison official of the impending attack, he would have been branded a “snitch” and have been as “good as dead right then.” *Id.* at 571, 569 (Seiler, J., dissenting).

¹⁶ See Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 328-38 (2008) [hereinafter Benforado & Hanson, *The Great Attributional Divide*] (investigating how certain exterior situations can allow certain individuals to break away from dispositionism). As explored in *The Great Attributional Divide*, academia, the press, and the judiciary are examples of institutions that have demonstrated, at least on certain occasions and in certain ways, the conditions necessary to gain situational sensitivity and promote situationist attributions. *Id.* at 338-76.

Predictably, legal academics appear far better at appreciating how particular legal rules can affect behavior than they are at seeing how *other* situational influences can have an impact. This is referenced in the critical commentary on claims of necessity in escape cases, where much of the scholarship has been focused on the *situational effects* of holding for or against a person like Green, rather than on unpacking the factors that may lead an inmate to escape. See, e.g., George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1285 (1974) (suggesting that one of the “reasons why a contemporary Anglo-American court would be reluctant to label [an escapee’s] conduct as right and proper [by granting a necessity defense is that] . . . it would be fashioning a rule that would seem to give other similarly maltreated inmates the right to walk out the front door”); David Dolinko, Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126, 1180 (1979) (suggesting that allowing the necessity defense in cases of escape may “weaken prison discipline, encourage other escape attempts, and possibly raise the level of tension and violence in the prison”).

¹⁷ Lee Ross and Donna Shestowsky postulate that, given the dispositionist bias present in the population, statistical evidence and expert testimony provided by social psychologists concerning the power of situational factors would generally be dismissed by those considering excuses to crimes: “Only evidence that the individual failed to form an intention or goal to behave in a particular fashion or to achieve particular goals, or evidence that the individual somehow lacked the ‘free will’ to do otherwise would be deemed exculpatory.” See Ross & Shestowsky, *supra* note 9, at 1107. Indeed, researchers have discovered that even when observers are informed of very significant situational constraints on an actor, they still tend to attribute behavior to disposition. Thus, in one very famous experiment, subjects were asked to assess the actual opinion of writers of essays defending or attacking Fidel Castro. See Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967). Predictably, when told that the writers had been able to *choose* their positions, subjects identified

people directly around him at the prison influenced Green's act of escape. For example, we might reflect on the inattentive prison administrators and the menacing other prisoners. However, we are very reluctant to consider seriously the effect of more distant individuals like Green's absent father, or environmental factors like the quality of Green's elementary education (he was transferred around foster homes) or the endemic poverty in his local community.¹⁸ Similarly, when considering why a particular individual was convicted, we might, on occasion, be willing to move beyond a dispositionist assumption of a bad actor getting his just deserts and entertain the possibility of a racist jury, a corrupt witness, or a poor lawyer. However, unless we are a law professor researching one of these topics or a defense attorney working on an appeal, we will rarely consider systemic problems, like biased laws, or the effects of unconscious implicit associations held by many Americans.¹⁹ These latter concerns just seem too remote to warrant inclusion in the very limited subset of situational elements that we are willing to consider.²⁰

Whatever the attributional focus in a criminal law case—whether it involves apportioning blame for a death, explaining why an officer drew his weapon, or why the officer conducted a *Terry* stop—one element of the situation that we are particularly likely to miss is the role of the physical environment in shaping behavior.²¹ Even in a case like this,

those defending Castro as actually holding pro-Castro views; however, when the subjects were told that the writers had been *assigned* their positions (and had no free choice), they *still* tended to assess those writing in defense of Castro as being pro-Castro. *Id.* at 6.

¹⁸ See ROBINSON, *supra* note 7, at 97 (offering a rare situationist glimpse into some of Green's background).

¹⁹ As this example demonstrates, since dispositionism is so firmly engrained in our minds, it affects many other attributions relating to criminal law aside from the issue of responsibility for a crime.

²⁰ Part of the reason that the fundamental attribution error may be so prevalent in attributions in the criminal law context may lie in the fact that the attributions so often involve harmful acts and bad outcomes. As Donald Dripps has summarized:

[The fundamental attribution error] implies that observers tend not just to attribute behavior to personality, but also to attribute undesirable consequences to behavior rather than to circumstances. Observers resist the conclusion that serious harm might have resulted from chance rather than from wrongdoing. When harm has occurred, this tendency is magnified by the desire to believe that the world is basically just and that unlikely events that in fact occur were more likely *ex ante* than in fact they were.

Dripps, *supra* note 9, at 1399-400 (footnotes omitted). “[A]ll other things being equal, the greater the harm that the particular behavior brings about, the more likely that it will be attributed to internal causes (i.e., to the perpetrator of the act).” Haney, *supra* note 9, at 162-63.

²¹ At least two factors may be operating to disadvantage the appreciation of spatial issues in comparison to other situational factors. First, as discussed previously, *see supra* note 9, we have “a greater willingness to attribute negative outcomes to human beings rather than to impersonal forces.” Dripps, *supra* note 9, at 1407-08. Donald Dripps has theorized that this is a major reason why legislators, judges, and juries tend to cast the grounds of excuse much too narrowly when the defense is based on non-human situational factors as opposed to third-party wrongdoing. *Id.* at 1389. Second (and likely related), many issues of place and space involve factors which, despite their actual causal importance, appear extremely “distant” from the acts

involving an escape from prison, where the criminal act quite saliently involved the crossing of a physical boundary, it is hard to see the physical world—that is, landscapes, places, spatialities, and natures—as anything more than the stage (or stages) upon which the dispositional actors acted. In scene one, it was the building where Green made the poor choice to commit the crime of burglary, leading directly to his incarceration. In scene two, it was the prison where he suffered several sexual assaults before deciding to escape. In scene three, it was the side of the highway where Green elected to give up without a struggle to Trooper Roy Robinson.²² Physical space is something that the criminal chooses to walk across, climb over, or sit down upon. In most instances, we perceive it as static—an element or set of elements that, in the interests of getting to the heart of the matter, we can largely ignore.

and actors at the scene. As Lee Ross and Donna Shestowksy have explained:

To academically trained social psychologists, much of the discussion [by legal academics] about bad and good excuses seems to hinge on dubious distinctions and incoherent notions of behavioral causation and personal agency. In general, it appears that where one can stipulate the nature of the malignant causal agent or factor and postulate a direct link from that agent or factor to the transgressions in question, especially if the actor did not choose to expose himself or herself to it, the excuse is typically deemed to be a good one. By contrast, if one cannot stipulate the particular causal processes and the link or the multi-link chain that led to a particular deed, even where the actor is similarly innocent of having chosen his or her exposure to the initial links in that chain, we tend to attribute that deed to free will and hold the individual accountable.

Ross & Shestowksy, *supra* note 9, at 1108.

²² See ROBINSON, *supra* note 7, at 105.

B. *Project and Article Overview: A Spatial Analysis*²³

The problem with this pervasive tendency is that spatial issues are vitally important: Physical space and the meanings that we attach to landscapes, places, spatialities, and natures actively shape (and are reflected in) our legal structures. They order interactions and impact outcomes. And physical boundary management is central to our legal—and, in particular, our criminal justice—system. As this Article suggests, spatial factors are powerfully implicated in, among other things, (1) the proximate decision to commit a crime, (2) the likelihood a given person will become a criminal, (3) the experience of victimization, (4) the way in which policing is conducted, (5) what a crime is and how it is prosecuted, and (6) the consequences of being convicted.

This Article, an introduction to a broader project, uses the *Green* case as a starting point to investigate each of the six broad dynamics listed above. The purpose is to provide a convincing overview of the myriad ways in which physical space influences and engages criminal law.

For many of the scholars interested in the intersection of geography and criminal law, the reason for undertaking the research explored in this Article is its use in battling crime—that is, in its potential for efficiently reducing the number of criminals, victims, and criminal acts. In this project, by contrast, the examination of spatial

²³ This project adopts a *critical realist* approach (also referred to as a *situationist* or *law and mind sciences* approach). Critical realism is based on the idea that legal theory and analysis should be grounded on the most realistic account of the human animal currently available. Consequently, critical realism relies particularly heavily on the insights of social psychology, cognitive neuroscience, social cognition, and other mind sciences, and insights gained from the study of market practices devoted to understanding, predicting, and influencing people's conduct. For a sampling of scholarship, see Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. (forthcoming 2010); Benforado & Hanson, *The Great Attributional Divide*, *supra* note 16; Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087 (2008); Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005); Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) [hereinafter Benforado, Hanson & Yosifon, *Broken Scales*]; Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004) [hereinafter Chen & Hanson, *Categorically Biased*]; Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Hanson & Yosifon, *The Situational Character*, *supra* note 9; Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); David Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681 (2008).

dynamics is meant to establish a baseline for (1) understanding the origins of our legal system and (2) assessing whether our current legal structures—from the laws on the books to the practices of police officers to our approaches to punishment—align with our societal needs and values, and, thus, whether the structures we have in place ought to be changed.

There are two additional elements that make this a *new* spatial analysis.²⁴ First, the gaze of the project is purposefully wider than most of the earlier scholarship, which has tended to focus on discrete issues like geographic constraints on burglar decision-making or the relationship between neighborhood incarceration rates and criminal behavior. In contrast, the aim here is to look across seemingly disparate spatial dynamics to see connections that might otherwise be missed. The theory is that by casting a wide net and capturing data across a diverse set of fields of inquiry, it may be possible to see unappreciated but vital relationships, similarities, and contrasts. Second—and most

²⁴ Beginning in the 1920s, a number of sociologists at the University of Chicago began to study how human behavior was shaped by spatial relationships and to map out how the different spaces (zones) of the city were differentiated. See Robert E. Park, *Community Organization and Juvenile Delinquency*, in *THE CITY: SUGGESTIONS FOR INVESTIGATION OF HUMAN BEHAVIOR IN THE URBAN ENVIRONMENT* (Robert E. Park & Ernest W. Burgess eds., 1925); JOHN LANDESCO, *ORGANIZED CRIME IN CHICAGO* (1929); CLIFFORD SHAW & HENRY MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (1942). For an overview of the Chicago School, see MARTIN BULMER, *THE CHICAGO SCHOOL OF SOCIOLOGY: INSTITUTIONALIZATION, DIVERSITY, AND THE RISE OF SOCIOLOGICAL RESEARCH* (1984).

The work of these early pioneers was further developed and refined during the 1970s and 1980s as researchers began to place more emphasis on studying offences instead of just offenders and began to consider the importance of housing markets in respect to crime rates. For a brief overview of these developments, see Anthony E. Bottoms & Paul Wiles, *Environmental Criminology*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY* 620, 623-24 (Mike Maguire et al. eds., 3d ed. 2002). For good examples of geographer contributions to the field, see, for example, DAVID T. HERBERT, *THE GEOGRAPHY OF URBAN CRIME* (1982), and K.D. HARRIES, *CRIME AND THE ENVIRONMENT* (1980).

Today, much of the work focused on the connections between crime, space, and the law is conducted by environmental criminologists, primarily outside the United States. As Anthony E. Bottoms and Paul Wiles explain, “Environmental criminology is the study of crime, criminality, and victimization as they relate, first, to particular *places* and, secondly, to the way that individuals and organizations shape their activities *spatially*, and in so doing are in turn influenced by *place-based* or *spatial* factors.” Bottoms & Wiles, *supra*, at 620. While this Article is clearly in keeping with the spirit and focus of that research and draws together some of the most important findings by environmental criminologists, it is concerned with space and place in ways that have not traditionally drawn the attention of the discipline’s scholars.

Overall, this project shares the most with work by the few (but proud!) academics operating in the field of “law and geography” who engage normative questions raised by spatial analysis. See, e.g., NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* (1994); *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* (Nicholas Blomley, David Delaney & Richard T. Ford eds., 2001); *LAW AND GEOGRAPHY* (Jane Holder & Carolyn Harrison eds., 2003). At the same time, this project, by adopting a critical realist approach, begins from a notably different perspective and, because of its heavy reliance on the behavioral sciences, looks for answers in notably different places. This, in turn, leads to a different array of critiques and potential policy prescriptions.

important—the project does not build its ultimate normative conclusions on geographical analysis alone. Rather, it utilizes the lens of the mind sciences—including social psychology, social cognition, evolutionary psychology, and related disciplines—to make sense of identified spatial dynamics. This approach greatly enriches the analysis because it provides potential answers to the many “why” questions that this Article raises: Why have laws frequently been built around protecting the physical boundaries of the body, the home, the local community, and the state? Why has our justice system focused on physically isolating the criminal from society? Why do more police shootings occur in certain areas? Why do we have spatially-embedded laws that become inoperative when an individual leaves a jurisdiction?

With explanations from the mind sciences, it is possible to distinguish true problems and inconsistencies from false ones and to offer policy prescriptions that have a genuine chance of working, because they are based on a grounded understanding of the origins of the problem. Using the insights of the mind sciences to drive normative conclusions about the dynamics revealed in this Article is the focus of future work in the project.

While the emphasis here is on criminal law, the hope is that this Article’s framework may prove useful in analyzing—and perhaps more aptly, “reconceptualizing”—other areas of law.²⁵ Initial inquiry suggests that tort law, constitutional law, international law, and many other realms of our legal world are all powerfully structured around physical boundaries and frequently protect physical spaces.²⁶ The stage may be far more important than any of us actors ever imagined.

²⁵ Although not utilizing the methodological framework proposed in this project (employing the insights of the mind sciences to elucidate geographic dynamics), in the last few years, a few legal scholars have demonstrated the promise of a reinvigorated spatial analysis to law and legal theory outside of the criminal law context. For example, in an intriguing set of articles, Timothy Zick has explored the concept of place as it relates to First Amendment concerns. See Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439 (2006); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006). Similarly, Hari M. Osofsky has brought a valuable geographic perspective to international law. See, e.g., Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT’L L. 421 (2007).

²⁶ Indeed, a cursory examination suggests that the “sacred” spaces—the body, the home, and the community, among others—privileged by the criminal law are the same spaces offered special protections by other areas of law. The body space, for example, is also protected by Constitutional rights to abortion, to contraception, to refuse medical treatment, and to perform various sex acts in private. Tort law protects the body space through the torts of battery, assault, wrongful death, and interference with rescue, as well as through the defense of necessity. Likewise, the home is protected by legal structures upholding residential privacy over certain free speech rights, barring the quartering of soldiers in peacetime, and affirming the right to private possession of obscene materials within the home. In addition, tort law protects the home space (and other private spaces) from physical invasion through the torts of trespass and intrusion.

C. *Four Initial Clarifications*

Before turning to the analysis, it is important to clarify four areas of potential confusion. By understanding the propositions that this project is—and is not—asserting, several concerns can be eliminated.

1. What Is Meant by “Physical Space”?

This project addresses a number of geographical and spatial elements, including places, spaces, boundaries, and barriers.²⁷ More concretely, this series of Articles analyzes the criminal law with respect to the jurisdiction, the neighborhood, the border, the prison, the fence, the cell, the home, the school zone, and the body, among many other things.

This project also focuses on the meanings attached to these spatial elements. The Berlin Wall was not just a barrier of stone, brick, and concrete physically separating two populations; it was also a richly textured symbol of the Cold War. Berkeley, California and Newark, New Jersey are not just cities; they are also socially-coded spaces with particular racial, economic, and political connotations. The boundary of a body is not just a layer of cells; it is also the metaphorical edge or end of the self.

On a related note, this project is concerned with how various social variables—for example, poverty, unemployment, and crime—are concentrated in particular geographic areas and may be linked to certain spatial factors. Hence, the focus is not only on implicit meanings and assumed associations, but also on the *actual* relationship between geography and social variables. These dynamics may sometimes be in tension. The meaning or set of meanings that we attach to a place may not reflect a true relationship to a social variable: We may view a street as dangerous, despite the fact that the level of criminal activity is low.

In addition, this project addresses how the physical attributes,

²⁷ The project is also concerned with the issue of scale, whether we are zoomed in on the level of the individual interacting in a home space or zoomed out to the level of the city, state, or nation.

Although noting that there has been—and continues to be—a vigorous debate on definitions of terms like “space,” “place,” and “scale” (and, indeed, on whether single meanings are possible), this Article proceeds from the notion that it is possible to meaningfully engage issues of criminal law and geography with imperfect “words.” For those interested in the debate, see, for example, John A. Agnew & James S. Duncan, *Introduction* to THE POWER OF PLACE: BRINGING TOGETHER GEOGRAPHICAL AND SOCIOLOGICAL IMAGINATIONS 1 (John A. Agnew & James S. Duncan eds., 1989); YI-FU TUAN, SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE 6 (1977); Osofsky, *supra* note 25, at 445-47.

meanings, and associations of spatial elements may shape our reactions to them and our interactions within them. An electrified fence may physically prevent a criminal from escaping, but it may also make members of the public feel safe whether or not it is actually effective. Walking in a neighborhood a police officer knows to have a high level of drug violence may change how he interprets the ambiguous behavior of an approaching man, just as a jury may see a crime committed in a synagogue as more heinous than an identical one committed in a McDonald's.

Finally, this project focuses not only on how the criminal law reflects certain physical realities, constructed meanings, and associations, but also on how the law changes physical realities, meanings, and associations. For example, laws prohibiting burglary and embracing the Castle Doctrine may reflect our concern with protecting the home from invasion; however, having these laws may change how we experience an attack occurring in the home.

2. Does This Project Assert that All Implicated Spatial Elements and Dynamics Reference the Same Process or Set of Processes?

No. As explored later in this Article and in related work, a number of different processes are implicated; however, common mechanisms may explain many of the dynamics. For example, the reason that police officers go to their guns more often in minority neighborhoods may also help explain why the criminal law does not tend to recognize defenses based on non-human environmental forces. Similarly, the reason that prisons are an appealing solution to the issue of what to do with those who have broken laws may also help explain why, historically, certain criminal laws differentiated between members of the community and outsiders. To discover these unexpected connections, it is necessary to conduct a broad investigation of all of the ways in which physical space matters to criminal law.

In addition, part of the purpose of this project is to show the benefits of a spatial analysis of law. While legal history has been a legitimate field of inquiry since at least the early nineteenth century, a geographic approach is quite new and its value is not self-evident.²⁸ Exploring the breadth of impact and influence of spatial dynamics in criminal law is to document the potential of the field. It is certainly not a valid criticism of the historical lens to suggest that many different and arguably discrete historical processes—technological, scientific, political, and social—are at work. Nor is it a valid criticism of spatial

²⁸ See Issachar Rosen-Zvi, *Law and Geography*, in *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 641 (David S. Clark ed., 2007).

analysis to assert that many different spatial mechanisms are in operation.

3. Does This Project Suggest that Space Is the Only Thing That Matters?

No. This project's focus on the importance of the physical—places, landscapes, boundaries, and the like—is not in any way meant to suggest that many other non-spatial elements are not also central to criminal law. Nor is it meant to suggest that issues of physical space are operating independently from other elements.²⁹ By way of example, non-spatial risk factors often correlate to spatial risk factors for criminal behavior: “[A]dolescents living in physically deteriorated and socially disorganized neighbourhoods disproportionately tend also to come from families with poor parental supervision and erratic parental discipline, and tend also to have high impulsivity and low intelligence.”³⁰ So to understand the causes of criminal behavior, one must appreciate, among other things, the temporal, societal, and spatial dynamics at work. Likewise, to suggest that officers take cues from their physical environment when deciding whether behavior is suspicious is not to say that implicit racial bias mechanisms are not also at work. They likely are, but understanding the spatial component offers a more complete picture of what is going on. In addition to direct bias, macrosocial forces, like the history of segregation and housing discrimination, may result in minorities continuing to be concentrated in areas with elevated levels of offending. And because such neighborhoods are coded as high crime, officers entering these areas may be more aggressive in interpreting the behavior of those within the geographic confines. Race is implicated in both explanations, but in very different ways—and mandating very different prescriptions.

4. Does This Project Assert that Humans Always Ignore—or Have Always Ignored—the Role of Physical Space in Criminal Law?

No. The argument in this Article—and in the broader project—is that when making sense of behavior and outcomes, humans (particularly Westerners) tend to focus on dispositional factors at the expense of

²⁹ Thus, although this Article asserts the active role of spatial elements with respect to the criminal law, it certainly cannot be considered a work of environmental or geographical determinism.

³⁰ David P. Farrington, *Developmental Criminology and Risk-Focused Prevention*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 657, 680.

more critical situational factors, including spatial dynamics. *Generally*, we have ignored—and we continue to ignore—physical space as an active force in criminal law. There are a number of important exceptions. For example, the Fourth Amendment used to explicitly protect particular physical spaces from governmental intrusion.³¹ Likewise, police officers now rely heavily on mapping to figure out where to devote their resources in trying to reduce crime.³² In addition, as part of sentencing, individuals are permitted to (and frequently do) assert that their actions reflect their physical situations of growing up in neighborhoods of high unemployment, incarceration, and crime.³³

The existence of these exceptions does not undercut the general thesis of this Article. Indeed, part of the purpose of the latter parts of this project is to understand why we sometimes appreciate spatial dynamics and why we frequently do not. Initial work applying the insights of the mind sciences offers some compelling explanations for when and how physical space can become salient.

II. STAGING THE ACTORS

I take SPACE to be the central fact to man born in America

—*Charles Olson*³⁴

A. *The Decision to Commit a Crime*

Popular perceptions to the contrary, criminals are not actors freely and consciously choosing their “evil” deeds and victims as they move across space. Criminals are creatures *of* place and space. In many cases, it is spatial factors that lie behind the decision to commit a particular crime in a particular location at a particular moment in time.

1. Spatial Incursion

For one thing, an individual or group’s motivation to protect or defend a given place or space from intrusion may spur criminal behavior. That “sacred” space may be one’s own body, a building with

³¹ See *United States v. White*, 401 U.S. 745, 748 (1971) (describing the traditional conception of the Amendment).

³² See *infra* text accompanying notes 142-146.

³³ See *infra* text accompanying notes 79-86.

³⁴ *CALL ME ISHMAEL* 11 (1947).

special significance, or a territory, among other things. In Green's case, it was a physical threat to the borders of his person,³⁵ coupled with the prison's failure to prevent other inmates from entering the space of his cell and breaching his body boundary,³⁶ which led to his decision to escape.

Perceived threats to or actual transgressions of the criminal's body space—or the body space of an intimate or associate—by the victim appear to trigger many crimes.³⁷ A push may prompt a stabbing in return.³⁸ A threatened beating may prompt an individual to illegally carry a gun or commit an act of vandalism against the perpetrator's property.³⁹

Perceived personal boundary breaches may be particularly relevant to understanding the causes of violent crimes, including assaults and homicides. Indeed, historically, courts in the United States have recognized the following categories of "adequate" provocation: "(1) a violent assault; (2) an unlawful arrest; (3) mutual combat; (4) the sight of the accused's wife in the act of adultery."⁴⁰ These categories provide some indirect support for the proposition that physical transgressions of body spaces frequently prompt violent (indeed, criminal) responses.⁴¹ The existence of the Castle Doctrine may reference a similar dynamic with respect to strong responses to ingress into the home space by unwanted outsiders.⁴²

Group behavior also appears to be linked to boundary incursion concerns. Studies show that gangs often organize around a particular geographic territory, and controlling identifiable turf is critical to a

³⁵ The inmates threatened to rape Green, "'beat his head in' or kill" him. *State v. Green*, 470 S.W.2d 565, 570 (Mo. 1971) (Seiler, J., dissenting). Without the threat of a bodily invasion, Green may very well have quietly served out the remainder of his original sentence.

³⁶ As the dissent explained, the physical transgression of Green's spaces was readily accomplished because there were "several master keys . . . illicitly in the hands of the inmates [and because the cell] . . . locks could easily be picked with any sharp object." *Id.* at 569 (Seiler, J., dissenting).

³⁷ See, e.g., *People v. Terk*, 805 N.Y.S.2d 738, 739 (App. Div. 3d Dep't 2005).

³⁸ See, e.g., *United States v. Evans*, 576 F.3d 766, 767 (7th Cir. 2009).

³⁹ See, e.g., *People v. Dupree*, 771 N.W.2d 470, 478 (Mich. Ct. App. 2009) ("Under the facts alleged by the defense at trial, [the defendant] was presented with a clear choice of evils: he had to either commit the crime of being a felon-in-possession by taking [the] gun or risk death or serious bodily harm at [the] hands" of the man with whom he had been quarreling.).

⁴⁰ Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 80 (1992).

⁴¹ See *infra* text accompanying notes 227-237. A perceived threat to or actual entry into the body space of an intimate by another appears to be particularly explosive, and the violence appears often to be directed at the intimate for inviting or allowing such entry. It has been documented that roughly sixty percent of men who murder their spouses claim that their wives were sexually unfaithful. George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 (1982).

⁴² See *infra* text accompanying notes 249-253.

gang's success, especially as it relates to maximizing drug profits.⁴³ In their analysis of homicide data from the 1960s to the 1990s, researchers "found that gang-related homicides were more closely related to areas in which turf was under dispute than any other factor, including the incidence of drug trafficking."⁴⁴ They also found that "street gang situations that are potentially most lethal are those of escalating turf battles where gangs are battling over territory boundaries."⁴⁵ As Carl Taylor described in his study of Detroit:

Gangs defend their territories in order to protect their narcotic business. The word is out on the street to everyone: "This is gang territory—stay away." . . . Anyone who attempts to enter the territory becomes the invader, the intruder, the enemy. Unlike the legitimate business world, gangs use physical violence as their only enforcement tool to stop competition and opposition. All gang types in this study respect the conditions of territorial law and the necessity that it generates for punishment.⁴⁶

Thus, a perception of ownership or dominion over a particular place or space—whether by an individual or a group—appears frequently to provide the conditions for a criminal response to apparent entry.

2. Physical Barriers

Even where a boundary incursion threat reaction is not at issue, the physical attributes of a place or space may encourage or discourage criminal behavior. This is most saliently the case where barriers exist that deter or completely prevent a crime from being committed,⁴⁷ or where barriers are absent with the opposite effect. Since the early 1970s, a number of scholars interested in the idea of "defensible space" have argued that the design of physical structures has an important role to play in reducing criminal activity.⁴⁸ Empirical studies support this

⁴³ Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 132-34 (2000).

⁴⁴ *Id.* at 136-37 & n.154 (citing ILL. CRIM. JUST. INFO. AUTH., RESEARCH BULLETIN: STREET GANGS AND CRIME—PATTERNS AND TRENDS IN CHICAGO 10-20 (1996)).

⁴⁵ ILL. CRIM. JUST. INFO. AUTH., TRENDS AND ISSUES 1997, at 49 (1997).

⁴⁶ CARL S. TAYLOR, DANGEROUS SOCIETY 6 (1989).

⁴⁷ The locked iron gate of a bank may prevent a robber with a clear nefarious intent from accomplishing the necessary bad act to establish a prima facie case, just as body armor may prevent an individual intent on killing a police officer from committing murder, although both perpetrators may be charged with attempted crimes. See MODEL PENAL CODE § 5.01 (1962).

⁴⁸ Oscar Newman is credited with the development of the idea of "defensible space," see OSCAR NEWMAN, CRIME PREVENTION THROUGH URBAN DESIGN: DEFENSIBLE SPACE (1972), although other scholars have expanded and refined the concept in more recent decades. Alice Coleman, for example, has suggested that crime may be combated by physically limiting site accessibility and the connections between different buildings, and by more carefully

work by showing, for example, that physical accessibility is an important determinant of which residences burglars choose.⁴⁹ In practice, recent government efforts to “harden targets” in the context of the war on terror reflect the insights of “defensible space” scholars.⁵⁰ The government has created or installed physical impediments to discourage individuals from choosing landmarks, public buildings, and other important sites as targets and to make it impossible to successfully carry out an attack.

Paradoxically, the erection or fortification of a physical barrier may also have the effect of encouraging crime or keeping crime “within.” In some cases, boundaries may constrain choices (e.g., by eliminating recourse to legal options) such that criminal behavior becomes a more attractive—or potentially, the sole—course of action. If a highway blocks legal access to a shopping mall and a person lacks a car, he may choose to trespass across private property to reach his destination. In other cases, boundaries may create conflict by forcing individuals into close contact. A person may have no inherent desire to harm another, but physical confinement in a home with that other person may drive him to violence. Finally, boundaries may constrain the physical mobility of a criminal with the effect of neither encouraging nor discouraging the commission of a criminal act, but merely determining that the crime will be committed here and now, as opposed to later and elsewhere. The penal colony and the modern prison both operate to concentrate the location of crime. Certain urban renewal efforts accomplished the same effect: physically isolating and immobilizing the inhabitants of certain high crime areas with the result of focusing and confining criminal activity.⁵¹

distinguishing between private space and public space. See ALICE COLEMAN, UTOPIA ON TRIAL: VISION AND REALITY IN PLANNED HOUSING (1985); Alice Coleman, *Disposition and Situation: Two Sides of the Same Crime*, in THE GEOGRAPHY OF CRIME 108 (David J. Evans & David T. Herbert eds., 1989).

⁴⁹ Wim Bernasco & Paul Nieuwebeerta, *How Do Residential Burglars Select Target Areas?*, 45 BRIT. J. CRIMINOLOGY 296, 298, 310 (2005) (finding that neighborhoods with a higher percentage of single-family dwellings—“[u]nits with doors and windows on the ground floor, and units that have access both at the street side and the backside”—had higher rates of burglary than neighborhoods with less accessible types of residences like multi-floor apartments).

⁵⁰ See, e.g., Garrett M. Graff, *Sidewalk Bulwarks*, HARV. MAG., July-Aug. 2003, at 14-16 (suggesting that in the wake of the September 11, 2001 terrorist attacks, there was a significant push to protect the physical space directly adjacent to important public buildings and corporate headquarters with Jersey barriers and “bollards”); ROHAN GUNARATNA, STATEMENT TO THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (July 9, 2003), http://www.9-11commission.gov/hearings/hearing3/witness_gunaratna.htm (suggesting that the hardening of American targets has been successful and that the threat from al Qaeda is “shifting to both government and population targets of allies and friends of the US” and softer American civilian targets, among others).

⁵¹ There is evidence that one of the reasons that subway systems in Washington, D.C., Atlanta, and elsewhere were not extended into certain neighborhoods was the fear that mass transportation would allow crime to “seep” from impoverished and dangerous inner-city areas

The *Green* case provides a powerful example of how physical boundaries may largely determine whether an individual decides to take actions that constitute a crime. If the building Green chose to burglarize back in 1966 had had a high wall around it or better locks, he might have decided not to attempt the criminal act that got him into trouble in the first place. Indeed, even with the intent to commit the crime, if the boundaries had been significant enough, it might have been *impossible* for Green to commit the *actus reus*. Once incarcerated, physical barriers that existed or did not exist within the prison space defined Green's choices. There were, for example, no barriers protecting him from other inmates: "Unless a guard witnessed an assault, the alleged assailant would be allowed to remain within the general population during the investigation."⁵² However, there were physical barriers that prevented Green from receiving the aid and protection of correctional officers. During his first sexual assault, even if Green had yelled out for help to a guard, the official on duty in the central rotunda between the four wings of the prison was "separated from each wing by a heavy door" and, consequently, would not have heard him.⁵³ In this context, the crime of escape became a far more attractive option and was further enhanced by the lack of significant external boundaries to the prison. If there had been a powerful electrified fence around the border of the correctional facility or if the prison had been located on an island, Green's thinking on how to deal with the threat posed by the other inmates would likely have been very different.⁵⁴

3. Spatial Characteristics and Meanings⁵⁵

Even where barriers are not at issue, the nature of the physical space may have a powerful effect on criminal decision-making. The characteristics and meanings of a place may largely determine whether a

(that had previously been isolated) into the wealthy enclaves. See, e.g., ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO* 156 (2006).

⁵² *State v. Green*, 470 S.W.2d 565, 569 (Mo. 1971). Where an assault was witnessed, the prison protocol required the inmate to "be confined to the 'hole,' which was the area used to discipline prisoners"—that is, a space of extreme punishment. *Id.*

⁵³ *Id.* at 568.

⁵⁴ As it was, the physical layout of the prison made escape quite easy: Green simply climbed "over the fence near the powerhouse on the west side of the institution." ROBINSON, *supra* note 7, at 100.

⁵⁵ It is worth noting that the discussion is somewhat artificial in the sense that there is much overlap between the processes outlined in these three sub-Parts. For example, when we are talking about how incursion into a "sacred" space may prompt a criminal reaction, we are also talking about how a space that has a particular meaning for an individual or group may prompt unlawful behavior. However, providing some classification and order, even if imperfect, helps to reveal a set of dynamics that would otherwise be overlooked and that may be explained by insights from the mind sciences.

potential criminal chooses to act: A robber is likely to choose an alley over an open field; a pickpocket may prefer cramped physical spaces like subway cars, where individuals are forced into close contact; a murderer may be unable to bring himself to kill in a church. Understanding the impact of spatial cues may help explain “[o]ne of the remarkable features of crime[:] . . . the extent to which it is concentrated on particular areas, and on particular places and people within them.”⁵⁶

The “broken windows” theory, first articulated by George Kelling and James Wilson, asserts that physical signs of disorder—like dilapidated buildings, graffiti, garbage, abandoned cars, public intoxication, and panhandling—encourage (additional) criminal behavior.⁵⁷ “[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.”⁵⁸ For the last two-and-a-half decades, the theory has primarily relied on anecdotal and case study evidence and has lacked significant empirical support.⁵⁹ However, in December 2008, researchers in the Netherlands published results in *Science* offering strong evidence that disorder does, in fact, beget disorder.⁶⁰ In

⁵⁶ Ken Pease, *Crime Reduction*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 947, 960. Different physical places experience radically different rates of crime. As Per-Olof H. Wikström asserts, “Levels of crime vary between nations, between regions within nations, between urban and rural areas, and between areas within cities.” Per-Olof H. Wikström, *Communities and Crime*, in THE HANDBOOK OF CRIME AND PUNISHMENT 269 (Michael Tonry ed., 1998); *see, e.g.*, LAWRENCE W. SHERMAN ET AL., U.S. DEP’T OF JUSTICE, THE KANSAS CITY GUN EXPERIMENT (1995), available at <http://www.ncjrs.gov/pdffiles/kang.pdf> (evaluating a policing project in an area with a homicide rate twenty times higher than the national average); Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27, 27 (1989) (documenting that, in Minneapolis, “[r]elatively few ‘hot spots’ produce most calls to police (50% of calls in 3% of places) and [most] calls reporting predatory crimes (all robberies at 2.2% of places, all rapes at 1.2% of places, and all auto thefts at 2.7% of places)”). Even within “problem neighborhoods,” certain microspaces may be particularly at risk. *See, e.g.*, CATRIONA MIRRLEES-BLACK & ALEC ROSS, HOME OFFICE, RESEARCH STUDY 146, CRIME AGAINST RETAIL AND MANUFACTURING PREMISES: FINDINGS FROM THE 1994 COMMERCIAL VICTIMISATION SURVEY (1995), available at <http://rds.homeoffice.gov.uk/rds/pdfs2/hors146.pdf> (finding that just two percent of manufacturers in Britain suffered a quarter of all burglaries).

⁵⁷ *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

⁵⁸ *Id.* (emphasis added).

⁵⁹ *See, e.g.*, Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (suggesting that the broken windows theory is inadequately supported by social scientific evidence); Kees Keizer, Siegwart Lindenberg & Linda Steg, *The Spreading of Disorder*, 322 SCIENCE 1681, 1681 (2008) (asserting that, to date, the “broken windows” theory has lacked empirical support and that studies aimed at testing it have “provided mixed results at best”); D.W. Miller, *Poking Holes in the Theory of “Broken Windows”*, CHRON. HIGHER EDUC. (Feb. 9, 2001) (arguing that “little empirical evidence has ever emerged for the idea that disorder, left unchecked, causes crime”).

⁶⁰ Keizer, Lindenberg & Steg, *supra* note 59.

six field experiments conducted in common public spaces, the scientists found that by manipulating the amount of visible graffiti in an area they could greatly increase the number of people who littered and the number who stole a five-euro note.⁶¹ They had similar results when they manipulated other signs of physical disorder in the proximate environment. The simple presence of unreturned shopping carts, strewn in a parking lot, almost doubled the number of people littering as compared to when the parking lot was tidy. Having bicycles illegally locked to a fence more than tripled the number of people willing to trespass using a shortcut clearly marked “no throughway.”⁶² The researchers concluded,

The most likely interpretation of these results is . . . that one disorder (graffiti or littering) actually fostered a new disorder (stealing) by weakening the goal of acting appropriately. . . . Signs of inappropriate behavior like graffiti or broken windows lead to other inappropriate behavior (e.g., litter or stealing), which in turn results in the inhibition of other norms (i.e., a general weakening of the goal to act appropriately).⁶³

Although sufficient empirical work has yet to be completed, there is reason to suspect that just as visible signs of decay and disorder may *encourage* criminal behavior, other physical elements—like green space—may *discourage* crime.⁶⁴

Beyond theories implicating the role of physical disorder and decay in promoting criminal behavior, there is good evidence that other neighborhood factors also shape offending. In the case at hand, it is likely that when Green decided to commit burglary, spatial characteristics of the surrounding area in respect to attractiveness, opportunity, and accessibility largely determined his choice of target.⁶⁵ Studies have shown that burglaries are often “clustered either in poorer housing areas, or in more expensive properties close to main roads on the edges of towns; and [that] individual houses . . . [are] more likely to be burgled if situated near road junctions, or if they offer[] good cover (e.g., high hedges or fences) or access (e.g., rear or side alleys) to

⁶¹ *Id.* at 1683-84.

⁶² *Id.*

⁶³ *Id.* at 1684-85.

⁶⁴ Irus Braverman, *Governing Certain Things: The Regulation of Street Trees in Four North American Cities*, 22 TUL. ENVTL. L.J. 35, 47 (2008) (“Recent findings . . . establish[] a negative correlation between the amount of trees and vegetation, and the existence and level of fear of crime.”); Frances E. Kuo & William C. Sullivan, *Environment and Crime in the Inner City—Does Vegetation Reduce Crime?*, 33 ENV’T & BEHAV. 343, 343-64 (2001) (comparing police reports in inner-city areas and determining that increased vegetation correlated to a decrease in reported crimes).

⁶⁵ See Wim Bernasco & Floor Luykx, *Effects of Attractiveness, Opportunity and Accessibility to Burglars on Residential Burglary Rates of Urban Neighborhoods*, 41 CRIMINOLOGY 981, 981-1001 (2003) (analyzing data from 25,000 completed or attempted burglaries in The Hague, the Netherlands).

potential offenders.”⁶⁶ In addition, it seems to matter whether the proximate area has a large number of “capable guardians”—that is, witnesses and interveners.⁶⁷

After Green’s incarceration for his crime, the nature of his proximate environment again influenced his experiences and choices. Apart from the existence of the physical boundaries already discussed, additional spatial qualities of the prison enabled Green’s attackers to succeed.⁶⁸ According to the dissent, “The second [night] guard walked a circuit among the four wings,” and as a result of the large amount of space to cover, “[t]here were substantial periods of time during which a wing [was] without supervision.”⁶⁹ In addition, despite the existence of a complaint system, the spatial realities involved in its operation effectively ruled it out as a potential solution to the danger Green faced: Although “[a]n inmate could complain directly to a guard . . . [b]ecause of the physical structure of the residential buildings, it [was] . . . difficult to complain to a guard without the other inmates being aware of this action.”⁷⁰

Focusing more specifically on how meanings attached to particular places and spaces may impact behavior, a criminal may or may not want to commit a crime in a particular location because of how the nature of the place changes what the act means and its potential implications. An individual may decide not to rob a store in a particular neighborhood because he grew up down the block, which changes his personal sense of the gravity of the transgression. Another person may decide to murder his ex-girlfriend at the restaurant where they went on their first date because of the expressive message that the location sends. Yet another individual may be dissuaded from burglarizing a home because he knows that he is more likely to be caught and convicted in the jurisdiction in which the home is located.⁷¹

Green’s gang rape may reference just such a dynamic. It is possible that Green’s attackers knew that because they were inside of a prison, they could commit their act free from any repercussions and, therefore, were encouraged to do so. As discussed later with respect to

⁶⁶ Mike Maguire, *Crime Statistics: The ‘Data Explosion’ and Its Implications*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 322, 331 (summarizing MIKE MAGUIRE & TREVOR BENNETT, BURGLARY IN A DWELLING: THE OFFENCE, THE OFFENDER AND THE VICTIM (1982)).

⁶⁷ See, e.g., Bernasco & Nieuwbeerta, *supra* note 49, at 310 (finding that, among other things, “the likelihood of a neighbourhood’s being selected for burglary is positively influenced by its supposed lack of guardianship, as measured by ethnic heterogeneity”). Overall, burglars may prefer areas that are either familiar—allowing them to move about unmarked as “strangers”—or those that lack unifying social structures and exhibit little neighborly contact. *Id.* at 298-99.

⁶⁸ See *supra* text accompanying notes 51-53.

⁶⁹ *State v. Green*, 470 S.W.2d 565, 568 (Mo. 1971) (Seiler, J., dissenting).

⁷⁰ ROBINSON, *supra* note 7, at 99.

⁷¹ See *infra* text accompanying notes 158-173, 186-188, 275-277.

victimization, the prison space is in many ways a degenerative zone, where violence is expected and accepted.⁷² As Mary Sigler explains, “[P]rosecutions of prison rape are exceedingly rare, and perpetrators can realistically expect to commit the offense ‘without fear of spending additional time in prison.’”⁷³ However, had they not been within the space of the prison, Green’s attackers may have been dissuaded from sexually assaulting him for a different reason. Aside from how the legal system treats rape—and particularly homosexual rape—participants may interpret it very differently when it occurs in prison and when it occurs in outside society. For one thing, to the perpetrator, prison rape may seem like a less “evil” act given that it is pervasive within incarceration spaces and is not generally punished.⁷⁴ For another, based on shared cultural narratives, male-male rape in prison does not imply that one is necessarily gay.⁷⁵ The nature of the space changes the conception of the act.

As a final point, it is worth noting more explicitly that although the specific spatial features and meanings of a target and its environs are clearly important to the decision to commit a crime in a particular area, by focusing too much on the target, one can potentially overlook the importance of the physical realities of the offender. Over twenty-five years ago, Patricia L. and Paul J. Brantingham suggested that criminals’ movements across space during their daily life might have a strong effect on where criminal acts ultimately took place.⁷⁶ And, in fact, subsequent research has shown that offending does tend to be concentrated near criminals’ residences, work places, and recreational spaces,⁷⁷ and along the routes between these locations.⁷⁸

⁷² See *infra* text accompanying notes 100-107; see also Ahmed A. White, *The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 737 (2008) (“[V]iolence thoroughly defines the prison experience. . . . [V]iolence is the dominate arbiter of social status in prison.”).

⁷³ Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 607 (2006) (quoting HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS pt. VIII (2001), available at <http://www.hrw.org/legacy/reports/2001/prison/report.html>).

⁷⁴ See *id.* at 570 (“Relying on the testimony of social scientists and penologists, Congress ‘conservatively’ estimated that thirteen percent of inmates in the United States have been sexually assaulted in prison.” (citing 42 U.S.C. §§ 15601 (2000))).

⁷⁵ See White, *supra* note 72, at 756 (“[F]ew if any perpetrators identify themselves as homosexual outside of the prison context . . .”).

⁷⁶ PAUL J. BRANTINGHAM & PATRICIA L. BRANTINGHAM, ENVIRONMENTAL CRIMINOLOGY (1981).

⁷⁷ See, e.g., PAUL WILES & ANDREW COSTELLO, HOME OFFICE, RESEARCH STUDY 207, THE ‘ROAD TO NOWHERE’: THE EVIDENCE FOR TRAVELING CRIMINALS (2000), available at <http://www.homeoffice.gov.uk/rds/pdfs/hors207.pdf> (finding that, in Sheffield, England, the site of a burglary was, on average, 1.8 miles from the recorded home address of the offender and 1.6 miles from the address where he or she slept the previous night); Wim Bernasco & Floor Luykx, *Effects of Attractiveness, Opportunity and Accessibility to Burglars on Residential Burglary Rates of Urban Neighborhoods*, 41 CRIMINOLOGY 981, 981-1001 (2003) (finding that proximity to

B. *The Criminal Identity*

In the previous Part, the focus was on uncovering some of the ways in which spatial features, relationships, and meanings shape the *proximate decision* to commit a particular crime, but spatially-embedded dynamics also operate to encourage criminality more generally. An unlocked back door may prompt some individuals to burglarize a home, but it does not spur everyone who notices the back door to do so. Certain people are more likely to commit crimes, and place and space appear to have an important effect on determining who those people are.

1. The Neighborhood

Grow up on the wrong side of town, and your chances of ending up in the back of a squad car increase dramatically. If people enjoyed total freedom of movement across space or if criminogenic variables were distributed evenly across the landscape, there might be an argument for neglecting geography in an analysis of the causes of crime, but, in fact, neither is the case: Certain people are tethered to particular locations where they are exposed to known risk factors for later criminal behavior. As Per-Olof H. Wikström suggests, “[C]ommunities vary in environmental conditions conducive to crime, including their levels of formal and informal social controls and, partly related to that, their levels of temptations and provocations.”⁷⁹ More specifically, key

geographic area where a high number of burglars live is the strongest predictor of the burglary rate for a neighborhood and was a significant predictor even after controlling for other variables); John P. McIver, *Criminal Mobility: A Review of Empirical Studies*, in CRIME SPILLOVER 20 (Simon Hakim & George F. Rengert eds., 1981) (providing an overview of studies addressing proximity of offenses to offenders' homes).

⁷⁸ As Michael Townsley et al. summarize, “Research has confirmed that offenders predominately select addresses that they observe while engaging in legitimate activities, such as traveling to places of work or recreation.” Michael Townsley et al., *Infectious Burglaries: A Test of the Near Repeat Hypothesis*, 43 BRIT. J. CRIMINOLOGY 615, 618 (2003) (citing Patricia L. Brantingham & Paul J. Brantingham, *Burglar Mobility and Crime Prevention Planning*, in COPING WITH BURGLARY 77 (Ronald Clarke & Tim Hope eds., 1984); GEORGE RENGERT & JOHN WASILCHICK, *SUBURBAN BURGLARY: A TIME AND A PLACE FOR EVERYTHING* (1985)).

⁷⁹ Per-Olof H. Wikström, *Communities and Crime*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 269, 281; see also Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517, 550-53 (2001) (suggesting that social control—the process by which social norms, such as prohibitions on violence, are enforced—is a creature of space). As Janet L. Lauritsen and Robert J. Sampson elaborate, “[H]istoric and contemporary macrosocial forces (e.g., segregation, migration, housing discrimination, structural transformation of the economy)” have not had a uniform effect across space, and, when these spatially-linked dynamics interact with “local community-level factors (e.g., residential turnover, concentrated poverty, family disruption),” the

factors correlated to high rates of crime—like the level of male unemployment and the prevalence of single-adult households—are not constant across neighborhoods; in fact, quite the opposite.⁸⁰ Poverty itself is embedded spatially,⁸¹ which has powerful implications given its well-documented connection to crime.⁸² The result, as Anthony E. Bottoms concludes, is that “neighbourhood effects on offending can and do sometimes exist,”⁸³ and in what amounts to a vicious circle, these

result is that certain areas—particularly inner cities—lack the “social organization” linked to decreased criminality. Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in *THE HANDBOOK OF CRIME AND PUNISHMENT*, *supra* note 56, at 58, 69. Janet L. Lauritsen and Robert J. Sampson offer a similar assessment: “The sources of violent crime appear to be remarkably similar across race and to be rooted instead in the structural differences among communities, cities, and regions in economic and family organization.” *Id.* at 68.

⁸⁰ See Tim Hope, *Community Crime Prevention*, in *Building a Safer Society: Strategic Approaches to Crime Prevention*, 19 *CRIME & JUST.* 21, 75-76 (1995) (“[H]igh-crime communities in both Britain and America now seem to be characterized increasingly by concentrations of jobless young men and by single-adult households, often headed by women and often with dependent children.”).

⁸¹ See, e.g., Frank Giarratani & Cynthia Rogers, *Some Spatial Aspects of Poverty in the USA*, 10 *POPULATION RES. & POL’Y REV.* 213, 213 (1991) (suggesting that de-industrialization, urbanization, and suburbanization have all had an effect on how economic development—and, consequently, poverty—has manifested itself across space); Daniel H. Weinberg, *Rural Pockets of Poverty*, 52 *RURAL SOC.* 398, 406 (1987) (documenting that “geographic determinants of poverty do exist”).

⁸² A number of scholars have written about the connection between crime and poverty. See, e.g., David L. Bazelon, *The Morality of the Criminal Law*, 49 *S. CAL. L. REV.* 385, 403 (1976) (“[P]overty appears to be a *necessary*, though not a sufficient, condition for the occurrence of most violent crime.”); Robert J. Bursik, Jr. & Harold G. Grasmick, *Economic Deprivation and Neighborhood Crime Rates, 1960-1980*, 27 *L. & SOC’Y REV.* 263, 277 (1993) (pointing to poverty as a key variable in delinquency); Lin Huff-Corzine et al., *Deadly Connections: Culture, Poverty, and the Direction of Lethal Violence*, 69 *SOC. FORCES* 715, 715 (1991) (“[S]evere poverty is positively associated with lethal-violence rates . . .”).

Of course, much recent scholarship has focused on relative deprivation rather than absolute poverty. For overviews of the literature relating to relative deprivation, see STEVEN BOX, *RECESSION, CRIME AND PUNISHMENT* (1987); JOCK YOUNG, *THE EXCLUSIVE SOCIETY* (1999). Young believes that the best approach is to understand crime as it relates to “social exclusion,” which captures the idea of poverty but also the non-economic dimensions of marginalization. See Jock Young, *Crime and Social Exclusion*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY*, *supra* note 24, at 457. For Young, space is still an incredibly important variable; indeed, it is “the breakdown of spatial and social isolation in late modernity” concurrent with systematic structural exclusion that “leads to a diminishing of cultural differences and a rise in discontent [in respect to relative deprivation], both within nations and between nations.” *Id.* at 480.

⁸³ Anthony E. Bottoms, *Place, Space, Crime, and Disorder*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY* 528, 559 (Mike Maguire et al. eds., 4th ed. 2007); see also Paul Rock, *Sociological Theories of Crime*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY*, *supra* note 24, at 51, 63 (surveying a number of studies that demonstrate the importance of spatially-concentrated social disadvantage particularly as it relates to housing allocation). For a good example of research documenting a “neighborhood effect” on young people, see Per-Olof H. Wikström & Rolf Loeber, *Do Disadvantaged Neighborhoods Cause Well-Adjusted Children to Become Adolescent Delinquents?: A Study of Male Juvenile Serious Offending, Individual Risk and Protective Factors, and Neighborhood Context*, 38 *CRIMINOLOGY* 1109, 1109-42 (2000) (noting that except for those juveniles with the highest individual risk factors, adolescents living in disadvantaged public housing areas had a significantly higher likelihood of criminal behavior than those living in other neighborhoods).

effects may be perpetuated by the offending that they encourage. Not only are incarceration rates significantly higher in certain areas,⁸⁴ but also, as Jeffrey Fagan and his colleagues have shown, high levels of “incarceration begets more incarceration, and incarceration also begets more crime, which in turn invites more aggressive enforcement, which then re-supplies incarceration.”⁸⁵ Likewise, a dearth of good educational opportunities for young people encourages delinquency,⁸⁶ and delinquency, in turn, reduces the attractiveness of areas to businesses and new residents who pay the taxes that largely determine the quality of local schools.

2. The Home

While the neighborhood is clearly an important variable, the spatial influences on criminality also operate on a smaller scale. As Marcia Johnson has summarized, “Most sociological and psychological theorists agree that violence is a problem that begins *at home*”⁸⁷—that is, again, criminality has a point of origin in physical space. For example, witnessing violence within the physical space of the home appears to be one of the strongest predictors of juvenile homicide.⁸⁸ In one study of “homicidally aggressive children, nearly two-thirds (62%) of homicidal children lived in households where their fathers had been physically abusive to their mothers, as compared to only thirteen

⁸⁴ See, e.g., Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551, 1568 (2003) (“In New York City, arrests and incarcerations, both for drug and non-drug crimes, have long been spatially concentrated in the poorest neighborhoods.”); see also James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 *CRIMINOLOGY & PUB. POL’Y* 267 (2004) (showing spatial concentration in respect to incarceration).

⁸⁵ Jeffrey Fagan et al., *Neighborhood, Crime, and Incarceration in New York City*, 36 *COLUM. HUM. RTS. L. REV.* 71, 73-4 (2004) (“[H]igh rates of incarceration may be internalized as a part of the ecological dynamic of neighborhoods, becoming part of a cycle that may actually elevate crime within neighborhoods.”); see also Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *CRIMINOLOGY* 441 (1998) (suggesting that a neighborhood experiencing a high incarceration rate is likely to see higher rates over time).

⁸⁶ Although this area of research is underdeveloped, an important project in Michigan that tracked the effects of a preschool intellectual enrichment program on individuals as they aged found that it “led to decreases in school failure, in offending, and in other undesirable outcomes.” David P. Farrington, *Individual Differences and Offending*, in *THE HANDBOOK OF CRIME AND PUNISHMENT*, *supra* note 56, at 241, 260 (citing L. J. SCHWEINHART ET AL., *SIGNIFICANT BENEFITS* (1993)).

⁸⁷ Marcia Johnson, *Juvenile Justice*, 17 *WHITTIER L. REV.* 713, 767 (1996) (emphasis added).

⁸⁸ CHARLES PATRICK EWING, *WHEN CHILDREN KILL* 22 (1990) (“Probably the single most consistent finding in the research on juvenile homicide to date is that children and adolescents who kill, especially those who kill family members, have generally witnessed and/or been directly victimized by domestic violence.”).

percent of the non-homicidal children studied.”⁸⁹ Moreover, the viewing of violence within the home also appears to have broader criminogenic effects, including being linked to later property crime.⁹⁰

It is important to emphasize that as with neighborhood, what is critical here is not the particular variable that encourages criminality, but how issues of geography determine or amplify exposure. Whether it is parental alcoholism, economic disadvantage, inter-parental violence, or any of a number of other adversities that generate later criminal behavior, the key is that these factors have an impact because the individual is rooted to a place where it is impossible to avoid exposure.

Thus, it is a somewhat ironic twist that lacking a single stable living space may itself be linked to an increased likelihood of becoming a criminal. One important British study of delinquency, for instance, found frequent change of address to be associated with criminal behavior.⁹¹ Although the records do not provide sufficient detail to assess the neighborhoods that Green inhabited as a young person, there is evidence that he bounced around a number of different foster homes.⁹² This condition of physical rootlessness may have been important in eventually leading him to take up crime.

3. The Body

As with the neighborhood space and the home space, the experience of the individual body space also appears to have a notable influence on criminality. There have been a number of studies suggesting that the sexual and physical abuse of young women—that is, the breach of their personal body boundaries—is linked to their later involvement in criminal acts.⁹³ Overall, approximately thirty percent of women in prison report having been physically or sexually abused as young people.⁹⁴ This aligns with more general research suggesting that

⁸⁹ Mirah A. Horowitz, *Further Developments: Kids Who Kill: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 L. & CONTEMP. PROBS. 133, 155-56 (2000).

⁹⁰ See David M. Fergusson & L. John Horwood, *Exposure to Interparental Violence in Childhood and Psychosocial Adjustment in Young Adulthood*, 22 CHILD ABUSE & NEGLECT 339, 339-57 (1998) (studying the effects of interparental violence on 1,265 New Zealand children).

⁹¹ See S. G. Osborn, *Moving Home, Leaving London, and Delinquent Trends*, 20 BRIT. J. CRIMINOLOGY 54, 54-61 (finding that “[d]elinquents moved home more frequently than non-delinquents,” but cautioning that “frequent changes of address” may reflect family problems and may not in itself be a cause of criminal behavior).

⁹² See ROBINSON, *supra* note 7, at 97.

⁹³ See, e.g., Regina A. Arnold, *Processes of Victimization and Criminalization of Black Women*, 17 SOC. JUST. 153, 153-66 (1990); Mary E. Gilfus, *From Victims to Survivors to Offenders: Women’s Routes of Entry and Immersion into Street Crime*, 4 WOMEN & CRIM. JUST. 63, 63-89 (1992).

⁹⁴ TRACY L. SNELL, U.S. DEP’T OF JUSTICE, WOMEN IN PRISON 5 (1994), available at

children who were adjudicated as having been abused showed an increased likelihood of criminal arrest in adulthood.⁹⁵ The link appears to be particularly strong with respect to physical abuse and later physical violence.⁹⁶ “[S]exually abused children are . . . at a greatly increased risk of becoming offenders.”⁹⁷ Thus, physical transgression may beget physical transgression.⁹⁸

C. *Victimization*

Understanding spatial dynamics is also vital to unpacking the following key questions with respect to victimization: (1) who is victimized; (2) what is the relationship between the victim and the criminal; (3) where does victimization occur; and (4) what is the experience of victimization?⁹⁹

<http://www.ojp.usdoj.gov/bjs/pub/pdf/wopris.pdf>.

⁹⁵ See Cathy Spatz Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27 CRIMINOLOGY 251, 251-72 (1989).

⁹⁶ Johnson, *supra* note 87, at 767 (“There is a clear and undisputed nexus between child abuse and aggression. Although not all abused children grow up to be abusers, there is a strong correlation that those who are seriously abused become the most violent members of society.”).

⁹⁷ Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 107 (1997) (cautioning, however, that “there is no support for the proposition that abused children will unavoidably become abusers”); see also Joan Kaufman & Edward Zigler, *Do Abused Children Become Abusive Parents?*, 57 AM. J. ORTHOPSYCHIATRY 186, 190 (1987) (noting that “[t]he rate of abuse among individuals with a history of abuse (30 ± 5%) is approximately six times higher than the base rate for abuse in the general population (5%),” but asserting that there are “many mediating factors [that] affect the likelihood of [intergenerational] transmission”).

⁹⁸ See Richard J. Gelles, *Family Violence*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 178, 193-94 (“[C]hildren who witness and experience violence are more likely to use violence toward their parents and siblings than are children who do not experience or see violence in their homes.”).

⁹⁹ The question of who victims are is clearly related to the question, just discussed, of where offenders choose to commit their criminal acts. See *supra* text accompanying notes 35-78. It is also undoubtedly tied up with the spatially-embedded elements that encourage certain individuals to become criminals more generally. See *supra* text accompanying notes 79-92. As Professor Andrew Karmen summarizes:

[S]ince [t]he problem of crime and violence is rooted in neighborhood conditions—high rates of poverty, family disruption, failing schools, lack of recreational opportunities, active recruitment by street gangs, drug markets . . . [it is not surprising that] people forced to reside under those conditions are at a greater risk of getting caught up in violence, [both] as victims . . . [and] as perpetrators.

Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, N.Y. TIMES, Apr. 28, 2006, at A1. However, despite some overlap with the preceding Parts, a separate discussion is warranted as considering spatial concerns from the victim’s perspective raises a number of unique issues.

1. Victim Identity

Often, location provides identity: If you are hanging out in this area you must be a Blood; if you live in this neighborhood you must be a Jew; if you are walking on this street you must be rich. That identity, whether accurate or not, can make you a prospective victim. For the Crip gang-member doing a drive-by, the bigot committing a hate crime, and the robber seeking a big payoff, it may be the nature and meaning of the place as much as the particular qualities of the person that determine whether someone is victimized or not.

In her research, Sherene H. Razack has noted how some parts of a landscape are coded as “spaces of civility” (e.g., the university and the suburb) and other parts “spaces of violence” (e.g., the slum and the colony).¹⁰⁰ Being located in (or belonging to) a degenerative space puts one “beyond universal justice” and “limit[s] the extent to which the violence done to [one’s] body c[an] be recognized and the accused made accountable for it.”¹⁰¹ Razack continues that “[i]n this no-man’s-land, violent acts can be committed without meaningful consequence”¹⁰²: This is “the space of license to do as one pleases, regardless of its impact on the personhood of others.”¹⁰³ Thus, as Lisa Gotell has echoed, simply entering into a “marginalized social location [may] . . . render [a person] highly vulnerable to sexual violence.”¹⁰⁴ Both those who perpetrate violence and those who would otherwise intervene are inclined to view violence as more expected and acceptable in a degenerative zone. It is the natural and inevitable “by-product of the space.”¹⁰⁵

By entering the space of the prison, Green entered a space of violence in which he was suddenly vulnerable. There was not necessarily something about him that made him inherently a victim; it was his ingress into a degenerate space and the extreme challenge of egress that largely engendered his victimhood.¹⁰⁶ Once within the space, the situation presented Green with a choice between two evils common to repeat victims, particularly those experiencing domestic violence: Remain and face continued physical breaches of the body space, or leave and face potentially worse transgressions.

¹⁰⁰ Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, 15 CAN. J.L. & SOC’Y 91, 118 (2000).

¹⁰¹ *Id.* at 123.

¹⁰² *Id.* at 114.

¹⁰³ *Id.* at 107.

¹⁰⁴ Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865, 882 (2008).

¹⁰⁵ Razack, *supra* note 100, at 117.

¹⁰⁶ *See supra* text accompanying note 72.

By committing the crime of escape, Green risked increasing the length of his detention within the space of the prison—a space where the boundaries of his person and living space were not respected. For victims of domestic violence attempting to escape abuse, there is a serious risk of either provoking more serious physical attacks or becoming homeless—a condition of significant lost boundary protections. Overall, “[w]omen attempting to leave violent spouses are twice as likely to become victims of homicide [as] abused women who continue to cohabit with their abusers.”¹⁰⁷ And data suggests that roughly half of homeless women and children are escaping physical abuse.¹⁰⁸ Just as individuals may become tied to locations where they cannot escape criminogenic factors,¹⁰⁹ victims may become bound to places where they cannot avoid victimization.

2. The Relationship Between the Victim and the Criminal

The realities of domestic violence also reveal a second important spatial dynamic with respect to victimization: Those who are physically proximate to us are often the ones who end up committing criminal acts against us.¹¹⁰ Initially, individuals in Green’s wing of the prison raped him. Later, when he moved, inmates in Green’s new wing threatened him.¹¹¹

The same proximity effect operates outside the prison walls as well. As the evidence outlined earlier suggests, the victims of crimes like burglary often live very close to the perpetrators.¹¹² In addition, individuals are often victimized by people with whom they share, or have shared, close spatial proximity;¹¹³ in fact, people are often

¹⁰⁷ Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 617 (2001).

¹⁰⁸ See WOMEN’S RIGHTS PROJECT, ACLU, DOMESTIC VIOLENCE AND HOMELESSNESS 2 (2006), available at <http://www.aclu.org/pdfs/dvhomelessness032106.pdf>.

¹⁰⁹ See *supra* text accompanying notes 79-92.

¹¹⁰ Cf. Frans B.M. de Waal, *Evolutionary Ethics, Aggression, and Violence: Lessons from Primate Research*, 32 J.L. MED. & ETHICS 18, 18 (2004) (“[H]omicides in human society often are committed by an individual who is close to the victim. This probably is true not only for violence, but for all aggressive behavior; aggression is more often seen between individuals who are close than those who are distant.”).

¹¹¹ ROBINSON, *supra* note 7, at 99-100.

¹¹² See *supra* note 77. Similarly, a study of forcible rape in Philadelphia found that “[i]n the majority of cases (82 percent) offenders and victims lived in the same area . . .” MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 339 (1971).

¹¹³ For example, in the United States, for approximately seven out of ten female victims of sexual assault or rape the perpetrator was an intimate, other relative, friend, or an acquaintance. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, CRIME CHARACTERISTICS, http://www.ojp.usdoj.gov/bjs/cvict_c.htm#findings (last visited Jan. 20, 2010) [hereinafter CRIME CHARACTERISTICS]. And overall, women were more likely to experience any sort of violent crime at the hands of a friend, acquaintance, or intimate than they were to be victimized by a

victimized by people inhabiting the same residence.¹¹⁴

There is reason to think, however, that this dynamic may change as continued technological advances—particularly in the communications sector—allow individuals to interact meaningfully while being separated geographically.¹¹⁵

3. The Location of Victimization

Far from random, research on victimization across space indicates clear patterns: Victims often experience crime within their own intimate spaces—in particular in their own homes.¹¹⁶ In 2004, approximately twenty-five percent of all violent crimes were committed at or directly adjacent to the victim's residence; for those occurring away from the residence, approximately half were committed within a mile and seventy-five percent within five miles.¹¹⁷

Moreover, victimization is spatially concentrated, with victims being clustered in particular locations. On the micro scale, studies show that living in spatial proximity to a residence that was recently targeted increases the risk of being burglarized.¹¹⁸ More broadly, “[i]n respect of burglary, [the] risk [of victimization] is much higher in inner-city

stranger. *See id.* (finding that men demonstrated an equal likelihood of victimization by intimates and strangers).

¹¹⁴ As Frances Heidensohn suggests, although “private harms perpetrated within the home in domestic violence, and physical and sexual abuse of children . . . are shadowy . . . victim surveys do suggest that there are low reporting rates for such offences and yet a high rate of distress.” Frances Heidensohn, *Gender and Crime*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 491, 499 (citations omitted). Indeed, two-thirds of children murdered before their fifth birthday were killed by a parent or another member of their family. CRIME CHARACTERISTICS, *supra* note 113.

¹¹⁵ *See infra* text accompanying note 125.

¹¹⁶ This spatial dynamic, however, appears to be strongly affected by the gender of the victim. In general, women are “more likely to be victimized at a private home (their own or that of a neighbor, friend, or relative) than in any other place.” DIANE CRAVEN, U.S. DEP’T OF JUSTICE, SEX DIFFERENCES IN VIOLENT VICTIMIZATION, 1994, at 1 (1997). In contrast, “males [are] most likely to be victimized in public places, such as businesses, parking lots, and open areas.” *Id.*

¹¹⁷ CRIME CHARACTERISTICS, *supra* note 113 (noting that only three percent were committed more than fifty miles from the victim’s home).

¹¹⁸ Michael Townsley and his colleagues, for example, recently documented that “proximity to a burgled dwelling increases burglary risk for those areas with a high degree of housing homogeneity.” *See, e.g.*, Michael Townsley et al., *Infectious Burglaries: A Test of the Near Repeat Hypothesis*, 43 BRIT. J. CRIMINOLOGY 615, 617, 618 (2003) (suggesting a “contagion model of near repeat victimization [such] . . . that victimization can be ‘passed’ from victim to victim in a similar way to that which occurs in diseases”).

In addition, having a particular person within your home space can increase the risk of burglary. As Anthony E. Bottoms and Paul Wiles explain, “households which contain a known offender [have been shown to have] . . . a higher rate of victimization than other households, regardless of the area offence rate, and . . . repeat victimization . . . [is also] higher in offender-households.” Anthony E. Bottoms & Paul Wiles, *Environmental Criminology*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 620, 641.

areas, particularly those with high levels of physical disorder, and in rented accommodation rather than owner-occupied homes.”¹¹⁹ Incorporating data from other crimes, studies have identified relatively affluent subareas of poor inner-city locales as having the highest rates of victimization.¹²⁰ “Within these areas, victimisation is unrelated to socio-economic and demographic characteristics. Susceptibility to crime seems rather to be conditioned by one’s neighbourhood of residence.”¹²¹

Even when away from home, victimization tends to occur in distinct physical locations.¹²² There is good evidence, for example, that in public urban spaces, women face a significantly higher risk of harassment than in other areas.¹²³ Common sense notions support the empirical data: Most people know to avoid the strip of bars at closing time and eschew walking through the park alone at night. Less obvious is troubling research suggesting that spatial variation in terms of victimization may be becoming starker.¹²⁴

¹¹⁹ Lucia Zedner, *Victims*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 419, 422 (summarizing findings from the British Crime Surveys, first conducted in 1982). According to a 2004 study in the United States, “Urban residents had the highest violent victimization rates, followed by suburban resident rates. Rural residents had the lowest rates.” CRIME CHARACTERISTICS, *supra* note 113. As Ken Pease explains further, “Repeat victimization is highest, both absolutely and proportionately, in the most crime-ridden areas . . . which are also the areas that suffer the most serious crime” Ken Pease, *Crime Reduction*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 947, 962 (citing Alan Trickett et al., *What Is Different About High Crime Areas?*, 32 BRIT. J. CRIMINOLOGY 81, 81-90 (1992) and Ken Pease, *Judgments of Offence Seriousness: Evidence from the 1984 British Crime Survey* (Research and Planning Unit Paper No. 44, 1988)).

¹²⁰ See SUSAN J. SMITH, CRIME, SPACE AND SOCIETY 97 (1986).

¹²¹ *Id.*

¹²² Spending evenings out as opposed to in the home, itself, has been shown to increase the risk of victimization. See MICHAEL R. GOTTFREDSON, HOME OFFICE, RESEARCH STUDY NO. 81, VICTIMS OF CRIME: THE DIMENSIONS OF RISK 9-11 (1984), available at <http://rds.homeoffice.gov.uk/rds/pdfs/05/hors81.pdf> (“The relationship between the number of evenings out of the home at night in the previous week and personal victimisation is direct, increasing from a likelihood of 7% for those not going out at all to 14% for those out three or more nights a week.”).

¹²³ See Kate Painter, *Different Worlds: The Spatial, Temporal and Social Dimensions of Female Victimization*, in CRIME, POLICING AND PLACE: ESSAYS IN ENVIRONMENTAL CRIMINOLOGY 164 (David J. Evans et al. eds., 1992).

¹²⁴ See, e.g., Tim Hope, *Community Crime Prevention*, in 19 CRIME & JUST. 21, 75-76 (Michael Tonry & David P. Farrington eds., 1995). As Tim Hope explains, if, as the evidence suggests:

the dynamics of postindustrial societies are redistributing and concentrating economic inequality among residential areas—particularly affecting the spatial concentration of the young poor—then it may be that such community resource deprivation is being accompanied (in Britain) by an increasing spatial and interpersonal inequality of victimization and (in the United States) by high rates of violence and homicide. In other words, the increasing inequality of victimization between communities may be characterized in both societies by an increase in the frequency and severity of harm, arguably as an expression of an increasing intensity of intracommunal offending.

Id. (citations omitted).

4. The Experience of Victimization

Another significant historical change in the spatial pattern of victimization relates to the spatial concentration or dispersion of harm from a single criminal act. The harm to a victim or victims has a location in space, either because it has a physical impact (e.g., a gunshot wound to an arm or vandalism to a vehicle) or because it has a non-physical impact on individuals or entities that are, nonetheless, situated in space. Five hundred years ago, transportation and communication realities meant that a single criminal act would have generally had a victimization effect that was very geographically focused.¹²⁵ The harm would have touched people living in one home, or on one street, or in one village. The killing of a man would have been felt by the man's children and wife, the neighbors who attended to the family, the townsman who found the body, and the other villagers who, as a result, feared for their own safety, but the broader impact would have been constrained. An ordinary man would not have had occasion to make social and economic connections many miles from his home, and, for the most part, the media of exchange were not sufficiently developed to bring news of his death to strangers.

Over the last hundred years, the geographical scope of victimization has vastly expanded outward. Today, the map of harm—the expanse of broader victimization—from the murder of a single individual appears as a constellation. The harm is experienced by his parents in Chicago, his sister in San Francisco, his co-workers in New York, his friends from high school, college, and law school who now live all over the country, and all those around the world who read about the incident in newspaper articles, magazines, and blogs, or learn of it on television or the Internet. This expanding scope of victimization is likely to have profound effects on our criminal law system. If the notion of “local” crime is dissolving, localized law enforcement and judicial mechanisms may face considerable challenges. In addition, our ever-spreading galaxy of interactions may make it more difficult to remedy harms and help society heal following a criminal act. The experience of a sister a thousand miles away from the scene where her brother was murdered is likely to be very different than that of a friend who lives on the same block where the attack occurred. While the murder may deeply affect both individuals, each one may have disparate reactions and needs.

On a related note, research suggests that how a victim makes sense of a criminal act may depend to a significant extent on where it occurs,

¹²⁵ Cf. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1182 (2007).

because particular places have particular individual and social meanings.¹²⁶ From the victim's perspective, the act is transformed by the locus of the crime: Rape in the home is not the same as rape outside the home.¹²⁷ Indeed, as Kate Painter articulates, "[T]he meaning attached to the space within which the abuse takes place and the cultural myths and pressures supporting the idealized family home as a 'safe haven in a heartless world,' make it difficult for women not only to talk about their experiences of violence, but also to recognize their violation for what it is."¹²⁸ More broadly, the impact of crimes on all members of the population—not just direct victims—also seems to turn importantly on elements of space and place and their social meanings. As Susan Smith summarizes, "It is known that both in North America and in Britain fear and concern about crime is variously expressed according to people's locations in social and physical space."¹²⁹

D. Policing

At the same time that landscapes, places, natures, boundaries, and spatialities are shaping interactions between criminals and victims, they are also powerfully informing the post-criminal-act response by the state. This is particularly true in respect to police decision-making, both at the individual level of an officer's discretion and at the general level of law enforcement policy and practice.¹³⁰

1. Individual Discretion

There is good evidence that officer discretion can result in inequitable treatment of individuals based on their ethnicity, class, age, and gender;¹³¹ in turn, the exercise of that discretion may be significantly influenced by the place where an individual encounters an

¹²⁶ See Painter, *supra* note 123, at 189.

¹²⁷ See *id.* ("Households are physical structures which are also an extension of one's self, role, ego and social position in the world. Household space carries particular gender-based meaning and provides the physical and social context for understanding and interpreting the 'seriousness' of crime, hidden from public view, which occurs within it.")

¹²⁸ *Id.* at 188.

¹²⁹ SMITH, *supra* note 120, at 110.

¹³⁰ As Paul Quinton et al. have suggested, place often determines not only "the structure of police patrol activity . . . [but may] also affect how officers perceive people." PAUL QUINTON ET AL., HOME OFFICE, POLICE RESEARCH SERIES PAPER 130, POLICE STOPS, DECISION-MAKING AND PRACTICE 28 (2000), available at <http://www.homeoffice.gov.uk/rds/prgpdfs/prs130.pdf>.

¹³¹ See Andrew Sanders & Richard Young, *From Suspect to Trial*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 1034, 1039-43 (reviewing a number of studies from Britain and the U.S. on police discretionary practices).

officer.¹³² The same action—for example, running with a duffle bag slung over one’s shoulder—may be viewed very differently based on the physical space in which it takes place and, more importantly, may be treated very differently by the police as a result of where it occurs. Physical space offers cues to law enforcement officers that suggest appropriate behavior, whether at the point of deciding who seems suspicious and needs to be investigated further, or later in deciding how to interact with an individual during subsequent questioning, search, or arrest.

Officers often appear to have “strong perceptions about the types of people they . . . expect to see in different parts of” their beat, and suspicion is often generated by those who seem out of place: In the words of one British police officer, “I focus on people not matching [the] area.”¹³³ Had Trooper Robinson come across Green reading a map on a crowded street in Manhattan, rather than on the side of a rural highway,¹³⁴ he might not have pulled over for a closer look.

In addition, research suggests that officers are aware of certain locales as crime “hotspots,” which may have an effect on how officers perceive various individuals and activities within these zones.¹³⁵ Being within the physical bounds of a particular “problem area” increases the chances that a person will be approached by an officer. Given that neighborhoods often have disproportionate ethnic makeups, the issue of why police stop and question more minorities than whites may be written off as one of simple racism within police forces. However, a more complex dynamic involving spatial cues and continuing racial segregation in housing may be playing an equal or greater role in producing the disparity in treatment.¹³⁶

¹³² As one British officer described, in respect to “[s]ecluded spots—couples go there but if, say, [I see] four youths [I’ll] have a chat and then check for the grounds.” QUINTON ET AL., *supra* note 130, at 19.

¹³³ *Id.* at 23. Other officers gave similar assessments. One explained that he keeps an eye out for “someone who doesn’t fit the categories of the area—people [who are] very young in a student area, not dressed like a student . . .” *Id.* According to another, “Because this is a predominately Afro-Caribbean area, white faces stand out. Particularly if you see a car full of young white lads, and you see them drive off. They are probably here to buy drugs.” *Id.* Hence, police officers may frequently rely on race, class, age, and gender characteristics *in conjunction* with spatial cues when deciding how to interpret an ambiguous action. Officers in a wealthy white neighborhood may pull two young black males in a rusted Chevy over for failing to signal, while they would not do so in a poor minority neighborhood, where the men would not seem “out of place.” *Id.*

¹³⁴ ROBINSON, *supra* note 7, at 103.

¹³⁵ QUINTON ET AL., *supra* note 130, at 33 (noting that officers tended to have a “familiarity with the types of crime that were commonly committed in the general area . . . [and] some officers were able to identify specific locations which had current crime problems ([e.g.,] streets with high incidence of car crime or burglary, pubs known for drug dealing or public order[, etc.] . . .”).

¹³⁶ Marian FitzGerald and Rae Sibbitt have offered a similar insight:

There are at least three reasons why young black people seem more likely than whites

When it comes to the actual exchange between an officer and an individual, the field of interaction—a housing project, a deserted warehouse, a bustling mall, a private residence—may largely determine how rigorously an officer pats down a suspect and how quickly an officer goes to his gun.¹³⁷ Had Robinson discovered Green in a dark alley, he might have been more careful in searching Green for weapons or more inclined to use force to effectuate the arrest.

Even where spatial cues do not play a large role in an initial interaction such as a *Terry* stop, geography may powerfully shape a police officer's subsequent treatment of an individual. It may matter, for example, that a person's driver's license reveals that he is from another county or state, or that he happens to live in a neighborhood known to have high crime. Indeed, as researchers have uncovered, a person's address "can become a constraining moral fact that affect[s] . . . how one [is] . . . treated by others in and about the criminal

to be 'available' for searching; and many police officers we spoke to gave these as 'commonsense' explanations for the higher rate at which black people are stopped, even if they lacked the hard evidence with which to justify their perceptions. One reason given was that black young people have much higher levels of unemployment than whites. They may, therefore, be on the streets during the daytime because they have nowhere else in particular to go and they may be out later at night because there is nothing to get up for in the mornings. Secondly, the numbers of young unemployed black men 'available' to be searched were also thought to be swollen by the disproportionate numbers of black pupils excluded from school. This is borne out by official statistics which showed in 1993–4 that black children were more frequently excluded from English secondary schools than any other group, with the rate for black Caribbeans six times that for whites. Thirdly the analysis of the 1994 British Crime Survey . . . shows that, compared to the Asian groups, black people generally are far more likely to go out on two or more evenings per week.

MARIAN FITZGERALD & RAE SIBBITT, HOME OFFICE, RESEARCH STUDY 173, ETHNIC MONITORING IN POLICE FORCES: A BEGINNING 59 (1997) (citations omitted), available at <http://www.homeoffice.gov.uk/rds/pdfs/hors173.pdf>. In addition, work by Vanessa Stone and Nick Pettigrew suggests that disproportionate police stops of blacks and Asians in the United Kingdom may also be related to the number of minorities who work in late-night jobs that force them to travel through deserted areas at unusual hours. See VANESSA STONE & NICK PETTIGREW, HOME OFFICE, POLICE RESEARCH SERIES PAPER 129, THE VIEWS OF THE PUBLIC ON STOPS AND SEARCHES 27 (2000), available at <http://www.homeoffice.gov.uk/rds/prgpdfs/prs129.pdf>.

¹³⁷ Douglas A. Smith has documented that neighborhood context can have a large impact on whether police choose to make an arrest and how they accomplish that end. See Douglas A. Smith, *The Neighborhood Context of Police Behavior*, in COMMUNITIES AND CRIME 313 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986) (noting that arrests and threats by officers are more likely in minority neighborhoods). At the same time, neighborhood context often works in combination with other cues to shape police behavior. As Janet L. Lauritsen and Robert J. Sampson point out, "[N]eighborhood characteristics such as racial composition and socioeconomic status [frequently] interact with suspect characteristics to predict arrest and use of coercive authority. . . . [And] the importance of a suspect's race for predicting police use of deadly force appears to vary across social context (e.g., neighborhoods, cities)." Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 58, 71.

justice system.”¹³⁸

2. Police Policy, Practice, and Procedure

As with decision-making by individual officers, spatial issues significantly influence precinct or jurisdictional practice. At the outset, it is physical space that determines who may make an arrest and conduct an investigation. In Green’s case, it would have been invalid for officers from neighboring Macon County to attempt to execute a search warrant for his residence in Adair County (where the burglary took place),¹³⁹ just as it would have been for officers from Illinois to enter Missouri to make the arrest and dust for fingerprints at the crime scene.¹⁴⁰ Had Green fled to Illinois after either his initial burglary or his subsequent escape, he could legally have been detained and returned to Missouri; however, had he fled to China, his presence in a foreign country with which the United States has no extradition agreement may have effectively prevented his return to Missouri.¹⁴¹

In addition, law enforcement strategies for both crime prevention and crime response are developed in geographically focused ways within a jurisdiction. The key approaches to crime prevention—situational crime prevention, community crime prevention, and criminality prevention—all require acute awareness of spatial characteristics and relationships to be successful.¹⁴² Furthermore, one of the most important developments in policing in recent years concerns

¹³⁸ Paul Rock, *Sociological Theories of Crime*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 51, 63 (citing Sean Damer, *Wine Alley: The Sociology of a Dreadful Enclosure*, 22 SOC. REV. 221, 221-48 (1974)).

¹³⁹ In Missouri, “search warrants [must] be executed within the territorial jurisdiction of the court out of which the warrant issued and within the territorial jurisdiction of the officer executing the warrant,” unless the search warrant is for a person or movable object. MO. ANN. STAT. § 542.286 (West 2006).

¹⁴⁰ *Cf. id.* § 541.090.

¹⁴¹ *Cf.* 18 U.S.C. § 3184 (2006) (outlining the conditions under which a fugitive from a foreign country may be extradited).

¹⁴² See Trevor Bennett, *Crime Prevention*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 369, 380-87. For instance, situational crime prevention, as summarized by Ronald V. Clarke, focuses on “opportunity-reducing measures that: (1) are directed at highly specific forms of crime, (2) involve the management, design or manipulation of the immediate environment in as systematic and permanent way as possible, (3) make crime more difficult and risky, or less rewarding and excusable as judged by a wide range of offenders.” RONALD V. CLARKE, *SITUATIONAL CRIME PREVENTION: SUCCESSFUL CASE STUDIES* 4 (2d ed. 1997). Examples include target hardening, controlling access, deflecting offenders, introducing entry/exit screening or formal surveillance, and removing targets or inducements. See Trevor Bennett, *Crime Prevention*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 369, 381. For any of these measures to work, law enforcement officers must understand exactly where different crimes are committed and the ways in which changes in physical spaces and the allocation of officer resources across space can lower crime rates.

the visualization of crime patterns over space: Computer technology now allows for the rapid production of maps that can be used not only to implement more efficient targeted policing practices at the precinct level, but also to monitor the effectiveness of different police policies.¹⁴³

The result of such strategies is that officers tend not to be placed evenly across the physical landscape; rather, they are focused in specific areas of high crime or in areas deemed to require special protection.¹⁴⁴ Policing is, thus, very different in a high crime neighborhood than it is in one known to have low crime.¹⁴⁵ And it is not just a matter of concentrating officers spatially, but also of giving them space-specific duties.¹⁴⁶

Even after a crime has been committed and the role of law enforcement shifts to collecting evidence, identifying the victim and perpetrator, tracking down interested parties, and arresting, processing,

¹⁴³ See Lawrence W. Sherman, *American Policing*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 429, 430-33, 435-36. Other space-focused technological developments have had a similarly crucial role in changing the face of policing: in the twentieth century, perhaps none more than the emergence of the radio-dispatched police car with its ability to offer far greater spatial coverage along with the potential for extremely targeted action. *See id.* at 440.

¹⁴⁴ For example, in early 2003, New York City launched the following program:

Operation Impact, an initiative aimed at reducing and preventing serious and violent crimes by deploying approximately 1,500 Police Officers each day to strategically targeted locations or impact zones that exhibited a greater propensity for crime during certain hours and days. These sites were selected based on analyses of crime trends identified through COMPSTAT. As part of the initiative, the NYPD tracked crimes, enforcement, and deployment on a daily basis, placing highly visible Field Command Posts throughout the impact zones, and conduct[ed] daily intelligence briefings to examine current crime trends and conditions.

Press Release, Michael R. Bloomberg, Mayor of New York, Mayor Michael R. Bloomberg Outlines Public Safety Accomplishments in 2003 (Dec. 15, 2003), *available at* www.nyc.gov/html/om/html/2003b/pr359-03.html.

¹⁴⁵ In their study of New York in the 1980s and 1990s, Jeffrey Fagan and his colleagues show that “neighborhoods with high rates of incarceration invite closer and more punitive police enforcement and parole surveillance.” Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1554 (2003); *see also* Jeffrey A. Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 207-10 (Bernard E. Harcourt ed., 2003) (suggesting that racially segregated neighborhoods with weak social control are the spaces where police drug enforcement is most rigorous); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461-63 (2000) (same).

¹⁴⁶ Hence, what works in one city is not necessarily likely to work in another. As Lawrence W. Sherman points out, after it was discovered that a high number of New York City murders involved drunken behavior and guns illegally brought into public locations, the police department implemented a rigorous crackdown on all crimes committed in areas deemed violence hot spots with a corresponding reduction in “both gun carrying and intoxication in those places”—and, more importantly, the homicide rate. Lawrence W. Sherman, *American Policing*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 429, 437. However, focusing on these particular localized crime facilitators “in London or Sydney . . . may have little effect, since few crimes in those cities are committed with guns.” *Id.*

and holding a suspect, spatial issues may significantly impact the officers' work.

Although the Supreme Court has retreated from the traditional understanding that the Fourth Amendment protects private property from governmental invasion and that without a physical penetration there can be no constitutional violation,¹⁴⁷ the discretion of individual law enforcement officers in conducting investigations continues to be constrained by rules that turn on spatial characteristics and relationships. Indeed, as investigated in other work now in progress, physical boundary protections are fundamental to the regime that regulates how officers interact with suspects—in terms of whether they can enter a person's body space, vehicle, or home, and how such searches are conducted.¹⁴⁸ For example, had the officers who initially arrested Green for burglary had an arrest warrant but no search warrant, they could have searched his person and the area within his immediate control, but they would have been unjustified in searching another room in his home or even in going through "the desk drawers or other closed or concealed areas in" the room in which he was arrested.¹⁴⁹ Of course, once Green was taken into custody, the protections of, and control over, his intimate physical spaces began to dissolve at the hands of the state. Searches of his body and living space that were once impermissible became permissible. Free movement across space that was once possible became impossible. In fact, it can be argued that the primary experience of engaging the U.S. criminal justice system is that of ceding control over physical boundary management to the state, and the primary role of the state within criminal law is to control or regulate boundaries.¹⁵⁰

Once the police are legally in a particular area—be it the victim's car or a suspect's apartment—conduct continues to be strongly

¹⁴⁷ As the Supreme Court summarized in *United States v. White*:

Until *Katz v. United States*, neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." . . . But where "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied" by the defendant, although falling short of a technical trespass under the local property law," the Fourth Amendment was violated and any evidence of what was seen and heard, as well as tangible objects seized, was considered the inadmissible fruit of an unlawful invasion.

United States v. White, 401 U.S. 745, 748 (1971) (citations omitted).

¹⁴⁸ See Adam Benforado, *Managing Space: The Regulation of Officers, Suspects, and Prisoners in the United States* (Oct. 19, 2009) (unpublished manuscript, on file with author) [hereinafter Benforado, *Managing Space*] (examining the extent to which Fourth Amendment law has been—and largely continues to be—based around guarding against *physical* intrusion into protected spaces).

¹⁴⁹ See *Chimel v. California*, 395 U.S. 752, 763 (1969).

¹⁵⁰ See Benforado, *Managing Space*, *supra* note 148 (tracing the boundary-altering process from initial contact with a police officer, through arrest, incarceration, and eventual release).

informed by issues of physical space. When it comes to reconstructing a crime scene, while officers also rely on witness accounts, it is physical space—in particular, noticeable changes to physical space—that is often the starting point for an investigation. A fingerprint, a fiber, blood splatter on a wall, a broken lock, a tire print, and a bullet hole are all alterations in the physical landscape that help answer the vital questions that move a case forward: Who was the victim?; Who committed the crime?; When was it committed?; How did it unfold?; and, Where was it committed?¹⁵¹ Intrusions into physical space may leave important clues. For instance, careful study of a bullet wound can reveal, among other things, how far away the shooter was, “the direction or angle of the shot,” “the type of firearm that caused the wound,” “the type of ammunition used,” and even “the number and sequence of shots.”¹⁵² Similarly, physical evidence of rape may be vital to identifying the assailant, documenting force (or lack of consent), and establishing the time of attack.¹⁵³ In addition, the physical context of a crime scene may itself help to piece together events. For example, a body found in a desert will decompose at a different rate than one found in a forest,¹⁵⁴ and the presence in the body of certain insects not native to the proximate habitat may reveal that the victim was left in another location for a period of time and later moved.¹⁵⁵

Furthermore, the investigation itself is often conducted in space-specific ways as a result of official or unofficial policies. The accumulation of data on criminal behavior over time reveals certain

¹⁵¹ As Mark Cooney argues:

Evidence is the currency in which legal cases are transacted. The amount and quality of evidence helps to determine whether crimes will be cleared, prosecutions brought, the gravity of the charges levied, the decision to plead or go to trial, the likelihood of a conviction, and the length of any sentence imposed.

Mark Cooney, *Evidence as Partisanship*, 28 L. & SOC'Y REV. 833, 851 (1994).

¹⁵² Edward J. Imwinkelried, *Forensic Science: Opinions by Forensic Pathologists as to the Cause of Death*, 39 CRIM. LAW BULL. 87, 97-99 (2003). Imwinkelried also describes how a forensic pathologist may be able to determine, based on a wound, whether a knife had one or two sharp edges, the length and width of the blade, whether the victim was attempting to defend himself, and the direction of the stab. *Id.* at 92-93.

¹⁵³ See Lorraine E. Ferris & Jane Sandercock, *The Sensitivity of Forensic Tests for Rape*, 17 MED. & L. 333, 336-43 (1998).

¹⁵⁴ For an overview of how examiners can determine the time of death from studying a body and the physical space in which it is found, see JESSICA SNYDER SACHS, *CORPSE: NATURE, FORENSICS, AND THE STRUGGLE TO PINPOINT TIME OF DEATH* (2001) (explaining the use of various post-mortem markers like beetles and grubs, pollen grains, and soil composition).

¹⁵⁵ As Jon M. Sands explains:

Besides timing, insects can help pinpoint areas. Insects occupy ecological niches; certain insects prefer warmer climates, others cooler. Certain flies are city flies; others are country or forest flies. If the maggots of one are found where they should not be (a body found in the woods, for example, with insects of an urban nature), this has to be accounted for.

Jon M. Sands, Book Review, 48 FED. LAW. 80, 81 (2001) (reviewing M. LEE GOFF, *A FLY FOR THE PROSECUTION: HOW INSECT EVIDENCE HELPS SOLVE CRIMES* (2000)).

spatial patterns as to the probable locations of evidence, witnesses, and even perpetrators.¹⁵⁶ After an escape like Green's, officers may focus their attention on particular places, like the homes of friends and family, bus and train stations, or interstate highways. When looking for a missing person, the police may concentrate on secluded wooded areas near where the victim was last seen, or dumps or local cemeteries where a body might be inconspicuously buried. Knowing the particular kinds of places where evidence and "people of interest" tend to be found can greatly increase the ability of the police to close cases.

The post-crime response story, however, is not only about where police investigate the crime, but also about how their ability—and eagerness—to solve a crime is shaped by the location in which the crime was committed. Nationally, clearance rates for rape, robbery, homicide, aggravated assault, burglary, larceny, arson, and motor vehicle theft stand at around only twenty percent.¹⁵⁷ Yet there is significant variation across physical space: Murders are solved at significantly higher rates in small cities and rural areas than in suburban and urban districts.¹⁵⁸ Although there has been very little research on how clearance rates are affected by the "social characteristics of the location where they occur," Marian J. Borg and Karen F. Parker's work on homicides showed that "clearance rates were highest in cities marked by greater racial disparities in education, income, employment, and residence; greater residential stability; higher levels of educational attainment; higher expenditures for educational programs; and lower rates of homicide."¹⁵⁹

The origins of this variation appear to lie both in the way police allocate limited resources across space and in how populations in different areas view and interact with investigating officers.¹⁶⁰ With respect to the former, as Gary D. LaFree articulates, the "generation [of evidence] requires human labor and interpretation, and usually, economic resources. . . . [O]fficials create more or less of it depending on their conceptions of cases. Cases that they are less interested in winning, for whatever reasons, generally receive less work and thus

¹⁵⁶ For example, as James Alan Fox and Jack Levin assert, "Since serial killers typically operate in 'comfort zones,' areas close to home or work with which they are familiar, spatial analysis of crime scene locations and dump sites can potentially uncover possible home bases for the perpetrator." James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 CRIME & JUST. 407, 429 (1998).

¹⁵⁷ FBI, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1996, at 205-06 (1997), available at <http://www.fbi.gov/ucr/96cius.htm>.

¹⁵⁸ *Id.* at 22 (noting that in small cities and rural areas, seventy-nine percent of homicide cases were cleared in 1996, whereas in America's biggest cities and in suburban areas only about sixty-six percent of cases were cleared).

¹⁵⁹ Marian J. Borg & Karen F. Parker, *Mobilizing Law in Urban Areas: The Social Structure of Homicide Clearance Rates*, 35 L. & SOC'Y REV. 435, 461 (2001).

¹⁶⁰ *See id.* at 439-40.

generate less evidence.”¹⁶¹ And, as it turns out, the cases that officials are less intent on successfully resolving may have a lot to do with where they take place. In his study of Canadian police detectives, Richard V. Ericson described a particular episode that shows how important physical space can be to investigators’ decision-making.¹⁶² Following up on an incident, officers went to visit a victim who had been seriously injured in a fight at a party.¹⁶³ However, despite the brutality of the crime, they only spent a few minutes on the case and never contacted the suspect or the known witnesses.¹⁶⁴ The reason appears to be that they took powerful cues from the physical space of the victim’s apartment to decide that it was not worth pursuing. As one officer described after the visit: “Did you see the way he lives? He’s probably glad he got hurt so that he had an excuse not to be working.”¹⁶⁵

This type of thinking may also be present when officers consider the neighborhood in which a crime occurred. Since homicides in which the victim is white¹⁶⁶ or of high status tend to involve a significantly stronger response from the police in terms of evidence collection, forensic tests, interviews, and interrogations,¹⁶⁷ it is reasonable to hypothesize that serious crimes that occur in affluent, primarily-white neighborhoods are likely to be investigated more vigorously than those that occur in depressed minority districts. Research on the comparatively lackluster investigative responses to homicides on American Indian reservations, in slums, and in poor rural areas supports this premise.¹⁶⁸ In addition, officers who patrol high-crime neighborhoods may simply not have as much time and energy to devote to each individual case as do officers in low-crime neighborhoods.¹⁶⁹

As suggested above, the extent to which populations of different neighborhoods cooperate with police investigations may also influence the disparate rates of crime clearance in different areas. As Borg and Parker summarize, “[D]escriptive studies suggest that members of lower-status groups view the police, and the criminal justice system in

¹⁶¹ GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 106 (1989).

¹⁶² RICHARD V. ERICSON, MAKING CRIME: A STUDY OF DETECTIVE WORK 106-07 (1981).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (internal quotation marks omitted).

¹⁶⁶ See Borg & Parker, *supra* note 159, at 454-55.

¹⁶⁷ See Cooney, *supra* note 151, at 834-41 (“As the victim’s social status declines, the probability that . . . [serious] investigatory measures will be undertaken decreases. Thus, in cases where the victims are of decidedly low status, even the most obvious investigative leads may not be pursued, regardless of the legal seriousness of the incident.”).

¹⁶⁸ See Cooney, *supra* note 151, at 840 (reviewing a number of studies).

¹⁶⁹ See, e.g., Raymond J. Michalowski & Michael A. Pearson, *Punishment and Social Structure at the State Level: A Cross-Sectional Comparison of 1970 and 1980*, 27 J. RES. CRIME & DELINQ. 52 (1990) (suggesting that the likelihood of arrests being made and crimes being cleared is largely a function of resource saturation).

general, with significant distrust and are often reluctant to become involved in official investigations.”¹⁷⁰ Consequently, when individuals are murdered in socially and economically impoverished neighborhoods, there is often little evidence that accrues.¹⁷¹ The same dynamic appears to be at work in prisons.¹⁷² If Green had sought to get the men who raped him prosecuted, it seems likely that he would have been told that there was insufficient evidence to proceed.

Whatever the cause, investigations are conducted differently in different neighborhoods, and the consequence is that a criminal may be far more likely to get caught when committing a crime in one physical space rather than another.¹⁷³

E. *Prosecution and the Law*

In general, criminal laws operate based on geographical space. With some exceptions, the accused must be, or must have been, in certain places at critical times in order to be prosecuted. As Kal Raustiala has traced, traditionally there has been an understanding that “[t]he scope and reach of the law is connected to territory, and, therefore, spatial location determines the operative legal regime. More plainly, where you sit determines what rules you sit under.”¹⁷⁴

¹⁷⁰ Borg & Parker, *supra* note 159, at 440.

¹⁷¹ See Cooney, *supra* note 151, at 844 (citing DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 147 (1991)).

¹⁷² See *id.* (citing Bruce Porter, *California Prison Gangs: The Price of Control*, 6 CORRECTIONS MAG. 6, 16 (1982); SANYIKA SHAKUR, *MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER* (1993)).

¹⁷³ A number of studies have shown that a spatial law enforcement focus increases the chances that individuals engaging in illegal activity within the physical space of the neighborhood will be caught and imprisoned. See, e.g., Fagan et al., *supra* note 85, at 74 (showing that geographically focused police surveillance can result in a “growing number of repeat admissions and the resilience of incarceration rates even as crime rates fall”); BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 88-89 (2001) (documenting that police often use high arrest rates in a neighborhood to justify increased policing under a theory that the arrest rates reflect higher levels of crime).

¹⁷⁴ Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2506 (2005) (referring to the concept that “[t]he physical location of an individual determines the legal rules applicable and the legal rights that individual possesses” as “legal spatiality”); see also David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1368 (1996) (“Territorial borders, generally speaking, delineate areas within which different sets of legal rules apply. There has until now been a general correspondence between borders drawn in physical space . . . and borders in ‘law space.’”). “This understanding of sovereignty and territoriality provided the basis not only for nineteenth-century international relations, but also for relations among the constituent states of the United States.” Raustiala, *supra*, at 2509. During the last century, Raustiala emphasizes, there has been “a progressive relaxing of legal spatiality.” *Id.* at 2504.

1. Issues of Jurisdiction

Without Green's physical presence within the space of the courtroom, the trial itself could not have proceeded.¹⁷⁵ There were no similar requirements—outside basic competency to stand trial—that Green be mentally attentive to the proceedings or that he feel a certain way when, for instance, the district attorney questioned witnesses; the key was that Green's physical body simply be within the physical bounds of the court.

Similarly, the state of Missouri had jurisdiction over the offenses that Green committed because the conduct occurred within the physical space of the state—"the land and water and the air space above the land and water."¹⁷⁶ Green was initially tried in the Circuit Court of Adair County because the burglary took place within the geographical limits of that political subdivision.¹⁷⁷ If Green had burglarized a home in Randolph County, Illinois, it would not have mattered that he was born in Missouri, voted in state elections in Missouri, had a wife and kids in Missouri, considered himself a Missourian, or preferred to be prosecuted in Missouri—Missouri would not have had jurisdiction and the Missouri law on burglary would not have been implicated.¹⁷⁸

¹⁷⁵ See MO. ANN. STAT. § 546.030 (West 2006) ("No person indicted for a felony can be tried unless he be personally present, during the trial . . .").

¹⁷⁶ With respect to Missouri criminal cases, the state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which such person is legally accountable if:

- (1) Conduct constituting any element of the offense or a result of such conduct occurs within this state; or
- (2) The conduct outside this state constitutes an attempt or conspiracy to commit an offense within this state and an act in furtherance of the attempt or conspiracy occurs within this state; or
- (3) The conduct within this state constitutes an attempt, solicitation, conspiracy or facilitation to commit or establishes criminal accountability for the commission of an offense in another jurisdiction that is also an offense under the law of this state; or
- (4) The offense consists of an omission to perform a duty imposed by the law of this state regardless of the location of the defendant at the time of the offense; and
- (5) The offense is a violation of a statute of this state that prohibits conduct outside the state.

Id. § 541.191.

¹⁷⁷ The relevant Missouri statute states:

Persons accused of committing offenses against the laws of this state, except as may be otherwise provided by law, shall be prosecuted:

- (1) In the county in which the offense is committed; or
- (2) If the offense is committed partly in one county and partly in another, or if the elements of the crime occur in more than one county, then in any of the counties where any element of the offense occurred.

Id. § 541.033.

¹⁷⁸ However, if Green had stolen goods in Illinois and driven them into the geographical confines of Missouri, that physical incursion would have triggered Missouri law. See *id.* § 541.040 ("Every person who shall steal, or obtain by robbery, the property of another from any

At the same time, the *external* borders of the state are not the only concern with respect to jurisdiction: Despite being within the *greater* boundaries of the state of Missouri, had Green escaped from a Missouri federal prison, the state would have lacked the jurisdiction to try him since he would have committed the crimes within a federally owned and exclusively controlled territory.¹⁷⁹ In addition, the choice of federal court in such a case would largely be driven by spatial concerns. According to the Sixth Amendment, “In all criminal prosecutions, the accused shall enjoy the right [to be tried] . . . by an impartial jury of the State and district wherein the crime shall have been committed,” and under the Federal Rules of Criminal Procedure (Rule 18):

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.¹⁸⁰

Even at the international level, issues of jurisdiction are still very much tied to ideas of sovereignty over set geographic regions, and claims of jurisdiction tend to be viewed more skeptically by the international community when they do not involve acts committed within the territory of the state.¹⁸¹

other state or country, and shall bring the same into this state, may be convicted and punished for stealing or robbery in the same manner as if the property had been feloniously stolen or taken in this state . . .”).

¹⁷⁹ Where, as in the space of a federal prison, the United States has acquired exclusive legislative jurisdiction over an area, a state may not prosecute crimes within such territory. *See, e.g., Bowen v. Johnston*, 306 U.S. 19, 29-30 (1939) (finding that the United States had been vested with exclusive jurisdiction over national park lands within the exterior limits of the state of Georgia and that criminal violations on such lands were enforceable only by the federal government). Had he chosen to burglarize a building at Wilson’s Creek National Battlefield, southwest of Springfield, Missouri, the issue would have been more complicated as Missouri and the United States enjoy concurrent jurisdiction over criminal acts committed in that park. MO. ANN. STAT. § 12.027 (West 2005).

¹⁸⁰ U.S. CONST. amend. VI; FED. R. CRIM. P. 18. As the Supreme Court articulated in *United States v. Anderson*, involving the prosecution of a man for refusal to submit to induction into the military:

The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board’s location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction.

United States v. Anderson, 328 U.S. 699, 704-05 (1946) (citations omitted).

¹⁸¹ Raustiala, for example, argues that “while Westphalian territorial sovereignty remains an important ideal, [increasingly,] geographic borders in fact coincide quite imperfectly with the reach of national laws.” Raustiala, *supra* note 174, at 2511-12 (pointing to, among other things, regulatory statutes that assert prescriptive jurisdiction of the state beyond its territorial limits and “Status of Forces Agreements” relating to military deployments). Raustiala is certainly correct to note a shift away from “legal spatiality,” but the advances are often not as profound as might

Additionally, the precedential impact of a court's determination is, in large part, determined by space. A ruling by the Supreme Court of Missouri that there is no "lesser evils" defense to the crime of escape has no binding effect on a court in neighboring Illinois. The result of having the law embedded spatially is that an actor can commit the same act against the same victim in the same manner, yet face drastically different consequences based solely upon where he happens to be standing at the critical time.¹⁸²

This important dynamic is relevant not only as one moves between countries, states, or local jurisdictions, but also as one moves *within* the space of individual municipal units. For example, as of 2000, every

appear on first glance. For instance, states sometimes claim jurisdiction in cases that involve foreign citizens who commit acts in foreign territories; however, the acts themselves usually involve issues like spying that have a direct effect on individuals who live within the physical space of the state. More controversial is where a state claims criminal jurisdiction "based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction." PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001) [hereinafter THE PRINCETON PRINCIPLES]. For many scholars and commentators, universal jurisdiction—even for crimes like genocide, crimes against humanity, war crimes, piracy, slavery, and torture—remains highly suspect. *See, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF., July-Aug. 2001, at 86, 94.

It should be noted that, in the case of universal jurisdiction, space issues do not disappear but are merely recast: That is, the crimes are so atrocious that concern shifts from establishing a clear connection in each case between the criminal act and a particular state territory to making sure that an individual cannot evade punishment by avoiding certain physical spaces. *See* Mary Robinson, *Forward to THE PRINCETON PRINCIPLES, supra*, at 15-18 ("[Because t]he sad reality is that territorial states often fail to investigate and prosecute serious human rights abuses . . . [t]he application of universal jurisdiction is . . . a crucial means of justice."). Moreover, there is general agreement that in order for a judicial body of a state to exercise universal jurisdiction the accused must be physically "present before such judicial body." THE PRINCETON PRINCIPLES, *supra*, at 28.

¹⁸² This, of course, has important consequences for the issue—discussed earlier—of whether an individual decides to commit a crime or not. *See supra* text accompanying notes 55-78. The fact that the laws carry a stiffer penalty in one area may prove important in the calculus. For example, Turkey, Thailand, Malaysia, Singapore, Indonesia, Iran, and Algeria all provide for the death penalty for drug crimes, which may make trafficking within—or across—the borders of these countries a less attractive option than trafficking within a country like the United Kingdom, where there are more liberal drug laws. *See* Drug Laws Abroad, TheSite.org, <http://www.thesite.org/travelandfreetime/travel/beingthere/druglawsabroad> (last visited Jan. 20, 2010) (citing information provided by the U.K. Foreign & Commonwealth Office). Of course, stricter drug laws within a territory may also mean that those traffickers willing to take a serious risk can earn a significantly higher return, which may have the unintended effect of making a stricter jurisdiction more appealing to certain criminals.

On the more local level, it is an open question whether criminal decision-making is significantly influenced by differences in laws across space (or even whether potential criminals are aware of the actual spatial coverage of things like drug free school zones). *See* JUDITH GREENE ET AL., JUSTICE POLICY INST., DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY—AND FAIL TO PROTECT YOUTH 30-31 (2006), available at http://www.justicepolicy.org/images/upload/06-03_REP_DisparitybyDesign_DP-JJ-RD.pdf (discussing evidence from New Jersey that drug sellers were not aware of zoned areas and did not tailor their behavior to avoid them).

state in the United States had passed laws that created either enhanced penalties or new distinct crimes for drug offenses committed within protected school zones and other public spaces like parks, playgrounds, and housing projects.¹⁸³ Since such “sacred” spaces¹⁸⁴ are not distributed evenly across a given jurisdiction—and may, in some cases, be heavily concentrated and overlapping—the effect of “micro space protections” may be to create macro spaces with significantly different legal rules. For instance, drug-free school zone legislation in New Jersey resulted in over half of Newark, Jersey City, and Camden falling within the zones, while rural Mansfield Township had only six percent of its area covered.¹⁸⁵

Thus, a big part of the disparate treatment that individuals experience in the criminal justice system has to do with the fact that different laws are triggered based on the physical space in which the crime takes place. Yet it is also a matter of how very similar laws may be applied differently based on spatial relationships. As Candace McCoy suggests, “Prosecutors in different—sometimes adjacent—jurisdictions often decide to implement very different policies about legal factors that . . . make a difference in decisions about how vigorously to prosecute.”¹⁸⁶ In our decentralized system, prosecutors have great freedom to decide whom to go after and how vigorously to pursue a case, and in using their discretion, they frequently rely on factors that may themselves be strongly shaped by particular geographic settings: community sentiment, personal values, and their own experience and training.¹⁸⁷ The consequence of these structures and dynamics is “widely divergent disposition patterns . . . [in which] a defendant in one county may be prosecuted and convicted of a particular crime while another factually identical defendant in the next county will be convicted of a lesser crime or even diverted from prosecution altogether.”¹⁸⁸

¹⁸³ See GREENE ET AL., *supra* note 182, at 3, 5 (“[While t]he typical statute establishes a 1,000-foot zone . . . the size of the zone can vary from 300 feet to three miles depending [on] the state.”). The differences in conviction rates and lengths of sentence are stark in respect to those charged with committing drug crimes within school zones and those charged with committing them outside such zones. See *id.* at 18 (“[D]rug-free zone defendants are not only more likely to be incarcerated than their counterparts, but also to receive twice as much jail time.”).

¹⁸⁴ The type and number of “special” places varies between jurisdictions. In many states, only primary and secondary schools may be protected, whereas in “Arkansas[,] lawmakers have cast a wide net that includes public parks, public housing, day care centers, colleges and universities, recreation centers, skating rinks, Boys’ and Girls’ clubs, substance abuse treatment facilities, and churches. In Utah, coverage is [even] extended . . . [to] parking lots and shopping malls.” *Id.* at 7.

¹⁸⁵ *Id.* at 26.

¹⁸⁶ Candace McCoy, *Prosecution*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 457, 465.

¹⁸⁷ *Id.* at 463.

¹⁸⁸ *Id.* at 465 (“[I]n order to remedy this situation it would be necessary to place all locally

2. Criminal Definitions

On a more fundamental level, what constitutes a crime may largely be a matter of whether a physical boundary has been transgressed. Green committed the crime of burglary by making an unlawful entry into a protected space—an inhabited structure—and having an intent to perpetrate a criminal act within that space.¹⁸⁹ Under Missouri law, the offense turns very much on the crossing of a physical threshold—in fact, the entry of any part of the burglar’s body, however slight, into the physical premises is enough to satisfy the “entry” requirement.¹⁹⁰ Moreover, as the *Green* case demonstrates, the physical space itself can provide the necessary intent to commit a crime: “When burglary with intent to steal is charged, it is not necessary that an act of stealing be completed after the habitable building . . . has been unlawfully entered . . . [U]nlawful entry into a building containing items of value is sufficient to demonstrate an intent to steal.”¹⁹¹ As with his initial criminal action, entry into a protected physical space was central to Green committing “escape.” Under Missouri law, Green triggered the state statute by crossing outside the boundary of the prison where he was lawfully incarcerated.¹⁹²

Although it may seem obvious that burglary and escape would be

elected prosecutors under central authority—and even then, geographic unanimity would not be assured, if the federal experience is any indication.”).

¹⁸⁹ See MO. REV. STAT. § 560.040 (1959). The current version of the statute reads:

1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

- (1) Is armed with explosives or a deadly weapon or;
- (2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or
- (3) There is present in the structure another person who is not a participant in the crime.

MO. ANN. STAT. § 569.160 (West 2006).

¹⁹⁰ See *State v. Sincup*, 674 S.W.2d 689 (Mo. Ct. App. 1984); *State v. Johnson*, 587 S.W.2d 636, 637-38 (Mo. Ct. App. 1979).

¹⁹¹ *State v. Harris*, 744 S.W.2d 505, 508 (Mo. Ct. App. 1988).

¹⁹² See MO. REV. STAT. § 557.351 (1969) (current version at MO. ANN. STAT. § 575.210 (West 2006) (“Any person sentenced to the state department of corrections upon conviction of escaping or attempting to escape from any state institution in which he was lawfully confined, or from the lawful custody of any person while being transported, shall be sentenced to the department of corrections generally for a term of not less than two and not exceeding five years.”)). Although Green triggered the first clause of the statute by escaping from a state institution rather than by escaping from custody, it is revealing that the term “custody” is spatially defined as well: “‘Custody’ includes one person’s exercise of control over another to confine the other person within certain physical limits.” *State v. Jackson*, 645 S.W.2d 725, 727 (Mo. Ct. App. 1982) (citing *State v. Hahn*, 625 S.W.2d 703, 705 (Mo. Ct. App. 1981)).

defined around physical-space transgressions, they need not have been: There are many other things that the law might seek to protect and countless different triggers that it might utilize to secure those societal goods. The crime of “escape,” for example, could have been delineated as something that had nothing to do with physically leaving the prison. Indeed, it might have been defined as “day dreaming” or “exhibiting signs of contentment or detachment while imprisoned.” After all, for specific deterrence, or even retributive purposes, it might make sense that a prisoner should be constantly aware of the fact that he is in prison because of his bad actions. Counterintuitive as it may seem, a *choice* was made to protect physical space and to use a physical boundary breach as an element of the crime.

a. The Model Penal Code¹⁹³

Expanding the focus of inquiry beyond the *Green* case, many of the crimes outlined in the Model Penal Code have triggers based upon breaches of physical space—particularly, the body and home boundaries—and many are graded in respect to seriousness based on the extent of the physical incursion. In general, crimes are not constructed around harms that do not involve an actual physical penetration of a protected space or the threat of such a penetration.¹⁹⁴ Thus, under the Model Penal Code, it is not a crime to make someone feel depressed or anxious.¹⁹⁵ It is also not criminal to make someone hate—even if the

¹⁹³ Because the Model Penal Code was drafted in the 1950s, its provisions may unduly reflect a particular time in our nation’s history and may offer a somewhat distorted vision of the current—or general—historical importance of space in the criminal law. Indeed, parts of the Code, particularly those dealing with sexual and drug crimes, are significantly dated. PAUL H. ROBINSON & MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 7 (1999), available at <http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>. However, as Paul H. Robinson and Markus Dirk Dubber have suggested, it “is the closest thing to being an American criminal code” that we have and is useful in getting a sense of the spatial dynamics at work in criminal definitions. *Id.* at 1, 6 (noting that it has had an important influence on many state codes and has appeared in countless court opinions “as persuasive authority for the interpretation of an existing statute or in the exercise of a court’s occasional power to formulate a criminal law doctrine”); see also John Darley et al., *Psychological Jurisprudence*, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 35, 47 (James R. P. Ogloff ed., 2002) (explaining the choice to focus on the Model Penal Code).

¹⁹⁴ Indeed, the idea of a crime as being tied to the crossing or passing over of a boundary is suggested in the early common law, where “[a]ny kind of wrong, from murder to a slap on the face to diverting water onto someone’s land, was a trespass.” David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 68 (1996) (noting that according to “[t]he mid-thirteenth century treatise known as Bracton . . . every felony is a trespass, but not every trespass is a felony”).

¹⁹⁵ Making someone feel hopeless about his situation may be very costly and harmful, but it is usually not a crime, even where the ultimate result is a body boundary breach—that is, a self-inflicted injury or suicide. Under the Model Penal Code, “A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force,

result has very damaging effects—as long as that hate does not involve an incitement to prohibited violence.¹⁹⁶ Nor is it, in most cases, a crime to manipulate people to get them to do what you want—whether it is buying your product or agreeing to go on a date—as long as you do not transgress a protected physical space in a salient way.¹⁹⁷ Thus, you may advertise to young children through commercial television for sugared cereal that comes with a free toy, but you may not send henchmen to enter the home, kidnap the parents and child, take them to the supermarket, and force them under threat of bodily harm to buy Cocoa Puffs. That is, despite the fact that the practical effect may be the same, the parents purchase the cereal against their *ex ante* professed preference.¹⁹⁸

One of the things that the Model Penal Code does protect is the physical space of the body from harmful transgression. Indeed, a number of crimes are defined in terms of inflicting “bodily injury.”¹⁹⁹ Murder, manslaughter, aiding suicide, assault, recklessly endangering another person, rape, and robbery among other crimes all have definitions that turn on whether the perpetrator breaches or threatens to

duress or deception.” MODEL PENAL CODE § 210.5(1) (1962). It *is* a crime, in certain circumstances, to make someone feel fear. Thus, “[a] person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.” *Id.* § 211.3. However, part of the motivation behind this particular definition seems to be about avoiding the *physical* consequences of the threat—that is, the expulsion of members of the public from a particular area and the temporary construction by the criminal of an impermeable boundary around that space. Moreover, the “terror” that the definition seeks to eliminate may not be “terror as experienced” but “terror as leading to physical harms” (i.e., the type of terror that leads to trampling deaths in a movie theater when someone shouts “fire”).

¹⁹⁶ See *id.* § 2.06 (outlining the conditions necessary for liability for the conduct of another). Hence, under the Code, as long as it did not prompt a directly linked criminal action, it would not be a crime to make a child hate black people or gays or Jews, despite the great social harm of such tutelage.

¹⁹⁷ Two important exceptions would be that it is a crime to blackmail someone and it is a crime to fraudulently induce someone to take an action. See, e.g., *id.* § 212.5 (defining criminal coercion). In addition, it is also a crime if, “with the kind of culpability that is sufficient for the commission of” an offense, an individual “causes an innocent or irresponsible person to engage in” prohibited conduct (e.g., giving a five-year-old child a loaded gun and telling them to shoot someone). *Id.* § 2.06(2)(a). These exceptions are clear demonstrations that protecting against physical boundary breaches is not the law’s *sole* concern. Indeed, the point to emphasize is that we are far more likely to criminalize actions that involve a physical transgression than we are to criminalize actions that do not, even where the ultimate outcome (harm) is the same.

¹⁹⁸ For a discussion of the power of children over the food purchases of their parents, see Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 23, at 1705-07. Even where the result of such manipulation is a physical harm (say, developing diabetes as a result of eating too much sugared food), we do not tend to criminalize the manipulation, in large part, this Article would suggest, because the manipulation does not involve a clear physical breach into a protected space (e.g., force-feeding by a corporate actor).

¹⁹⁹ See, e.g., MODEL PENAL CODE § 211.1 (1962) (assault); *id.* § 212.1 (kidnapping); *id.* § 213.1 (rape).

breach the border of the body.²⁰⁰ The Code treats the body space as so sacred that even if the victim of a serious physical breach of the body wishes for and consents to the transgression, the breach will still be a crime.²⁰¹ Furthermore, the magnitude of the incursion into the protected space—primarily, in terms of duration and spatial extent—largely determines the gravity of the offense.²⁰² And these same variables of physical transgression also impact the seriousness of other crimes, particularly as they are reflected in the definitions of various aggravating circumstances.²⁰³ The Code affords special protections from physical incursions to “occupied structures,” and these protections do not appear to be directly attached to the threat posed to the physical

²⁰⁰ For example, under the Code, “A person is guilty of robbery . . . [both] if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury . . .” *Id.* § 222.1(1). Although the argument can be made that the subsections of certain definitions prohibiting the “threat” of serious bodily injury are, in fact, best understood as prohibitions on causing another to be fearful, it seems more likely that they are designed to reduce the incidence of *actual* physical transgressions of the body. Thus, the criminal who makes a threat and has the opportunity to carry out that threat and the criminal who is caught before actually acting can both be successfully prosecuted, arguably multiplying the deterrence potential of the law and reducing the actual number of physical transgressions.

²⁰¹ *See id.* § 2.11(2)(a).

²⁰² In the Code, “[b]odily injury” is defined as “physical pain, illness or any impairment of physical condition,” while “serious bodily injury” is defined as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” *Id.* § 210.0(2)-(3). Considering the latter definition, killing someone may be thought of as the most extensive invasion of the body space because it results in the transgression of the entire physical system, even where it is accomplished through means that are not particularly visibly salient—as with poison. Likewise, “permanent disfigurement” and “protracted loss or impairment of the function of any bodily member or organ” may best be understood as ongoing breaches of the physical space of the body. The fact that a breach continues for an extended amount of time or penetrates significantly enough to cause not just an “impairment of physical condition” but an “impairment of the function” of the body appears to be why crimes resulting in *serious bodily injury*, like aggravated assault, are usually treated more harshly than crimes that involve only *bodily injury*, like simple assault. *Compare id.* § 211.1(1), with *id.* § 211.1(2).

²⁰³ Many of the aggravating circumstances for murder involve situations in which the body breach of the victim is especially serious or where it involves other breaches of sacred spaces. Thus, mutilating a victim’s body (increasing the spatial extent of the breach) or killing the victim slowly (increasing the temporal length of the breach) would likely qualify as aggravating circumstances, as would killing someone while escaping from lawful confinement (breaching a state imposed boundary), killing or endangering the lives of others (multiple body space breaches), killing while committing another physical boundary transgression like rape, burglary, or kidnapping, and killing following a previous murder conviction or while imprisoned. *See* MODEL PENAL CODE § 210.6(3) (1985).

With respect to the *Green* case, in Missouri, the crime of escape is treated as graver if an individual threatens or actually injures the physical body of another individual in accomplishing the escape, *see* MO. ANN. STAT. § 575.210 (West 2006) (“Escape or attempted escape from confinement . . . [is a] class A felony if it is effected or attempted by means of a deadly weapon or dangerous instrument . . .”), and a defense to the crime is not available if an individual fails to surrender himself to the authorities as soon as he is the minimum safe distance from the perceived danger that led him to escape, *see* *State v. Kirkland*, 684 S.W.2d 402, 405-06 (Mo. Ct. App. 1984).

bodies inside.²⁰⁴ Moreover, presumptions as to guilt may change based on whether an event takes place within a sacred space or without. Thus, “[i]f a person possesses a firearm or other weapon on or about his person, in a vehicle occupied by him, or otherwise readily available for use, it is presumed that he had the purpose to employ it criminally”; however, if “the weapon is possessed in the actor’s home or place of business” there is no such presumption.²⁰⁵

At the same time, the law does not acknowledge all boundaries relating to occupied structures. In certain cases, the components of a crime are not met unless a border has been “policed”—that is, marked and guarded as inviolable.²⁰⁶ Consequently, under the Code, a person is not “guilty of burglary if . . . the premises are at the time open to the public or the actor is licensed or privileged to enter. [And i]t is an affirmative defense to prosecution for burglary that the building or structure was abandoned.”²⁰⁷ Even where an incursion into a space amounts to a violation regardless of whether or not the border is policed, crossing such a boundary when it is policed is likely to increase the severity of the penalty.²⁰⁸

While this brief overview of the Model Penal Code is useful in capturing some of the ways in which physical space protection and boundary triggers are written into criminal definitions, to capture some of the more subtle nuances, it is worth considering, in slightly more depth, the crime at the center of the *Green* case: rape.

²⁰⁴ According to the Code, “‘Occupied structure’ means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.” MODEL PENAL CODE § 220.1(4) (1962). Arson is defined as “start[ing] a fire or caus[ing] an explosion with the purpose of: (a) destroying a building or occupied structure of another; or (b) destroying or damaging any property, whether his own or another’s, to collect insurance for such loss.” *Id.* § 220.1(1).

²⁰⁵ MODEL PENAL CODE § 5.06(2)(a) (1985).

²⁰⁶ The Code’s definition of trespass provides a good example:

A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by: (a) actual communication to the actor; or (b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or (c) fencing or other enclosure manifestly designed to exclude intruders.

Id. § 221.2(2).

²⁰⁷ *Id.* § 221.1. Similarly,

It is an affirmative defense to prosecution . . . [for trespass] that: (a) a building or occupied structure involved in an offense . . . was abandoned; or (b) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or (c) the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain.”

Id. § 221.2(3).

²⁰⁸ “An offense under this Subsection [relating to trespass] constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation.” *Id.* § 221.2(2).

b. Rape

As Catherine MacKinnon has suggested, “[T]he crime of rape centers on penetration”²⁰⁹—that is, rape turns on the physical breach of the border of the body.²¹⁰ Even states like Michigan, which enacted the first “rape reform” statute in 1975, have continued to adhere to triggers based on penetration of the physical body boundary, even as they have “redefined intercourse to include not only oral and anal penetration but also ‘any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.’”²¹¹

In addition, sexual assaults have traditionally been classified along a continuum of seriousness, largely based on the significance of the boundary breach. As Richard Posner and Katherine Silbaugh summarize, traditionally, “sexual assaults that did not involve intercourse were treated under the assault and battery provisions of the criminal law rather than as a separate offense of sexual battery,” and although these non-penetration offenses are “now usually treated in the same code section as rape . . . in most cases [they involve] . . . less severe punishment.”²¹²

Moreover, in order to convict a person of rape, there traditionally

²⁰⁹ Catharine A. MacKinnon, *Rape: On Coercion and Consent*, in TOWARD A FEMINIST THEORY OF THE STATE (1989), reprinted in SEX, MORALITY, AND THE LAW 419, 420 (Lori Gruen & George E. Panichas eds., 1997).

²¹⁰ Although the emphasis in this Part is on showing that the law *has been* based around protecting physical boundaries and not on what it *could* or *should* be based around, it is important to note that, if the law had developed under different circumstances, rape might involve a very different standard. For example, if women had had more of an influence in the development of the common law, the crime might not have been defined around the “penile invasion of the vagina,” given, as MacKinnon points out, that the crossing of the physical threshold is “less pivotal to a women’s sexuality, pleasure, or violation, than it is to male sexuality.” MacKinnon, *supra* note 209, at 420.

Other sex crimes, like bestiality and sodomy, have traditionally been based upon similar conceptions of the act involving “penetration”—“however slight”—of a particular sacred physical space. In Nebraska, by way of example,

It is a misdemeanor to subject an animal to sexual penetration. Sexual penetration shall mean sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor’s or victim’s body . . . which can be reasonably construed as being for non-medical or nonhealth purposes. Sexual penetration shall not require emission of semen.

RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA’S SEX LAWS 210 (1996) (citing NEB. REV. STAT. §§ 28-1010, 28-318 (1977)). Similarly, in Arkansas, “[s]odomy is any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a male by the penis of another male; or the penetration, however slight, of the anus or vagina of a female by any body member of another female.” *Id.* at 66 (citing ARK. CODE ANN. § 5-14-122 (1977)).

²¹¹ SUSAN ESTRICH, REAL RAPE 83 (1987).

²¹² POSNER & SILBAUGH, *supra* note 210, at 5-6.

needed to be evidence of “substantial force by the man”²¹³ and the victim had to demonstrate that she put up *physical* resistance to her assailant.²¹⁴ In other words, in order for the boundary to be protected she had to physically police it.²¹⁵ Many historical rape statutes defined the nonconsent requirement on the victim’s side as “utmost resistance,” which demanded that the vehemence of the struggle both “reflect the victim’s physical capacity to oppose sexual aggression” and that “her efforts [did] . . . not abate[] during the encounter.”²¹⁶ As the Wisconsin Supreme Court explained in the 1906 case of *Brown v. State*, “Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.”²¹⁷ Although the utmost resistance standard gave way to the “reasonable resistance standard” by the 1960s,²¹⁸ and over the last thirty years physical resistance by the victim has been removed from state statutes altogether,²¹⁹ a number of courts have struggled with moving away from physical boundary policing to a regime turning simply on verbal nonconsent.²²⁰ Though an individual might say “no” throughout an encounter, without clear evidence of force some state courts have refused to find the forcible compulsion necessary for a rape

²¹³ See ESTRICH, *supra* note 211, at 5.

²¹⁴ For most of Anglo-American history, the argument made by the dissent in *Rusk v. State* that “verbal resistance *is* resistance!” was largely ignored by courts. See *Rusk v. State*, 406 A.2d 624, 634 (Md. Ct. Spec. App. 1979), *rev’d*, 424 A.2d 720 (Md. 1981).

²¹⁵ As Russell Weaver, Leslie Abramson, John Burkoff, and Catherine Hancock suggest, “Without proof of resistance, judges treated the use of force as an ambiguous act that showed nothing more than an event of ‘seduction.’” RUSSELL L. WEAVER ET AL., *CRIMINAL LAW: CASES, MATERIALS & PROBLEMS* 344 (2002).

The necessity of policing the physical boundary was reflected in many subtle ways. For instance, in respect to statutory rape, in many of states there used to be a requirement that victims be “of previous chaste character,” and, although reforms during the second half of the twentieth century removed such language from most statutes, there are still a few states in which it remains part of the law. POSNER & SILBAUGH, *supra* note 210, at 44. In addition, in the broader context, the non-existence of rape shield laws for many years allowed for a similar sort of inquiry into whether a young woman had policed her boundaries. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 420-21 (2d ed. 1999). Where she was shown to have not—that is, where, in the eyes of the law, she had not delineated a border to be respected—the state refused to step in, after the fact, and say that one existed. Hence, convictions in cases where a young woman’s sexual history demonstrated clear promiscuity were very rare.

²¹⁶ MODEL PENAL CODE § 213.1 cmt. (1980). As Susan Estrich has pointed out, nonconsent has been a necessary element of many crimes “including theft, assault, battery, and trespass,” but rape is “unique . . . in the definition that has been given to nonconsent—one that has required victims of rape, unlike victims of any other crime, to demonstrate their ‘wishes’ through physical resistance.” ESTRICH, *supra* note 211, at 29 (citations omitted).

²¹⁷ *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906).

²¹⁸ See ESTRICH, *supra* note 211, at 37.

²¹⁹ PAUL DEROHANNESIAN II, *SEXUAL ASSAULT TRIALS* 314 (1995).

²²⁰ See *id.* at 318-20.

conviction.²²¹ As the Maryland court in *Goldberg v. State* announced, “It is true that . . . [the victim] told the appellant that she ‘didn’t want to do that [stuff].’ But the resistance that must be shown involves not merely verbal but physical resistance ‘to the extent of her ability at the time.’”²²² The body boundary must be delineated and fought for.²²³

Physical boundary breaches, then, have been central to rape in terms of how it has been defined in statutes and in terms of judicial interpretation.²²⁴ And these spatially-based definitions have, in turn, influenced the experience and interpretation of the criminal act by the

²²¹ See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994). Although a female college student said “no” throughout an encounter with another student, the Pennsylvania Supreme Court refused to find sufficient evidence of forcible compulsion. *Id.* As the court noted in *Berkowitz*, verbally protesting but failing to physically police the body boundary could provide proof of a crime, but a crime that was not nearly as serious. *Id.* (pointing out that the legislature had chosen “to define a separate crime, a misdemeanor, which is based simply on lack of consent of the complainant”). In recent years, however, some courts have moved toward a standard based around “affirmative and freely-given permission” so that “no” is closer to actually meaning “no.” See, e.g., *State in Interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (“[A]ny act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to that specific act of penetration constitutes the offence of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of physical force is satisfied . . . if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration.”).

²²² *Goldberg v. State*, 395 A.2d 1213, 1219 (Md. Ct. Spec. App. 1979).

²²³ Overall, force—or the threat of force—has been central to the crime of rape, and, as Paul DerOhannesian II explains, “force is usually defined in terms of physical force or threats, either express or implied, which places the complainant in fear of harm of physical injury.” DEROHANNESIAN, *supra* note 219, at 314.

²²⁴ By way of a summary, consider the Model Penal Code’s definition of rape:

A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or (c) the female is unconscious; or (d) the female is less than 10 years old. Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

MODEL PENAL CODE § 213.1(1) (1962). The Code is strongly reliant on physical boundary triggers in its definition. First, the crime is defined in terms of “sexual intercourse,” which the code states “includes intercourse per os or per anum, with some penetration however slight; emission is not required.” *Id.* § 213.0(2). Thus, the key act is one of crossing a boundary, even just slightly. Second, the crime is defined as involving physical force or the threat of a physical force (“imminent death, serious bodily injury, extreme pain or kidnapping”) against any person; or, alternatively, it involves the accomplishment of the penetration through a similar physical invasion of the body space with the administration of certain drugs or intoxicants. *Id.* § 213.1(1). Third, the seriousness of the offense is increased by one of the following: (1) by crossing the physical boundary in a particularly salient way—“inflict[ing] *serious* bodily injury upon anyone”; or (2) where there was no evidence that the victim had not been adequately policing her body boundary—the case where she “had not previously permitted [her attacker] . . . sexual liberties.” *Id.* (emphasis added).

victim. By choosing to define a crime based on the crossing of a physical boundary, we may change the way we feel about or make sense of the act of crossing itself. Indeed, the breach of the boundary may not be all that central to the experience of harm until we are told that the breach of the boundary *is*, in fact, the harm.²²⁵ Consequently, our laws with their spatial triggers may appear to merely reflect and protect what is important to us, when they are actually an important source of our valuation.

Additionally, having constructed our criminal laws to bulwark physical spaces and having employed the language of boundaries, we may shape future laws in areas that have little direct connection to the physical world. For instance, as we go to write laws for the Internet—prohibiting cybercrime—we may feel compelled to rely on analogies to physical space. Thus, we may treat sending spam to a list of company employees as comparable to illegally picketing on the streets of a company town.²²⁶ Or we may treat hacking into a company network just like burglarizing a company warehouse. There is nothing natural or inevitable about these analogies and, yet, with the passage of time they come to feel that way.

3. Criminal Defenses

The fact that the law treats certain physical spaces, like the body, as sacred may justify or excuse the defense or protection of one of these physical spaces that results in a crime. For example, it may be permissible to guard one's body from a knife attack by shooting a knife-wielding attacker, although, in general, the law strongly condemns shooting a human.

a. The Sacred Body

An understanding of the body space as inviolable has deep roots in

²²⁵ See ESTRICH, *supra* note 211, at 13 (“Some women do not report because they were ‘successful’ in resisting the actual penetration, suggesting an erroneous belief that sexual aggression is a crime only when it ends in unwanted intercourse. Other women do not report because they ended up ‘giving in’ to the sexual pressure without a ‘fight,’ suggesting the equation of nonconsent with utmost or at least reasonable physical resistance.” (citations omitted)).

²²⁶ Cf. Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 82 (2008) (suggesting the possibility of “constru[ing] Second Life [an Internet ‘virtual world’] as a private place analogous to a real world company town”); Jason S. Zack, Comment, *The Ultimate Company Town: Wading in the Digital Marsh of Second Life*, 10 U. PA. J. CONST. L. 225, 227 (2007) (“Second Life is perhaps the quintessential company town for its citizens . . .”).

the common law. According to William Blackstone, the first of the “three principle or primary articles” comprising the “rights of all mankind” is “[t]he right of personal security . . . in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health.”²²⁷ In the United States, “courts [have long] recognized with ‘universal acquiescence’ that ‘the free citizen’s first and greatest right, which underlies all others,’ is ‘the right to the inviolability of his person.’”²²⁸

Because the physical sanctity of the body is so important, when someone threatens the boundary of the body in an unlawful way, an individual is justified in taking certain actions that the law would otherwise prohibit to protect the inviolability of that space. In certain circumstances, that has traditionally included performing the ultimate act of killing another human. As Blackstone explained in his *Commentaries on the Laws of England*:

Both the life and limbs of a man are of such high value . . . that [the law] pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.²²⁹

The self-defense justification “provides a complete defense to intentional crimes like murder, manslaughter, assault and battery, and attempted murder or assault.”²³⁰ Historically, even where a person could retreat safely, the law allowed an individual to choose nonlethal force as an alternative to fleeing, and in a number of jurisdictions the law even justified lethal force where non-confrontation was possible.²³¹

²²⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *129.

²²⁸ *Abigail Alliance v. Von Eschenbach*, 495 F.3d 695, 717 (D.C. Cir. 2007) (Rogers, J., dissenting) (quoting *Pratt v. Davis*, 118 Ill. App. 161, 166 (1905), *aff’d*, 79 N.E. 562 (Ill. 1906)). Indeed, in the words of Samuel Adams, “[T]he first law of nature” is “the duty of self preservation.” Samuel Adams, *The Rights of the Colonists: Report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772*, reprinted in 7 OLD SOUTH LEAFLETS 417 (No. 173) (Burt Franklin 1970); *see also* *People v. Pignatoro*, 136 N.Y.S. 155, 160 (N.Y. City Magis. Ct. 1911) (describing the right as “an inherent right of man, older than states or Constitutions”).

²²⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *130; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES *186 (“[There exists a] great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish.”).

²³⁰ WEAVER ET AL., *supra* note 215, at 405.

²³¹ *See id.* at 428-29. By way of contrast, the Model Penal Code requires that the individual not resort to lethal force where fleeing is possible. *See* MODEL PENAL CODE § 3.04(3)(b)(ii) (1962) (“The use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take.”). At the same time, even the Model Penal Code only requires a potential victim to run away if he can retreat “with complete safety”—hence, emphasizing the importance of the body boundary.

However, the “provocation” necessary for a claim of self-defense has generally required a transgression or potential transgression of the body space.²³² Where there is no real threat to bodily safety, there can be no defense.²³³ Thus, words alone—if they do not reference a direct danger to the body space—are not sufficient to justify a response under a claim of self-defense.²³⁴ As the Maryland Court of Appeals put it in *Girouard v. State*, the standard relating to provocation “does not and should not focus on the peculiar frailties of mind of the Petitioner”—whether or not he is experiencing severe psychological distress—but rather turns on the nature of the provocation. In particular, the standard turns on whether the provocation is one of the types considered to be sufficient under the law, an approach which, as suggested earlier, heavily privileges breaches of the body space.²³⁵ Under the common law, it was only the most serious physical threats—“fear of loss of life, . . . mayhem, or loss of limb” (that is, loss of those members that “enable man to protect himself from external injuries in a state of nature”)—that were sufficient for the employment of lethal self-

²³² The Model Penal Code, for example, states that “[t]he use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat” MODEL PENAL CODE § 3.04(2)(b)(i) (1962).

²³³ See, e.g., *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991) (“[The victim] simply did not have the size or strength to cause [the defendant] . . . to fear for his bodily safety. Thus, since there was no ability [to physically harm the defendant] . . . the words she hurled at him could not . . . constitute legally sufficient provocation.”).

²³⁴ See, e.g., *id.* (“[W]ords can [only] constitute adequate provocation if they are accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm.”).

²³⁵ *Id.* at 723. As Joshua Dressler points out, “Lawful conduct, no matter how provocative, is never adequate provocation.” Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421,439 (1982). What is interesting, of course, is that what is lawful and unlawful often turns on conceptions of body borders that the state recognizes and protects and borders that the state does not recognize or protect. Thus, as Dressler explains:

[A] married person who kills upon sight of adultery commits manslaughter, but an unmarried individual who kills upon sight of unfaithfulness by one’s lover or fiancé is a murderer. Only a highly unrealistic belief about passion can explain this rule in terms of excusing conduct. It is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor’s spouse. Instead, this rule is really a judgment by courts that adultery is . . . the “highest invasion of [a husband’s] property,” whereas in the unmarried situation the defendant “has no such control” over his faithless lover.

Id. at 440 (quoting *Regina v. Mawgridge*, [1707] Kel. J. 119, 137, reprinted in 84 Eng. Rep. 1107, 1115; *Rex v. Greening*, (1913) 23 Cox Crim. C. 601, 603). The wording the court uses—“highest invasion”—is worth noting as it suggests that the key to the provocation lies, not in its mental effects, but in the extent of its physical incursion into a sacred space. Having sex with a married woman was invading the sacred space of the husband; having sex with an engaged woman was not a similar invasion of her fiancé’s sacred space for he had no legally-cognizable gatekeeping interest. In the latter instance, it was not the man’s space to police: He had no right to repel others whose advances his fiancée had welcomed, just as he had no right to repel invitees from entering his neighbor’s home.

defense.²³⁶ As Blackstone stated, “A fear of battery, or being beaten” are not sufficient causes, nor “is the fear of having one’s house burnt, or one’s goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life, or limb.”²³⁷ The commentary reveals two dynamics. First, claims of self-defense traditionally turned on the extent of the physical breach. For example, the threat of a more extensive physical transgression provided the justification for a more extensive physical transgression by the would-be victim in response. Second, there exists a hierarchy of sacred spaces: A person’s body space is primary, whereas a person’s home space is secondary.

Yet the privileging of the body space is not absolute. In Green’s case, he tried to argue that in order to protect the physical integrity of his body space he had to break the law and escape from prison.²³⁸ In rejecting his defense, the court implied that the physical sanctity of the boundary between the prison and outside society was more important than the boundary of the inmate’s body.²³⁹

b. The Sacred Home

In the Anglo-American tradition, the importance of body boundaries nearly matched the importance of the home. As Blackstone wrote in his *Commentaries*, the common law—in agreement with “the sentiments of ancient Rome”—“has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity.”²⁴⁰ As Blackstone qualifies, the protections given to the borders of the home are not absolute, but they are robust and special:

For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nusancers, and incendiaries: and to

²³⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *130-31.

²³⁷ *Id.* at *131.

²³⁸ See *State v. Green*, 470 S.W.2d 565, 566 (Mo. 1971). Green argued that “he [had to] escape in order to protect himself from submission to the threatened assault or the alternative of death or great bodily harm.” *Id.*

²³⁹ Of course, the balancing of the need to protect one’s physical space against the need to protect another may be accomplished by a legislature setting the law as well as by the judge interpreting it. As Paul H. Robinson suggests: “By not creating an exception for threatened rape in its escape prohibition, the legislature might be taken as expressing a view that the threatened harm of rape is not sufficiently great to justify the offense of escape. Better to suffer the rape than to permit escape.” ROBINSON, *supra* note 7, at 105-06.

²⁴⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES *231.

this principal it must be assigned, that a man may assemble people together lawfully without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case.²⁴¹

It is not only that the common law has developed special protections for the border of the home—fortifying the physical walls of a habitation—but also that it has altered the rules within the protected space. Certain actions taken outside the home are crimes, but taken inside the home are not.²⁴² In *Stanley v. Georgia*, for instance, the Supreme Court held that while “the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.”²⁴³ The Court explained that “the mere private possession of obscene matter [within the confines of the home] cannot constitutionally be made a crime.”²⁴⁴ In later cases, the Court has made clear that the distinction between a valid criminal prohibition and an invalid prohibition in this context turns on whether the disputed activity takes place in the home and not on general notions of privacy or consent.²⁴⁵

State courts have adopted similar reasoning. In *Ravin v. State*, for example, the Alaskan Supreme Court “conclude[d] that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska’s constitution . . . [which] encompass[es] the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home.”²⁴⁶ Today, the home’s sanctuary status with respect to criminal acts continues to inform courts’ jurisprudence even as the conception of “liberty of the person” is understood to have both “spatial and more transcendent dimensions.”²⁴⁷

²⁴¹ *Id.* at *223.

²⁴² See *United States v. Orito*, 413 U.S. 139, 142-43 (1973) (“[There are] myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.”).

²⁴³ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969); see also *id.* at 565 (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”).

²⁴⁴ *Id.* at 588.

²⁴⁵ See *Orito*, 413 U.S. at 142 (“The Constitution extends special safeguards to the privacy of the home But viewing obscene films in a commercial theater open to the adult public or transporting such films in common carriers in interstate commerce, has no claim to such special consideration.” (citation omitted)); *id.* at 141-42 (“[T]he right to possess obscene material in the privacy of the home . . . [does not] create[] a correlative right to receive it, transport it, or distribute it [Our] holdings negate the idea that some zone of constitutionally protected privacy follows such material when it is moved outside the home area” (citations omitted)).

²⁴⁶ *Ravin v. State*, 537 P.2d 494, 504 (Ala. 1975). As the court explained, “[i]f there is any area of human activity to which a right to privacy pertains more than any other, it is the home.” *Id.* at 503.

²⁴⁷ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (emphasis added). Although stating that “[f]reedom extends beyond spatial bounds,” the Supreme Court in *Lawrence* emphasized that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other

As the Supreme Court stated in the opening paragraph of *Lawrence v. Texas*, “In our tradition the State is not omnipresent in the home.”²⁴⁸ In many situations, the long arm of the law stops at the front door.

Nowhere is this more evident than with respect to actions taken against assailants. While the law may place a duty on an individual to retreat when faced with a threat out on the street, generally, within the home, a person is under no such duty to avoid an assailant. As the Supreme Court of Florida articulated:

[T]he privilege of nonretreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary. As has been asked rhetorically, if the duty to retreat from the home is applied to a defendant attacked by a co-occupant in the home, “whither shall he flee, and how far, and when may he be permitted to return?”²⁴⁹

A number of states have enacted statutes that quite explicitly trumpet the sanctity of the home space. For instance, the Oklahoma legislature enacted a statute that, in the words of the Court of Criminal Appeals, “create[d] a place of absolute safety and freedom”²⁵⁰: an individual legally in a dwelling may use “any degree of physical force . . . against [an unlawful entrant] . . . when the occupant has a reasonable belief that such other person might use any physical force, no matter how slight, against any occupant of the dwelling.”²⁵¹

What is particularly revealing is that the protections in such laws

private places,” and the fact that the acts in questions took place within a private residence seems to have been critical to the Court’s ultimate determination. *Id.* at 562; *see also id.* at 568 (stating that the sex act prohibitions at issue touch “upon the most private human conduct, sexual behavior, and in the most private of places, the home”).

²⁴⁸ *Id.* at 562.

²⁴⁹ *Weiland v. State*, 732 So.2d 1044, 1052 (Fla. 1999) (quoting *Jones v. State*, 76 Ala. 8, 16 (1884)) (other citations omitted). Other courts have voiced a similar understanding:

It is well settled that one who through no fault of his own is attacked in his home is under no duty to retreat therefrom. The oft-repeated expression that “a man’s home is his castle” reflected the belief in olden days that there were few if any safer sanctuaries than the home. The “castle” exception, moreover, has been extended by some courts to encompass the occupant’s presence within the curtilage outside his dwelling.

United States v. Peterson, 483 F.2d 1222, 1236 (D.C. Cir. 1973) (footnotes omitted); *see also* *People v. Eatman*, 91 N.E.2d 387, 390 (Ill. 1950) (“We think it may be safely laid down to be the law of this State that a man’s habitation is one place where he may rest secure in the knowledge that he will not be disturbed by persons coming within, without proper invitation or warrant, and that he may use all of the force apparently necessary to repel any invasion of his home.”).

²⁵⁰ *State v. Anderson*, 972 P.2d 32, 36 (Okla. Crim. App. 1998).

²⁵¹ OKLA. STAT. tit. 21, § 1289.25(B) (1991) (emphasis added). The statute was popularly known as the “Make My Day” law. The Colorado legislature has enacted a law that uses nearly identical language. *See* COLO. REV. STAT. § 18-1-704.5 (1986) (“[A]ny occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.”).

seem to flow largely from the space of the home itself rather than from property rights enjoyed by owners or inhabitants. As the Oklahoma Court of Criminal Appeals explained, “When one intrudes into the dwelling of another, the harm is the violation of the sanctity of the dwelling itself, not merely to a particular person’s property interest.”²⁵² Hence, since the home is the key variable, the self-defense justification covers *anyone* legally inside.²⁵³

As highlighted earlier, on a certain level, the discussion of defenses comes down to an ordering of protected spaces. As suggested in the previous paragraphs, a home itself exists within a jurisdiction that makes certain actions criminal. In contrast, being within the micro space of the home may effectively negate the practical effect of being within the macro space of the jurisdiction through the operation of a defense. Similarly, within a jurisdiction, a spatially-embedded law—like a drug-free school zone—may provide protection to a microspace, such as a school or recreation center. However, that protection may give way to the protection of the space of the home under certain circumstances. Thus, in many states, an individual charged with a drug offense within a drug-free zone may prove that the criminal actions took place within a private-residence as an affirmative defense.²⁵⁴ Moreover, just as the home space exists within the greater space of the municipality, the body space may exist within the bounds of the protected home space; and in some cases, the law treats the body space as primary. Hence, despite the continued robustness of the castle doctrine, not all breaches of the boundary of the home justify a breach of the boundary of the assailant’s body.²⁵⁵

²⁵² *Anderson*, 972 P.2d at 36.

²⁵³ The *Anderson* court noted:

[A]ny person legally in the dwelling is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made an unlawful entry into that dwelling, and when the person legally inside the dwelling has a reasonable belief that such other person might use any physical force, no matter how slight, against any person legally in the dwelling.

Id. at 35. The Supreme Court of Ohio, in *State v. Thomas*, similarly emphasized the importance of the space rather than the particular identity of the inhabitant: “There is no rational reason for a distinction between an intruder and a cohabitant” when considering the “castle” exception. *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997) (holding that a woman need not flee from her own house and was justified in killing her abusive boyfriend who also lived in the house).

²⁵⁴ See GREENE ET AL., *supra* note 182, at 8 (noting, however, generally, that the transaction must not have been for profit and that no children must have been present). Some states like Arizona, balance the two micro space protections by applying enhanced prison terms for those convicted of drug transactions within 1000 feet of a school where the crime is committed on public property, but only within 300 feet of a school where it is committed on private property. *See id.*

²⁵⁵ See, e.g., *People v. Ceballos*, 526 P.2d 241 (Cal. 1974) (finding that the defense of habitation does not excuse the killing of a burglar with a spring-loaded gun).

4. Subtle Cues

Even where physical space protections are not written into criminal statutes or articulated in court opinions, they may nonetheless influence how a case comes out. Individual and institutional biases in favor of protecting particular spaces—or, more generally, physical boundaries and places over non-physical values—may change the operation of the laws on the books.²⁵⁶

A successful prosecution turns on many elements in addition to what the law says and what the suspect did. Victims and witnesses enjoy discretion to report a crime in the first place, and it is worth considering whether unreported crimes tend to be disproportionately based on non-physical breaches.²⁵⁷ In addition, with the discretion the law gives to both police forces and individual officers, it is possible that officers might investigate crimes involving breaches of certain physical spaces—or physical spaces in general—more frequently or vigorously than those involving other types of breaches. Likewise, prosecutors may choose to drop the charges in cases that do not involve breaches of physical space more often than in cases where there is a breach of physical space. A prosecutor might make the decision for several reasons: her own individual bias that crimes involving non-physical space transgressions are less serious; her sense that she cannot prove the case to a jury as a result of the jury's biases; or because there is less salient "evidence."

This is borne out in research on rape cases. In one survey of the key factors relating to rape convictions, prosecutors ranked the physical force used by the defendant as the most notable element in avoiding dismissal. They also emphasized the significance of the victim's physical injury, proof of the victim's physical resistance, the use of a weapon by the defendant, and proof of penetration.²⁵⁸ Documenting the

²⁵⁶ An example would be a prohibition on a crime like indecent exposure, which, by the language of the criminal code, may not appear to have any significant spatial trigger other than that the act be committed "in public": That is, it may simply state that it is a crime to expose one's genitals "for the purpose of arousing or gratifying sexual desire." MODEL PENAL CODE § 213.5 (1962). Note, however, that the Model Penal Code, unlike a number of other statutes, does implicitly recognize the importance of the particular space in which the exposure takes place, limiting the crime to "circumstances in which [a person] knows his conduct is likely to cause affront or alarm." *Id.* Despite this fact, concerns with physical boundaries and special places may be very important when it comes to investigation, prosecution, conviction, or the severity of the punishment. It might turn out that, in spite of the written law's silence on the matter, those accused of indecent exposures in schoolyards are almost always found guilty and face much stiffer penalties than those who commit the same acts in other public realms.

²⁵⁷ According to Kamisar, LaFave, and Israel, "The best available studies indicate, for example, that substantially less than half of all committed crimes are brought to the attention of the police." *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 16 (8th ed. 1994).

²⁵⁸ BATTELLE MEM'L INST., FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY

actual breach of a physical boundary is, as a consequence, a vital part of the work of a successful prosecutor.²⁵⁹ When there is no beating and no weapon—and no physical evidence of an invasion—prosecution is very difficult.²⁶⁰

Additionally, judges may not only have some discretion in sentencing but also in the conduct of the trial that may involve disparate treatment for physical-space and non-physical-space transgressions. And juries themselves may bring with them cultural biases that change the way they view crimes based on, among other things, where they are committed.

As suggested in Part II.C.4 on victimization,²⁶¹ committing an act in a particular space that we view as special may change the way we see the act itself. Thus, if Green had burglarized a church or a hospice, he may have been sentenced to a greater number of years in prison than if he had burglarized a brothel or the residence of an alleged mafia boss. Sometimes the nature of the space may interact with the nature of the crime to change its complexion. The *motives* of two adult males caught having sex in a secluded spot in a forest may appear very different than the motives of two adults caught having sex in the toilets of a youth center, and, as a consequence, we may view the latter individuals less sympathetically.

Moreover, how a victim demarcates or defends a physical

PROSECUTORS 30 (1977).

²⁵⁹ As DerOhannesian II advises:

The scene itself should be reviewed, particularly the initial photos, for any evidence of a struggle: objects thrown about, a grassy field matted down, etc. Overturned furniture and broken objects at a scene can be significant. The clothing of a complainant and defendant worn at the time in question can be examined for rips, tears, dirt, stains, and especially, missing buttons—evidence that would be consistent or inconsistent with the version of events described by the parties and witnesses Medical witnesses and law enforcement investigators may also testify to the victim's appearance and behavior, including facial discoloration, disarrayed clothing, smeared makeup, and bruises of other physical marks.

DEROHANNESIAN, *supra* note 219, at 321-22.

²⁶⁰ As Estrich explains, summarizing a 1960s study by Harry Kalven and Hans Zeisel of American juries, in a simple rape case “of a single defendant who knew his victim and neither beat her nor threatened her with a weapon[,] [Kalven and Zeisel] found that juries were four times . . . [less] willing to convict [than] in the aggravated rape” case. ESTRICH, *supra* note 211, at 4-5 (summarizing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 252-55 (1966)). Juries are less likely to see a “rape” if the actions taken by the defendant, other than the actual sex act, do not involve breaches of the physical space of the body. In another study, individuals were asked to assess whether a “rape” had occurred after being given a series of hypothetical fact patterns. While they easily found a rape in the setup with a stranger pointing a gun at his victim and threatening to kill her, when the man in the hypothetical merely “warn[ed the victim] to do as he said” or “told her to lie down” rather than “slashing her with a knife” or moving it menacingly into her space and physically forcing her to the ground, there was a significant decrease in those who saw the crime of rape. Judith E. Krulewitz & Elaine Johnson Payne, *Attributions About Rape: Effects of Rapist Force, Observer Sex and Sex Role Attitudes*, 8 J. APPLIED SOC. PSYCHOL. 291, 295, 297 (1978) (internal quotation marks omitted).

²⁶¹ See *supra* text accompanying notes 126-129.

boundary may change how we feel about the guilt or innocence of a criminal defendant. Had Green been shown to have engaged in consensual sodomy with other men at the prison—failing to police the boundary of his body—some might feel differently about the homosexual rapes he suffered.²⁶² Though the implications are deeply troubling, studies of rape prosecutions suggest that some might question whether the sexual contact was actually consensual and might feel Green was less justified in escaping.²⁶³

Physical space relationships and boundaries within the courtroom may also matter in terms of the outcome of a trial.²⁶⁴ A defendant who is separated from the jury by a salient physical barrier or who is restrained from moving unencumbered by shackles may be at a distinct disadvantage when it comes to walking away a free man.²⁶⁵ Although we typically overlook potentially important elements, like the placement of the prosecutor's table nearer to the jury than the defense's, some courts and legislatures have been conscious of the influence of spatial cues and have worked to address them. The Nebraska Supreme Court, for example, has held that the use of "a large screen in the courtroom to block" the defendant from seeing a juvenile witness "unduly compromise[s] the presumption of innocence fundamental to the right to a fair trial."²⁶⁶ The screen suggests that the court believes that the witness's accusations are true, such that protection from the defendant is necessary, "act[s] as a dramatic reminder of [the defendant's] position as the accused at trial," and may place "dramatic emphasis . . . upon the State's key witness."²⁶⁷

In the neighboring state of Missouri, Green would have enjoyed other protections. Under Missouri law, Green would not have been chained up during trial if he did not pose any concern for security or order, because, in the words of the court in *State v. Kring*, with the

²⁶² See *supra* notes 214-223 and accompanying text.

²⁶³ See *id.*

²⁶⁴ It is interesting to note that, under the early common law, the *question* of guilt or innocence was sometimes resolved through the penetration (or non-penetration) of the body space—that is, by the mid-thirteenth century, under the common law, a defendant accused of a felony was permitted to defend himself either "by the country" (which entailed leaving a jury to decide guilt or innocence) or "by my body" (which meant actually fighting a duel with the accusing plaintiff). See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 65 (1996). This ancient mechanism effectively allowed an individual who was, in fact, guilty of a serious crime to win acquittal by killing his accuser in hand-to-hand combat. *Id.*

²⁶⁵ In certain parts of the world, such spatial domination by the state is routine within the courtroom. As Duncan DeVille describes, "[I]n most Russian courts, the defendant [sits] in a cage in an opposite corner of the courtroom. The only way for the defense attorney to communicate with his client during trial [is] to whisper through the bars." Duncan DeVille, *Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial*, 32 GEO. WASH. J. INT'L L. & ECON. 73, 73-74 (1999).

²⁶⁶ *State v. Parker*, 757 N.W.2d 7, 11 (Neb. 2008), *mod. on reh'g*, 767 N.W.2d 68 (Neb. 2009).

²⁶⁷ *Id.* at 18.

defendant visibly restrained, a “jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted . . . Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties.”²⁶⁸ Thus, the spatial realities of the defendant may not only offer cues to members of the jury as to his character and culpability—just as the judge’s elevated position on the bench inspires deference—but may also govern the comportment of the defendant himself. As the Supreme Court has noted, “Shackles can interfere with the accused’s ‘ability to communicate’ with his lawyer . . . [and] with a defendant’s ability to participate in his own defense.”²⁶⁹ Furthermore, being separated off and physically restrained may breed fear, anxiousness, and distress that has nothing to do with actual guilt but can easily be mistaken for it.²⁷⁰

F. Sentencing

Spatial dynamics also have a large effect on the nature of sentencing and the form that it takes. As punishment for breaching certain protected boundaries, we frequently breach the important boundaries of the convict.²⁷¹ Someone like Green, who has invaded

²⁶⁸ *State v. Kring*, 64 Mo. 591, 593 (1877). More recently, the Supreme Court has held “that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is ‘justified by an essential state interest’—such as the interest in courtroom security—specific to the defendant on trial.” *Deck v. Missouri*, 544 U.S. 622, 624 (2005) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)).

²⁶⁹ *Deck*, 544 U.S. at 631 (citation omitted) (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)).

²⁷⁰ See 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 28, § 1 (1721) (“Every person, at the time of his arraignment, ought to be used with all the humanity and gentleness that is consistent with the nature of the thing, and under no other terror and uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances; and, therefore, ought not to be brought to the bar in a contumelious manner, as with hands tied together, or any other mark of ignominy or reproach, nor even with fetters on his feet, unless there be some danger of a rescue or escape.”).

²⁷¹ This mechanism of justice has deep roots in the Anglo-American tradition. Under the early common law, for example, felonies like rape, homicide, burglary, and arson were frequently met with punishments that involved transgressions against the physical body of the convicted. As David J. Seipp describes, “The usual sentence for felons after 1200 was death by hanging. Before that time, English kings had sometimes substituted blinding and castration or amputation of a hand or foot.” Seipp, *supra* note 264, at 61-62 (footnote omitted). This appears to have been primarily the case with mayhem (maiming), for which the punishment was often “dismemberment—literally eye for eye, tooth for tooth, member for member.” *Id.* at 68 (citations omitted). The idea of justice arising from the meeting of physical transgression with physical transgression was also reflected in the fact that traditionally “the widow and children of a slain man personally dragged the killer to the gallows . . . [and] a victim of rape personally castrated and blinded her wrongdoer.” *Id.* at 63 (footnote omitted).

Punishments that focused on spaces other than the body of the defendant echoed the

another's physical space by committing the crime of burglary, will, in turn, find his personal space invaded at the hands of the state, which forces him to live with a stranger in a cell that is itself open to random search. Similarly, the state may subsequently subject someone who has stabbed his victim to death to a lethal penetration of his own body at the hands of the state.²⁷² Of course, it should be noted that the extent of the boundary breach by the convict does not necessarily mirror the extent of the boundary breach by the state. For example, in many cases, the state does not impose capital punishment—the state's ultimate physical transgression of space—on an offender who has committed murder,²⁷³ and, until recently, the state *could* impose capital punishment for crimes that did not lead to actual loss of life.²⁷⁴

Spatial issues can affect sentencing in other ways, as well. As Theodore G. Chiricos and Charles Crawford assert, “[C]riminal punishment not only responds to crime, but responds as well to specific community conditions.”²⁷⁵ In their research, Chiricos and Crawford found that blacks were more likely to be imprisoned in areas that were heavily minority, in areas with greater unemployment, and in the South.²⁷⁶ This aligns with studies showing significant variability in the application of the death penalty across, and even within, states.²⁷⁷

practice of meeting physical transgression with physical transgression. For example, following conviction for a felony, the law permitted the king to “take possession, for a year and a day, of any heritable interest in land held by the felon . . . [and to] commit ‘waste’ on such land, by means such as cutting down trees and pulling down houses.” *Id.* at 62-63 (footnote omitted). “The term ‘felony’ originally meant the sort of offenses for which feudal lords were entitled to end their relationships with tenants and to take back the tenants’ lands.” *Id.*

²⁷² Indeed, there is some recent evidence that lethal injection—the nearly universal method of execution in the United States—may not just be similar in terms of the physical act of transgressing the body boundary but in the actual experience of having the boundary breached. See Adam Liptak, *Judges Set Hurdles for Lethal Injection*, N. Y. TIMES, Apr. 12, 2006, at A1 (“[A]ccounts of witnesses, post-mortem blood testing and execution logs . . . seem to show that executions meant to be humane have, in fact, caused excruciating pain.”).

The sense of justice being served by meeting physical transgression with physical transgression is as old as an “eye for an eye,” but it is alive and well in mainstream modern America. As Senator Orrin Hatch once explained, “Mr. President, capital punishment is our society’s ultimate recognition of the sanctity of human life.” 134 CONG. REC. S7556-01 (daily ed. June 10, 1988) (statement of Sen. Hatch), 1988 WL 171191, at *15.

²⁷³ Fourteen states and the District of Columbia have completely abolished the death penalty for all crimes. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2009), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

²⁷⁴ Until the Supreme Court’s ruling in *Coker v. Georgia*, 433 U.S. 584 (1977), a rapist of an adult could face the death penalty in nineteen states, and until *Eberheart v. Georgia*, 433 U.S. 917 (1977), a sentence of death was possible for aggravated kidnapping. In 2008, the Supreme Court held that it was unconstitutional for a state to impose the death penalty for the crime of rape of a child. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

²⁷⁵ Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, in ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 281, 301 (Darnell F. Hawkins ed., 1995).

²⁷⁶ See *id.*

²⁷⁷ Roger Hood, *Capital Punishment*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra*

Overall, our anger at the boundary breach of the crime and our fears about the future sanctity of our physical spaces may largely determine how we deal with the criminal in the post-conviction context. The modern American sentencing regime—with its emphasis on physically separating the convict from the non-convict—is so ingrained that it is difficult to comprehend that it embodies only one of a number of alternatives.²⁷⁸

Rather than reentering society under close supervision, after having paid a fine, or with some mark identifying his transgression, the state sent Green to a prison. The Missouri Training Center was a self-contained unit with its own nurse and chaplain, and with little exchange between those inside the prison and those outside.²⁷⁹ Indeed, in his appeal, Green claimed, in part, that his physical isolation—the fact that he was “denied access to the courts”—forced him to choose escape.²⁸⁰ In addition, the internal physical divisions of the prison itself²⁸¹ had a powerful influence on Green’s experience of incarceration—removing boundaries that he had come to expect in his outside life (like the boundary between his private residential space and that of strangers), while creating others (like the one hampering him from getting help from prison administrators after he was attacked).²⁸² Overall, as investigated in work now in progress, the prison regime alters physical boundaries in a number of fundamental ways, and even after the state releases a person from prison, physical boundary prohibitions may continue to affect a person’s life.²⁸³

note 56, at 739, 745 (“[S]ome commentators have pointed out that ‘the most powerful predictor of differential imposition of the death penalty is . . . not substantive law, but . . . geographical region.’”).

²⁷⁸ See Rod Morgan, *Imprisonment: A Brief History, The Contemporary Scene, and Likely Prospects*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 1113, 1119-22.

²⁷⁹ See *State v. Green*, 470 S.W.2d 565, 568 (Mo. 1971) (Seiler, J., dissenting); ROBINSON, *supra* note 7, at 97, 99.

²⁸⁰ *Green*, 470 S.W.2d at 566-67. The only library in the physical space he was allowed to enter did not have the necessary legal resources to research his rights, and the realities of his confinement meant that he could not gain access to legal assistance. *Id.*

²⁸¹ *Id.* at 568 (Seiler, J., dissenting) (“The inmates were confined in single cells within a residential building. The physical structure of the residential building was formed by a central rotunda with the four inmate wings radiating outward. Within each inmate wing, there were seventy-nine cells. During the day, the inmates could wander freely within the residential building. The inmates were locked in the cells at night.”).

²⁸² Unlike in the world outside the prison, where after suffering a sexual assault Green might have walked into a police station and demanded assistance, within the prison, physical boundaries prevented Green from approaching a prison official directly for help. In fact, there were only two ways to make a complaint: either by working through a guard, who was at liberty to either pass it on or do nothing, or by using the prison mail system, which was often read by prisoners who worked with the prison mail. See ROBINSON, *supra* note 7, at 99.

²⁸³ See Benforado, *Managing Space*, *supra* note 148.

III. QUESTIONS AND IMPLICATIONS

As this Article has investigated, physical space—the vast array of landscapes, places, natures, and spatialities—plays multiple and sometimes contradictory roles within criminal law. It can influence outcomes both physically and psychologically—for instance, when an electrified fence makes escape from prison impossible, or when a thief cannot bring himself to steal in a mosque. It can shape human behavior both when it is written into law and when it functions as an informal cue—for example, when a statute defines rape as a “penetration” into the space of the body, or when a police officer decides to stop and question a young black male in a neighborhood that is primarily elderly and white. Physical space can both help the criminal law system accomplish its goals of reducing crime and bringing criminals to justice, and it can stymie that same system—for instance, when a computer map of burglaries allows a precinct to better utilize limited resources, or when jurisdictional boundaries prevent the effective policing or prosecution of transborder crime.

Whatever its particular operation in a given case, the point is that physical space matters—it has an effect on criminality, victimization, policing, prosecution, sentencing, and punishment. Protections of physical spaces and definitional triggers based on breaches of physical boundaries are built into our laws. Yet despite the importance of physical space, legal scholars, practitioners, law enforcement, legislators, and members of the public have largely ignored it. Indeed, we tend to acknowledge its significance only when we address certain limited questions, like where police departments ought to place patrols to best reduce vandalism in a neighborhood.

The purpose of this Article is to draw together disparate materials on the many different ways in which place and space affect and are reflected in criminal law in order to reveal unappreciated but vital parallels, connections, and patterns. For example, it is fairly evident that something similar motivates the Castle Doctrine and the Fourth Amendment’s traditional treatment of the home space as sacred, but the spatial dynamics informing the two also seem relevant to how the law defines burglary with respect to the crossing of a physical threshold into a protected area. This, in turn, may relate to how people experience victimization within the home differently than without, as well as to how intrusion into special space by others often triggers violent (and potentially) criminal responses. Moreover, this strong territorial consciousness on the small scale may, in turn, connect to boundary concerns relating to larger communities, states, and even nations. It may be that some of the same processes that drive gang-related turf battles also animate such hallowed concepts as state sovereignty.

The next component of this new geographical analysis involves using the mind sciences to understand the origins of these key spatial dynamics in criminal law. Underlying this unique spatial approach is a conviction that the reasons our laws contain boundary trigger mechanisms—or that we physically separate those who have breached social norms from the rest of the population—lie to a significant extent in the way our brains are structured.

A. *The Potential for Mind Sciences Research*

In approaching the origins of spatial dynamics, one must question the appropriate depth and breadth of the inquiry. Go too deep, and marking the causal connection can become a struggle. Go too shallow, and there is the risk of completely overlooking generally applicable dynamics with wide-ranging relevance. A few legal scholars have begun to consider the origins of certain spatial conceptions and effects in law, but, for the most part, they have been interested in proximate origins. Kal Raustiala, for example, argues that “the belief that law derives from land”—what he refers to as “legal spatiality”—has significant and meaningful “historical roots.”²⁸⁴ In particular, Raustiala traces “[t]he supposition that law and legal remedies are connected to, or limited by, territorial location”²⁸⁵ to “the Westphalian model of sovereignty that undergirds the modern territorial state system.”²⁸⁶ As Raustiala explains:

The Treaty of Westphalia, penned in 1648, ended the Thirty Years War and is generally credited with ushering out the medieval system of overlapping loyalties and allegiances in Europe, and heralding a new system of political rule based on territoriality and absolute secular power. The Westphalian conception of the state represented a break with the past because it drew all legitimate power into a single sovereign, who controlled absolutely a defined territory and its associated population. That defined territory demarcated, for most purposes, the reach of the sovereign’s law.²⁸⁷

In examining modern tensions in legal spatiality, Raustiala similarly looks to history to find examples of exceptions to the Westphalian model. Among other things, he points to the understanding of diplomatic immunity by later medieval civilians: “While an ambassador was on mission his person was inviolable, and he, his suite and his goods enjoyed a wide immunity from any form of

²⁸⁴ Raustiala, *supra* note 174, at 2508.

²⁸⁵ *Id.* at 2503.

²⁸⁶ *Id.* at 2513.

²⁸⁷ *Id.* at 2508 (footnotes omitted).

civil or criminal action, either in the country where he was accredited or in any through which he might pass.”²⁸⁸

Raustiala’s historical explanations are important and useful, yet they ultimately present only part of the story. As a vital supplement, it is crucial to push beyond the historical to underlying forces. In this endeavor, the sometimes overlapping insights of social psychology, social cognition, cognitive neuroscience, evolutionary psychology, and a number of other behavioral sciences make up the key tools. The potential for this work in progress is great. By way of a brief example, consider an issue this Article raises: Why our criminal justice system focuses on physically separating off transgressors from society.

Is there a connection between the appeal of the maximum security prison in the modern United States and the prevalence of exclusion or banishment mechanisms throughout history?²⁸⁹ Social psychological research on self-, group-, and system-affirming motives and motives for order and closure may offer some tentative answers. A desire to avoid ambiguity and to reach definitive answers or conclusions that minimize any threat that we experience strongly motivates us.²⁹⁰ Likewise, to deal with an overwhelming array of stimuli, “we seek to order, systematize and simplify our field of perception by dividing the social and physical world into categories.”²⁹¹ This includes classifying people into groups.²⁹² In turn, we are driven to see ourselves and our ingroups as good and deserving, which may, in part, hinge on social comparison (that is, our positive perceptions of our ingroups may be tied, in part, to how we perceive outgroup members).²⁹³ Thus, maintaining and protecting group boundaries is crucial to preserving the group as a

²⁸⁸ *Id.* at 2510 (quoting GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* 269 (Butler & Tanner 1963)).

²⁸⁹ For a recent overview of the long history of banishment as punishment, focusing on Western societies’ experiences with expulsion, prison colonies, and internal exile, see Corey Rayburn Yung, *Banishment by a Thousand Law: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 106-14 (2007). Banishment is also referenced in many non-Western traditions. See, e.g., Petra Butler, *Margin of Appreciation—A Note Towards a Solution for the Pacific?*, 39 VICTORIA U. WELLINGTON L. REV. 687, 692 (2009) (“Banishment is a customary procedure which allows the village council to banish people from the village.”).

²⁹⁰ See Chen & Hanson, *Categorically Biased*, *supra* note 23, at 1182-1211; Hanson & Yosifon, *The Situational Character*, *supra* note 9, at 71-74, 91-94, 106-14.

²⁹¹ Tobias Theiler, *Societal Security and Social Psychology*, 29 REV. INT’L STUD. 249, 260 (2003).

²⁹² Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 432-33 (1999) (“Although attitudes toward and relationships with outgroups vary, cross-cultural evidence documents the universality of social differentiation into ingroups and outgroups at some level beyond the family or social village.”).

²⁹³ See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 16, at 325-26; Marilynn B. Brewer, *The Importance of Being We: Human Nature and Intergroup Relations*, 62 AM. PSYCHOLOGIST 728, 729 (2007) (“The fact that individuals value, favor, and conform to their own membership groups (in-groups) over groups to which they do not belong (out-groups) is among the most well-established phenomena in social psychology.”).

source of self-worth²⁹⁴ and to satisfying needs for certainty and security.²⁹⁵ Somewhat startlingly, when it comes to fulfilling our basic emotional and cognitive needs, what appear to matter most are the boundaries themselves rather than the cultural substance that they enclose.²⁹⁶

All of this may help explain why the prison provides such a ready and appealing solution to the societal problem of what to do with convicted criminals. First, the physical divide of the prison wall offers a clear reinforcement of who is an “ingroup” member and who is an “outgroup” member.²⁹⁷ The physical boundary of the incarceration facility is evidence that criminals are not part of “us”—their transgressions are not our transgressions, and we are not to blame for whatever happened.²⁹⁸ We are different and we are good. By contrast, an approach to punishment focused on rehabilitation and reincorporation is a threat to our conceptions of ourselves, our groups, and our systems. Such an approach forces us to confront the fact that criminals may not all be “bad apples” but rather creatures of “bad situations” that society itself has created or even encouraged. Furthermore, an approach to punishment based on physical separation offers affirmation of the fact that we have resolved the problem and that we are safe—we have taken the problem out of society and placed it behind a wall. Rehabilitation and reincorporation, on the other hand, create a society where it is not evident who is “good” and who is “bad.”

Research from evolutionary psychology may also help shed light

²⁹⁴ See Theiler, *supra* note 291, at 264. We are also driven to see the systems of which we are a part as legitimate and just. See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 16, at 327.

²⁹⁵ See Brewer, *supra* note 293, at 732, 735. In their research on housing developments in Israel, for example, Miriam Billig and Arza Churchman found that clear physical boundaries had an impact on the attitudes and behavior of different socioeconomic groups living in the same area: “Physical separation between the new and the old buildings improved satisfaction with their housing among [different] population groups. In the absence of physical separation, dissatisfaction, disengagement, and indications of ethnic tension were more likely to be found.” Miriam Billig & Arza Churchman, *Building Walls of Brick and Breaching Walls of Separation*, 35 ENV'T & BEHAV. 227, 227 (2003).

²⁹⁶ See Theiler, *supra* note 291, at 266-67; see generally FREDRIK BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* (1969). As Marilyn Brewer has described, “[O]ur sense of personal security and certainty are maximized in the context of shared in-group membership and clear in-group/out-group distinctions.” Brewer, *supra* note 293, at 735.

²⁹⁷ See Brewer, *supra* note 292, at 434 (“[Humans have] opposing needs for inclusion (assimilation) and differentiation from others. . . . Clear ingroup boundaries serve to secure both inclusion and exclusion.”); Miles Hewstone, Mark Rubin & Hazel Willis, *Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 591 (2002) (“[T]o protect against loss of distinctiveness for groups involved in contact . . . [t]he salience of group boundaries should be maintained during contact . . .”).

²⁹⁸ See Brewer, *supra* note 292, at 438 (“When the salience and strength of intragroup interdependence and mutual obligation is increased, the importance of maintaining group boundaries is also increased.”).

on modes of punishment focused on physical separation. This work suggests that in our evolutionary past, selective pressures resulted in adaptations designed to solve recurrent problems that our human ancestors faced.²⁹⁹ The complex social world in which our hominid forebears interacted presented an array of potential fitness benefits (like matings, communal parent care, and cooperation toward shared goals) as well as fitness costs (like conspecific violence and competition over resources).³⁰⁰ Models of cooperative evolution would predict that to reap the fitness benefits of sociality, it is necessary to have mechanisms (that is, a set of cognitive structures) that are able to detect (1) those individuals who threaten physical safety and health; (2) those who violate norms of trust, authority, and cooperation; and (3) those who fail to carry their share of costs and risks. And such mechanisms must be designed to exclude the transgressors (those cheaters in our midst) from future group relationships and perhaps also to inflict additional costs in the form of punishment.³⁰¹ As Robert Kurzban and Mark Leary have

²⁹⁹ See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 466 (2005) (“[T]he lens of evolutionary analysis can help us to see how architectural features of legal systems reflect the effect of evolutionary processes on the human brain. Although human cultures vary greatly in detail, human brains are basically the same in all cultures. The human brain inevitably reflects its evolutionary history in the ways that it processes information and in the behavioral predispositions it exhibits. Consequently, all legal systems, like the cultures of which they are a part, have been shaped to some degree by fundamental attributes of human brains that in turn are expressions of basic human goals and desires. By this reasoning, it should be possible to see the telltale results of evolutionary processes in the framework of legal systems across both cultures and time.” (footnote omitted)); Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1639 (2007) (“[E]volutionary processes, most notably natural selection, operate to preserve both anatomical and behavioral traits that helped to solve challenges regularly encountered by ancestors over evolutionary time. . . . [T]he process of solving those challenges can lead to a variety of common psychological preferences in humans, including some general moral preferences. . . . [T]hose evolutionary processes can result in shared intuitions of justice in the context of punishments for wrongdoing.”).

³⁰⁰ See, e.g., Robert Kurzban & Mark R. Leary, *Evolutionary Origins of Stigmatization: The Functions of Social Exclusion*, 127 PSYCHOL. BULL. 187, 191 (2001); Steven L. Neuberg & Catherine A. Cottrell, *Managing the Threats and Opportunities Afforded by Human Sociality*, 12 GROUP DYNAMICS: THEORY RES. & PRAC. 63, 63 (2008); Mark Van Vugt & Mark Schaller, *Evolutionary Approaches to Group Dynamics: An Introduction*, 12 GROUP DYNAMICS: THEORY RES. & PRAC. 1, 1 (2008).

³⁰¹ See, e.g., Steven L. Neuberg, Dylan M. Smith & Terrilee Asher, *Why People Stigmatize: Toward a Biocultural Framework*, in THE SOCIAL PSYCHOLOGY OF STIGMA 31, 36 (Todd Heatherton et al. eds., 2000) (“[U]trasociality will be adaptive—and will persist—only to the extent that threats from within the group can be minimized. There must be mechanisms to identify individuals who threaten or hinder successful group functioning, to label them as such, to motivate group members to withhold group benefits from them, and to separate such individuals from the group if necessary.”); Neuberg & Cottrell, *supra* note 300, at 64 (“For the fitness benefits of sociality to exceed its costs, then, mechanisms would have evolved to (a) attune individuals to the features or behaviors of others that could characterize them as being potentially valuable or threatening to effective sociality and (b) lead individuals to respond to such perceived opportunities and threats in functional, opportunity-enhancing, and threat-mitigating ways.”); Robinson, Kurzban & Jones, *supra* note 299, at 1676 (“[I]ntuitions about punishment may

written, “[P]unishment or banishment of defectors may be critical for group cooperation to evolve.”³⁰² Allowing individuals to remain within the physical space of the group after a significant transgression (or repeated set of transgressions) of group norms might have been too costly given the difficulty of detection and the high fitness costs of anti-cooperative behavior.³⁰³ And the benefits of exclusion mechanisms are likely to have been significant “in not only the immediate, short term, but in the longer terms as well”³⁰⁴: “Avoidance and exclusion not only eliminate the cheater’s access to exploitation opportunities and reduce his or her ability to enjoy group benefits, but also provide a message of deterrence to would-be cheaters.”³⁰⁵ Hence, the existence and appeal of prisons and sentences of exile may have their roots in ancient pressures to ensure the benefits of social exchanges.³⁰⁶

frequently facilitate certain kinds of cooperation, such as social exchange. Such intuitions require an ability to perceive wrongful behavior, to remember transgressors, and to treat them differently than non-transgressors. We not only see this ability in many other social animals, but we also see it specifically in contexts of inflictions of physical harm, the taking of resources, and the violations of norms of reciprocity.”); Van Vugt & Schaller, *supra* note 300, at 1 (“Because it was potentially lethal to share with people unlikely to reciprocate, natural selection processes may have favored psychological mechanisms that facilitate the identification, avoidance, and ostracism of nonreciprocators. There is growing evidence that humans indeed have specialized decision rules for cheater detection and social exclusion.”).

³⁰² Kurzban & Leary, *supra* note 300, at 196 (“[P]eople generally want to exclude those who defect against the group, violating the group rules that preserve the interests of individual group members. So those who violate property rights, aggress against group members, fail to share the costs and risks of group membership, and so forth are likely to be targets of exclusion.”).

³⁰³ This is supported by existing cross-cultural and animal evidence showing the prevalence of exclusion or expulsion dynamics. *See, e.g., id.* at 191 (“Historians, anthropologists, and political scientists tend to agree that social exclusion is characteristic of human cultures around the world and throughout recorded history.”); *id.* (“Lemurs, baboons, [chimps,] and a number of other species have all been observed preventing others from joining their social groups or forcing the expulsion of particular individuals.” (citations omitted)); Robinson, Kurzban & Jones, *supra* note 299, at 1659 (“[O]ne would expect frequently to observe punishment (as well as retaliation, selective ostracism, and the like) of wrongdoing in ultra-social species such as ours. And the intersecting vectors of available animal evidence point toward that conclusion.”).

³⁰⁴ Neuberger & Cottrell, *supra* note 300, at 68 (“Stigmatization may serve to rehabilitate offenders, separate them from the group if necessary, and provide a lesson to other group members who might be tempted to pose similar threats in the future.”).

³⁰⁵ Neuberger, Smith & Asher, *supra* note 301, at 43; *see also* Jones & Goldsmith, *supra* note 299, at 470-71. The authors theorize that there is an evolutionary adaptation relating “to the idea that one of the best ways to alter behavior is by manipulating access to resources.” *Id.* (“Criminal penalties limit physical freedoms, coalitional and political (associational) freedom, access to children and other relatives, reputation and status, and sexual opportunity. At times of imposed isolation, criminal penalties even wholly deny social, physical, and emotional access to other human beings.”) (footnote omitted)).

³⁰⁶ Neuberger, Smith & Asher, *supra* note 301, at 39 (“Prison sentences satisfy th[e] aim [to separate the offender from the group and its resources] and, as an added benefit, provide a socialization lesson to the broader community.”); *id.* at 43 (“In smaller groups where social networks more effectively communicate information, public exposure and labeling may be sufficient to reduce the threat posed by cheaters. In larger, more anonymous groups, however, where one can be less confident that communication will effectively expose the perpetrator, imprisonment or banishment may be seen as necessary to reduce the threat.”).

Although this brief example of potential insights from social psychology and evolutionary psychology is necessarily incomplete, it is intended to evoke how the mind sciences might be used to shed light on the spatial dynamics this Article investigates and might help elucidate previously misunderstood realms of criminal law.

B. *Normative Tensions: Preliminary Insights*

Putting together the research documenting the powerful role of physical space in criminal law with theory derived from social psychology, social cognition, evolutionary psychology, and other fields explaining the origins of these spatial dynamics raises a number of serious questions about our laws, legal institutions, and structures of justice. Having only offered a glimpse of the mind sciences research in this introductory Article, such analysis must be saved for other work.

However, even without having yet considered the behavioral literature, it is possible to see some of the potential normative tensions that exist. Thus, to get a sense of the implications of the broader project, it may be fruitful to take a parting glance at some of the ways in which our blindness to the power of landscapes, places, natures, and spatialities may result in outcomes that conflict with our purported values, in addition to the ways in which the generally unnoticed emphasis on protecting physical space in our laws may not serve contemporary societal goals and needs.

One major concern is that when we consider why a person committed a crime, we often appear to place too much weight on the choices actors make and not enough emphasis on the way physical space constrains and creates those choices. By failing to realize how space can catalyze or inhibit action, we are liable to assign more blame to individuals than they deserve. Often, we send eighteen-year-olds from broken homes and impoverished neighborhoods away to prison for drug crimes or robberies, confident that they are bad people who made bad decisions that warrant punishment, without acknowledging that our own choices as a society not to address spatially-embedded criminogenic factors are directly tied to the offenses we condemn.³⁰⁷ Moreover, our crime reduction policies may be comparatively ineffective to the extent that they focus on people making better choices and not on reducing unemployment rates, improving early education, or

³⁰⁷ Cf. THOMAS MORE, *UTOPIA* 21 (George M. Logan & Robert M. Adams eds., 1975) (1516) (“If you allow young folk to be abominably brought up and their characters corrupted, little by little, from childhood; and if then you punish them as grownups for committing the crimes to which their training has inclined them, what else is this, I ask, but first making them thieves and then punishing them for it?”).

encouraging community engagement in certain at-risk neighborhoods, or on better protecting children from witnessing or experiencing domestic violence in their own homes.³⁰⁸

Another concern is with space-specific policing, some of which is clearly beneficial. As suggested above, in the last few decades technological developments involving crime mapping have allowed precincts to increase efficiency and effectiveness by targeting problem areas. However, other such policing is troubling. If one of our important normative goals is equal treatment and equal protection of our citizens by the law, the fact that police—as a result of official policy and individual discretion—treat people differently depending on the neighborhood in which they are encountered should disturb us. And it is not just out of a sense of fairness that we should be concerned. When people in a particular area feel that police mistreat them, individuals are far less likely to provide the cooperation that the police desperately need to clear cases and reduce crime. This lack of cooperation might occur, for example, when individuals notice that officers handle people in their neighborhood more harshly than in other boroughs or when officers fail to expend as much energy on local murder investigations than elsewhere in the city.³⁰⁹

In addition, rules that order police interactions based on place—as Fourth Amendment jurisprudence traditionally did³¹⁰—may both fail to provide the necessary flexibility to meet emerging developments (e.g., electronic eavesdropping) and allow outcomes that are at odds with central societal values (e.g., permitting officers to unduly interfere in citizens' private interactions while protecting the bricks, wood, glass, and drywall in which such interactions take place).³¹¹ Ironically, safeguarding one particular space may endanger another. As Chief Justice Roberts suggested in *Georgia v. Randolph*, by treating the space of the home as particularly sacred and buffering it against state intrusion, we may allow for horrible breaches of individuals' body spaces within the home—in the form of domestic violence—that police might otherwise stop.³¹² Just as unsettling are recent research studies

³⁰⁸ See *supra* text accompanying notes 79-92.

³⁰⁹ See Borg & Parker, *supra* note 159, at 458.

³¹⁰ See Benforado, *Managing Space*, *supra* note 148.

³¹¹ See *Katz v. United States*, 389 U.S. 347, 353 (1967) (“[T]he Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures,” and its reach “cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”).

³¹² *Georgia v. Randolph*, 547 U.S. 103, 139 (2006) (Roberts, C.J., dissenting) (“The majority’s rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.”). In his concurrence, Justice Breyer also raised the concern but agreed with the majority’s argument that the Court’s limited ruling protecting the home space would not seriously affect an officer’s ability to enter a home in the case of domestic violence given the recognized exception for exigent circumstances. *Id.* at 126-27 (Breyer, J., concurring).

that show that those with homes enjoy greater Fourth Amendment protections than those living in apartments or those who are homeless.³¹³ The continued spatial dependency of critical constitutional safeguards may mean that it is wealth that determines basic rights, an affront to our ideals of a system of government free of privilege.

With respect to an investigation, because federal, state, and local jurisdiction designations confine police work to particular geographic areas, it may be difficult to connect certain crimes or parts of crimes committed by the same individual or individuals across jurisdictions.³¹⁴ Where a criminal murders a victim in one county but dumps her body in another, it may be hard not only to link the evidence but also to overcome procedural, technological, or bureaucratic hurdles to effectively solving the crime.³¹⁵

When it comes to criminal prosecution, jurisdictional barriers between nations may effectively prevent a criminal who has ordered the rape, torture, and execution of thousands from being brought to justice. An individual who remains within the territorial boundaries of a sovereign nation that refuses to prosecute or extradite him and has not agreed to submit to the jurisdiction of the International Criminal Court can effectively escape punishment altogether.³¹⁶ The result is that under international law, we may end up privileging the boundary of the nation over the boundary of the individual body, an outcome that does not align well with our professed commitment to human rights.³¹⁷

Given the importance of physical space to issues of criminality, at first blush, it would seem appropriate that crimes often protect physical

³¹³ See Rosen-Zvi, *supra* note 28, at 643 (noting also that car owners enjoy greater protections than those who must rely on public transportation).

³¹⁴ Steven A. Egger has termed this stumbling block to the cross-jurisdictional sharing of information on unsolved murders “linkage blindness.” For an overview, see Part III of STEVEN A. EGGER, *THE KILLERS AMONG US: AN EXAMINATION OF SERIAL MURDER AND ITS INVESTIGATION* 177-89 (1998).

³¹⁵ As Ronald Hinch and Cystal Hepburn explain, “In the United States, it is not [even] mandatory for coroners to report the discovery of unidentified bodies to a centralized data bank.” Ronald Hinch & Cystal Hepburn, *Researching Serial Murder: Methodological and Definitional Problems*, 3 ELECTRONIC J. SOC. 2 (1998), http://www.sociology.org/content/vol003.002/hinch_d.html. Overall, the result of these created constraints is that many bodies simply go unidentified. See *id.* (suggesting that there are 4000 to 5000 unidentified dead bodies found in the United States annually).

³¹⁶ Were the ICC to indict an individual like Robert Mugabe, whose regime in Zimbabwe has engaged in systematic human rights abuses, he could still avoid being brought to justice by staying within the physical space of Zimbabwe. See Mark S. Ellis, Op-Ed, *Indict Zimbabwe’s Demagogue; A Referral to the ICC*, INT’L HERALD TRIB., Dec. 28, 2005, at 9.

³¹⁷ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, art. 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”).

spaces and are defined with triggers based on physical boundaries, but the connection between the two turns out to be unsound: Space may shape criminal behavior, but that does not mean that we ought to privilege spatial concerns when it comes to articulating our values. If one of our goals in crafting a criminal code is to reduce “harms” experienced by the public, it may make sense to focus on preventing boundary breaches of physical spaces; however, it is quite possible that today non-physical transgressions cause us equal or greater injury. Research on children, for example, suggests that the consequences of emotional abuse can be just as harmful as physical or sexual abuse, forms of abuse that involve intrusion into the body space.³¹⁸ Yet our criminal law regime focuses almost exclusively on the *latter* harms, and, in most cases, the authorities hesitate to intervene in child welfare cases where there is just psychological maltreatment.³¹⁹ While there may still be good reasons for emphasizing physical harms over emotional ones in our criminal law (e.g., it is likely to be more difficult to *prove* psychological abuse and we are wary of feigned injury), it is important to be aware that our failure to criminalize “being psychologically unavailable to one’s child” or “preventing one’s child from engaging in normal social interactions” is not a result of these acts or omissions’ being trivial or less damaging.

Moreover, although embedding spatial triggers into certain laws may seem a logical way to accomplish particular aims—for example, increasing the penalty for dealing drugs within a thousand yards of a school in order to protect children—such laws often do not accomplish the ends that seem so certain to result. In his study of drug sales in Fall River, New Bedford, and Springfield, Massachusetts, for instance, William Brownsberger noted that while many of the drug offenses in those cities did occur within drug free school zones (80%), “less than 1% of the drug-dealing cases involved sales to minors.”³²⁰ In addition,

³¹⁸ As Adam M. Tomison and Joe Tucci suggest, “Not only does emotional abuse appear to be the most prevalent form of child maltreatment . . . some professionals believe it to produce the most destructive consequences.” Adam M. Tomison & Joe Tucci, *Emotional Abuse: The Hidden Form of Maltreatment*, ISSUES CHILD ABUSE PREVENTION (Austl.), Spring 1997, available at <http://www.aifs.gov.au/nch/pubs/issues/issues8/issues8.html> (citation omitted).

³¹⁹ See *id.* (“[T]he American Bar Association recommends protective intervention only when a child is already suffering serious emotional damage as evidenced by severe anxiety, depression, withdrawal, self-harming behavior or aggressive behavior towards others, and where the child’s parents are unwilling to provide appropriate treatment.” (citation omitted)).

³²⁰ WILLIAM N. BROWNSBERGER & SUSAN AROMAA, AN EMPIRICAL STUDY OF THE SCHOOL ZONE LAW IN THREE CITIES IN MASSACHUSETTS (2001), available at http://www.jointogether.org/resources/pdf/school_zone.pdf (“[T]he school zone statute . . . does not make the areas around schools particularly safe for children [and] . . . is not used by prosecutors in a way calculated to move dealing away from schools. Instead the law operates generally to raise the penalty level for drug dealing and does so in ways that are unpredictable for defendants.”). The Utah Sentencing Commission has documented similar dynamics; as Greene et al. summarize:

such laws may have serious negative consequences. In a 2005 study, The New Jersey Commission to Review Criminal Sentencing found that the drug-free zones were having “a devastatingly disproportionate impact on New Jersey’s minority community” because of large differences in the density of schools (and, thus, school zones) between minority (primarily urban) and white (primarily suburban) areas.³²¹ Ultimately, laws with spatial boundary triggers have the potential to be particularly imprecise mechanisms for solving societal problems. The law is over-inclusive in urban areas with a high density of school zones, capturing acts that do not involve children in any way.³²² In contrast, in sparsely populated rural areas without overlapping school zones, the law is under-inclusive, failing to capture acts involving children.³²³

The spatial disparity in judicial outcomes is of major concern. Again, if our aspiration is blind and equal justice—justice that is meted out consistently across space—it is unfair that the same person breaking the same law faces radically different treatment based solely on where the case comes up for trial. Moreover, our reliance on incarceration at the sentencing stage may itself be problematic. At the same time that it may serve certain societal objectives, it may harm others.³²⁴ For instance, separating prisoners off spatially from the rest of society may align well with retributive, deterrent, and incapacitative theories of justice. Yet it may be a very poor policy from the point of view of

Most of those charged under an enhancement have only an accidental or incidental connection to any of the locations cited in the statutes. . . . [M]ost drug offenses that qualify for an enhancement actually occur within a residence which simply happens to be located in a 1,000-foot zone . . . [and] few of these offenses are committed in the presence of children. Most of those who are charged with a penalty enhancement either live or work within a zone, and would find it difficult to avoid the area of prohibition. . . . [Finally, there have been a number of] instances where law officers have deliberately lured people inside a zone in order to make an arrest that will trigger the enhancement.

GREENE ET AL., *supra* note 182, at 38.

³²¹ N.J. COMM’N TO REVIEW CRIM. SENTENCING, REPORT ON NEW JERSEY’S DRUG FREE ZONE CRIMES AND PROPOSAL FOR REFORM 3, 24 (2005), available at <http://sentencing.nj.gov/publications.html> [hereinafter N.J. REPORT] (“The end result of this cumulative ‘urban effect’ of the drug free zone laws is that nearly every offender (96%) convicted and incarcerated for drug free zone offenses in New Jersey is either Black or Hispanic.”). The Massachusetts Sentencing Commission found that although minorities accounted for only twenty percent of the population, almost eighty percent of the people convicted of mandatory drug offenses were Hispanic or blacks. MASS. SENTENCING COMM’N, SURVEY OF SENTENCING PRACTICES FY 2004, at 52 (2005), available at <http://www.mass.gov/courts/admin/sentcomm/fy2004survey.pdf>.

³²² As the New Jersey Commission on Criminal Sentencing emphasizes, “[T]he size of the zones actually dilutes the ‘special’ protection the laws are supposed to offer, undermining its practical ability to create incentives to drug dealers to relocate their operations away from schools, parks and other protected property.” N.J. REPORT, *supra* note 321, at 25.

³²³ See GREENE ET AL., *supra* note 182, at 44 (discussing recent state attempts to address this problem).

³²⁴ See Andrew Ashworth, *Sentencing*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 24, at 1076, 1076-81.

rehabilitative or restorative goals.³²⁵ In respect to the victim, a focus on physical resolutions to committed crimes—that is, mending the body of the victim (e.g., extracting bullets or healing bones), re-securing the home (e.g., fixing a broken window or reinstalling a lock), or removing the perpetrator from society—may do very little to address the actual harms that the victim experiences as a result of a criminal act. Again, looking at children, evidence suggests that it is the emotional trauma that arises from sexual or physical abuse that ultimately embodies the most serious consequences of the illegal act.³²⁶ Assuming that society's role ends with sewing up the cuts and locking away the abuser is to ignore the true needs of the victim.³²⁷

In respect to the prisoner, the physical isolation of the prison experience may cause more problems than it resolves. The solitary confinement typical of super-max prisons is designed to make prisons safer, yet some corrections experts believe that it makes the jobs of guards more dangerous since a prisoner in solitary “has no reason not to attack, maim or even kill a guard.”³²⁸ Likewise, doctors have found that such confinement can be very psychologically scarring for prisoners,³²⁹

³²⁵ And, of course, there are many other sentencing goals, such as cost minimization, which may be poorly served by a regime focused on physical separation. Prisons are incredibly costly for both state and federal governments. See JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf> (“The average annual operating cost per State inmate in 2001 was \$22,650, or \$62.05 per day. Among facilities operated by the Federal Bureau of Prisons, it was \$22,632 per inmate, or \$62.01 per day.”).

³²⁶ As Tomison and Tucci summarize, “[T]he emotional and psychological trauma associated with physical and sexual abuse . . . has the most detrimental impact on the development of children. . . . Children may recover from physical pain and injuries, but may never recover from the terror, degradation, humiliation or breach of trust involved in sexual abuse.” Tomison & Tucci, *supra* note 318 (citations omitted).

³²⁷ Analyzing the data from the 1998 British Crime Survey, Mike Maguire and Jocelyn Kynch found that the two most commonly cited needs were psychological ones—“someone to talk to/moral support” and “information from the police.” “By contrast, ‘practical help’—e.g., with cleaning up mess, replacing locks or mending damage—emerge[d], rather surprisingly, as a relatively infrequently mentioned need.” MIKE MAGUIRE & JOCELYN KYNCH, HOME OFFICE OCCASIONAL PAPER, PUBLIC PERCEPTIONS AND VICTIMS’ EXPERIENCES OF VICTIM SUPPORT: FINDINGS FROM THE 1998 BRITISH CRIME SURVEY 8-9 (2000), available at <http://www.homeoffice.gov.uk/rds/pdfs/occ-vicsupport.pdf>. Overall, Maguire and Jocelyn found that “almost 40 per cent [of victims] expressed needs which were not met from any source.” *Id.* at 12.

³²⁸ Peg Tyre, *Trend Toward Solitary Confinement Worries Experts*, CNN.COM, Jan. 9, 1998, <http://www.cnn.com/US/9801/09/solitary.confinement>; see also Laura Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, NPR, July 26, 2006, <http://www.npr.org/templates/story/story.php?storyId=5582144> [hereinafter Sullivan, *In U.S. Prisons*].

³²⁹ Psychiatrist Dr. Henry Weinstein, for example, has found that prisoners in solitary exhibit symptoms including memory loss, hallucinations, severe anxiety, and delusions; as he summarizes, “[U]nder the severest cases of sensory deprivation, people go crazy.” Tyre, *supra* note 328; see also Laura Sullivan, *At Pelican Bay Prison, a Life in Solitary*, NPR, July 26, 2006, <http://www.npr.org/templates/story/story.php?storyId=5584254> (noting that the 128-bed psychiatric wing at the Pelican Bay State Prison SHU is completely filled and has a waiting list). Moreover, the use of extreme isolation facilities appears to have a negative effect on the mental

and it may, in fact, make it more difficult to reintegrate individuals into society after they have served their time.³³⁰ In addition, by removing inmates from the public eye, punishment based on spatial separation may facilitate exactly the type of abuses that we condemn—like the rapes and assaults that Green suffered.

The physical brutalization of the prison experience along with the continued use of capital punishment in the United States has led some commentators to question the didactic statement entailed in a regime that meets physical transgression with physical transgression. In the words of Roger Hood, the death penalty may be “counterproductive in the moral message it convey[s] . . . for it legitimise[s] . . . the very behavior—killing—which the law [seeks] . . . to repress.”³³¹ Indeed, more broadly, it is troubling that our law should treat certain physical spaces as so inviolable—counting transgressions of the body and home as particularly heinous and uncivilized—while engaging in exactly such boundary breaches as a normal part of the operation of the criminal justice system.

Despite these serious concerns, the influence and impact of spatial factors within the criminal law likely has clear benefits as well—from the clarity and administrability of having legal rules triggered based on the crossing of salient physical boundaries, to the reduced sense of threat we all feel at having physically removed problem elements from society and placed them behind a barrier.

To unravel these complexities, it is necessary to explore the psychological underpinnings of the spatial dynamics uncovered in this Article, the next step in the project. Only then can we hope to assess accurately decisive issues like whether we continue to base our criminal law system around physical boundaries because such an approach better serves our needs and values, or whether it simply reflects the power of tradition and widely-held, but deeply flawed, assumptions about

health of guards as well. See Laura Sullivan, *Working the Isolation Unit: A Prison Officer's Tale*, NPR, July 28, 2006, <http://www.npr.org/templates/story/story.php?storyId=5589233>. Among other manifestations, some evidence suggests the guards working at super-max facilities are more apt to be abusive toward prisoners than those employed in other settings. Laura Sullivan, *As Populations Swell, Prisons Rethink Supermax*, NPR, July 27, 2006, <http://www.npr.org/templates/story/story.php?storyId=5587644> [hereinafter Sullivan, *As Populations Swell*].

³³⁰ Studies conducted in Washington and in Texas showed that the rate of recidivism—particularly with respect to violent crimes—for inmates coming from isolation was greater than for those coming from the general prison population. Laura Sullivan, *Making It on the Outside, After Decades in Solitary*, NPR, July 28, 2006, <http://www.npr.org/templates/story/story.php?storyId=5589778>. This is particularly unsettling news given that approximately ninety-five percent of those individuals in isolation facilities will one day be let out of prison. Only a few states offer any help with transitioning back into society. See Sullivan, *As Populations Swell*, *supra* note 329. In 2005, Texas “took 1,458 inmates out of isolation . . . walked them to the prison’s gates and took the handcuffs off.” Sullivan, *In U.S. Prisons*, *supra* note 328.

³³¹ Roger Hood, *Capital Punishment*, in THE HANDBOOK OF CRIME AND PUNISHMENT, *supra* note 56, at 739 (citation omitted).

criminals, crime, and establishing a safe society.