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SPACING OUT:
TOWARDS A CRITICAL GEOGRAPHY
OF LAW

BY NICHOLAS K. BLOMLEY* AND JOEL C. BAKAN**

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'Law' ... is too important to be left to the lawyers.
— Lawrence Friedman

Geography is too important to be left to geographers.
— David Harvey

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** Faculty of Law, University of British Columbia. This paper is based on an article originally published as J. Bakan & N. Blomley, “Spatial Categories, Legal Boundaries, and the Judicial Mapping of the Worker” (1992, forthcoming) 24 Env't & Plan. A. Given the interdisciplinary nature of our argument we felt it appropriate to also seek publication in a legal journal. In so doing, we have revised and extended our argument. We are very grateful to the editors of both Environment and Planning A and the Osgoode Hall Law Journal for their cooperation. We also appreciate the helpful comments of an anonymous referee, as well as the criticisms of Trevor Barnes, David Cohen, Robert Grant, Marlee Kline, and Peter Marden on earlier drafts. Any errors or omissions are solely the responsibility of the authors.

1 "The Law and Society Movement" (1986) 38 Stan. L. Rev. 763 at 780.

I. INTRODUCTION

This paper seeks to transcend a deep-seated division of intellectual labour. It analyzes the imbrication of space, law, and power and attempts to forge a closer link between critical traditions in the disciplines of law and geography. Such an exploration, long overdue, is important for the development of socio-legal studies. Until recently, the relationship between law and space has been largely underplayed and confused. The continued invisibility of space within legal studies and of law within geography not only limits the analytical potential of each but, more importantly, contributes problematically to the presentation of law and space as pre-political categories. In this paper, we will note the extent of the curious divide between traditional legal and geographic research, which belies the ostensibly interdisciplinary character of each discipline. However, we will also argue that critical researchers who attempt the exploratory crossing between law and geography are assisted by a number of developments, including a shared scepticism on the part of both critical lawyers and critical geographers towards the supposedly objective status of law and space. Partly in response to this, recent years have seen a number of exploratory forays from both disciplines.

One of the reasons for the apparent invisibility of space as an analytical category within legal studies rests with the modernist ascendancy of historical analysis within social theory.\(^3\) Certainly, critical studies within law have largely relied upon history in their attempts to argue against the closure of law. While this contributes to the invisibility

of space, it also serves as an analogical basis for a *spatialization* of law. Legal actors can be understood not only as constructing historical representations, but also as defining and dividing *legal geographies*. Such geographies, we will argue, are of more than passing interest. Just as representations of history may buttress legal claims to rationality and closure, so may certain renderings of space. Further, just as such histories are contingent and contradictory, so are the geographies of law. Given the paucity of research in this field, however, any legal/geographic argument must be tentative. We try to illustrate ours with an important legal debate in Canada and the United States about federalism and the regulation of worker safety. The central question is whether local officials, acting under provincial or state regulatory regimes, have enforcement authority in contexts where national worker-safety regulations apply. We will argue that similarities between the Canadian and American legal decisions concerning this question can be explained in part by a common judicial *mapping* of work, local space, and state regulation.

II. LAW AND GEOGRAPHY

Legal culture is

based upon an authoritarian monologue of initiation. It is a culture confined within the parameters of a professionalised and esoteric language, in turn supported by a jurisprudence of legal uni-vocality within which the institutional meaning of law is always given and merely remains to be said.4

The apparent exclusion of geography under these conditions is not surprising. Legal interpretation, as a discursive practice, appears resolutely closed to external influences, admitting them only under conditions of its own choosing. In a trenchant account of the relationship between legal discourse and the multiple geographies of social life, Wesley Pue has argued that law is, in this sense, "anti-geographical."5 By this, he means that the legal mentality is curiously acontextual, such that legal relations and obligations are frequently


5 "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 Urb. Geography 566 at 568 [emphasis in original].
thought of by the courts and other legal agencies as existing in a purely conceptual space, with little recognition of their spatial heterogeneity or the local material contexts within which law is understood and contested. Geography, then, can challenge the self-acclaimed rationality of the legal order. It can challenge, as well, traditional legal theory, which is largely unconscious of geographic questions, even when exploring the link between law and society. With a few notable exceptions, such as the work of comparative legal scholar John Wigmore, space appears to have been largely downplayed in legal theory. This replicates a pervasive modernist downgrading of the spatial, perhaps deriving from the Kantian distinction between the activism of the historical and the passivity of the spatial. Explanatory power is thought to lie with history, not with the inertia of space.

Silence about space is also problematic for critical legal scholarship. Whether political, economic, or postmodern in inspiration, critical analyses of law profess suspicion of disciplinary boundaries and the stability of the traditional core of legal endeavour, leading to an efflorescence of interdisciplinary research, with exciting and productive exchanges between legal studies and feminism, literary theory, critical race theory, political theory, history, and sociology. The absence of geography in this context is striking. Again, it perhaps derives from the deeper invisibility of the space/society link within the modernist, theoretical underpinnings of critical research. Marx, for example, saw space as “an unnecessary complication.” The meta-histories of time, not the geographies of space, provided the focus for critical analysis. Similarly, Gordon has noted that “critical legal writers pay a lot of attention to history.” In fact, “they have probably devoted more pages to historical description ... than anything.” The consequence has been

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9 *Supra* note 3 at 57.

10 Ibid.
the construction of an historical epistemology that sees the world primarily through the dynamics arising from the emplacement of social being and becoming in the interpretive contexts of time: in what Kant called nacheinander and Marx defined ... as the contingently constrained 'making of history.' This enduring epistemological presence has preserved a privileged place for the 'historical imagination' in defining the very nature of critical insight and interpretation.\textsuperscript{11}

Meanwhile, academic geography has not only acquiesced and even cooperated in its legal invisibility, it has returned the insult by effectively downplaying or ignoring law. Again, with a few exceptions, mainstream geographic research on legal questions is sporadic and almost incidental.\textsuperscript{12} Much of it takes the form of "impact analyses," wherein the geographer tracks the effect of a specific law or ruling on a geographic configuration, such as a housing market.\textsuperscript{13} The implicit divide between legal, social, and spatial categories characteristic of these analyses and the refusal to engage in deeper analysis of legal discourse serve to reproduce the problematic law/society and law/space divides.\textsuperscript{14}

As in legal studies, however, a critical strain of geographic research has emerged in recent years. Drawing upon debates within social theory and postmodernism, it has simultaneously imported insights from other fields and argued for the analytic relevance of space to researchers outside geography. Space, in this work, is far from empty or asocial; it is deeply political. Critical human geography has devoted considerable energy to examining the spatiality of structures that constrain human action and social consciousness, with special attention given to the politics of race, class, and gender. Therefore, a neglect of legal ideology and legal discourse amongst such analyses is surprising. Even when geographers consider law—through regulation theory, for example—they often do so in an unsophisticated manner.\textsuperscript{15}

Despite their mutual indifference, the academic disciplines of law and geography demonstrate striking internal symmetries and share

\textsuperscript{11} Soja, \textit{supra} note 7 at 10.

\textsuperscript{12} D. Whittlesey, "The Impress of Effective Central Authority upon the Landscape" (1935) 25 Annals A. Am. Geographers 85.


\textsuperscript{15} P. Marden, "'Real' Regulation Reconsidered" (1992) 24 Env't & Plan. A 751.
numerous areas of inquiry. For example, each has well-developed analyses of federalism and the appropriate locus of state regulation. Moreover, the mainstream methodologies of the two disciplines are parallel, each relying on what might be termed instrumentalist\(^\text{16}\) and formalist\(^\text{17}\) methodologies. However, the possibility for forging a connection between law and geography lies not here, but within the critical traditions of each discipline. Despite the apparent divide between law and geography, a theoretical symmetry can be identified that offers a basis for cross-over. Both critical legal and geographic studies interrogate the categories relied upon within each disciplinary mainstream—law in legal studies, space in geography. Arguing that these categories are socially constructed, they reveal a shared scepticism towards the ontological status of their respective discipline cores. Law and space are understood as relational, acquiring meaning through social action; rather than as objective, existing logically prior to and separate from social and political relations.\(^\text{18}\) Critical lawyers and critical geographers, respectively, have rejected legal science, spatial science, and their claims that law and space can be understood as separate from society. They have concentrated instead upon the political and ideological significance of space and law, and their representations within the mainstream of each discipline and wider social discourse.

Thus, for example, in geography, it has been argued that the evolution of the landscape aesthetic as a “way of seeing” was not a purely autonomous or technical event, but was bound up with the evolution of capitalist social relations.\(^\text{19}\) Similarly, cartography is


understood as speaking more powerfully of political imperatives and tensions than representing purely technical and scientific spatial truths.\textsuperscript{20} In a parallel fashion, critical lawyers have demonstrated that social relations portrayed within the legal system as natural, necessary, and pre-political—like the family, contractual relations, or private ownership of property—are indeed deeply social and political. They have also shown that interpretations of allegedly neutral and universal legal standards represent particular political imperatives.\textsuperscript{21} The parallels between the two critical literatures are evident if one compares the following passages—the first about space and the second about law:

Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and thus seems to be “purely” formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes ... Space has been shaped and moulded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.\textsuperscript{22}

For CLS [critical legal studies], critique must begin and proceed with the operation of law as ideology. ... For CLS, the rule of law is a mask that lends to existing social structures the appearance of legitimacy and inevitability; it transforms the contingency of social history into a fixed set of structural arrangements and ideological commitments. ... [T]he status quo and its intellectual footings, far from being built on the hard rock of historical necessity, are actually sited on the shifting sands of social contingency.\textsuperscript{23}

The assumed passivity and objectivity of the spatial and the legal, and their often technical representation, render them especially opaque to critical insight. A central concern in both critical literatures is that


\textsuperscript{22} H. Lefebvre, “Reflections on the Politics of Space” (1976) 8 Antipode 30 at 31.

\textsuperscript{23} A.C. Hutchinson, “Crits and Cricket: A Deconstructive Spin (Or was it Googly?)” in Devlin ed., \textit{supra} note 21, 181 at 183.
space and law are frequently reified—social relations are represented and experienced through legal and spatial categories and conventions as fixed, natural, objective, and thus asocial and apolitical. In itself, this does not merit much attention. However, critical scholarship strives to prove that the hegemony of particular reified conventions and representations, and the concomitant exclusion of other frameworks, partly shape human experience of the social world. The ever-present danger is that such representations come to be seen as true knowledge, thus obfuscating the contingency of social life and the need and possibilities for change. In other words, the notion that “things could be different” is made unintelligible by powerful frames of reference and understanding. This has been a central concern for both critical geographic and critical legal literatures. The two literatures have tended to argue in parallel, relying on similar theoretical claims about space and law, respectively, though there has been little overlap between the two lines of argument.

III. CROSSING THE DIVIDE

In this paper we suggest that the absence of a dialogue between critical perspectives in law and geography foreshortens the critical reach and intellectual potential of each. In many instances there exist powerful ideological conjunctions between the reified representations of space and law. Understanding these is important for critical social theory. A small but growing literature has begun to map out the law/space nexus. It is more systematized within geography than within law—recent years have seen the publication of a number of collections and review essays24—but the writings of legal scholars also contain intriguing insights. Examples can be found in Wesley Pue’s discussion of the “insurrectionary” effect of geography within law;25 Boaventura de Sousa Santos’s attention to the link between geographic scale and the politics of legal interpretation;26 and David Engel’s discussion of legal

24 See, for example, Blomley, supra note 14; Clark, supra note 13; and N.K. Blomley, Law, Space and the Geographies of Power (New York: Guilford Press, forthcoming).

25 Supra note 5 at 575-79.

interpretation in Thailand, with an account of the forcible imposition of an a-spatial and individualized modern grid upon a traditionally variegated, contextual, and deeply local legal map in which "who one was could not be separated conceptually from where one was."27 This literature offers some comfort for our endeavour but does not provide a well articulated theoretical position from which to proceed.

In this paper, we begin with the claim that legal thought and legal practice contain a number of representations—or geographies—of the multiple spaces of political, social, and economic life. Much as law relies in various ways on claims concerning history and time, it also simultaneously defines and draws upon a complex range of geographies and spatial understandings. While struggling to make sense of the complexity and ambiguity of social life, legal agents—whether judges, legal theorists, administrative officers, or others—represent and evaluate space in various ways. When we start looking, we discover that such representations are abundant and varied, touching all aspects of legal and social life, such as property, crime, contractual relations, intergovernmental relations, and so on. The construction of such spaces can be seen, for example, when legal actors designate boundaries between public and private spaces, make decisions concerning the autonomy of local governmental actors, or consider questions of personal mobility or spatial equality. Legal spaces are also relied upon implicitly on many other occasions. Legal interpretation, for example, with its encoded claims concerning the placement of the individual legal subject and the balance between universal and particularized legal knowledge, implies a claim about the situated contextuality of law. An assertion of legal closure constitutes not only a rejection of the historicity of social life but also its spatiality.

The construction of legal spaces is a central part of a broader process by which law and social life are interpreted. The representation and evaluation of space in legal discourse, as in the construction and value ascribed to mobility or the locality, is constituted by, and is in turn constitutive of, broader accounts of social and political life under law. Space, like law, is not an empty or objective category, but has a direct bearing on the way power is deployed and social life constituted. The geographies of law are neither passive backdrops in the legal process,

nor of random import; they can, in combination with their implied claims concerning social life, be problematic and even oppressive. In part, this reflects the frozen way in which such geographies are presented. The geographies of law—for example, the division between the private workplace and the public domain—can appear in legal discourse as facts of life or found objects. Further, the manner in which legal geographies are defined can have problematic effects, both in an immediate and a more indirect sense. A useful claim of recent legal theory is that legal categories and distinctions not only draw upon consciousness, but form it, such that everyday language becomes imbued with the vocabulary of rights, property, and legality. The geographies of law may serve a similar constitutive function, both shaping and constraining the social, imaginary, and popular readings of the spatiality of social life. At the same time, it must be recognized that such geographies, like the histories of law, are necessarily conditional and partial. Not only are they often contradictory, but alternative legal maps can be constructed to challenge those which are dominant. There is potential, in other words, to destabilize the frozen spaces of legal discourse.

We will attempt to demonstrate the analytical potential of a critical legal geography through a theoretical commentary upon recent American and Canadian decisions on federalism and worker safety, with particular emphasis on their construction and reification of spatial boundaries and legal categories. The effect, we shall suggest, is frequently to “space out” certain people, by virtue of their supposed “geo-legal” location, and deny them the protection accorded other citizens. The cases we will analyze arise in somewhat different contexts in each country. The American cases ask whether state criminal law can be used to sanction employers for dangerous and unhealthy working conditions when federal occupational health and safety standards apply; while the Canadian cases are concerned with the application of provincial occupational health and safety laws to employers who are within federal jurisdiction. In legal terms, a different kind of jurisdictional dispute is raised by each set of cases. What we find

interesting, however, is the way the legal discourse in each context draws upon the same ideologies of work and space.

IV. THE CASE STUDIES

In a regulatory vacuum created by weak enforcement of federal health and safety standards, many local prosecutors in the United States have instituted proceedings against employers in whose workplace employees have died. Rather than using the federal Occupational Health and Safety Act, such initiatives by local prosecutors have relied upon the traditional police powers of the states, including laws designed to protect the local citizenry from violent crime. Employers and supervisors have been charged with such offenses as manslaughter, aggravated battery, reckless conduct, and criminally negligent homicide. These local initiatives, not surprisingly, have prompted a litigation storm. Defendant employers have challenged the constitutionality of local prosecutions, claiming that the existence of the federal OSHA expresses a Congressional intent that worker safety be administered by federal, not state, regulations. Accordingly, employers have argued that local initiatives should be preempted and that prosecutions concerning worker

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29 In the United States, the Occupational Health and Safety Administration (OSHA) has faced budget cuts and has been obliged to adopt a less "confrontational" approach to enforcement. Critics have charged that policy changes such as the move to self reporting of workplace injuries have lead to severe abuses. It has also been argued that OSHA is inadequate for enforcing worker health and safety standards. See National Safe Workplace Institute, Criminal Job Safety Prosecutions: Lessons Learned, Prospects for the Future (Chicago: NSWI, 1990).

30 W. Glaberson, "States are Toppling Workplace-Injury Convictions" New York Times (19 September 1989) A1, D5. Glaberson reports that more than 200 such proceedings were launched by September 1988. The concerns leading to this strategy are expressed by Jay Magnuson in "Interview with Jay Magnuson, Deputy Chef, Public Interest Bureau, Cook County (Illinois) State's Attorney" Corp. Crime Reporter (27 April 1987) 7 at 8. Asked why there had been an upsurge in local prosecutions, Magnuson noted that "it has become apparent to [local prosecutors] that in fact the federal government is not doing the kind of job that we expected. Therefore, it falls back to the traditional local level to enforce": ibid. at 8. Magnuson continued that such a move might overturn certain assumptions about criminality. The problem was that of convincing a judge "whose idea of crime was to put a gun to somebody's head and take their money ... [that] robbing somebody of their health is really no different": ibid. at 8.

It is also interesting to note that similar local responses and legal debates concerning preemption have occurred in other employment contexts. H. Weinstein, "Protections for Workers Now Challenged by Federal Laws" Los Angeles Times (21 February 1989) A5.

safety can only be launched under the federal scheme.32 State prosecutors have responded by arguing that section 4(b)(4) of the OSHA,33 which provides that the "common law, or statutory rights, duties or liabilities of employers and employees" are to be preserved with respect to injuries or deaths "arising out of, or in the course of employment," expresses a Congressional intent to preserve the applicability of the pre-existing state criminal laws under which employers are being charged. Some courts in the United States have rejected, and others have accepted, the prosecutors' argument. The law is currently unsettled.34 In all of the cases employers or supervisors were

32 Art. VI, cl. 2 of the United States Constitution states that federal law is "the supreme law of the land." On the basis of this provision, it has been held by courts that state laws are preempted by federal laws where an explicit or implicit Congressional intent to preempt can be inferred from federal legislation.

Employers have argued that an implicit congressional intent to preempt state criminal laws from application to worker safety can be found to rely upon section 18 of the OSHA, 29 U.S.C. § 667 (1982), which states that "[n]othing ... shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under § 655 of this title." Section 655 provides for the promulgation of workplace safety standards. This is taken to mean that Congress intended an absolute preemption of local prosecutions concerning worker safety. The argument in support of this interpretation is encapsulated in Sabine Consolidated Inc. v. State, 756 S.W.2d 865, 868 (Tex. Ct. App. 1988) [hereinafter Sabine]:

We read [s. 18(a)] to mean that the states are free to establish and enforce any laws relating to worker safety so long as those laws or actions do not entail establishing or enforcing standards affecting occupational safety issues that are addressed by OSHA standards. We are not alone in this interpretation. [Section 18(a)] has been consistently interpreted by OSHA and the courts to bar the exercise of state jurisdiction over issues addressed by OSHA standard, even where the state law may arguably be more stringent or where OSHA has not explicitly addressed a provision. New Jersey State Chamber of Commerce v. Hughey, 600 F. Supp. 606 (D.N.J. 1985) ... We hold that § 667(a) absolutely preempts all state regulation of workplace safety where such regulation would effectively establish standards in areas governed by OSHA.

33 Supra note 31.

34 Several lower state courts have held in favour of preemption—for example, see People v. Chicago Magnet Wire Corporation, 510 N.E.2d 1173 (Ill. Ct. App. 1987) [hereinafter Magnet Wire (Ill. C.A.)]—as has one higher state court: Sabine, supra note 32. Decisions in favour of preemption were the dominant tendency until quite recently: see, for discussion, Note, "Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents" (1987) 101 Harv. L. Rev. 535; and N.K. Blomley, "Federalism, Place and the Regulation of Worker Safety" (1990) 66 Econ. Geography 22. A prosecutor in Los Angeles has noted, "I feel that these courts are wrong. However, when as many courts are as wrong as are wrong here, you don't have a great deal of hope of getting this reversed"; as quoted in Glaberson, supra note 30.

More recently, decisions appear to be going the other way. In Illinois, Michigan, and New York, the high courts have rejected the preemption argument: see People v. Chicago Magnet Wire Corporation, 534 N.E. 2d 962 (Ill. 1989) [hereinafter Magnet Wire (Ill. S.Ct.)]; People v. Hegedus, 443
prosecuted on charges of homicide, manslaughter, or assault following the death or injury of a worker in the course of employment. Where the prosecutions were unsuccessful, the courts held that section 4(b)(4) only preserved the rights of an injured worker *qua* employee and did not validate the application of state regulation, in the form of criminal law, designed to protect the local citizenry.35

In Canada, federal legislation and enforcement mechanisms concerning worker health and safety are, on the whole, weaker and less stringently enforced than provincial laws. Accordingly, the effects of excluding the application of provincial legislation are tangible. In several recent cases, employees and inspectors have attempted to bring within the ambit of provincial health and safety laws, enterprises that fall into the constitutional category of "federal works or undertakings."36 Employment matters in such enterprises are within exclusive federal jurisdiction.37 Provincial attorneys general supporting the application of provincial health and safety laws to such undertakings therefore had to argue that such laws did not relate only to employment matters, but also to local public health—a matter squarely within provincial jurisdiction.38 Occupational health and safety in federal works and undertakings thus had two aspects: regulation of employment in a federal undertaking

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35 See cases cited *supra* note 34.

36 "Federal undertakings" is the term used to describe undertakings falling under federal jurisdiction by virtue of ss. 92(10)(a-c) and 91(29) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. Under this scheme, the following fall within federal jurisdiction:

(a) Lines of Steam or other ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situated within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general advantage of Canada or for the Advantage of two or more of the Provinces.

The undertakings at issue in the cases, *infra* note 40, all clearly fell within these criteria.


(federal) and regulation of health (provincial). This argument was rejected by the Supreme Court of Canada in a trilogy of cases. While acknowledging that “general legislative jurisdiction over health belongs to the provinces,” Beetz J. wrote for a unanimous Court, “the Act [Act Respecting Occupational Health And Safety] is not related to the subject matter of health” and “[t]he health and safety of workers are no more than a purely nominal ‘aspect’ of occupational health and safety legislation.” Therefore, Beetz J. held such legislation could not be applied to protect workers employed within federal undertakings because employment matters in these undertakings are within exclusive federal jurisdiction.

V. A CRITICAL LEGAL GEOGRAPHIC ANALYSIS

The American and Canadian courts have found that local laws protecting worker health and safety are ousted by federal laws in the contexts described. We will argue that, despite obvious differences between the two countries and the legal frameworks of the examples, the courts’ decisions are justified and explained with reference to similar spatial/legal reifications. Both sets of decisions draw upon liberalism and specific conceptions of social and political life peculiar to capitalism. We will interrogate the decisions in terms of how they construct a particular geography of power. At an immediate level, how are the individuals who are potentially and actually killed, injured, and made sick understood by the courts? Where exactly are they located? Put simply, are they understood first and foremost as citizens within a local jurisdiction subject to the protection of local measures designed to protect the public (e.g., criminal and public health laws), or are they understood as occupying a special category that precludes such protection? Our aim is to explore the ideological conjunction of legal

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39 See infra at 684-85.
41 Bell, ibid. at 761.
42 Ibid. at 815 [emphasis added].
43 Ibid. at 854.
and spatial distinctions. In particular, we will analyze the cases under study in terms of several dichotomies: citizen/employee, local community/workplace, and public/private. We will argue that the intelligibility and ideological power of the courts' reasoning in support of their decisions ousting federal laws rests upon the reification and conjunction of these distinctions. Before doing so, however, it is necessary to look at how the courts' reasons for concluding that local regulation aimed at protecting members of the public, that is, citizens, does not apply to people when involved in employment relations; and, by way of corollary, that legislation aimed at protecting workers cannot be characterized as public protection regulation.

For the U.S. pro-preemption courts, the rejection of the local prosecutors' arguments is justified partly by the "course of employment" language in section 4(b)(4) of the OSHA which, according to these courts, precludes local prosecutions. In Sabine, for example, this language was relied upon by the Court to hold that the section "addresses only actions between employers and employees, not the relationship between state and federal law or the right of state prosecuting attorneys to bring criminal prosecutions."45 Similarly, in Magnet Wire, the Court stated:

the courts ... have consistently found that the purpose of this section was to preserve the existing private rights of injured employees relative to workman's compensation, state tort law, and other common law remedies against employers but not to create any additional civil remedies in favour of employees.46

Therefore, the distinctive context in which the fatalities occurred—private employment relations—precludes the application of local regulation protecting citizens from violent crimes. It follows that any local intervention must be of a distinct character, that is, employment related. The law, as applied to employment relations, undergoes a curious transformation. No longer a form of criminal law, it is redefined as an attempt to set up worker safety standards. This logical inversion is performed in Sabine, where the Court rejects the application

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45 Sabine, supra note 32 at 868.

46 Magnet Wire (Ill. C.A.), supra note 34 at 1175.
of Texas criminal law to employment relations on the basis that it becomes an "employment standard" when so applied; it is thereby necessarily preempted by federal regulations.\textsuperscript{47} Thus, an attempt to charge the president of a company with criminal negligence following the death of two construction workers in a trench collapse was redefined as an attempt

to establish local standards governing the digging of trenches ... criminal prosecution based on the violation of state or local standards for working conditions [amounts] to an impermissible attempt to regulate through the state criminal laws, conduct now regulated under OSHA. By prosecuting the appellant for not digging trenches safely, the State intruded on an area covered by OSHA regulations.\textsuperscript{48}

Turning to the Canadian cases, it might seem strange that worker health and safety legislation is considered by the Supreme Court of Canada to have nothing to do with public health. It is one thing to say that health and safety legislation relates to working conditions and labour relations as well as to health, but it is quite another to say it does not relate to health \textit{at all}. Yet this is what Beetz J. said. The key to understanding his reasoning lies, once again, in the presumption that there is something distinctive about employment that puts workers outside the scope of regulation designed to protect the public. "I ... do not think," Beetz J. said, "that the Act is intended to protect the health and safety of people in the province in general. It governs relations between worker and employer."\textsuperscript{49} Because of their status as employees, workers cease to be members of the public and, therefore, cannot be the beneficiaries of public health protection. The "citizen" is effectively taken out of the "worker," leaving only the "employee." And, as with the pro-preemption U.S. cases, law that applies to employment can \textit{only} be understood as employment related. Thus, legislation with the express purpose of eliminating dangers to the "health, safety and physical well-being of workers"\textsuperscript{50} cannot be related to public health, but must be

\textsuperscript{47} Sabine, supra note 32. For the legal framework of this argument, see \textit{ibid}.

\textsuperscript{48} Sabine, \textit{ibid}. at 868-69 [emphasis added].

\textsuperscript{49} Bell, supra note 40 at 809.

\textsuperscript{50} \textit{An Act Respecting Occupational Health and Safety}, S.Q. 1979, c. 63, s. 2.
related to working conditions and labour relations—matters within the
private world of employment.\textsuperscript{51}

Central to the reasoning in both the U.S. pro-preemption cases
and the Supreme Court of Canada’s decisions is an implicit construction
of two classes of people: employee and citizen. This, in turn, relates to
some variant of liberal ideology and its attendant separation between the
public and the private spheres. Critical analyses of judicial discourse
have revealed just how central the public/private construct is to
adjudication of issues, particularly those arising in the context of labour
relations and the family.\textsuperscript{52} Traditionally, employment relations have
been constructed in law as a private domain, defined by the instruments
of private ordering (contracts) and the various rights attendant to
ownership of productive property.\textsuperscript{53} This has considerable explanatory
power in the current context. When the worker goes to work she enters
the private sphere of employment. She is classified as an “employee”
and is no longer entitled to the protection afforded to her as a “citizen,”
that is, as a member of the public. By reifying the related distinctions of
public/private and citizen/employee, the courts are able to make
intelligible the denial to employees of local regulation designed to
protect the public.\textsuperscript{54}

We want to argue further that the reification of these
dichotomies is strengthened by the reification of another distinction, a

\textsuperscript{51} According to Beetz J., occupational health and safety provisions “fall within the scope of
the contract of employment”; they “articulate the terms of the contract of employment, in the same
way as does a collective agreement which contains preventive clauses dealing with occupational
health and safety,” (see supra note 40 at 799), and establish the respective “rights and obligations of
the worker and the employer”: ibid. at 809.

96 Harv. L. Rev. 1497; and J. Fudge, “The Public/Private Distinction: The Possibilities and the
Limits to the Use of Charter Litigation to Further Feminist Struggles” (1987) 25 Osgoode Hall L.J.
485; and J. Fudge, “Labour, the New Constitution and Old Style Liberalism” in Labour Law Under
the Charter (Kingston: Queen’s Law Journal and Industrial Relations Centre, 1988) 61. Early
critical theorists, like Marx and those in the Marxian tradition, have recognized the public/private
distinction as a central ideological component of capitalism. See, e.g., K. Marx, “on the Jewish


\textsuperscript{54} At the same time, it is crucial to remember that the categories of “public” and “private,”
and particularly the idea of a private and depoliticized workplace, which are embedded in legal
discourse, are historically rooted in the material, social relations of capitalism.
spatial distinction between the workplace and the local community. There is an implicit, and sometimes explicit, conjunction of this spatial representation with the legal discursive distinctions. Some have begun the exploration of the relationship between spatial and discursive distinctions. For example, Kay Anderson seeks to spatialize and socialize apparently “natural” discursive distinctions of race as expressed in late nineteenth century Vancouver. She argues persuasively that race is a social construction and, importantly, that it is one bound up with geographic classifications. Therefore, the designation of a residential area within Vancouver as Chinatown is far from an innocent act, but rather represents an arbitrary classification of space which becomes bound up, in complex ways, with an arbitrary social classification.

As a concrete form Chinatown has been a critical nexus through which a system of racial classification has been continuously constructed. Racial ideology has been materially embedded in space ... and it is through 'place' that it has been given a local referent, become a social fact, and aided in its own reproduction.

The categories “Chinese” and “Chinatown” are, in that sense, doubly reified. Discursive distinctions come to define the spatial category Chinatown, which, along with its material presence, serves to reinforce and reproduce the discursive distinction Chinese. The social and political significance of this process is substantial. The spatial boundaries constructed around Chinatown provide powerful underpinnings of a racial ideology that constructs people of Chinese descent as “other,” and thus serves to legitimate their oppression.

Similarly, we want to suggest that the discursive and ideological boundaries constructed by the courts around the employment relationship, and reified to justify shielding it from public protection regulation, are partly referable to the workplace, a spatial construct, which assists in reproducing the discursive category “employee.” The dynamic is similar to that in Anderson’s analysis where the place

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56 Ibid. at 584.
57 Ibid.
58 Ibid. at 583-85.
reference of Chinatown aids in the reproduction of the category Chinese. When the worker enters the workplace, she enters a space which, like Chinatown, is materially and discursively constructed as separate from the local community. In ideological terms, she crosses from the local public domain into the private domain; correspondingly, her status is transformed from a citizen to an employee. To this extent geographically locating the worker within the workplace reinforces the category of employee. Crossing the spatial/legal boundary effectively removes the worker from her community and re-classifies her in law as being outside the scope of her local community's legitimate concerns.59

The proposed relationship between place, legal discourses, and ideologies around employment are necessarily speculative at this point—more work would need to be done, and on a wider set of materials, to draw stronger conclusions. Nonetheless, there is some interesting evidence of the relationship in the cases we review. The workplace/employee conjunction is implicitly, and occasionally explicitly, relied upon to establish a boundary around the private sphere of work

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59 In this, it may be that another geography is at issue, that of central/local state relations. By effectively removing or abstracting the employment relationship from the locality, it is placed beyond the protection and obligations of a local jurisdiction. It no longer makes a difference where it is located given the uniformity of federal occupational health and safety regulations in both countries. Disenfranchised, the worker and manager are no longer subject to the liabilities and rights that inhere in membership in a locality—a place. The workplace occupies space but is not located in a place. Therefore, a vision of the workplace as private presupposes a privileging of the central or, more accurately, the non-local. Perhaps it is possible that the reverse applies—a specific vision of the local presupposes the privatization of the workplace. As N.K. Blomley has argued in "Federalism, Place and the Regulation of Worker Safety," supra note 34, pro-preemption arguments often include a suspicion of the locality as an imperfect manifestation of liberal political relations. The U.S. courts, industrialists, and policy makers make frequent reference to the regulatory chaos that would ensue if different localities established what were in effect different OSHA standards. Chicago attorney Edward B. Miller, whose firm prepared the amicus brief filed by the U.S. Chamber of Commerce and other business groups, noted that his clients stated that companies "would rather have a uniform federal standard for workplace safety than be at the mercy of however many thousand district attorneys, who are each determining what the safety standards should be for individual companies": quoted in “Prosecution of Employers for Safety Violations not Pre-empted by OSH Act, Illinois Court Rules” Occupational Safety and Health Reporter (8 February 1989) 1611 at 1612. A liberal anxiety about doctrinaire liberalism and the illegitimate force of the local group apparently can be avoided by carving off the marketplace as private and individualist. Freed from the vagaries of the local community, it accords more closely with one strand of liberal political thought. One might speculate that, in Canada too, there is a desire for regulatory uniformity, at least with respect to "federal undertakings" and other matters that are "interprovincial" in scope: see R.E. Simeon “Criteria for Choice in a Federal System” (1982-83) 8 Queen's L.J. 131. At the same time, however, it should be noted that labour relations in non-federal undertakings falls within provincial jurisdiction.
relations, thus shielding this sphere from regulation designed to protect the local public. When discussing employment, the courts often use the term *workplace* to refer to employment relations in general, rather than any work site in particular; therefore, they discursively link relations of employment to a particular *place* referent. In *Magnet Wire* and *Sabine*, for example, the issue of worker safety is discussed in terms of workplace safety, and the regulation of employment is referred to as regulation of the workplace.\(^{60}\) To similar effect, in *Bell*, in support of his argument that provincial health and safety laws infringe on employers' managerial authority, Beetz J. refers approvingly to government reports that speak of the impact and effect of such laws on the operation and organization of the workplace.\(^{61}\) In each of these examples, a spatial representation is used to describe a social relation (employment); the representation also contributes to the construction and reification of legal boundaries around that social relation.

The spatiality of the discursive distinctions constructed by the courts is perhaps most apparent in a set of alternative accounts of place and power relied upon in the United States by local prosecutors and some state high courts for challenging the immunization of employment from state criminal law. While at an immediate level local prosecutors seek to secure convictions of employers and supervisors, their arguments for applying criminal sanctions to employers rely upon an interesting re-mapping of the employee and employer. They explicitly reject the spatial boundaries that construct the private workplace as distinct from the local public domain, and the employee as distinct from the citizen. Therefore, they debunk the very basis for denying the benefits of local public protection regulation (criminal law) to workers. The prosecutors' accounts illustrate how the dissolution or construction of a spatial/legal boundary becomes critically important to mapping and remapping the status and legal entitlements of the worker. An alternative map of legal obligations and rights also challenges the assumed objectivity and necessity of the account found in the pro-preemption decisions by

\(^{60}\) *Magnet Wire* (Ill. C.A.), *supra* note 34 at 1176; and *Sabine*, *supra* note 32 at 867.

\(^{61}\) *Bell*, *supra* note 40 at 814-15.
articulating internally coherent and plausible accounts which contradict it.\textsuperscript{62}

The alternative account tries to resist privatization of the workplace. The employment relation is remapped as situated in a public place—a local community. Simultaneously, the employer and employee are made local citizens, subject to the same rights and responsibilities as other citizens. Such a remapping is necessarily hostile to the bright lines of \textit{Magnet Wire}\textsuperscript{63} and \textit{Sabine}.\textsuperscript{64} Local prosecutors in the United States note, again and again, both the artificiality of the distinction between the workplace and other spatial settings within a locality, and the associated divide between employee and citizen.

\begin{quote}
[If there was an explosion stemming from hazardous conditions and dozens of workers died, local prosecutors would be preempted from prosecution. Yet if the explosion resulted in the deaths of residents in the surrounding area, or a passerby, or a delivery person, we would not be preempted from prosecution. All these deaths would occur due to the same reckless or negligent conduct. But we could prosecute only for the death of those who were employed by the factory.\textsuperscript{65}]

There is no difference between exposing a crowd to a bullet and exposing workers to a lethal substance. ... People are coming to understand that when a person is killed it is not necessarily an accident. Sometimes it's a crime.\textsuperscript{66}
\end{quote}

\textsuperscript{62} The alternative account has been accepted by some courts. Thus, for example, in \textit{Hegedus}, \textit{supra} note 34 at 135, the Court asserts that the reference to “rights, duties or liabilities” in section 653 of OSHA is not confined to the private rights of workers, but is meant to include public criminal laws. The Court states, at 135, “the manslaughter law under which the state seeks to impose ‘statutory liability’ upon the defendant qualifies as ‘any law’ under the [section’s] language ... the section does not appear to be in any way qualified, other than in by the ‘arising out of, in the course of employment’ language.” See also \textit{Magnet Wire}, \textit{supra} note 34; and \textit{Pymm}, \textit{supra}, note 34.

\textsuperscript{63} \textit{Supra} note 34.

\textsuperscript{64} \textit{Supra} note 32.


\textsuperscript{66} Los Angeles Special Assistant District Attorney Jan Chatten Brown quoted in “Local Officials Set Up New Programs as Others Urge Caution Over Trend to Use Criminal Prosecutions for Workplace Hazards” \textit{Occupational Safety and Health Reporter} (4 April 1985) 1132 at 1132 and at 1133.
Such claims have recently been accepted by the high courts of several states. In *Hegedus*, for example, the Court stated:

> While OSHA is concerned with protecting employees as “workers” ... the state is concerned with protecting the employees as “citizens” from criminal conduct. Whether this conduct occurs in public or in private, in the home or in the workplace, the state’s interest in preventing it, and punishing, it is indeed both legitimate and substantial.

Essentially, the assertion here is that there is something artificial about removing the workplace from the locality.

One might speculate that the local prosecutors’ collapsing of the workplace/local community distinction relates to their location in the local community. The distinction between public and private worlds imagines, in the abstract, two discrete domains. Perhaps local prosecutors are in a position to test such abstractions, and the reified categories and boundaries constructed by the courts, against the lived world of the locality of which they are a part. In mapping out these abstractions, local prosecutors note the contiguity and spatial overlap of the public and the private. The work site occupies, apparently, the same space as the public sites. The employer and employee are not entirely enclosed by the private domain, but live, die, and are injured in the same public space as other local citizens. Speculatively, then, one might argue that the very materiality of the work site and its physical location render it difficult for local prosecutors to think of the work site as abstracted from the locality. Moreover, the physicality of the worker and manager, and their shared participation in the two worlds of work and locality, make any attempt to decontextualize either intuitively implausible.

By locating the worker and manager spatially within the locality, both are also redefined legally as bound by a set of rights and obligations

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67 As one commentator has stated:
Debate on the preemption of state criminal prosecutions is unsettled, but it appears that anti-preemption forces have gained the advantage. Although OSHA has no formal position on the issue and the Supreme Court recently declined to decide it, strong arguments against preemption have come from academicians, Congress, the Justice Department, and the high courts of three major industrial states. S.D. Jones, “State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.’s Succeed Where OSHA Failed?” (1990) 79 Ky. L.J. 139 at 140.

68 *Hegedus*, supra note 34 at 134.
that inhere in the concept of citizenship. Implicit in this remapping is another claim about geography and power. Local prosecutors and some judges insist on the special and distinctive qualities of decentralized political life and the locality in which the worker and manager share by virtue of their location. Local U.S. prosecutors often make reference to certain qualities of the decentralized polity, including its traditional police power. Jay Magnuson, the head of the Cook County States Attorney who investigated Film Recovery System Inc., commented following a workplace fatality,

> local prosecutors have this traditional belief that their role is to protect their citizens and to ensure the safety and health of their citizens no matter where they are. If we are to protect citizens on the highway from drunk drivers or on the sidewalks, in theatres, in restaurants, who is to say to us that we cannot protect their health and safety inside a workplace?

Once again, the high courts of several states have recently indicated an openness to such arguments. In Magnet Wire, the Court stated:

> The power to prosecute criminal conduct has traditionally been regarded as properly within the scope of state superintendence ... The regulation of health and safety has also been considered as “primarily and historically” a matter of local concern.

The basis of this claim is unclear, except for an assumption of the essential worth and value of decentralized political action. This may correspond with a variant of liberal thought which assumes the political life of the individual is ideally lived out at the local level. Such a political life includes the right to political and legal agency—the right to structure

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69 The concept of citizenship is, of course, a profoundly spatial one. Its present usage, that of a native or naturalized member of a state, indicates a territorially finite set of rights and obligations that non-citizens cannot share in. By virtue of the crossing of a political boundary, those rights and obligations can change. However, the historical roots of citizenship have a different inflection that is of greater relevance to our argument. Citizenship, historically, was defined in decentralized terms as that of membership within the city. Both city and citizen share a similar Latin root, in civitas. That status also embodied certain spatially discrete legal rights and obligations as expressed in city charters, such as the right to self-government and legal enactment and adjudication. See H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983); and M.E. Tigar, *Law and the Rise of Capitalism* (New York: Monthly Review Press, 1977).

70 “Interview with Jay Magnuson,” *supra* note 30 at 8.

71 *Magnet Wire* (Ill. S.Ct.), *supra* note 34 at 966.
and regulate an immediate local environment in line with a normative vision. Decentralization, defined by the pro-preemption decisions as an obstacle to efficient regulation, becomes redefined here as an essential component of political life.

An alternative account can be found as well in the Canadian cases. As noted above, provincial attorneys general argued in these cases that health and safety regulation is concerned with public health as well as employment matters. Within contemporary constitutional doctrine in Canada the fact that Parliament has regulated a particular area of activity does not necessarily preclude a provincial legislature from regulating in that area of activity. Double regulation is thereby allowed. Accordingly, provincial lawyers argued that the province could regulate health and safety in federal undertakings by virtue of its jurisdiction over public health, while the federal government could regulate by virtue of its jurisdiction over employment in such undertakings. Implicit in this argument is a rejection of the distinctiveness of the employment relation as private, and therefore removed from the domain of public health. In the Court of Appeal decision in Alltrans Express Ltd. v. Workers' Compensation Board of B.C., for example, Lambert J., writing for the Court, reasoned that the matter of “health and safety in the work place of a federal undertaking” had both provincial and federal aspects. The federal aspect was that of “working condition[s] in the employer-employee relationship.” The provincial aspect was “the concern of the province, generally, for public health and for medical and hospital care, and, more particularly, for the scheme of worker safety, treatment and compensation embodied in the Workers' Compensation Act.” Similarly, a majority of the Quebec Court of Appeal in Bell concluded “that the object of the dispute is related to

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72 For example, the factum of the Attorney General of Quebec states at 5: “En tant que réglementation sur la santé de la travailleuse enceinte et de l'enfant à naître, le système du retrait préventif de la travailleuse enceinte, en l'espèce, devrait être applicable aux entreprises fédérales de la même façon que toute autre législation provinciale en matière de santé publique.”


74 Ibid.

75 Ibid. at 389.
related to both health and labour relations. In both decisions, the appellate courts were unprepared to draw the kind of bright line between public health and the private workplace that is relied upon by the Supreme Court of Canada in its decisions.

VI. CONCLUSION

In conclusion, we want to make two points. The first relates to the immediate implications of these decisions; the second is more theoretical. The immediate implications are relatively clear cut. Working people will continue to die, get sick, and be injured at work in the United States and in Canadian federal undertakings, but they will not be protected by state criminal laws or provincial health and safety laws, despite the inadequacies of federal regimes. Employers, conversely, will likely face lighter penalties, weaker standards, and, accordingly, lower production costs. As the Supreme Court of Illinois noted, to accept the claims of pro-preemption courts "would, in effect, convert the statute [OSHA], which was enacted to create a safe work environment for the nation's workers, into a grant of immunity for employers responsible for serious injuries or deaths of employees." As well, the Committee on Government Operations has noted: "we have, in effect, set a price on the life of the American worker. It is only $10,000, the maximum fine allowed for a violation of a provision of the OSHA." Similarly, in Canada, owners and managers of federal undertakings are likely relieved that their operations are outside the jurisdiction of provincial standards, inspectors, and investigators. The

76 Bell Canada v. Quebec (Commission de la santé et de la securité du travail) (1985), 16 D.L.R. (4th) 345 at 358 (Que. C.A.), aff'd [1988] 1 S.C.R. 749. However, the majority was of the view that a conflict existed between the federal and provincial schemes, rendering the federal scheme paramount and the provincial scheme inoperative: ibid. at 358.

77 For example, as concerns the particular issue in the Canadian cases analyzed, the complainant in that case and others similarly situated would likely not be able to refuse Video Display Terminal (VDT) work under the federal Act because the Canada Labour Relations Board has held that VDTs are not dangerous to pregnant women and, therefore, there was no reasonable cause to refuse work. See Law Reform Commission of Canada, Workplace Pollution (Working Paper 53) (Ottawa: Law Reform Commission of Canada, 1986) at 35 n. 168.

78 Magnet Wire (Ill. S.Ct.), supra note 34 at 969.

79 Supra note 65.
loss, of course, falls on workers in such enterprises who are denied the added protection of provincial legislation. One can only speculate at this point, but it would seem that an immediate consequence of the Canadian decisions will be more deaths, injuries, and illnesses in federal undertakings.

However, this begs a series of questions relating to the implications of our analysis for progressive struggles around work and beyond. Should workers abandon federal regulatory regimes that have failed them, and seek protection in others, whether provincial worker safety law or local criminal law? Do worker struggles which centre, perhaps unwittingly, on a claim concerning the separability of the workplace contribute to the reification of the spaces of the public and the private, and the spacing out of certain categories of people? Put more geographically, should workers concentrate their efforts on obtaining local regulatory relief, given its more favourable track record in these case studies, or should they direct their attention to the national arena? Any unconditional answer which equates the locality with "good" politics or uncritically rejects the public/private distinction runs the risk of simply re-freezing the map in the process. Though in the present context, a convincing \textit{pragmatic} argument can be made for challenges to the public/private distinction and demands for local rather than federal protection, this need not hold for all cases. Indeed, it should be remembered that there are dangers with such a strategy. In the American context pressure has been applied by labour to local prosecutors only reluctantly, because using the criminal law not only constitutes a politically dangerous admission that federal worker safety law is beyond hope but also marks a problematic individualization of worker/management relations.\textsuperscript{80} Moreover, historically, in the United States, advocacy for greater protection of workers' health sought recognition that the workplace was distinct from other places and that workers' health was a labour issue, not a public health issue.\textsuperscript{81} That the same argument is now made in the United States and Canada to deny workers greater protection suggests the danger in drawing strategic

\textsuperscript{80} Weinstein, \textit{supra} note 30.

conclusions that are not attentive to extant political and ideological conditions.

In relation to the immediate implications of these decisions, however, our purpose is not to offer strategic or programmatic prescriptions. We only want to challenge the frozen manner in which law, space, and locality are frequently conceived. Such conceptions, and the practices they relate to, need not (perhaps, cannot) be overturned, and, in some contexts, a powerful case can be made for their tactical use in progressive struggles. However, they must not be taken as given, and we should be wary of their effectiveness in naturalizing relations of oppression and exploitation. This brings us to our second, and more theoretical, concluding point.

Our ambition in this paper has been to build upon the insights of both critical geography and critical legal studies in a way that allows for a deeper understanding of the regulatory events we address than either discipline alone would allow. In some sense, as we move from the mainstream to the critical traditions in each of our disciplines, the boundaries of the disciplines themselves begin to crumble. Once geographers accept that space is not a backdrop to political and social action but is, instead, a product of such action, the role of law becomes central to the analysis of space. Legal discourse, as a form of social discourse, represents space in various ways and, in so doing, helps construct the social significance of space. This has a bearing on social and political life given that, in advanced industrial states, law is a crucial site of social and political action. And, once lawyers accept that law both constitutes and reflects social and power relations, it becomes crucial to ask questions about the various ways such relations are constituted and expressed. The social and political nature of space thus becomes a central concern for critical analysts of law. At the same time, our two disciplines do not simply collapse into one. They differ in their emphases. For this reason, they inform and add to one another rather than simply becoming the same.

In theoretical terms, we have attempted to draw upon critical literatures in both law and geography. In one sense, both of these literatures lend themselves to interdisciplinary inquiry given their suspicion of the received methods and subjects of their disciplines. While both have engaged in such interdisciplinary work, rarely have they drawn upon each other. Such an intellectual closure, we have argued, foreshortens the imaginative range and political possibilities of both, and
does a disservice to the larger project of which both claim to be members. Both critical traditions have a lot to learn from each other and a lot to teach each other; an exchange between them is vital and necessary.

We have attempted to make the case for the critical importance of analyzing the intersection of spatial and legal discourse. Firstly, we have tried to illustrate the mutually reinforcing ideological effect of legal and spatial representations. By noting the geography of certain legal constructions, such as the public/private divide, we have discovered that they have the potential to be more powerfully formative of consciousness than even critical legal scholars suggest. To reiterate, law can be referred to as “frozen politics,” the implication being that it represents contingent social constructions as natural and apolitical. The social representations of space can similarly become reified. The contested geographies of social life are all too often presented as pre-political and objective. As with law, the very objectivity of space renders such representations opaque to critical insight. Consider, then, how much more frozen and opaque the politics of representation become when spatial and legal representations converge. A legal construction, such as private property, perhaps becomes all the more natural when it has a material/spatial referent, such as the workplace. As we have argued above, the same may be true of the category “employee.”

Much remains to be done in explicating the complex, messy, and intriguing intersection of ideology, spatial representations, and discursive, in particular legal, categories. Indeed, one might speculate about other potential examples of spatial/discursive conjunctions that have ideological significance. What, for example, is the relationship between the “home,” as a spatially defined set of boundaries, and gender ideology; the “ghetto” or “inner city” and racial ideology; the “reservation” and ideologies about First Nations; the “nation state”

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and national citizenship;\textsuperscript{85} or the "street" and ideologies of criminality?\textsuperscript{86} In each of these examples, one might hypothesize that the relevant discursive or ideological distinction is produced and reproduced in part through its spatial referent.

Our analysis is critical in a second respect. We see the stability and closure of legal/spatial constructions as having only a conditional and partial effectiveness. Not only is legal discourse itself indeterminate, but perhaps the spatial representations embedded within it are also problematic. In part perhaps, this rests on their very spatiality. In our examples, we characterize as abstractions the constructions of the U.S. pro-preemption courts and the Supreme Court of Canada. If the accounts of these courts exist anywhere, it is in a curious conceptual space in which, for example, citizens are plucked out of their local community context and redefined as employees and employers. A spatial referent, the workplace, lends such abstractions an immediate tangibility. Perhaps by resituating these abstractions in a complex, specific, and evolving local milieu, with its own history of public health regulation or criminal law enforcement, they can, on occasion and dependent on contingent circumstances, be challenged successfully. Prosecutors in the United States have challenged the very foundation of the pro-preemption argument—the public/private distinction—by noting the simple contiguity and co-presence of public and private space; they have been successful, at least in some courts, in having the argument rejected. At issue in their struggle is a cartography of power. The prosecutors have demonstrated how the remapping of discursive representations of social space can be an important and necessary part of political praxis, although such discursive reconstructions and reinterpretations are not sufficient for achieving social change.\textsuperscript{87}

We have tried in our analysis to be doubly critical in drawing upon both critical geographic and critical legal analyses and in our concern with the simultaneous power and instability of legal and spatial representations. In conclusion, perhaps the task for a critical legal

\textsuperscript{85} Note, "Constructing the State Extraterritoriality: Jurisdictional Discourse, the National Interest and Transnational Norms" (1990) 103 Harv. L. Rev. 1273.

\textsuperscript{86} A.L. Stinchombe, "Institutions of Privacy in the Determination of Police Administrative Practice" (1963) 69 Am. J. Soc. 150.

geography is threefold: identification of the frozen politics of legal and spatial representations and an exploration of its implications; demonstration of the social construction (and thus the non-objectivity) of these representations; and, finally, a tactical analysis of the material conditions under which challenging such dominant representations can be part of a wider struggle for progressive social change.