Taking Place Seriously: Territorial Presence and the Rights of Immigrants

Paulina Ochoa Espejo

Follow this and additional works at: http://scholarship.haverford.edu/polisci_facpubs
CURRENT debates regarding justice in immigration and border control revolve around two main questions:¹ Do states have a right to exclude immigrants, and on what basis?² How should liberal democracies treat non-citizens who are already physically present in their territory?³ This article deals with the second question. In recent years, several scholars have answered it by arguing that continued physical presence in a territory gives individuals a right to stay, and perhaps also wider social and political rights. Some argue that those who are in a given place probably have family and intimates who also live there, and hence have a right to citizenship because they have developed close ties to the society where they live.⁴ Others argue that living in a given place for a period of time is a good proxy for these ties, such that extended presence alone grants a


right to stay.⁵ Thus these scholars argue that non-citizens have legal and moral rights grounded solely in their extended relationship with the state’s society.

But, if social ties are what generate such rights, then why does physical presence matter? For territory seems to do no real work in arguments that have social membership work the magic. As others have pointed out, these arguments are often unclear about the role they assign to territory.⁶ On examination, territorial presence turns out to be a proxy for other values: fair play, justified coercion, or depth of relationships to the state’s community.⁷ But then it is worth asking whether physical presence in a specific place is at all relevant when granting social and political rights. What is the moral magic of place?⁸

This article urges that we take place seriously. We should not just treat place as a dummy concept that makes membership carry the real argumentative burden. There is indeed, the article argues, something morally relevant in the relation between an individual and the particular place where she dwells. Physical presence in specific places can confer political rights and obligations on individuals. Such presence triggers special obligations that a person acquires by virtue of “being there.” That is, there exist place-specific duties, a special type of duty that this article will analyze. Such duties are the heart of what I call ius situs: a domain or level of morality that layfolk intuitively recognize, but theorists routinely overlook. Among such duties are the obligations of local citizenship: being a good neighbor, respecting sacred spaces, fostering the local ecosystem’s resilience, sharing communal areas, and generally, participating in schemes of cooperation specific to the locale. I further argue that having certain political rights, including a right to stay and a right to participate in local politics, is necessary to fulfill one’s place-specific duties. (By “a right to stay” I mean a pro tanto right that a person has not to be forcibly removed from the place where she dwells—at least until she has been given the chance to fulfill all of her outstanding place-specific duties.) Citizens should grant non-citizens, including unauthorized immigrants and transients, these rights, because within local collective schemes of cooperation, each citizen needs those others who are physically present to fulfill their duties in order to fulfill her own. Granting these rights to non-citizens is thus useful for the general success of cooperation schemes, but it is also an obligation.


⁷Song, “The significance of territorial presence and the rights of immigrants.”

⁸Kal Raustiala, “The geography of justice,” p. 2546, asks in the context of discussions about extraterritoriality in US law: “Why does moving individuals from one geographic location to another alter the scope of their constitutional and statutory rights vis-à-vis the US government? What is the legal magic of American soil?”
I argue that unless citizens grant these rights to aliens, aliens may prevent citizens from doing their share, thus undermining other citizens’ moral agency.9

Taking place seriously has several advantages. First, it articulates a rationale for a right to stay based on territorial presence.10 This rationale complements, rather than challenges, the existing ones for such a right, and thus it creates another tool for arguing for the rights of immigrants. Today, the toolbox is limited to arguments based on either membership or human rights. But taking place seriously reveals that besides humanity and national society there is a third kind of rights-generating collective. While the collective of all persons generates human rights, and the collective of all members of a society generates citizenship rights, the collective of those present in a place generates place-specific rights. As I shall show, this rationale justifies and clarifies the *ius situs*: a set of norms and a level of public morality that shapes extant jurisprudence in the US and other receiving countries.11 Second, taking place seriously allows us to avoid under-inclusion in the civic community, which is a common problem with most membership-based conceptions of political rights. This too will be shown in what follows. More schematically, taking place seriously also helps clarify what should be the boundaries of the territorial nation-state, as well as the grounds of territorial rights,12 and whether identity, attachment, or legal links are the appropriate connection between people, state, and territory.13 Finally, taking place seriously illuminates more general philosophical discussions about the relation of individuals to their environment.14

9I make this argument on analogy to an insight from Robert Goodin, “The state as a moral agent,” in *Utilitarianism as Public Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 28–44.
10This paper deals with an immigrant’s right to stay in a receiving country, but this question can also be posed regarding a person’s right not to emigrate, as in Kieran Oberman, “Immigration, global poverty and the right to stay,” *Political Studies*, 59 (2011), 253–68, or to explain the wrong of removal, as in Anna Stilz, “Occupancy rights and the wrong of removal,” *Philosophy and Public Affairs*, 41 (2013), 324–56.
The theory of the *ius situs* developed here allies itself with the new presence-based theories of a right to stay, as developed by Ayelet Schachar and Joseph Carens, among others. It shares their *justificandum*. But it challenges their *justificans*. On the other hand, my theory’s proposed *justificans*—*ius situs*—resembles that in theories recently presented by Michael Blake and Avery Kolers. Blake argues that a right to stay and a right to exclude are grounded in presence in a state’s jurisdiction. Kolers grounds a group’s claims to territory in its attachment to that territory as a place, and it generally takes place seriously. So both are genuine presence or place-centered theories. But while Blake focuses on presence in a state, the *ius situs* focuses on presence in a place. And while Kolers focuses on collective rights to territory, my theory focuses on the rights that individuals have against the collective in a place.

The article presents the theory in four parts. Part I shows why all leading membership-based theories of a right to stay suffer from problems of under-inclusion; it therefore proposes presence as a better criterion. Part II examines rival arguments for why physical presence itself grants a right to stay: it shows that these arguments, despite their official aims, do not in fact take place seriously. On examination, they in fact ground a right to stay in a proxy for social membership. Parts III and IV show that granting rights on the basis of physical location is a widely-held moral intuition, and a long-standing legal commitment of liberal democratic states; they also justify the intuition and legal settlement by grounding them in the notion of place-specific duties. Part III presents and justifies the idea of place-specific duties, while Part IV derives from them a right to stay. Hence the two parts together outline the structure of *ius situs*, and give an account of what it means to take place seriously.

I. MEMBERSHIP-BASED VIEWS: PROBLEMS OF UNDER-INCLUSION

Membership-based views are today the most prominent theories of a right to stay. However, they face an important problem: they tend to be under-inclusive—in that people are excluded who should be included. (They are also over-inclusive—in that people are counted as members who should not be. But I will not make that argument here.)

Membership is the traditional way of distributing rights within a state. According to membership views, the main question when treating the right of immigrants to stay in a country is whether newcomers meet the criterion to be a part of the group associated with the state. Here I consider the best-known of such criteria: ethnic identity, association, or socialization. I argue that each criterion makes a civic group under-inclusive, according to widely held standards of justice.

16 Kolers, *Land, Conflict, and Justice*. 
One traditional criterion for membership is modeled on the family: it sees civic communities in terms of ethnicity or thick cultural identity. This view excludes newcomers unless they are kin of current members of the group associated with the state. This view is, as many have argued, under-inclusive for liberal states, for two reasons. First, it uses ethnic or cultural membership acquired by birth or by ascribed identity to exclude people in the territory who want to stay. Such a ground for exclusion contravenes liberal egalitarianism. Second, the ethnic or cultural group’s boundaries do not coincide with the state’s boundaries, and states often contain more than one group; so all those who are citizens in the state are not the same set as the people who are members of the ethnic or cultural group. Even in multicultural states, the communities that ground the state do not exhaust the population: there are many individuals left out who deserve to be part of the community based on widely held criteria of justice. Hence, even though modern states still regularly rely on ethnicity and kinship as important criteria for determining who is a member, this is hardly ever (and should not be) the sole criterion for distributing rights.

Another frequently-used criterion for membership is invitation. This criterion relies on the principle of association, which creates groups that resemble a club rather than a family: new members are inducted into the group on the basis of mutual consent. However, this criterion is also under-inclusive. For it excludes non-citizens present in the territory, solely on the basis of the present members’ will, rather than on moral obligations that arise in a territorial jurisdiction. As Michael Blake argues, political societies involve more than shared understandings: they also involve “facts of shared liability and obligation” which relate all those present in a given territorial jurisdiction, rather than only the members of a “club” or association. Thus, in liberal democratic societies, the models of the family and the club must be limited by moral constraints. According to Michael Walzer, to remain democratic, a state ought to extend membership to all those who are part of the life of the society in question—lest the democratic community of members become “a family with live-in servants.” This brings us to the third criterion: socialization.

In Walzer’s view, the community of citizens ought to include those who are members of the group by inheritance, but also “those who hold membership simply by rights of place.” For socialization theorists, a person who is physically present among the members of a state on a continuing basis should

---

21Walzer, Spheres of Justice, p. 52.
22Ibid., p. 62.
count as a member of the state’s community, because and to the extent that she is socialized in the civic order. As a person entitled to membership, she should therefore eventually be accorded the full suite of citizens’ rights—including, of course, a right to stay.²³

Yet I argue, following many recent critics of the socialization criterion, that even this more encompassing view of membership is under-inclusive. For in requiring that all but only all civic-socialized persons be put on a path to citizenship, it excludes those who have been law-abiding long-term residents, but do not wish to become citizens and hence are not sufficiently civic-socialized. The criterion seems to leave us with a dichotomy: either treat someone as a proto-citizen, or consider her as nothing more than a transient deserving of no more than the basic human and legal rights that any liberal society should accord to any person.²⁴ This view has little to say about how to treat those people—such as long-time green-card holders in the US—who may choose to remain citizens of their original countries because their sense of identity depends on it, but should still be eligible for more rights than transients. Nor does it have much to say about those people who are as yet not highly socialized in the civic order, and yet have made enough contributions to society (such as soldiers) or have been blameless enough (such as children) that they should be accorded rights, including a right to education. In sum, focusing on membership alone can be under-inclusive. If all this is correct, then to avoid under-inclusion, we should complement membership with territorial presence when distributing rights in a state.

So, even though membership offers an account of why some people should have rights, including a right to stay, it does not account for all those who should have such rights. Hence it is worth considering whether—as some important new theories suggest—presence in the territory itself might suffice for granting these rights.

II. PHYSICAL PRESENCE AND THE RIGHT TO STAY:
PROXY-FOR-MEMBERSHIP VIEWS

The new presence-based theories of a right to stay and of other rights of participation take two forms that we shall consider here.²⁵ One grounds a right to stay in the strength of the ties to the place that one’s presence has created: its foundation is the *ius nexi*.²⁶ A second theory argues that a right to stay should be

²⁶Shachar, *Birthright Lottery*. 
granted to those with a sufficiently long presence in the place: it appeals to a *ius temporis*.\(^{27}\) Both of these theories consciously distinguish themselves from ethnic, associational, and civic socialization views; hence they count themselves as presence-based theories.

My purpose here is not to criticize these theories. It is rather to show that neither of them has presence in a place do the real work in generating a right to stay. For both of them, I shall show, presence in a place is ultimately a proxy for social membership. Hence neither of them really takes place seriously.

The new presence-based theories of a right to stay amend membership-based views of such a right, of which Walzer’s socialization criterion is the leading example. Walzer argued that internal gradations and differentiations of rights are incompatible with the egalitarian principles that ground the liberal democratic state. For this reason, those immigrants who were in the territory without full rights should be put on a path to citizenship, and be fully admitted into the national community by naturalization. This path would allow temporary workers to remain in the country if they so chose, because belonging to the community gives individuals a *prima facie* right to stay. In making this argument, Walzer held that territorial presence is a key criterion for justice in allocating membership.\(^{28}\) He thus articulated the commonly held view that, on the one hand, membership in the state’s society is—or should be—equivalent to citizenship; and, on the other, that membership should be considered nearly equivalent to presence. This is why debates about physical presence often run together citizenship, membership, and territorial presence.

The new presence-based theories share Walzer’s underlying motivation here. With him and Owen Fiss, they argue that excluding physically present aliens undermines equality, a core commitment of democratic states.\(^{29}\) But the new theories also share a worry about Walzer’s membership-based theory of a right to stay. They worry that it comes close to suggesting that membership in the state’s community is both necessary and sufficient for establishing which rights are due to those who are in a given place. This idea they reject. The new theories agree that while in some circumstances communally-determined membership suffices to grant political rights, it is not necessary for deserving such rights. For political rights, they hold, are not and need not be a package deal: a community can justifiably give some but not all such rights to a person. In fact, as Elizabeth Cohen reminds us, there are several types of “semi-citizenship.”\(^{30}\) Membership, citizenship, and presence are three distinct factors that generate different rights: not all members of the identity community or association are full citizens, not all

---


\(^{28}\)Walzer, *Spheres of Justice*, pp. 42–63.

\(^{29}\)Walzer, *Spheres of Justice*; Fiss, *A Community of Equals*.

\(^{30}\)Cohen, *Semi-Citizenship in Democratic Politics*. 
citizens’ rights are acquired by membership, and not all members or citizens are present. As to the first, minors and felons lack the rights to vote and to hold office. As to the second, many rights are independent of a person’s legal status in a polity. As to the third, many members of the community are expatriates and are not currently present. That persons have rights and duties independently of membership and citizenship is shown by the existence of universal rights and duties that attach to everyone just by virtue of being a person. So membership is not, according to the new presence-based theories, necessary for establishing the rights of all people present in a country. These theories observe that non-citizens, for example, tourists and other transients, are eligible for many rights within a legal community. Yet, if you are not a member, your presence is a sine qua non to get legal rights from a specific state. These theories thus make presence, rather than membership, the main criterion for analyzing and giving rights.

I think these new presence-based theories are superior to membership-based theories, in that they better illuminate the grounds and limits of a right to stay. I also agree with them and Elizabeth Cohen that political rights are not a package deal: liberal states do and should grant some political rights—like rights of local participation—to non-citizens, while refusing to grant them all the political rights enjoyed by citizens.

However, these presence-based theories do not take place, or indeed presence, very seriously. True, they maintain that a lengthy stay confers rights. But they do not say that being in a given place itself confers rights. They say that something besides presence in a place works the rights-generating magic, and they try to show that the people in question are aliens de jure but members de facto. They thus seem really to be seeking a proxy for membership.

Consider the first such theory, that of the ius nexi. This powerful and important theory begins by pointing out that the ius soli, while it might seem less of a membership view than the ius sanguinis, in fact grants inclusion by birth in a territory, not by mere presence in that territory. As Ayelet Shachar, the ius nexi’s leading advocate, observes, in the end, both ius soli and ius sanguinis are criteria of birthright—either by soil or by blood. Hence they are remnants of long superseded social hierarchies. Shachar thus points out that, for all we know, an adopted child has as deep a tie to his adopted parents as a blood child has to his, and a child born in one place is only a member of the community settled there if he has important ties to other people in that place. So, she argues, the criterion of civic exclusion and inclusion should not be ius soli or ius sanguinis, but strength of ties to the community: ius nexi. This view seems at first to be genuinely presence-based, at least in comparison to the ius soli. But what actually

32Shachar, Birthright Lottery.
grounds such inclusion is the density of the person’s social ties to the society. The theory thus makes inclusion even less dependent on territorial presence than does *ius soli*. For it is right that what really works the magic are social and communal ties, then the community could be anywhere. Hence presence in a place does not do the work in *ius nexi*.

Consider now *ius temporis*. On this theory, those who have been present in a territory for a number of years should have a right to stay there, because a lengthy stay is the best existing proxy for connections to the state’s society. Joseph Carens, for example, argues that length of residence is a good legal proxy for membership, just as the age of legal majority is a good proxy for adulthood. Like legal majority, a period of residence is a convenient measure that allows us to prevent discrimination. Moreover, Carens argues, length of residence is also a good measure in the case of illegal immigrants. For the offense of illegal immigration should be subject to a statute of limitations: after a number of years, there should be no offense to prosecute and punish. These are powerful arguments for a right to stay, and they may tell us why illegal immigrants should be included in the community. But on examination, they do not take place seriously either. While Carens insists that familiar urban features, landscapes, and sites are deeply meaningful to individuals, what truly matters for his theory is *time spent* in a given legal community, not the connection or attachment to a specific place. In his view, an immigrant in the US could move several times from Portland, Oregon, to Portland, Maine and still be eligible to stay, provided that he has been in the United States for several years. What matters on his account is the time spent interacting with the legal community as a whole, not physical presence in a particular vicinity.

In sum, then, these seemingly presence-based theories in fact ground a right to stay in something else, namely, connections to the state’s society. But that seems hard to distinguish from a proxy for membership. Hence, *a fortiori*, these theories do not take place seriously.

III. *IUS SITUS*: THE SYSTEM OF PLACE-SPECIFIC RIGHTS AND DUTIES

Given these defects in the leading justifications of a right to stay, I propose that we consider an alternative, which is that such a right can be grounded in genuine presence in a place. As an alternative to *ius sanguinis*, *ius soli*, *ius nexi*, and *ius temporis*, we could call the rights and duties derived from such presence “*ius situs*.” In law, *lex situs* (*lex loci rei sitae*) refers to the law of the place where a thing is located, and it helps determine which laws apply to the case where there

---


35Ibid., p. 17.
is a conflict of laws. Here we are looking for a *ius* that grants rights to a person by simply being in a place. These are the type of rights that wax and wane if you move a person in space, that is, the rights of the place: *ius situs*.

*ius situs* captures a domain or level of morality that has been ignored of late by political philosophy, although it is well understood by laypeople. This domain exists somewhere between the rights and duties of membership, on the one hand, and the moral incidents of natural rights and personhood, on the other. It is wholly distinct from the first domain, and cannot be reduced without remainder to the second. For as I shall show, *ius situs* can capture a person’s rights and obligations in territorial transfers and similar circumstances; but membership criteria like ethnic, associative, or social membership cannot. On the other hand, I shall also show that natural rights, including a right not to be harmed, and also the universal rights clearly derivable from personhood, are too general to capture the specific rights and duties created in particular relation of the individual to the place where she dwells. The idea of *ius situs*, instead, can fully capture such rights and duties, which I call *place-specific rights and duties*.

Although *ius situs* is overlooked by the political philosophy of our day, it was appreciated by political philosophers in the past. *ius situs* was recognized by a line of thinkers including Machiavelli, Montesquieu, Rousseau, Bentham, and Tocqueville, all of whom theorized about the social and the physical conditions that make possible different forms of political organization, and to what extent geography and economy determine these traits. Indeed, they considered to what extent political principles should vary depending on the different aspects of the natural, cultural, and built environment of a society. In so doing, they thought in terms of *ius situs*. But the place-specific concerns of this tradition have come to be overshadowed by other aspects of their thought. This is partly because in the twentieth century, concerns about national identity, ideology, membership, and the market system trumped concern about the specifics of place and geography. So although political philosophy today overlooks *ius situs*, it has not always done so.

By contrast, laypeople and the law have never overlooked the claims of *ius situs*. To see that *ius situs* is intuitively accepted by laypeople and moreover has been widely deemed a valid source of law, consider cases in which a right of place becomes a burning issue: occasions when the border of the state moves, but people on either side do not. In such cases, it is, as I shall now try to show, a widely-held intuition in liberal democracies that people have the right to stay in the place where they live, irrespective of their citizenship or national membership.

Take the Treaty of Guadalupe Hidalgo of 1848, which ended the Mexican-American War by transferring half the territory of Mexico to the United

---

States.\textsuperscript{37} In this cession, the inhabitants of the lost Mexican territories changed jurisdiction without having moved from the place where they lived. As the saying goes: they didn’t jump the border; the border jumped them. In the Treaty’s article VIII, both parties agreed that the new rulers of the former Mexican territory would respect all rights of existing residents; that these rights were not contingent on membership in the new political community; and that the rights were contingent on a person’s physical presence (or property holdings) in those territories. The inhabitants of these territories were neither expected, nor required, to assume legal membership. So those who were not members had a right to remain aliens and yet be granted many rights enjoyed by citizens, particularly the right to continue living where they did before the cession. And all this while both states were firmly committed to nation-building and fostering national identity among the population. Hence those present in a given place were legally given rights independent of their membership in a given group, but dependent on their being in a place.

Now consider a similar case of territorial transfer, but one where the rights of membership won out over the rights of place. The Treaty of Versailles, which ended the First World War in 1919, restored to France the provinces of Alsace and Lorraine, which had been ceded to the German Empire after the Franco-Prussian war of 1870. The Treaty’s article 54 (paragraph 3, annex) stipulated that only those residents of Alsace and Lorraine who had been French nationals prior to 1870 or were their direct descendants (in the paternal line) would become French citizens after the change in territory. People whom the French state considered German nationals lost their right to stay in those provinces. After the war, the Third Republic embarked on campaigns to classify citizens on the basis of their ancestry and to purge the recovered territories of “recent” German immigrants.\textsuperscript{38} These policies were at the core of a peace settlement that so aggrieved and humiliated the Germans that it eventually drove them into the arms of the Nazis. They were also widely denounced by many citizens of the Allied countries. Both groups evidently thought that the policies violated a right to stay held by the expelled German Alsatians. And yet the policies were perfectly good applications of membership views! For the expelled people were not ethnic members of France, nor had they been in France by mutual consent, nor had they been socialized in the French civic order. This suggests that many people think there are place-specific rights to stay.

In sum, the contrast between these two policies shows that presence in a place is a rights-generating relation that may be disrupted by displacement and deportation. This relation, moreover, has in the recent past been considered a


source of law in liberal or republican polities. Moreover, the examples make clear that natural rights, including a right not to be harmed, are too general to capture the particular relation of the individual to the place where she dwells, and to track distinctions in the rights of individuals across borders. By contrast, the normative system of *ius situs* can capture these normative relations.

But what justifies such a system? The rest of this and the following section argue for *ius situs*. This *ius* complements rather than supplants other reasons to grant rights in a state: it adds one more resource to the repertoire of reasons that justify immigrant inclusion and exclusion; reasons that are now restricted to the narrowly particular rights of membership, and the expansively general natural rights. The *ius situs* is a normative system by which physical presence in specific places gives special duties to individuals, and these place-specific duties, I shall argue, are a type of role obligation. Yet they do not attach to persons by virtue of who they are as a matter of social role; rather, they depend on where they are. A doctor or a minister carries her role obligations with her as she travels the globe; but you do not carry place-specific duties with you through space. For place-specific duties depend on configurations of people and things that only exist in a particular place. Place-specific duties vanish once you exit the place. For “place” denotes both nature and culture, a network of relations among the natural, cultural, and built environment. Such duties are thus distinguished from other role obligations in that all other role obligations are place-unspecific: they exist regardless of where the obligated is, and of where the obligations’ beneficiaries are. For example, Julia has a role obligation to her mother, and this does not change whether she is present in Mexico or the United States; she always remains her daughter. However, when she travels, her place-specific duties change completely.

So what, then, are the functions and content of place-specific duties? Above all, such duties establish and uphold local schemes of cooperation. Moreover, unless we fulfill our place-specific duties, others cannot fulfill theirs; so they are a condition on others’ moral agency. All such duties allow strangers to live close to one another without deep conflict. As such, they reflect common understandings that allow for predictability and ease in social life. These, of course, differ in each place according to local custom and the local environment. Everywhere, however, such duties include being a good neighbor, sharing communal areas, allowing for the provision of services, respecting sacred (and other purpose-specific) places, fostering the local ecosystem’s resilience, and generally, participating in schemes of cooperation specific to the locale. Superficially, the specific content of some of these duties might seem arbitrary. For some of them do no more than provide a coordination point, like the duty in Britain to drive on the left side of the road, rather than the right. But most often the duties’ content is not arbitrary; it depends—as such thinkers as Montesquieu, Rousseau, or Tocqueville would have insisted—on the physical surroundings, the climate, and the locals’ culture. In

---

most hilly towns, for instance, streets hug the side of a slope; hence people on
the high side of the street have a duty to protect their down-hill neighbors
from debris that may be washed down from their gardens in the rainy season.
These obligations depend on the town’s topography and the placement of
people’s houses in it, and how natural resources are shared. Similarly, the type
of obligations you owe your neighbors differ when you live door-to-door in a
city high-rise from when your closest neighbor lives half a mile away in the
countryside. These varying surroundings assign varying roles to each person, and
thus create varying duties associated with those roles.

Notice that these duties are place-specific, or indexed to the place, but they are
not created directly by space or topography, without reference to the rest of
morality. *Ius situs* is a distinct level of morality, which means that it is derived
from the basic principles of morality. These derivations come from combining
those basic principles with the goals of the local political order; with the goal of
creating a stable scheme of fair local cooperation; and with facts about the
place—the natural, cultural, and built environment in the vicinity. Hence the
duties of *ius situs* are not generated by space alone. Nor are these duties
space-directed: they are not owed directly to a place’s topography or climate, but
rather to other people who together endow spaces with meaning.

What makes a place-specific duty kick in and be valid for you is whether or not
you are “there” where the duty arises. The applicability of the duty does not vary
with whether or not you are near or far from where you usually perform the
duties, as has been claimed of universal duties to aid. Place-specific duties arise
due to the configuration of people and things in a particular place, so they don’t
apply to you if you are not presently part of that configuration. Distance or
nearness to a mosque does not affect your place-specific duty to take your shoes
off when you enter it. If you are in the mosque, you have the duty; if not, not.
Equally, your distance or nearness to a library does not affect your place-specific
duty to be quiet when you are in it. The same goes for a duty not to smoke in
the hospital. These duties only obtain when you are in the place in question, and
their particular content is unaffected by relative distance from the place. For place
is not only “placement,” not only a location in physical space or particular
coordinates on a map. Place is also constituted by culture, social activities,
institutions, and physical constraints. A place emerges from the way individuals
relate to their surroundings, and how their agency alters physical space. So a

40 Edward S. Casey, *Getting Back into Place: Toward a Renewed Understanding of the Place
41 Frances M. Kamm, “Does distance matter morally to the duty to rescue?” *Law and Philosophy*,
42 These cultural aspects of place, moreover, do not simply make place vague or subjective (the
psychological response to physical reality), rather, it makes it more precise because it relates space to
agency, both individual and collective. See Jeffrey Malpas, *Place and Experience* (Cambridge:
Cambridge University Press, 1999).
place is partly constituted by rules and institutions, and only when present “there” does one occupy a place-specific role that carries its own obligations.

But what precisely is “there”? A “place,” as I use the term, is a bounded (but not necessarily closed) area that provides a setting for social relations, has a precise location, an environing situation, and cultural meaning. Places can be of all kinds, depending on the social relations for which they are the setting, but the place-specific duties that I discuss here are often associated with civic and legal obligations and thus they arise in public domains. (You may have important place-specific duties to family members in your home, roommates in your apartment, or co-workers in your office, but these roles are privately regulated and thus subordinated to a legal order that distinguishes between public and private realms). Thus, the place-specific duties I discuss here emerge in concrete places such as pedestrian malls, markets, parks, highways, public schools, and street corners. These places are nested in other public places and are legally bound by territorial jurisdictions, so, for these purposes, we may think of place-specific duties as circumscribed by the smallest territorial jurisdictions within a state, such as towns, counties, etc.

Many of these place-specific duties are just set by custom and may not at first seem legally or morally important. Why, it might be asked, is it a requirement for enabling others’ moral agency that I put the trash-can on the curb rather than smack in the middle of the sidewalk? These duties, I answer, are important because they aim to minimize conflict among people who live together by chance rather than by choice. These customs allow people to live next to strangers without too much friction. Yet custom and spontaneous order cannot do all the work, and this is why many place-specific duties should and do also have a legal expression.

Given this, it is tempting to think that both the customary duties and the legal ones can be understood in the light of Kant’s idea that we ought to solve conflicts with those in our vicinity by recourse to law. So we are obligated to live under a legal state to regulate our (local) interactions. Jeremy Waldron has made an argument of this kind from a “principle of proximity” which establishes the contours of membership in a state. Could this principle ground place-specific duties? Like me, Waldron pits his proximity principle against a “principle of affinity,” adopted by nationalists and culturalists, which states that those who should live together under one government are those who share a common

---


identity. On the contrary, according to Waldron, those who should share a common authority are those who do not share anything else other than proximity to one another: the idea is that of “[p]ublic lawful external coercion so that our interactions are determined by law.” The main reason that sustains this principle is that, “[o]ur vicinity to each other in the presence of natural resources will generate conflict and we have a moral obligation to solve those conflicts under law. So we have an obligation to create a state to regulate our interactions.”47 Proximity to one another imposes a duty to regard one another as parts of a collective that solves coordination problems and allows us to establish common schemes of cooperation.

Yet, even though this principle points in the right direction, it does not fully explain why there are place-specific duties. The principle focuses on the relations among persons in close proximity, but it does not matter that their relation occurs here, rather than somewhere else.48 For proximity is a person-to-person relation, whereas presence is a person-to-place relation. Under the proximity principle, the specifics of the place where interactions occur do no real work in the argument, and thus do not explain why place-specific duties stop at the place’s edge. What the principle does explain is why the duties it generates stop at the edge of our proximity. In Waldron’s argument, individuals’ main duty is to regulate their relations through law, but if they were to move the whole legal community somewhere else, this change would not alter the relations among persons: they would still be proximate to one another. Provided that they brought their relations with them, a change of place would not much matter. So Waldron’s Kantian principle of proximity, although illuminating and on the right track, does not really take place seriously.

What, then, grounds place-specific duties? Why does simple presence create duties that are owed to others and are specific to the place? The answer is that in every place, there is a scheme of cooperation going, and it needs some minimal participation by everyone present to avoid conflict over the most basic questions. Cooperation by everyone in the place to some degree is necessary: even transients and visitors. This cooperation scheme cannot be moved somewhere else, because it emerges and works around distinctive networks of natural relations, and its organization cannot be reduced to legal interactions. The duties central to this cooperation are place-specific duties.

Let us now consider an example of place-specific duties and how they obtain. Imagine a concrete place: a suburban street. Picture now the last three houses in a narrow cul-de-sac. My house faces Kim’s, and Rose’s house is perpendicular to ours, topping the street’s dead-end. Whenever there is a winter storm the snow accumulates in our driveways, and if either I or Kim push the snow from our driveways towards the street Rose cannot open her gate, which opens towards

---

47 Ibid.
48 For similar concern with respect to territorial rights, see Stilz, “Nations, states and territory.”
the outside. So to let Rose out, both Kim and I have to make sure to shovel the snow away from the curve. Fulfilling this duty, moreover, requires coordination. When there is a lot of snow, I cannot push it in the right direction unless Kim clears out his driveway before I clear mine. So I need Kim to do his duty if I want to discharge my obligation. As in this example, most concrete places generate networks of overlapping duties due to a combination of topography, climate, flora, fauna, and human relations, and these duties require coordinated action in order to be discharged. This is what grounds place-specific duties: proximity-in-a-place.

IV. THE FRUITS OF IUS SITUS: HOW PLACE-SPECIFIC DUTIES GROUND A RIGHT TO STAY

Yet, to fulfill these duties, those who have them also need certain rights—what we may call place-specific rights. Such rights are mostly the correlatives of place-specific duties. But they also include a pro tanto right to stay. As I shall now show, everyone present in a place needs these rights so as to fulfill her place-specific duties. And this, of course, includes non-citizens—including unauthorized immigrants and transients. All people present need these rights for two main reasons: First, because the participation of those present is often required for the success of local cooperation schemes; and secondly, and most importantly, because the rights—including the right to stay—are necessary to uphold the citizens’ moral agency.

Place-specific rights, as I have said, are both the correlatives of place-specific duties, and also a pro tanto right to stay, at least until one has fulfilled one’s own place-specific duties. The specific contents of the set of such correlatives depend on the particular scheme of cooperation and the shape of the locality; hence they vary from place to place. But those place-specific rights that would be more or less inevitable in any place would be those stemming from duties that arise in any scheme of cooperation, particularly the duties to assist others. These rights include the right to access public services, such as policing and firefighting, without fear of detention, deportation, or separation from one’s family (this may require the creation of a “fire-wall” between public services and immigration enforcement agencies).49 On the other hand, the place-specific duty to provide to local dependents who are also members of the community translates into a place-specific right to work. And they would, in most cases, include the right to participate in local political decision-making.

Note that in arguing that all people present in a place—even unauthorized immigrants—have place-specific rights, I am not arguing that these are the only rights that unauthorized immigrants have while in the place. For any person

49Carens, The Ethics of Immigration, p.133.
present should expect to have all the human or natural rights widely thought to be the entitlements of any person anywhere. In liberal states, these include a right to fair trial, a right to education, the right to free movement, as well as a right to participate in the main political decisions that affect them.

Let us now turn to considering how *ius situs* implies place-specific rights and a right to stay. Granting such rights is often necessary because most place-specific duties arise in situations similar to the *cul-de-sac*: they are mutual. That is, you cannot properly fulfill your duties unless other people around you fulfill theirs. Moreover, there are other types of coordinated action too complex to be solved by the immediate cooperation of those involved. In these circumstances, the local government must coordinate action. But when an individual is not an official part of the local collectivity, he lacks a right to participate in the cooperation scheme, and is forced to free ride. So, to discharge her place-specific duties, a non-citizen needs both rights sufficient to be part of the collective scheme, and also a right to stay in the vicinity long enough to discharge the place-specific duties she may have acquired there.

You often see this kind of relation at work on the highway. A motorist cannot drive well if others ignore their place-specific duties and change lanes randomly or drive on the left rather than the right. But it is also impossible for him to drive well if some drivers around him are not *allowed* to drive according to all rules of the road. And this is precisely what occurs when, for example, some are not allowed to have drivers’ licenses; for then they cannot get car insurance. The highway generates a host of place-specific duties that cannot be properly fulfilled unless there are place-specific rights.

This example helps explain what is wrong with thinking that those lacking a right to remain present in a place should simply be removed from it. In today’s market societies—especially ones with poor public transportation systems, like the US—people are going to take to the highways in private autos. The refusal to grant them rights like a driver’s license means that they will drive without car insurance, putting others at risk. Yet, physically removing people who already participate in schemes of cooperation cuts apart a web of place-specific duties in a given area, thereby disrupting local life in its entirety. For example, the removal of a neighbor creates all sorts of problems for other locals, and when removals happen in great numbers they can make a community fail altogether. An example of this kind of disruption was seen after the 2008 raids in Postville, Iowa, which resulted in the arrest and deportation of almost 400 illegal immigrants who had been working in a meat-packing plant. Their sudden removal forced the plant to close; Postville’s population was nearly halved in one year. Postville’s citizens afterwards found it extremely difficult to fulfill their place-specific duties. Hence in such situations, non-citizens and other aliens should be granted a right to stay

---

and other place-specific rights to allow for decent communal life and the general success of local cooperation schemes. Now, it is true that town life in Postville faltered only because great numbers of immigrants were removed from the town in one fell swoop. So some might wonder why a local government should not remove individual migrants or replace them one at a time. Is there a principled reason, they might ask, why it ought not to do this?

Indeed there is: granting place-specific rights to individual immigrants is a *pro tanto* moral duty. For unless the aliens are granted these rights, their resulting lack of cooperation may prevent *citizens* from doing their own share in the local scheme of cooperation, thus undermining their own and other citizens’ moral agency. This is shown by an insight from Robert Goodin: He challenges the “not my job” excuse that the libertarian gives for not participating in schemes of cooperation.\(^{51}\) The libertarian’s refusal to participate, Goodin argues, undermines the success of the collective scheme. This, in turn, can harm some individuals, and the harm requires compensation. However, the libertarian cannot simply compensate those harms to discharge his responsibilities. For in refusing to participate, he also prevents other citizens from doing their share, and those others cannot be compensated: “Morality cannot be traded off for anything but morality.”\(^{52}\) In Goodin’s view, the libertarian’s inability to compensate others for hindering their moral agency justifies the state in forcing him to participate in collective enterprises.

A similar scenario obtains when people do not contribute to the cooperation scheme because they fear the consequences of doing so. Imagine that Kim, my neighbor, would like to cooperate in local schemes, but his irregular immigration status prevents him from doing so. He worries that, as he shovels snow, the neighborhood police may single him out and demand to see his papers, so he feels compelled to stay indoors. A person has a strong incentive not to cooperate if she is under the “ever present threat of deportation,” as Walzer called it.\(^{53}\) This happens particularly when, due to their complexity, the place-specific schemes of cooperation in question are not organized among a few individuals in a *cul-de-sac*, but rather are managed by neighborhood associations, or the local government, and they expand throughout a given territorial jurisdiction. In such circumstances, a person who is concerned about her immigration status has a strong incentive to neglect duties whose compliance puts her in direct contact with public authorities. This refusal is particularly grave in the case of place-specific duties where a lack of cooperation harms third parties or undermines current citizens’ moral agency. For example, neighbors who are unauthorized immigrants or who have such immigrants as relatives have a reason to hesitate in denouncing criminal activity. For such contributions to the local

\(^{51}\)Goodin, “The state as a moral agent.”
\(^{52}\)Ibid., p. 39.
\(^{53}\)Walzer, *Spheres of Justice*, 58.
scheme of cooperation would put them or their relatives at risk of being found out. These bad incentives can bring down entire cooperation schemes and put third parties (such as children or people in danger) at further risk. If Kim does not cooperate in snow removal, school committees, neighborhood associations, and local policing, I will be unable to help Rose in those settings; and because it hinders me in doing my duty, Kim’s lacking a right to stay would eventually harm me. For the harm done to the local scheme of cooperation and to my ability to perform my own place-specific duties would eventually undermine my own moral agency. This is something for which neither I nor any other citizen can be compensated. Given this, Kim should be allowed to cooperate, and hence should be granted a limited and *pro tanto* right to stay. So local citizens should give rights to non-citizen locals in order that cooperation does not break down and citizens retain their moral agency.

This also holds true of the individual citizen who would be willing to put up with losing the fruits of cooperation with Kim in order to be rid of him. And this even if he claims that Kim is harming the collective by entering it without its consent. For even if the anti-immigrant would be willing to pay the costs of denying Kim a right to stay, he has no right to impose them on third parties who would be harmed by the denial to Kim of that right. For denying Kim a *pro tanto* right to stay may harm others within that scheme and its network of place-specific rights and duties. In this case, the harm to third-party individuals outweighs any possible harm Kim does the collective by imposing himself on it.

But this argument, of course, applies to the anti-immigrant individual. What about the group as a whole? May the group of current citizens throughout the nation collectively refuse to accept the unauthorized immigrant’s cooperation? I argue that they have a *pro tanto* duty not to do so. For current citizens nationwide are a membership group, and there is a crucial distinction between a membership group and a collection of individuals who belong to a network of place-specific rights and duties. While the national citizenry are members of an ethnic or associational group that may have the right to refuse to accept new members on the basis of identity or mutual consent, those who partake in a place-specific scheme of cooperation are not *members* of an association. Members are part of their group, wherever in the globe they happen to be. Those who are present in a place, instead, partake in a different collective defined by proximity-in-a-place rather than membership or social ties. (Participation in a network of place-specific duties is not a proxy for membership in the community because place-specific cooperation establishes a different type of collective defined by physical presence.) Hence, while the national citizenry may collectively have the right to deny membership to immigrants, this does not in itself entitle them to deny the immigrant a right to stay. And indeed, because the nationwide collective of citizens morally ought to avoid actions that impair the moral agency of their members, they are under a *pro tanto* duty to grant those present (who are not members) a right to stay. For if the citizenry denied Kim the right to stay,
those citizens who are also partake of the local scheme of cooperation involving Kim would have their moral agency impaired.

In sum, we should grant present non-citizens rights that allow them to fulfill their place-specific duties, because doing so is necessary to allow citizens to fulfill their duties. Hence most immigrants, visitors, and other transients should be given the rights and duties required to give other locals a good life. Yet they should also, and more importantly, be given the rights and duties required to enable those locals’ moral agency. In the case of immigrants who entered a country illegally, these rights include access to visas and a right to remain in the country long enough to sort out their responsibilities to the place circumscribed by the local jurisdiction.

There is an important corollary to this justification of a right to stay. In some cases, the right may translate into a legal permit to live only in certain areas within a country, and only temporarily. However, local rights of participation are so thoroughly entangled with rights and duties at other levels of government, that a right to stay locally may in practice have to become a right to remain in a wider region. Moreover, in such circumstances, the interaction of the right to stay in a place with natural rights, such as freedom of movement, may transform the right to stay locally and temporarily into a right to stay in a particular country for a much longer time. It might also translate into a right to return to a place once you or your forebears have left it. Whether or not the local and temporary right to stay defended here translates into these more robust rights depends on particular circumstances and how we interpret the natural right to free movement.

One possible concern with this justification of a right to stay is why a state should grant such a right to people who already have sufficient rights to fulfill their place-specific duties—for example, tourists or other visa holders. If I were visiting from abroad, and temporarily living in Kim’s house, I’d be expected to take out the trash and shovel snow—but my temporary visa would allow me to do that. Why and when should I be also granted a right to stay past the term of my visa? According to ius situs, I should be granted such a right when and for as long as I need it to fulfill my place-specific duties. When these have been fulfilled, then the community can say that my right to stay has expired. Consider students in a university town: if they rent a room in a college, their rights may end at term’s end. But if they establish other obligations in town, they may need to be permitted to stay on. In current practice, a liberal state usually makes allowances when a person’s membership obligations change. For example, liberal states are more accommodating when a visitor marries a citizen or has a child in a local school. Shouldn’t, therefore, a liberal state make allowances when place-specific duties change?54

---

54In this respect, place-specific rights are similar to the “probations” in Cohen’s temporal rule for political belonging; see Cohen, “Reconsidering US immigration reform: the temporal principle of citizenship.”
This, then, is why place-specific rights are consequences of *ius situs*. This *ius* and its consequent rights together constitute the true magic of place. By recognizing and appreciating the features of *ius situs*, we can make sense of situations that are common in legal systems, but which membership theories or natural rights theories have trouble explaining. Besides illegal immigrants, there are many other people who exist in the gray zones of membership in the community, and it is better to have more moral resources to deal with these gradations than to go on thinking that rights depend solely on whether one belongs to the community or not, or whether or not they are rights any person should have regardless of where she is. *Ius situs* allows us to see that there is a third source of civic rights and duties, besides universal rights and communal membership.

V. CONCLUSION

A person acquires the place-specific duties and rights for which I have argued in this article by “being there” rather than by belonging to the community. Being in a place and performing some roles there establishes place-specific duties. In order to fulfill those duties and allow others in the place to fulfill theirs, people in a given place are entitled to some place-specific rights. This web of rights and duties—this *ius situs*—I have argued, can extend so that it grants everybody present in a given place most of the social and political rights to which members of a political community are entitled. But even if they are not eligible for every right, in most circumstances, non-citizens who are present in a place will have a relation to it such that they have a right to stay.

*Ius situs* can thus explain what is so special about place. It allows us to make sense of laws and moral intuitions holding that physical presence plays a role in giving and granting rights, that there is indeed some “magic” in place. It can also explain the legal and moral relevance of territorial attachment without having to rely on identity, cultural belonging, or legal membership. Moreover, thinking in terms of *ius situs* moves the discussion of the ethics of immigration beyond citizenship and membership in communities. But it also has consequences for debates about our duties to the environment and territorial rights. Thinking in terms of *ius situs* can circumvent the monolithic focus on the territorial nation state and finally make sense of place-specific principles like subsidiarity and local environmental rights and obligations. Hence *ius situs* allows us to expand our understanding of the relation between political authority and territory: an expansion sorely needed in debates regarding shared resources—particularly those shared across state borders. These are some of the benefits of taking place seriously.