Excerpt from

THE GLOBALIZATION OF JURISDICTION

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There is more to the assertion of jurisdiction or the extraterritorial imposition of norms than simply questions of political legitimacy or efficient dispute resolution. The assertion of jurisdiction, like all legal acts, can also be viewed as a meaning-producing cultural product. What does it mean, after all, to say that some person, corporation, or activity is subject to a community's jurisdiction? And how does the idea of jurisdiction relate to conceptions of geographic space, community membership, citizenship, boundaries, and self-definition? Although largely ignored in the debates over Internet jurisdiction and the rise of transnational governing bodies, these foundational issues must be considered seriously if we are to develop a richer descriptive account of the role of legal jurisdiction in a global era.

I begin to develop such an account by isolating four specific aspects of jurisdiction that are often overlooked: the way in which jurisdictional rules reflect and construct social conceptions of space, the role of jurisdictional rules in establishing community dominion over a transgressor, the process by which the assertion of jurisdiction symbolically extends community membership to those brought within its ambit, and the way in which assertions of jurisdiction can open space for the articulation of norms that challenge sovereign power. We might also interrogate further both the presumed tie between a physical location and a community, and the assumption that the nation-state is the only appropriate community for jurisdictional purposes. Only then will we be in a position to construct a more nuanced normative model for understanding and addressing the globalization of jurisdiction.

A. Jurisdiction and the Social Construction of Space

It has become commonplace for cultural critics and others to identify the ways in which social structures shape and constrain conduct; yet, the link between social structure and physical space has received less attention.[1] Nevertheless, "[t]he production of space and place is both the medium and the outcome of human agency and social relations . . ."[2] This cultural construction of space includes the boundaries drawn between "public" and "private" spaces, the decisions a community makes about land-use and zoning, the appropriation and transformation of "nature" as both a concept and as a physical description, the local autonomy of governmental units, the use of specialized locations for the conduct of economic, cultural, and social practices, the creation of patterns of movement within a community, and "the formation of symbolically laden, meaning-filled, ideology-projecting sites and areas"[3]

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1. For two notable exceptions within legal scholarship, see generally Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627 (1991) (using insights drawn from critical human geography to understand changes in America's jurisdictional rules); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999) (describing socially constructed nature of jurisdiction in the context of voting districts). Kogan's work, although it pre-dated the rise of cyberspace, specifically addressed the social significance of adjudicative jurisdiction and so is particularly relevant here. My discussion in this section is heavily indebted to Kogan's argument.

2. ALLAN PRED, MAKING HISTORIES AND CONSTRUCTING HUMAN GEOGRAPHIES 10 (1990).

3. *Id.*

In addition, *topological* space, which consists of the formal boundary lines we have chosen, is distinctively different from *social* space, which includes the meanings given to space (both local and non-local), to the distances between delineated spaces, and to the time necessary to traverse those distances.[4] For example, a 100-mile automobile trip may seem like a greater journey to residents of the northeast United States, who are accustomed to relatively short distances between destinations, than to residents of the west, where cities and towns are more dispersed. Similarly, a 1,000-mile trip carries a very different social meaning today, in the age of relatively inexpensive air travel, than it did a hundred years ago, even if the topological space remains the same.[5] And of course America's well-documented post-war demographic shift from city to suburb is not merely a change of topology, but a politically and symbolically significant cultural transformation.[6]

Moreover, the construction of legal spaces and the delineation of boundaries is always embedded in broader social and political processes.[7] "Legal categories are used to construct and differentiate material spaces which, in turn, acquire a legal potency that has a direct bearing on those using and traversing such spaces."[8] For example, in the history of European conquest of Australia, the naming of particular spaces—rivers, mountains, capes, bays, etc.—became a central point of political contest.[9] The Europeans believed that the aboriginals did not classify or name the landscape and transformed that "spatial deficiency" into a "legal deficiency": if the aboriginals did not name their places, their hold on it must be tenuous and so it would not be a crime to take possession of it.[10] Similarly, Jeremy Waldron has observed that increasing restrictions on the use of public spaces for activities such as sleeping or washing means that homeless people cannot perform those acts at all because they are denied a place either public or private.[11]

The social meaning of geographical space also includes the way in which an individual or community perceives those who are *outside* the community's topological or social boundaries. While people tend to develop attitudes of familiarity toward the spaces in which they reside and conduct their daily activities, they may come to view unfamiliar people and locations as alien, forbidding, or foreign. Alternatively, the outside "other" can be seen as inviting, friendly, and hospitable, or as mysterious, exotic, and romantic.[12] These are just a few examples of the infinite variety of possible attitudes one may hold towards unfamiliar social spaces. "These attitudes will be influenced by a host of factors, including the political governance of that 'other' location, the socio-economic involvement that the individual has on a daily basis with that other location, and the extent of contact that a person has . . . with that other location."[13]

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4. Kogan, *supra* note 1, at 634.

5. *See* JOHN TOMLINSON, GLOBALIZATION AND CULTURE 4 (1999) ("In a globalized world, people in Spain really do continue to be 5,500 miles away from people in Mexico, separated, just as the Spanish conquistadors were in the sixteenth century, by a huge, inhospitable and perilous tract of ocean. What connectivity means is that we now experience this distance in different ways. We think of such distant places as routinely accessible, either representationally through communications technology or the mass media, or physically, through the expenditure of a relatively small amount of time (and, of course, money) on a transatlantic flight. So Mexico City is no longer meaningfully 5,500 miles from Madrid: it is eleven hours' flying time away.").

6. For a socio-political history of American suburbanization, see generally KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1992).

7. *See* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER *xi* (1994) ("The legal representation of space must be seen as constituted by—and in turn constitutive of—complex, normatively charged and often competing visions of social and political life under law.").

8. *Id.* at 54.

9. *See* PAUL CARTER, THE ROAD TO BOTANY BAY: AN EXPLORATION OF LANDSCAPE AND HISTORY (1988).

10. *Id.* at 64; *see also* ROBERT D. SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 6-8 (1986) (describing similarly loose conceptions of territoriality among members of the Chippewa tribe at the time Europeans settled in the United States).

11. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 315 (1991) ("Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions [such as sleeping] may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them.").

12. *See, e.g.*, Stuart Hall, *The Local and the Global: Globalization and Ethnicity, in* CULTURE, GLOBALIZATION AND THE WORLD-SYSTEM (Anthony D. King ed., 1997) ("To be English is to know yourself in relation to the French, and the hot-blooded Mediterraneans, and the passionate, traumatized Russian soul. You go round the entire globe: when you know what everybody else is, then you are what they are not. Identity is always, in that sense, a structured representation which only achieves its positive through the narrow eye of the negative.").

13. Kogan, *supra* note 1, at 637.

Thus, jurisdictional rules have never simply emerged from a utilitarian calculus about the most efficient forum for adjudicating a dispute. Rather, the exercise of jurisdiction has also been part of the way in which societies demarcate space, delineate communities, and draw both physical and symbolic boundaries. Such boundaries do not exist as an intrinsic part of the physical world; they are a social construction. As a result, the choice of jurisdictional rules reflects the attitudes and perceptions members of a community hold towards their geography, the physical spaces in which they live, and the way in which they define the idea of community itself.

In order to convey this basic idea, it might be useful to tell an admittedly over-simplified functionalist account of the change in American jurisdictional rules over time. In this account, the territorially-based jurisdictional principle articulated in the nineteenth century by the Supreme Court in *Pennoyer v. Neff*[14]—states have complete authority within their territorial boundaries but no authority outside those boundaries[15]—derives in part from a particular understanding of social space in the United States at the time. Historian Robert Wiebe has observed that

> America during the nineteenth century was a society of island communities. Weak communication severely restricted the interaction among these islands and dispersed the power to form opinion and enact public policy . . . . The heart of American democracy was local autonomy. A century after France had developed a reasonably efficient, centralized public administration, Americans could not even conceive of a managerial government. Almost all of a community's affairs were still arranged informally.[16]

According to Wiebe, geographical loyalties tended to inhibit connections with a whole society. "Partisanship . . . grew out of lives narrowly circumscribed by a community or neighborhood. For those who considered the next town or the next city block alien territory, such refined, deeply felt loyalties served both as a defense against outsiders and as a means of identification within."[17]

As the nineteenth century progressed, so this story goes, massive socio-economic changes brought an onslaught of seemingly "alien" presences into these island communities. Immigrants were the most obvious group of outsiders, but perhaps just as frightening was the emergence of powerful distant forces such as insurance companies, major manufacturers, railroads, and the national government itself. Significantly, these threats appear to have been conceived largely in spatial terms. According to Wiebe, Americans responded by reaffirming community self-determination and preserving old ways and values from "outside" invasion.[18]

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14. 95 U.S. 714 (1877).

15. *See id.* at 722 ("[E]very State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also the regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred.... [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.").

16. ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920, at *xiii* (1967).

17. *Id.* at 27.

18. *Id.* at 52-58.

Given such a social context, it is not surprising that the jurisdictional rules of the period emphasized state territorial boundaries. Indeed, it is likely that the burdens of litigating in another state far exceeded simply the time and expense of travel, substantial as those burdens were. Just as important was the *psychic* burden of being forced to defend oneself in a foreign state, which may have felt little different from the idea of defending oneself in a foreign country. An 1874 Pennsylvania state court decision issued shortly before *Pennoyer* illustrates the extent of this psychic burden. In the case, a resident of New York had contested jurisdiction in Pennsylvania. The court acknowledged that the Pennsylvania courthouse was only "a few hours travel by railroad" from New York, but nevertheless ruled that the defendant could not be sued personally, in part because "nothing can be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear . . . ."[19] The court disregarded the relatively slight literal burden in the case at hand, and instead focused on the specter of being "dragged" to a "distant state" located "thousands of miles" away. The decision equated other states with foreign countries, referring to a "defendant living in a remote state or foreign country . . . [who] becomes subject to the jurisdiction of this, to him, foreign tribunal . . . ."[20] These passages indicate that the psychic significance of defending oneself in another state was at least as important as the literal difficulties of travel.

Both the literal and psychic burdens associated with out-of-state litigation changed as a result of the urban industrial revolution at the turn of the twentieth century, a revolution that profoundly altered American social space. Increasingly, most economic and governmental activities were administered from afar by impersonal managers at centralized locations. In such a world, another state was likely to be viewed less as a foreign country and more as yet another distant power center, just one of many "anonymous, bureaucratic, regulatory bodies in an increasingly complex society."[21]

In addition, advances in transportation and communications helped to weaken territoriality as the central category in which Americans understood their space. "As long as daily lives were focused to a large extent on the local, a state boundary symbolized the edge of the world, and everything outside that boundary was alien and foreign."[22] With increased mobility, however, Americans regularly crossed state boundaries by train, by car, and in the air, which inevitably diminished the sense that other places were alien. The rise of radio and television meant that events in other states could become a regular part of one's daily consciousness. "Physical distance as a social barrier began to be bypassed through the shortening of communication 'distance.'"[23] And the functional interdependence that has characterized the United States in this century has meant that almost all of us are regularly affected by people, institutions, and events located far away.

In this altered social space, the call to defend a lawsuit in the courts of another state remained an imposition, but the burdens were no longer perceived in simple territorial terms. In other words, though many economic and practical burdens remained, the psychic burden was no longer as strong. Thus, it is not surprising that *International Shoe* substituted a flexible "fairness" test for the more rigidly territorial scheme of *Pennoyer*.

As stated previously, this is obviously an over-simplified account of the shift in American jurisdictional rules. Yet, for the purposes of this discussion it makes the essential point clearly enough: changes in political and social conceptions of space form at least part of the context for shifts in jurisdictional rules. Thus, although some might ask why we need to rethink our ideas about legal jurisdiction, the reality is that jurisdictional rules are always evolving, and this evolution has always responded to changing social constructions of space, distance, and community.

So now the question becomes whether, with the rise of global capitalism and the Internet, the sense of social space has shifted once again. Arguably, peoples around the world now share economic

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19. *Coleman's Appeal*, 75 Pa. 441, 457 (1874).

20. *Id.* Indeed, for juridical purposes, other states had, since the founding, been treated much like foreign countries, even for some time after the Civil War.

21. Kogan, *supra* note 1, at 651.

22. *Id.* at 652.

23. JOSHUA MEYROWITZ, NO SENSE OF PLACE 116 (1985).

space to a greater degree than ever before, in large part because of the increase in online interaction. Modern electronic communications, record-keeping, and trading capacities have allowed the world financial markets to become so powerful that the actions of individual territorial governments often appear to be ineffectual by comparison. Essential services, such as computer programming, can easily be "shipped" across national boundaries and can even be produced multinationally. The international production and distribution of merchandise means that communities around the country (and even around the world) increasingly purchase the same name-brand goods and shop at the same stores. Online communities (to the extent that we are willing to call them communities) ignore territoriality altogether and instead are organized around shared interests. People fly more than ever, carry telephones and lap-tops with them as they travel, and keep in touch by e-mail.

All of these changes radically reshape the relationship of people to their geography.[24] As Joshua Meyrowitz observed over fifteen years ago, electronic media create "a nearly total dissociation of physical place and social 'place.' When we communicate through telephone, radio, television, or computer, where we are physically no longer determines where and who we are socially."[25] Meyrowitz pointed out that, historically, communication and travel were synonymous, and it was not until the invention of the telegraph that for the first time text messages could move more quickly than a messenger could carry them.[26] Thus, "informational differences between different places began to erode."[27] Moreover, many of the boundaries that define social settings by including and excluding participants—including walls, doors, barbed wire, and other physical and legal barriers—are less significant in a world where "the once consonant relationship between access to information and access to places has been greatly weakened...."[28]

Given such changes, it is possible that the psychic burden of foreign jurisdiction is less significant today because of our increased contact with foreign places. On the other hand, we may feel the need to cling even more tenaciously to localism in the face of the encroaching global economic system.[29] Moreover, the "we" in this story is problematic. After all, different social groups, and different individuals, have very different degrees of exposure to and control over global flows of information, capital, and human migration. Nevertheless, the important point is that if jurisdictional rules both reflect and construct social space, further investigation is needed in order to better comprehend the relationship between community affiliation, physical location, and personal identity in a world where the importance of territorial borders and geographical distance are being challenged.

B. Jurisdiction and the Assertion of Community Dominion

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24. Some have conceptualized this shift as a change in the way we experience and represent space and time. *See, e.g.*, TOMLINSON, *supra* note 5, at 4-5 (describing the way airline journeys transform "spatial experience into temporal experience); ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 64 (1990) (describing the problem of "time-space distanciation"). In that regard, it is interesting to link this change to shifts in the arts. For example, in visual arts, we have witnessed the fall of the linear perspective of early Renaissance painting, which not coincidentally rose along with the rediscovery of Euclidean geometry and the emergence of spatial representation, such as maps. *See* Denis Cosgrove, *Prospect, Perspective, and the Evolution of the Landscape Idea*, 10 TRANSCRIPTS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 45-62 (1985). Beginning in the late nineteenth century, impressionists "fragmented light (and thus time)." Roger Friedland & Deirdre Boden, *NowHere: An Introduction to Space, Time and Modernity, in* NOWHERE: SPACE , TIME AND MODERNITY 1, 2 (Roger Friedland & Deirdre Boden eds., 1994). Then, postimpressionists such as Cezanne built "a new language, abandoning linear and aerial perspective and making spatial dispositions arise from the modulations of color." Charles Taylor, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 468 (1989). The cubists went still further, "providing simultaneous images of the same moment from different points in space and multiple views of a single scene at various points in time." Friedland & Boden, *supra*, at 2; *see also* Stephen Kern, *Cubism, Camouflage, Silence, and Democracy: A Phenomenological Approach, in* NOWHERE: SPACE , TIME AND MODERNITY, *supra*, at 163. Likewise the development of the modern novel, with books such as *Remembrance of Things Past*, *Finnegan's Wake*, and *Mrs. Dalloway*, also mined changes in the equation between space and time.

25. MEYROWITZ, *supra* note 23, at 115.

26. *See id.* at 116.

27. *Id.*

28. *Id.* at 117.

29. *Cf.* GIDDENS, *supra* note 24, at 65 ("The development of globalised social relations probably serves to diminish some aspects of nationalist feeling linked to nation-states (or some states) but may be causally involved with the intensifying of more localised nationalist sentiments.")

When a transgressor behaves in some way contrary to society's moral code, the community can come to view the transgressor in one of two ways. First, the community can close ranks by defining itself in opposition to the transgressor and by treating the transgression purely as an *external* threat. Or, second, the community can claim dominion over the transgression by conceptualizing the transgressor as a member of the community who has committed what might be considered an *internal* offense.

The definition of a threat as internal or external is, in part, a question of jurisdiction. When a community exercises legal jurisdiction, it is symbolically asserting its dominion over an actor. This jurisdictional reach can serve to transform what otherwise might have been considered an external threat into an internal adjudication. Accordingly, the assertion of jurisdiction can be seen as one way that communities domesticate chaos.

I have written previously about the surprisingly widespread and elaborate practice in medieval Europe and ancient Greece of putting on trial animals and inanimate objects that caused harm to human beings.[30] Although such trials may seem far removed from any discussion of contemporary jurisdictional rules, I believe they illuminate the symbolic content of such rules. In deciding how to respond to acts of violence or depredation caused by animals, communities were faced with a choice of whether to view the acts as internal or external threats. Random acts of violence caused by insensate agents undoubtedly brought a deep feeling of lawlessness: not so much the fear of laws being broken, but the far worse fear that the world might not be a lawful place at all.[31] To combat such a fear, it may have been essential to view the animals not as uncontrollable natural forces belonging to the outside world, but as members of the community who could actually break the community's laws. By asserting dominion over the animals, members of communities could assure themselves that, even if the social order had been violated, at least there was *some* order, and not simply undifferentiated chaos.

Just as the animal trials implicitly communicated a symbolic message that nonhuman transgressors were nevertheless subject to human control, so too our contemporary notions of jurisdiction continue to be linked to how we define the limits of the community and who should be within its dominion. This exercise of jurisdiction, in and of itself, can be part of the process of healing after the breach of a social norm. For example, a person injured by a defective product may feel powerless to affect the behavior of a distant, seemingly uncontrollable corporation. Indeed, while animals may have been viewed as an uncontrollable "other" in medieval Europe, the products of global capitalism today likewise may seem to be external forces of destruction that obey only their own law. By bringing the corporation within local jurisdiction, the individual and the community may feel they have regained some control over their world.

Finally, the need to assert community dominion may also be a significant part of the desire to use legal and quasi-legal proceedings to respond to atrocities such as war crimes or crimes against humanity. For example, the trial of accused Nazi war criminal Klaus Barbie, held in France several years ago, arguably was concerned less with punishing the individual (who, after all, was extremely old and in failing health at the time of the trial), than about asserting France's authority and sense of control after a horrific and chaotic human tragedy.[32]

The rise of online communication may create increased pressure to assert community dominion over the activities of outsiders. A foreign website can easily breach community boundaries and threaten community order. For example, material that a community might wish to ban nevertheless may be readily accessible from websites outside the bounds of that community. Likewise, a community that adopts strict consumer protection laws to regulate corporate activity may feel threatened when outside businesses can

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30. *See* Paul Schiff Berman, *An Observation and a Strange But True "Tale": What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?,* 52 HASTINGS L.J. 123 (2000) [hereinafter Berman, *Transformative Potential of Law*]; Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Criminal Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994).

31. Nicholas Humphrey, *Introduction, in* E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS at *xxv*. (Paperback ed. 1987; 1907).

32. *See* Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L. J. 1321, 1322 (1989) (describing intent of trial as "pedagogical").

ignore the local laws through Internet sales.[33] These “external” threats appear to flout local norms.

It is against this backdrop that we may understand the seemingly extreme position of the district court in the *Instruction Set* case discussed earlier in this article. There the court ruled that, if an individual’s website is accessible in a community, then the community can claim dominion over that individual. Similarly, the French court in the Yahoo! case saw the website as a force that had “entered” France and was subject to the community’s laws.

Thus, the impulse to assert jurisdiction over an outsider who “invades” a community via the Internet is tied to the need to assert dominion in order to domesticate external chaos. On the other hand, the jurisdictional puzzle will look quite different if online interaction is conceived not as foreign websites “sending” information into a community, but rather as members of a community choosing to “travel” to a foreign site to obtain information. Accordingly, linguistic metaphors for conceptualizing online interaction may also help determine the way people construct intuitions about jurisdictional questions.

C. Jurisdiction and the Extension of Community Membership

The previous section discussed how the exercise of jurisdiction functions in part as a symbolic assertion of community *dominion*. A corollary to this observation is that the exercise of jurisdiction also symbolically extends a form of community *membership*. As discussed above, a true outsider is either fought as an external threat or ignored entirely. By exercising jurisdiction, a community constructs a narrative whereby the outsider is not truly an outsider, but is in some way a member of that community and subject to its norms.

A rather extreme example of this phenomenon is the death sentence issued in the Islamic world against author Salmon Rushdie. Chances are that if I had written the same novel as Rushdie, I would not have been treated in the same way. Instead, it is likely that I would have been dismissed as a total outsider or targeted in an *ad hoc* fashion as a purely external threat. The death sentence therefore reflects the fact that Rushdie was considered a *member* of the Islamic community. Even this violent exercise of jurisdiction acted in part to extend community membership.

Similarly, by prosecuting war criminals we are insisting that the defendants are members of the world community. The assertion of jurisdiction therefore can be seen as an educative tool and not simply an exercise of coercive power. The community, in effect, tells the defendants that they share a membership bond with the rest of the world and therefore cannot simply impose their will with impunity. Meanwhile, the assertion of jurisdiction also implicitly delivers a message to the public at large that the defendants are neither sub-human nor the product of chaotic fate, but are instead members of the world community to be considered in their full humanity and punished according to human law.

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33. Such e-commerce issues have caused the European Union to change course several times in recent years regarding jurisdiction over Internet sales.

This idea of jurisdiction as the assertion of community membership may also have relevance in evaluating the usefulness of alternative legal procedures aimed at restorative justice, such as the growing use of truth commissions as a mechanism for societal reconciliation.[34] For example, the Truth and Reconciliation Commission (TRC) proceedings in South Africa have attempted to restore psychic membership in the South African community to both victims and perpetrators. The TRC required that those perpetrators seeking amnesty first acknowledge the community's jurisdiction by appearing before the Commission, and then describe their misdeeds to the entire country. Likewise, victims who for years were not recognized as full-fledged members of the South African community were given a forum to speak about their pain and enter into the community's legal system instead of remaining outside of it. The TRC proceedings, therefore, implicitly expressed the hope that victims, perpetrators, and spectators could all be integrated into the new South African community.

Even in more commonplace legal proceedings, the idea of jurisdiction as a way of asserting community membership may be important. For example, while a community may need to assert its dominion over the products of a distant corporation in order to feel some control over seemingly random misfortune, it may also be that, because of the potential exercise of local jurisdiction, a multi-national corporation comes to conceive of itself as a corporate citizen of many different localities. Accordingly, the exercise of jurisdiction may encourage corporations to rethink their sense of responsibility to communities far beyond the boundaries of their corporate headquarters.

In addition, the ability to assert the jurisdiction of a court may give people some sense of *their own* membership in the community. A prison inmate bringing a civil rights action against an abusive guard, for example, may feel vindicated simply by the fact that he or she is able to invoke the jurisdiction of a court. Regardless of outcome, the fact that the inmate's grievance is aired and considered, however briefly, may give a marginal member of society more of a sense of community affiliation.[35] As a result, the assertion of community dominion may be beneficial both for the community, which can assert its control over otherwise uncontrollable behavior, and for the individual, who achieves a form of community membership through the legal process. Even a criminal defendant is implicitly deemed to be a member of the community who has gone astray (and therefore retains certain rights), rather than a purely external pariah (who has none).[36]

The assertion of community membership is relevant to discussions of Internet jurisdiction as well. As discussed previously, the growth of electronic communications is closely linked to our increasing global economic and psychological interdependence. Online interaction contributes to our awareness of outsiders and our sense of connection with them. People develop friendships and business relationships regardless of physical proximity; they may even fall in love online. Many of the psychic bonds that in a previous era were shared only within the confines of one's local community now stretch far beyond any single geographical location. Given this change in economic and psychological interdependence, it would not be surprising to see the definition of community membership change as well. And, if jurisdiction is one of the ways we express our intuitions about community membership, then jurisdictional rules, in turn,

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34. For example, truth commissions have been established in countries including Argentina, Bolivia, Chile El Salvador, Guatamela, Haiti, the Phillipines, Rwanda, Somalia South Africa, Uganda, Uruguay. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 291-97 (2001) (listing 20 truth commissions established since 1982); Michael P. Scharf, *The Case For A Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 379 (1997); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 53-54 (1998);. Indeed, "truth commissions have proliferated, and now every nation emerging from dictatorship or war wants one. This year Nigeria, Ghana, Sierra Leone, Peru, Panama, East Timor, Yugoslavia, Bosnia and South Korea all began commissions or have them under way." Tina Rosenberg, *Designer Truth Commissions*, N.Y. TIMES, Dec. 9, 2001 (late edition), available at LEXIS. In addition, "there is pressure for commissions in Mexico, Bosnia, Serbia, Ghana and Burundi. Canada is concerned about the way it has treated native peoples and may use a committee to air the subject." *It's Time For A Good National Confession; Truth Commissions To Heal War Atrocities,* NATIONAL CATHOLIC REPORTER, June 15, 2001, *available at* LEXIS; *see also* Hayner, *supra*, at 5 (describing the possibility of truth commissions in Indonesia, Colombia, and Bosnia).

35. *See* Roland Acevedo, *Thoughts of an Ex-Jailhouse Lawyer*, N.Y. L. J. (Aug. 5 1998) at 2 (describing the psychological importance for prison inmates of being able to bring a lawsuit in court even if ultimately unsuccessful); .

36. *But see* David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 3 (2001) (charting the retreat since the early 1970s in the United States and Britain from a concern for criminal rehabilitation to an "official policy of punitive sentiments and expressive gestures that appear oddly archaic and downright anti-modern").

must evolve. Otherwise, we will risk being trapped in a legal doctrine that no longer represents the reality of modern life, just as the U.S. was during the first half of the twentieth century, when courts struggled to expand the strict territorial rule of *Pennoyer*.

D. Jurisdiction and the Assertion of Alternative Norms

We are used to thinking of jurisdictional assertions as the unique province of a sovereign entity. Such assertions, however, can also function to open space for the articulation of norms that function as an alternative to, or even in opposition to, sovereign power. For example, in seventeenth century England, common law courts began to issue writs of prohibition in order to prevent the rival Court of High Commission from hearing certain cases.[37] In response, some argued that the common law courts were over-reaching and that the question of which court had proper jurisdiction to hear a case could only be resolved by the King because the authority of all judges derived from him.[38] Lord Coke, in his Prohibitions del Roy, describes himself as having replied:

> [T]rue it was that God had endowed his Majesty with excellent science and great endowments of nature. But his Majesty was not learned in the Laws of his Realm of England;... With which the King was greatly offended, and said that then he should be under the Law, which was treason to affirm (as he said). To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et Lege—that the King should not be under man, but under God and the Law.[39]

Thus, Coke refused to place the King beyond or above the domain of law.

By challenging the King and affirming the jurisdiction of the common law courts, Coke placed the power of law above the King, but in doing so he also stripped the courts of the very institutional power that usually stands behind the Court and enforces its orders. After all, who is to enforce legal jurisdiction when the King stands in opposition? This story makes clear both that courts can exercise power separate from (and perhaps contrary to) the governing power of the state, and that the exercise of such power is risky and always contingent on broader acceptance by communities (and coercive authorities) over time. Nevertheless, despite the risk, the rhetorical assertion of jurisdiction itself can have an important effect.[40] For example, Coke's memorialization of this jurisdictional assertion in his treatise was undoubtedly part of the Enlightenment movement to limit the power of Kings and assert a higher rule of law. Thus, one can see a direct line from Coke to Thomas Paine, who declared that, in the new United States of America, law would be King.[41]

It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of states and peoples to follow judicial orders. This observation is often used as an argument for the irrelevance of international law itself. Because such "law" is subject to the realpolitik demands of pure power, so the argument goes, it is not really law at all.[42] But this is not

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37. *See Nicholas Fuller's Case*, 12 EDWARD COKE, PROHIBITIONS DEL ROY 41; *see also* C. BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 293-301 (1959).

38. *See* 12 COKE at 63; BOWEN, *supra* note 37, at 303-04.

39. 12 COKE at 65.

40. There is some evidence that Coke's version of his actions are not accurate and that he actually capitulated to the King's authority. *See* BOWEN, *supra* note 37, at 305-06 (noting that some historians have rejected Coke's account, relying on other seventeenth century evidence indicating that Coke actually threw himself on the mercy of the King). Even if this is so, however, the rhetorical assertion of jurisdiction in his treatise might still have ongoing persuasive value.

41. Thomas Paine, *Common Sense, reprinted in* THE COMPLETE WRITINGS OF THOMAS PAINE 1, 29 (Philip S. Foner ed., 1969) (1945).

42. This position is most often associated with so-called "international relations realists." *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993) (describing the "Realist challenge" embodied in "the defiant skepticism...that international law could ever play more than an epiphenomenal role in the ordering of international life"). From the realist perspective, states in the international realm always act only in their own national interest. Thus, law is irrelevant. The only relevant laws are the "laws of politics," and politics is "a struggle for power." HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 4-5, 25-26 (4th ed. 1967).

substantially different from domestic law, where courts can only exercise authority to the extent that someone with coercive power chooses to carry out the legal commands.[43]

Thus, the essence of law is that it makes aspirational judgments about the future that depend for their power on whether those judgments accurately reflect evolving norms of the communities that must choose to obey them. If this is so, then we might see extraterritorial law-making as no less legitimate than law-making within territorial bounds. To take the French prosecution of Yahoo! as an example, it is true that the court's command is only enforceable if an American authority will agree to enforce it, but the same court's decision against Yahoo!'s French subsidiary is similarly dependent on the enforcement power of a sovereign. After all, if the executive branch of the French government refused to enforce the order against the subsidiary, that order would have no more force than the order against the American parent.

If the assertion of jurisdiction is always an assertion of community dominion, then all judicial decisions are reliant on both that community's acquiescence and the willingness of other communities to recognize and enforce the jurisdictional assertion. Thus, for a court to dismiss a case because the original court did not have formally "proper" jurisdiction provides no answer to a "natural law of jurisdiction," where jurisdictional assertions depend solely on the rhetorical force of their articulation of norms in order to entice allegiance. Rather, courts would need to consider whether the prior judgment properly spoke for a relevant community and whether the substantive norms articulated in the judgment are attractive, in order to determine if the jurisdictional assertion and the substantive norms will be recognized.

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Having identified four ways in which the assertion of jurisdiction both constructs and reflects social meaning, it remains to investigate more fully to what extent accepted notions of legal jurisdiction actually accord with the social meanings at play in the contemporary world. Territorially-fixed boundaries remain the primary way of differentiating jurisdictional space, and nation-states remain the primary jurisdictional community. How well does this legal conception actually map onto social space? The answer to such a question cannot be left in the legal arena, where the discussion is often limited to debates about historical precedent, political philosophy, or economic efficiency. Instead, the relationship between jurisdiction and social understandings of space, borders and community is a topic that should engage theorists from a variety of disciplines, who might help forge a more complex account of the world onto which jurisdictional rules are imposed, and who might point the way to alternative conceptions of jurisdiction that allow for a more pluralist understanding of the variety of community affiliations people experience in their lives.

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43. *See* Laura Dickinson, *Law as Justice, Law as Violence: Responses to September 11th* ___ S. CAL. L. REV. ___ (2002, forthcoming).