

The Illusion of Territorial Jurisdiction

The theme of this year's Young Scholars' Conference is "Law on the Move," and the description of the conference topic asserts that "in an era where boundaries of space and time are getting more and more obscure, the 'move' itself may be both physical and conceptual." My submission argues that the "move" can only be conceptual – despite the perceived prevalence of territorial jurisdiction, there is in fact basically no connection between territory and the law. I plan to demonstrate this with the doctrine of territorial jurisdiction.

Common accounts of the development of territorial jurisdiction follow a "rise and fall" narrative. Territorial jurisdiction began in the mid-seventeenth century, and declined due to technological revolutions in communications and transportation, in the mid-twentieth century. In its place, today, we have effects jurisdiction ubiquitously. I claim that the "fall" in fact never happened: effects jurisdiction, the supposed inheritor of territoriality, has been alive and well since the mid-nineteenth century. There is in fact little difference between "strict" territorial jurisdiction; the doctrine of continuing acts (according to which an illegal action lasts as long as its intended effects last); and effects jurisdiction (which is also known as passive territoriality). The three doctrines use the same methods, and are easy to convert into one another, calling into question the entire territorial/extraterritorial divide. The reason for this ambiguity is that the law deals mostly with abstract concepts that cannot be unambiguously located, such as events, actions, intent and motivations, agency, responsibility, and so forth. Only when the location of objects or persons is in question, does territorial jurisdiction make sense as a doctrine.

The lack of a difference between territorial and extraterritorial jurisdiction is only the most straightforward aspect of the lack of geographical information in jurisdictional discourse. This is demonstrated by the impossibility of cartographically mapping jurisdiction. The lack of a geographical connection means that most jurisdictional conflicts are better described as conflicts between communities and their legal orders, without any necessary territorial connection. Doctrines of jurisdiction should therefore be reformulated to reflect the illusory nature of the territorial/extraterritorial division in jurisdiction.