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A Jurisprudential Justification for Extraterritoriality in (Private) International Law

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“For the more we learn about law, the more we grow convinced that nothing important about it is wholly uncontroversial,” RONALD DWORKIN, LAW’S EMPIRE 10 (1998).

Abstract

Extraterritoriality is a key concept in both public and private international law. Yet, scant attention has been given to the jurisprudential underpinnings of extraterritoriality and that of its Achilles’ heel—the enforcement difficulties commonly associated with extraterritorial claims.

To fill this gap, the article undertakes a study of the writings of a selection of leading legal theorists (Fuller, Kelsen, Hart, Goldsmith, and Posner). The analysis of the findings of that study draws attention to (1) the “dual (or perhaps triple) role of law,” (2) the “reputational dimension of extraterritoriality,” (3) the option of “domestic enforceability of extraterritorial claims” through so-called “market destroying measures,” and (4) the necessary distinction between “bite jurisdiction” and “bark jurisdiction.”

Stemming from this analysis, it is proposed that neither the jurisprudential legitimacy, nor the practical utility of extraterritorial claims necessarily depend on the legal enforceability of those claims. And that, in any case, also extraterritorial claims that cannot be backed up by extraterritorial legal enforcement are, in legal positivist terms, backed by sanctions through the possibility of domestic legal enforceability of extraterritorial claims.

Finally, a theoretical framework for assessing extraterritorial claims is presented. However, first, to prepare ground for the work described, the concept of extraterritoriality is discussed.

I. Introduction

The terms “extraterritorial” and “extraterritoriality” are commonly used in the context of matters falling within the discipline of public international law. In contrast, one surprisingly rarely finds reference to those terms in writings on private international law (or “conflict of laws”). Yet, at least on a practical level, extraterritoriality is as much an issue in private international law as it is in public international law. For example, where a court, in a civil matter, claims jurisdiction over a foreign defendant based on the fact that the defendant’s writings have been read in the country claiming jurisdiction, it is of course making a jurisdictional claim with extraterritorial effect. Similarly, when a court in such a case decides to apply its domestic law to the foreign conduct by the foreign party, it is giving extraterritorial effect to its law.

In fact, the centrality of the role played by extraterritoriality is such that it is difficult to think of any private international law case of note that does not involve some dimension of extraterritoriality. For example, it is often said that the Internet gives rise to controversial jurisdictional issues. However, there is nothing remarkable or controversial about, e.g., a country exercising jurisdiction over an Internet dispute involving two of its citizens who have acted within that country. Indeed, such a situation can typically be dealt with in the same way whether the parties used the Internet or not. The truth is that it is only where a country seeks to exercise jurisdiction over Internet conduct in an extraterritorial manner that the remarkable features of the Internet become relevant and that controversies arise. In other words, extraterritoriality is the key ingredient in every controversial claim of jurisdiction in relation to the Internet.

The weakness of extraterritoriality emerges with great clarity when one approaches private international law, as one should, as a system. Generally speaking, it is relatively uninteresting to, for example, look at rules of choice of law without also considering matters of jurisdiction, recognition, and enforcement. The weakness of extraterritoriality is that enforcement typically is tied to territorial limitations. It may, quite simply, seem to be useless to state that country A will have jurisdiction over matters meeting certain criteria, if practical realities stand in the way of the courts of country A ever being able to exercise effective jurisdiction in such cases. Similarly, a claim that country A's laws apply to conduct corresponding to certain fact patterns may be of limited value where country A lacks means to enforce its law. This—the, in Kohl's masterful language,¹ “Achilles' heel” of extraterritoriality—has been used as, and remains, a heavy and influential argument against extraterritoriality.

On the whole, however, insufficient attention has been afforded to the jurisprudential underpinnings of extraterritoriality, and indeed, to the jurisprudential underpinnings of the mentioned Achilles' heel. In fact, discussions of the pros and cons of different types of jurisdictional rules rarely go as far as to confront the absolutely fundamental question of whether practical enforceability of jurisdictional rules is a necessity. This is a considerable problem since it is premature, not to say futile, to design jurisdictional rules for any given context before one addresses the question of the extent to which the value of the rules to be designed hinges upon their practical enforceability. It is time we approached the jurisprudential legitimacy of extraterritoriality in this context, because until that topic has been confronted, no truly informed discussion can take place on the topic

1. UTA KOHL, JURISDICTION AND THE INTERNET: REGULATORY COMPETENCE OVER ONLINE ACTIVITY 26 (2007).

of extraterritoriality.

It is this latter question I will engage with here. In more detail, my aim is to approach extraterritoriality from a jurisprudential perspective in order to assess whether the commonly assumed lack of effective enforcement, or lacking effective enforceability, render extraterritorial claims practically pointless, jurisprudentially illegitimate and/or, as also has been argued, even dangerous.

In doing so, the point of departure will be a study of what a selection of leading legal theorists (Fuller, Kelsen, Hart, Goldsmith, and Posner) have said about the necessity of enforcement or enforceability of law generally. In analyzing the findings of that study, I draw attention to (1) the “dual (or perhaps triple) role of law,” (2) the “reputational dimension of extraterritoriality,” (3) the option of “domestic enforceability of extraterritorial claims” through so-called “market destroying measures,” and (4) the distinction between “bite jurisdiction” and “bark jurisdiction.” From that, it is proposed that neither the jurisprudential legitimacy nor the practical utility of extraterritorial claims necessarily depend on the legal enforceability of those claims. And that, in any case, extraterritorial claims that cannot be backed up by extraterritorial legal enforcement are, in legal positivist terms, backed by sanctions through the possibility of domestic legal enforceability of extraterritorial claims.

Finally, I proceed to outline a theoretical framework for assessing and guiding extraterritorial claims. However, first, to prepare ground for the discussion to come, I will say a few words about extraterritoriality as such.

The reader should note that the discussion will be largely focused on Internet related issues—the latest, and perhaps most interesting, arena on which the fight about extraterritoriality is taking place. However, much of what is said ought to be of more general application as well.

II. The Concept of Extraterritoriality²

While many may suppose extraterritoriality to be a modern phenomenon, this is not so. In fact, extraterritoriality has a long history indeed:

In seeking the origin of extraterritoriality, some jurists and historians trace it to the imperialistic period of the last century. Others find the origin of this jurisdiction in the “letters of privilege” which the Greek Christian rulers at Constantinople, and later their Moslem conquerors, issued to the city republics of Italy in the 11th and 12th centuries. Again, others trace it to the period of the Roman Empire. Quite a few writers, on the other hand, seem

2. This part draws and expands upon the discussion of the concept of extraterritoriality presented in: DAN SVANTESSON, *EXTRATERRITORIALITY IN DATA PRIVACY LAW* 83-88 (2007).

to be satisfied with the obviously less troublesome assumption, that the original document concerning extraterritoriality is to be found in the treaty of 1535 between the Franks and the Turks.

It is the writer's opinion that the origin of extraterritorial privileges has to be traced much earlier even than the period of early Rome and the Germanic tribes. Traces are found in the more ancient world. The principle of territorial law and sovereignty was unknown in the ancient world. It was even vague in the Middle Ages. In fact, kingdoms during the medieval period had vague and uncertain boundaries. Indeed, even during the first centuries of what we call modern history, no such conceptions as territorial law or territorial sovereignty were entertained. Sovereignty was not associated with dominion over a territory. It was a tribe-sovereignty. . . . Early man stood in great fear of the magic of strangers. He resorted to a variety of ceremonies in order to protect himself against the devilish power of the stranger. But in the course of time the natives were convinced that this attitude of strict exclusiveness could not be permanently maintained. As soon as they failed to find in their own association the satisfaction of their desires and the supply of their wants, they were compelled to go beyond it and enter into relations of some sort with the surrounding world. The alien, therefore, was incapable of amenability to the same jurisdiction to which the natives were subjected. For this reason we find that in the ancient world foreigners were either subjected to their own laws and customs or were placed under a special jurisdiction. It is in these relations and under these conditions that we find the earliest traces of extraterritoriality.³

In any case, put simply, jurisdictional claims are either territorial or extraterritorial, with the latter type often described as relating to “the exercise of jurisdiction by a State over activities occurring outside its borders.”⁴ In light of modern communications technology, such a division is, however, prone to lead the mind into a quagmire of confusion and errors. For example, is a State exercising jurisdiction “over activities occurring outside its borders” where it regulates the use of personal information about its citizens stored in a cloud computing arrangement with multi-jurisdictional reach? The focus on the location of the activities is causing unnecessary complications for the purpose of ascertaining whether a jurisdictional claim is extraterritorial or not.

In light of this, we would do well to search for an alternative definition. A better

3. Shalom Kassan, *Extraterritorial Jurisdiction in the Ancient World*, 29 AM. J. INT'L L. 237, 239-40 (1935) (footnotes omitted).

4. Deborah Senz & Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB. J. INT'L L. 69, 72 (2001).

definition would make clear that an assertion of jurisdiction is extraterritorial as soon as it seeks to control or otherwise directly affect⁵ the activities of an object (person, business, etc.) outside the territory of the State making the assertion—persons, whether legal or natural, are always located somewhere, while locating “activities” is much more difficult. Importantly, extraterritoriality cannot depend on whether the primary intention of the claim is aimed at actors within the territorial limits of a State or not. Thus, for example, a prescriptive jurisdiction primarily aimed domestically may also still be extraterritorial in nature to the extent that it controls or otherwise directly affects the activities of an object (person, business, etc.) outside the territory of the State. Consider, for example, the spatial scope of application of Singapore’s recently introduced Personal Data Protection Act 2012 (the “Act”).⁶

Unlike proposed drafts of this Act, in its final form it lacks an express claim of extraterritoriality. However, the true state of things cannot be ascertained merely by reference to what is expressly stated in the Act. Article 13, for example, states that “An organisation shall not . . . collect, use or disclose personal data about an individual unless (a) the individual gives, or is deemed to have given, his consent under this Act to the collection, use or disclosure, as the case may be.”⁷ The proper application of this provision can only be understood in light of how Article 2(1) defines the term “organisation:” “‘organisation’ includes any individual, company, association or body of persons, corporate or unincorporated, whether or not — (a) formed or recognised under the law of Singapore; or (b) resident, or having an office or a place of business, in Singapore.”⁸

Read together, it is clear that even with a presumption against extraterritoriality, the actual extraterritoriality of the Personal Data Protection Act 2012 hinges upon how one identifies the location of the data collection. If collection is deemed to take place where the data subject is located, there is no doubt that Article 13 may have extraterritorial effect in that it regulates the conduct of organizations lacking a place of business in Singapore. After all, not least with modern communication technologies, foreign organizations may well collect personal data in Singapore from abroad.

Assuming that collection in such a case will be held to take place in Singapore, denying the extraterritorial effect of the Act by reference to the fact that no express claim of extraterritoriality is made is, in my view, unsustainable. To put it in a

5. The form this direct effect takes will obviously depend on the type of jurisdiction—prescriptive, investigative, judicial, or enforcement—the matter relates to.

6. Personal Data Protection Act (Act No. 26/2012)(Sing.).

7. *Id.* at art. 13.

8. *Id.* at art. 2(1).

clear but somewhat silly manner: If you deem a cat to be a dog, and state that dogs are not allowed, you are regulating cats even though you do not say so.

Thus, we can get out of the definition quagmire and regain firm ground only if we realize that the two definitions noted above in fact refer to two different matters. The definition of extraterritorial jurisdiction as “the exercise of jurisdiction by a state over activities occurring outside its borders” refers to the exercise of jurisdiction being extraterritorial as such, while the latter definition focuses on whether the exercise of jurisdiction (that may well, but need not, be extraterritorial) has any extraterritorial effect or implications. An example may be illustrative.

On one occasion, an Austrian court claimed jurisdiction over a French skier in a child-support dispute based on the fact that the Frenchman had property in Austria (the property in question was a pair of boxer shorts the skier had, presumably accidentally, left behind in an Austrian hotel room).⁹ In this case, the Court was not exercising jurisdiction over activities—or in Kelsen’s terms, conditioning facts—occurring outside its borders and thus, the exercise of jurisdiction was not extraterritorial as such. However, the exercise of jurisdiction certainly had extraterritorial effect and implications.

This example re-emphasizes that to focus on whether the exercise of jurisdiction by a State is over activities occurring outside its borders is highly artificial, as the same extraterritorial effect can be achieved whether one anchors it in territorial jurisdictional connecting points or extraterritorial such points.

At any rate, it has been widely acknowledged that assertions of extraterritorial jurisdiction are increasing in frequency in the 21st century, with reasons such as increased travel and technological developments commonly pointed to as the driving forces behind this increase.¹⁰ Further, the international community’s desire to punish certain types of criminal activities seems to promote acceptance of extraterritorial claims of jurisdiction.¹¹

Further, it is also of relevance to consider the reasons why States opt in favor of extraterritoriality. In their insightful paper *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*,¹² a group of scholars consider extraterritoriality from a Canadian perspective, and in doing so,

9. Hans-Bertram Nothnagel, *Enforcement of Foreign Judgments and Arbitral Awards in West Germany* 17 VA. J. INT’L L. 385, 393 (1977) (footnotes omitted).

10. See, e.g., Danielle Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?*, 13 MELB. J. INT’L L. 1 (2012).

11. See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg) (Int’l Ct. Justice Feb. 14, 2002).

12. See generally Steve Coughlan et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, 6 CAN. J. L. & TECH. 1 (2007).

they identify four “observable motivations for acting extraterritorially” in the context of criminal law: “(1) to regulate extraterritorial conduct with a strong connection to [the State claiming jurisdiction]; (2) to control the ‘public face’ of [the State claiming jurisdiction]; (3) to avoid lawless territory; and (4) to implement international agreements regarding particular offenses [or other matters].”¹³

These “observable motivations” ought to be relevant also from a non-Canadian perspective and outside the context of criminal law. However, as useful as this observation is, it is no doubt incomplete. We must add at least one observable motivation for acting extraterritorially. States may act extraterritorially in order to affect a result in another state because that result is desirable for, e.g., (a) the world order, (b) the people of that other state, or (c) the people of the first state.

The discussion above about the concept of extraterritoriality ought to be largely uncontroversial. However, before moving on to the more substantive parts of this article, I want to stress my concerns about the concept of extraterritoriality as such. First of all, the discussion above makes clear that it is not always possible to draw a sharp line between what is territorial and what is extraterritorial. Although I suggest that we instead focus on ‘extraterritorial effect’ I hasten to acknowledge that it will not always be easy, perhaps not even possible, to draw sharp lines between occasions of such extraterritorial effect, and occasions not involving such an effect. Second, even if we were able to distinguish between what is territorial and what is extraterritorial, what would such a distinction tell us? I am afraid that the answer is that this distinction tells us disappointingly little. After all, an extraterritorial jurisdictional claim may, in certain circumstances be undisputedly legitimate, while in other circumstances, such a claim may be undisputedly illegitimate. Combined, these two fundamental impairments arguably render the concept of extraterritoriality impotent.

Despite this serious reservation, in order to avoid distracting from the discussion to be had, the article proceeds by adhering to the tradition of treating the concept of extraterritoriality as important, meaningful, and reasonably well-defined.

III. Some Leading Theories and Theorists

Anyone embarking on the perilous journey of seeking to summarize the thoughts of our leading legal theorists is well advised to start the journey by proclaiming some important caveats. First, it must be acknowledged that I obviously will only be able to focus on certain fragments of the rich and nuanced

13. *Id.* at 32.

legal landscapes painted by the theorists I examine. None of the theorists I focus on dealt exclusively, or indeed always directly, with the issue of extraterritoriality. Second, there is no denying that the subjectivity of the selection of which fragments one focuses on puts one at risk of misrepresenting the complexity, and indeed direction, of the theories one discusses. Third, this latter problem is exacerbated by the fact that at least some of the theorists examined developed their thoughts over time so as to render a situation where the theory of person A at time point T1 is slightly different to the same person's theory at time point T2. And finally, the very selection of which theorists to include, and which to exclude, is in itself a perilous exercise, leaving the person making the selection vulnerable to criticism; after all, the subjectivity of such an exercise is undeniable, and it will always be possible to question the choices made. On this point, I merely wish the reader to be mindful of the impossibility of addressing every single theory and theorist that may be of relevance. Thus, my defense, should one be needed, is that upon the acceptance of that fact, basing the selection on my subjective impression of where the most can be gained must surely be acceptable, not least as I do not seek to hide or veil the subjectivity.¹⁴

14. This is not to suggest that the process of selecting which theorists to focus on has been an easy one. It was, for example, with much hesitation and regret that I, in the end, decided to exclude Rorty, McCormick, and Dworkin from my scope of study. In many ways, Dworkin has been the most interesting of the contemporary legal philosophy scholars. His writings cover many different questions and it almost feels negligent not to include his work here. Having said that, it is clearly the case that Dworkin has not addressed the topic under scrutiny in this paper in an as direct manner as some of the other legal philosophers dealt with here.

Yet, examples can of course be found in Dworkin's writings that could be examined in the context of extraterritoriality. See RONALD DWORKIN, *LAW'S EMPIRE* 109 (1998) ("[A] difference between the question what the law is and the question whether judges or any other official or citizen should enforce or obey the law."). While Dworkin's discussion here is focused on situations where judges arguably should "ignore the law and try to replace it with better law," *id.*, this separation between law and enforcement must reasonably mean that law, including law with an extraterritorial effect, may be law also in the absence of enforcement; that enforcement is not, in a general sense, a necessary component of law.

On an even more abstract level, it is highly interesting to consider another observation he made in *LAW'S EMPIRE*. See *id.* at 113 ("It would make no sense to debate how far law should be obeyed if one side thought that the enactments of Parliament were the only source of law and the other side gave that power to the Bible.").

While uttered in a context completely different from ours, this statement is illustrative indeed for our purposes. In fact, it could be seen to go to the core of the problem of extraterritoriality. The source of law of the country making an extraterritorial claim is different from the sources of law of the countries affected by the extraterritorial claim. Thus, perhaps it makes no sense to debate how far the laws of the first state should be obeyed by the people in other states. Perhaps, this is the wrong enquiry all together. But of course, any such conclusion begs the question: then what is the "right" enquiry to make? To avoid straying too far from the main theme of this article, I will quietly retreat from this question here. However, it is no doubt a haunting questions and I hope to return to it in future research.

One possibility, which I cannot explore in any detail here, is that the focus ought to be placed on similarities and differences in the domestic laws of different countries. Where

Despite these caveats, I suspect the admittedly somewhat eclectic selection and analysis of the works of Fuller, Kelsen, Hart, Goldsmith, and Posner below will provide some valuable insights for any analysis of the jurisprudential aspects of extraterritoriality.

It is striking indeed that theorists from such varied backgrounds as those discussed here—representing natural law theory, hard legal positivism, soft legal positivism, and rational choice theory—stand relatively, and surprisingly, united in their views on the role the law’s enforceability plays for its jurisprudential legitimacy.

A. Lon L. Fuller

Harvard professor Lon L. Fuller is an important advocate for the broad and diverse natural law theory. In 1964, he published *THE MORALITY OF LAW*—one of the most influential legal theory books in the 20th century.

Fuller is perhaps most famous for having identified eight “distinct routes to disaster” in law-making:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, (8) a failure of congruence between the rules as announced and their actual administration.¹⁵

Fuller is discussing these matters from the perspective of a domestic legal system. Here, I will, however, consider Fuller’s eight routes of disaster from the perspective of the legal landscape facing an average Internet user of today. That landscape is not limited to one domestic legal system. Thus, I think it useful to put forward the concept of a “contextual legal system,” by which I refer to the system of

sufficient progress is made in eliminating key contradictions between different legal systems, we may not need to approach extraterritorial claims from the perspective of how far the laws of the state making the extraterritorial claim should be obeyed by the people in other states. Rather we may consider whether the extraterritorial claim reasonably should activate the application of the domestic law rules that are sufficiently similar to the rules of the extraterritorial claim.

15. LON L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1969).

legal rules from all sources that purport to apply to the conduct of the person in question. I shall, for the moment, not explore that topic any further, as it will find a more congenial environment in the text below.

The first route to disaster—a failure to achieve rules at all—may at a first glance seem irrelevant for our context. However, with the lightning speed of technology development, constituting a sharp contrast to the glacier-like speed with which legal rules and principles develop, there is an endless challenge of novel legal conundrums to which the application of established rules and principles often is uncomfortable, and sometimes the producer of the most awkward results.¹⁶ The law typically resorts to technology-neutral legal rules to overcome this issue.

However, time and time again, we are confronted with situations in which technology-neutral rules cause problems specifically because of their technology-neutral structure—they end up being applicable where, and in a manner, they arguably should not be.¹⁷ In such situations courts applying the rules must adopt what I elsewhere have termed a “consequence-focused approach”—meaning that attention must be given to the search for the option having the most favorable consequences for the future.¹⁸ One example of this can be seen in *Sweden v. Bodil Lindqvist*.¹⁹ There, the Court of Justice of the European Union (CJEU) clearly

16. See Christopher Kuner et al., *Editorial: The (Data Privacy) Law Hasn't Even Checked in When Technology Takes off*, 4 INT'L DATA PRIV. L. 175, 175-76 (2014).

17. See CHRIS REED, MAKING LAWS FOR CYBERSPACE 189-204 (2012), for a detailed discussion of technology-neutral rules. See Lee A. Bygrave, *Information Concepts in Law: Generic Dreams and Definitional Daylight*, OXFORD J. LEGAL S. 1-30 (2014), for a particularly interesting discussion of technology-neutral rules, which, among other things, seeks to recalibrate the regulatory principle of technology neutrality.

18. See, e.g., Dan Svantesson, *What is “Law,” if “the Law” is Not Something That “Is?”: A Modest Contribution to a Major Question*, 26(3) RATIO JURIS 456 (2013). This concept is related to, but in part distinct from, the teachings of utilitarianism and rationalism. It may also, in Dworkin's terms, be viewed as a species of a progressive view of the role of judges:

The most popular opinion [the conservative opinion], in Britain and the United States, insists that judges should always, in every decision, follow the law rather than try to improve upon it. . . . Some people take the contrary view [the progressive opinion] that judges should try to improve the law whenever they can, that they should always be political in the way the first answer deplors. The bad judge, on the minority view, is the rigid ‘mechanical’ judge who enforces the law for its own sake with no care for the misery or injustice or inefficiency that follows.

DWORKIN, LAW'S EMPIRE, *supra* note 14, at 8.

Perhaps my “consequence-focused approach” is best viewed as falling between these two extremes, although a great deal closer to the minority view than to the conservative majority view. Under my version, judges should not “always” seek to improve the law, but should do so where doing so is justified on balance.

19. There, a woman—Bodil Lindqvist—uploaded a website on which she made available personal information about herself and her husband, as well as personal information relating to a number of her colleagues in the church community she worked for. The website, which was published without the permission of her colleagues, generated some complaints and the matter ended up in court. The legal proceedings related to a range of matters. Interestingly,

based an important aspect of its decision on the consequences their decision would have:

If Article 25 of Directive 95/46 were interpreted to mean that there is “transfer [of data] to a third country” every time that personal data are loaded onto an internet page, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the internet. The special regime provided for by Chapter IV of the directive would thus necessarily become a regime of general application, as regards operations on the internet. Thus, if the Commission found, pursuant to Article 25(4) of Directive 95/46, that even one third country did not ensure adequate protection, the Member States would be obliged to prevent any personal data being placed on the internet.²⁰

In contrast, sometimes courts do not so clearly consider, or appreciate, the consequences of their decisions. For example, it could be said that in Google Spain²¹ the CJEU opted for a rather more strict literal interpretation of the same Directive, perhaps underestimating the tremendous consequences that flow from such an interpretation.²²

one of them was whether Lindqvist’s conduct meant she had transferred the data in question to a third country. Case C-101/01, Sweden v. Bodil Lindqvist, 2003 E.C.R. I-12992 (Nov. 6, 2003), ¶ 69, available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79968893C19010101&doc=T&ouvert=T&seance=ARRET>.

20. *Id.*

21. Case C-131/12, Google v. Agencia Española de Protección de Datos (Spain), 2013 E.C.R. ___, available at <http://curia.europa.eu/juris/liste.jsf?num=C-131/12>.

22. When Spanish citizen Mario Costeja González, via a Google search, found links to two (for him unflattering) pages of the Spanish newspaper *La Vanguardia* from 1998, he requested that the newspaper remove the personal information about him contained in the relevant pages. He also requested that Google Spain and Google, Inc. remove or conceal the personal data relating to him, so that the data no longer appeared in the search results and in the links to *La Vanguardia*. The CJEU held that a search engine is responsible for its search results completely independently of the possible liabilities of the publishers, such as the newspaper in this case. Thus, even if certain content, such as the newspaper reporting relating to Mr. Costeja González, can lawfully be uploaded to the Internet, it may be unlawful for a search engine to list such content in its search results.

The most serious aspect of the judgment relates to the so-called “right to be forgotten.” The Court concluded that where search results appear to be inadequate, irrelevant or no longer relevant, or excessive, the information and links contained in the list of results must be erased. This applies even where the information is true and published lawfully by third parties. In other words, the Court places on Google the burden of deciding whether search results have become outdated. *Id.*

The practical difficulties with this conclusion are obvious. First, there is the risk of search engines erring on the side of caution and removing any content complained of. After all, the risks of not removing the content may easily outweigh any perceived advantage of keeping the content accessible. Second, content may be seen to be outdated and irrelevant on one date, only to become highly relevant again at a later date.

This decision has the potential to fundamentally change the Internet, and its full implications

As serious as the above is, the second route to disaster is of even greater concern for our specific discussion here. The second route to disaster is a failure to publicize, or at least to make available to the affected party the rules it is expected to observe. Of course, we should remind ourselves that Fuller's focus here was on a domestic context. However, in our increasingly globalized world such a focus may no longer suffice.

So, which rules are we dealing with here? For the average Internet user posting content online the relevant rules are all those rules that make a claim of being applicable to the Internet user's conduct. In my experience, the rules of most legal systems contain at least some provisions with extraterritorial effect. Thus, to avoid Fuller's second route to disaster, all such domestic legal systems would need to publicize, or at least make available to the affected party, the rules it is expected to observe. Some countries, like Australia, provide comprehensive free-of-charge legal databases such as that of the Australasian Legal Information Institute.²³ However, first of all, not all countries do so, and second, for many domestic legal systems there are language barriers that to-date render legal databases inaccessible to foreigners.

Importantly, Fuller points out that, "[t]he need for this education [the education of citizens as to the content of the laws that apply to them] will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong."²⁴ It is easy to agree with this proposition, and the implications it has for the current discussion should be obvious to everyone. The laws we are exposed to when acting online are diverse and come from virtually all domestic legal systems in the world. The fact that those rules will then include concepts and principles that are different from the concepts and principles of right and wrong generally shared within our respective communities is beyond intelligent dispute.

I hasten to acknowledge that it is utopian to wish for a situation where every person is aware of every rule she is expected to follow in every legal system she is exposed to. Indeed, Fuller goes as far as to conclude that "[i]t would in fact be

remain to be seen.

While displeased with the label "literal interpretation," Dworkin describes it in the following terms:

It proposes that the words of a statute be given what we might better call their acontextual meaning, that is, the meaning we would assign them if we had no special information about the context of their use or the intentions of their author. This method of interpretation requires that no context-dependent and unexpressed qualifications be made to general language.

DWORKIN, *LAW'S EMPIRE*, *supra* note 14, at 17-18.

23. AUSTRALASIAN LEGAL INFORMATION INSTITUTE, <http://www.austlii.edu.au/> (last visited Mar. 24, 2015).

24. FULLER, *supra* note 15, at 50.

foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him.”²⁵ However, the fact remains that the global reach of Internet communications has placed the legal system on a route to disaster for the average Internet user. Even if it was the case, and it is not, that countries made all their laws available online, language barriers and difficulties in locating the laws (not to mention understanding them) will defeat even the Internet user keenest to abide by all applicable laws. Unfortunately, this fact, despite being widely recognized on a superficial level, has been ignored in substance for too long.²⁶

As the third and fourth²⁷ potential routes to disaster have no implications specific to extraterritoriality, we can now turn to the fifth—the enactment of contradictory rules. Again, I recognize that Fuller here spoke of contradictory rules within one and the same domestic legal system, but for an Internet user the relevant legal system could be seen to be made up of a combination of all those legal rules from various domestic legal systems that purport to apply to her actions. After all, for that Internet user all those legal rules dictate what she can and cannot do; combined, they represent her contextual legal system. Where this is accepted, the existence of contradictory rules will come as no surprise. This may be seen to represent a departure from what Fuller was addressing, and it may well be that Fuller would not condone the expansion of the concept of “legal system” I am advocating here. In light of that, I make no claim here to be applying Fuller’s framework as such. Rather, I am drawing upon it to illustrate a point that so far has gained little or no attention—the need to redefine the concept of “legal system” in light of the globalization caused by the Internet, and by current approaches to extraterritoriality.

We may here pause to consider a significant issue relating to contradictory

25. *Id.* at 49.

26. One of the relatively few scholars that have given attention to this problem is Kohl. Importantly, she concludes that:

The reality is that the global village lacks key “notice” mechanisms—such as common knowledge and knowledge hotspots—which in the domestic context play a central role either in bringing rules to the attention of their subjects or in relieving them of knowing them. States have a responsibility and a self-interest in bringing their rules home to online actors if they expect compliance with them. Any realistic debate on Internet governance, and in particular on the legal obligations of online actors under foreign law, must be sensitive to these more subtle concerns.

KOHL, *supra* note 1, at 162.

27. Most commentators, including Fuller himself, recognize that no matter how hard we work to make rules understandable, we may not reach perfection. For example, as noted by Dworkin “[o]f course the virtues of clarity and precision are ideals normally fulfilled only to a degree.” Ronald Dworkin, *Philosophy, Morality, and Law: Observations Prompted by Professor Fuller’s Novel Claims*, 113 U. PA. L. REV. 668, 678 (1965).

rules. Although differences exist between different countries, private international law has a long tradition of drawing a rather sharp line between what it sees as “true conflicts” and what it merely views as “false conflicts.”²⁸ Alternatively, as expressed by Justice Souter, “[n]o conflict exists, . . . ‘where a person subject to regulation by two states can comply with the laws of both.’”²⁹

Assertions such as that made by Justice Souter have particular relevance in the context of extraterritoriality, as they lend support to the idea of dealing with contradictory standards by enforcing the strictest of those standards. However, as I have expressed elsewhere,³⁰ I object to this duties-focused approach. Essentially, what Justice Souter and others are saying is that we should only focus on the duties imposed by law. If the duties do not conflict, the laws do not conflict.

In my view, this is too simplistic a perspective, as it completely neglects the importance of the rights that laws provide. Importantly, the correlative relationship between rights and duties we may be accustomed to from a domestic law setting does not necessarily survive when transplanted into a cross-border environment; that is, rights provided under one country’s legal system may not necessarily create corresponding duties under other legal systems.

I argue that in assessing whether two (or more) laws are in conflict we need to take account of both the duties and the rights those laws provide for. In other words, even where the duties do not clash, the rights of one country may clash with the duties of another country.

The difference can be illustrated by way of an example I have used on several occasions.³¹ Imagine that the laws of state A specifically provide for a right of religious freedom, while the laws of state B specifically impose a duty of adherence to Norse pagan faith. Where a person, for one reason or another, finds herself bound to comply with both the laws of state A and those of state B, there is no conflict in the view of the reasoning put forward by Justice Souter and others—such a person can comply with the law of both states by adhering to Norse pagan faith. In contrast, from the perspective I advocate here, there is a conflict since the right provided by the law of state A cannot be freely exercised while at the same time complying with the duty imposed by the law of state B (except of course by those who voluntarily chose to exercise their right to worship Odin, Thor, Freja, etc.).

28. See, e.g., REID MORTENSEN ET AL., *PRIVATE INTERNATIONAL LAW IN AUSTRALIA* 197 (2d ed. 2011).

29. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, 39 HARV. INT’L L. J. 101, 134 (1998).

30. See, e.g., Dan Svantesson, *Between a Rock and a Hard Place: An International Law Perspective of the Difficult Position of Globally Active Internet Intermediaries*, 30 COMPU. L. & SEC. REV. 348, 348-56 (2014).

31. *Id.*

In light of this, we may draw two distinct conclusions of great importance. First, it is clear that contradictory rules—that under this view include clashes between rights of one country with duties of another country—are common indeed. Second, it shows that calls for compliance with the strictest rules, as a solution to the problem of conflicting laws, are misguided.

For our discussion, the sixth of Fuller's routes to disaster is related to the second as well as the fifth, and focuses on rules that require conduct beyond the powers of the affected party. So what is required for us to follow the laws we are exposed to when, e.g., posting things online? First of all, we need to know all laws of all countries that claim to regulate our conduct: that is, all the laws of the contextual legal system that applies to us. Second, we do not have the power to conduct ourselves in a manner that pleases both legal systems, where two systems require us to do two opposing things. From this, it seems possible to conclude that if we accept that "a law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them,"³² we have reached a stage where at least some foreign law is not law for us, even where it claims to apply to our conduct.

Such a conclusion is no doubt uncomfortable for some. However, I submit that it is inevitable unless we are willing to accept the conclusion that we either must avoid posting online altogether, or more sensibly must geographically restrict online postings³³ unless we are sure they are benign worldwide.

We must also consider Fuller's seventh route to disaster—introducing such frequent changes in the rules that the subject cannot orient his action by them. Viewing the relevant rules as all those rules that any legal system purports to apply to Internet users' conduct, there is no doubt that the legal landscape Internet users are exposed to goes through frequent changes, perhaps to the degree of invoking Fuller's seventh route to disaster.

Finally, the eighth route to disaster seems to bear the greatest relevance for our discussion of extraterritoriality. Where a law is announced but not (sufficiently) enforced—as is often the case with extraterritorial claims—there may well be said to be a failure of congruence between the rules as announced and their actual administration. Yet, none of the examples and extensive discussions Fuller provides about this route to disaster directly relate to situations where the lacking

32. FULLER, *supra* note 15, at 33 (quoting Chief Justice Vaughn's decision in *Thomas v. Sorrell*, 124 Eng. Rep. 1098 (K.B.) (1677) (Eng.)).

33. See, e.g., Dan Svantesson, *Time for the Law to Take Internet Geo-Location Technologies Seriously*, 8 J. PRIVATE INT'L L. 473, 473 (2012). Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 569 (2012). Dan Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the "Borderless" Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101, 101 (2004).

enforcement is due to severe enforcement difficulties, which, of course, is the most commonplace explanation of enforcement failures in the context of extraterritoriality. Instead, his focus is on situations where the failure of congruence between the rules as announced and their actual administration is due to “mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive towards personal power.”³⁴

However, the temptation to conclude that Fuller does not here intend to deal with lacking enforcement due to severe enforcement difficulties is problematic to maintain upon a reading of *THE MORALITY OF LAW* as a whole. Fuller’s distaste for discrepancies between the law as written and the law as enforced in practice comes to clearer expression later on in his classic text. In discussing the law’s attitude towards homosexuality, he concludes:

I would, however, have no difficulty in asserting that the law ought not to make it a crime for consenting adults to engage privately in homosexual acts. The reason for this conclusion would be that any such law simply cannot be enforced and its existence on the books would constitute an open invitation to blackmail, so that there would be a gaping discrepancy between the law as written and its enforcement in practice.³⁵

The possibility of blackmail is, of course, not an issue, for example, in the context of extraterritorial jurisdictional claims. So, one may here be induced to question whether Fuller would maintain his concern independent of the risk of blackmail. However, any such doubt evaporates some pages later in *THE MORALITY OF LAW* when he confronts the issue of the legality of contraceptives:

If, as sometimes seems to be the case, laws prohibiting the sale of contraceptives are kept on the books as a kind of symbolic act, with the knowledge that they will not and cannot be enforced, legal morality is seriously affected. There is no way to quarantine this contagion against a spread to other parts of the legal system. It is unfortunately a familiar political technique to placate one interest by passing a statute, and to appease an opposing interest by leaving the statute largely unenforced.³⁶

A clearer articulation of his distaste for lacking enforcement of legal rules is scarcely needed. But Fuller’s harsh stance on this matter leaves him vulnerable to criticism.

First, it would perhaps have been warranted for Fuller to explain, by reference

34. FULLER, *supra* note 15, at 81.

35. *Id.* at 133.

36. *Id.* at 153.

to his routes to disaster, why such lacking enforcement offends his “legal morality.” As far as I can tell, the only possibility for Fuller would be to refer to his eighth route to disaster—namely, that of a failure of congruence between the rules as announced and their actual administration. Yet, surely the inability to enforce with perfection a legal rule does not offend legal morality. Consider, for example, rules against domestic violence. There can be no doubt that the enforcement of such legal rules is falling well short of perfection.³⁷ Indeed, such laws have only slightly better prospect of effective enforcement than do laws making it a crime for consenting adults to engage privately in homosexual acts. Thus, the dedicated pupils of Fuller’s school must reasonably have no difficulty in asserting that the law ought not to make domestic violence a crime. Yet, any such assertion is, of course, wholly unsatisfactory.

Furthermore, Fuller neglects to provide any examples of the contagion of lacking enforcement in one area of law spreading to other parts of the legal system. In fact, evidence to the contrary is plentiful. The inherent difficulty in enforcing speed limits on our roads has not resulted in lacking enforcement of rules restricting anti-competitive behavior, and the fact that the effective extraterritorial reach of data privacy law is limited has not caused lawlessness in corporate merger situations. The list of such examples could probably be made endless.

Here, it is also interesting to consider the implications of Fuller’s insistence on viewing his eight routes to disaster as making up an inner morality of law. Many commentators, such as Hart and Dworkin, have objected to this description of the eight routes to disaster, preferring instead to recognize them as matters of “efficacy.”³⁸ And even after reading Fuller’s vigorous defense on this matter,³⁹ it may be tempting to adopt a more pragmatic approach and view them as matters of procedural fairness, or perhaps as eight practicalities of law, corresponding with, but not for that sake constituting, morality.⁴⁰

37. See, e.g., Laura Dugan, *Domestic Violence Legislation: Exploring its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY & PUB. POL’Y 283, 299 (2003) (suggesting that the “dark figure” in domestic violence—the difference between what happens and what is reported—is about the same as the number of incidents known to the police).

38. FULLER, *supra* note 15, at 200-02.

39. *Id.* at 200-24.

40. In the words of Dworkin:

It is morally wrong for an official to harm a citizen groundlessly, to insult him unfairly, or to accuse him unjustly. Those occasions of defying the canons which involve such acts are occasions of moral wrongdoing, but they are so because they have these consequences and not because the canons are themselves moral standards.

Dworkin, *Philosophy, Morality, and Law*, *supra* note 27, at 674-75. Having said this, it is quite possible, likely even, that at least some of Fuller’s eight routes to disaster are easier to defend as an inner morality in the context of extraterritoriality, than it is in relation to law more generally. I will, however, not explore that question further here.

Either way, Fuller's insistence on reference to morality is of great significance for our discussion here, as it can be seen to signal that only immoral violations of his eight guiding principles are objectionable. Surely, it cannot be immoral to fail to enforce a law if the failure is due to the contextual impossibility of enforcing the law. At this point, I can imagine Fuller's disciples intervening that it may, however, be immoral to introduce law where one knows that one will not be able to enforce it. But responding to such an objection is easily done by reference to the example of domestic violence laws introduced above; certainly, Fuller would not suggest that it is immoral to introduce a law against domestic violence just because the prospect of effective enforcement is limited in practice. I am quite aware that Fuller does not explicitly embrace this farfetched proposition. But I ask in all seriousness, what tenet of his philosophy, what principle or standard enunciated by him, offers a stopping place short of this ultimate *reductio ad absurdum* of Fuller's point of view?

Finally on this topic, it is hard to understand why Fuller would place a particularly high threshold of acceptability on the degree of enforcement. After all, a cornerstone feature of his reasoning is the recognition of law as "a complex undertaking capable of various degrees of success."⁴¹ This clearly supports imperfect enforcement of law, such as is commonplace in the context of extraterritorial claims of jurisdiction. Indeed, in relation to his third route to disaster—i.e., through retroactive legislation—Fuller goes as far as to acknowledge that retroactive legislation may in fact be necessary in certain situations.⁴² It would then seem odd if Fuller's theory demanded absolute, or even near, perfection in enforcement to avoid violating his eight routes to disaster.

Taken as a whole, the above signals that unless we smarten up the way in which extraterritorial claims are made online, we are, in Fuller's view, on at least one, but possibly six, "routes to disaster," with a result worse than bad law, a result Fuller describes as "something that is not properly called a legal system at all."⁴³

One final observation must be made as to how Fuller's reasoning relates to the concept of extraterritoriality. Fuller recognizes that more than one legal system may govern a particular group of people. Acknowledging this may reasonably be seen as a necessary condition for the possibility of approving of extraterritoriality.⁴⁴ And indeed, Fuller goes as far as to remind us that in history

41. FULLER, *supra* note 15, at 157.

42. *Id.* at 53.

43. *Id.* at 39.

44. The only alternative being that one views a subject as governed only by the law with extraterritorial effect, and not by the law of the country within which the subject is located.

multiple systems have been more common than unitary systems.⁴⁵ He goes on to note: “Historically dual and triple systems have functioned without serious friction, and when conflict has arisen it has often been solved by some kind of voluntary accommodation.”⁴⁶

In this context, it is worth paying close attention to how Fuller suggests, like some other commentators before him,⁴⁷ that law involves an element of commitment by the lawgiver to the subjects. He objects to a conception of law as a one-way projection of authority and favors instead an interactional view of law—“the functioning of a legal system depends upon a cooperative effort – an effective and responsible interaction – between lawgiver and subject.”⁴⁸ But how does that work when the person a law purports to bind is not a citizen of the state making the law? What form does that cooperative effort take where a country makes an extraterritorial jurisdictional claim purporting to regulate the conduct of persons all around the world? Fuller gives us no hints as to how we should respond to such dilemmas. Others have, however, made much, I think too much, of the potential implications of this cooperative effort of law:

Under basic democratic principles and norms, government must rest upon the consent of the governed. Outsiders may not dictate the law to a political community that has not consented to it. But extraterritorial laws do exactly that: they force foreigners (i.e., those beyond the state’s territorial borders) to bear the costs of domestic regulation, even though they are nearly powerless to change those regulations.⁴⁹

This option, however, can be dismissed in its unrealistic bizarreness.

45. FULLER, *supra* note 15, at 123.

46. *Id.* at 124.

47. Fuller, for example, refers to the work of the German sociologist Georg Simmel. *Id.* at 216-17.

48. *Id.* at 219 (“I have been emphasizing that obedience to rules loses its point if the man subject to them knows that the rule maker will not himself pay any attention to his own enactments.”). This statement gives us occasion to draw a distinction between situations where, on the one hand, the rule maker fails to properly enforce the law, and on the other hand, situations where the rule maker deliberately contravenes laws regulating its conduct. I think Fuller’s statement relates to the latter situation rather than the former. This conclusion is perhaps supported by the fact that Fuller proceeds to state:

The converse of this proposition must also be kept in mind, namely, that the rule maker will lack any incentive to accept for himself the restraints of the Rule of Law if he knows that his subjects have no disposition, or lack the capacity, to abide by his rules; it would serve little purpose, for example, to attempt a juristic ordering of relations among the inmates of a lunatic asylum.

Id.

49. Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1456, 1483-84 (2008) (internal footnotes omitted). See also Richard Wolin, *The Idea of Cosmopolitanism: From Kant to the Iraq War and Beyond*, 3 ETHICS & GLOBAL POLITICS 143, 152 n.1 (2010) (“My external and rightful freedom should be defined as a warrant to obey no external laws except

This assertion has a ring of exaggeration and paradox, if not falsity; it attempts to paint in black and white a colorful landscape with plenty of nuances. Should this statement be read to mean that we can never be governed by the legal rules of systems other than the legal system of the country, or countries (in the case of dual citizenships), of which we are citizens with the right to vote in democratic elections? Surely, no one would suggest something quite so absurd. After all, it would mean that we need not abide by the legal rules of countries we visit, as we have no right to partake in elections in those countries. So how can the statement above be read down to better conform with reality? A better, but still odd, interpretation is that country A may not make law for country B. But this is just a truism that adds little to the debate about extraterritoriality, as few, if any, states attempt to make law for foreigners lacking connection to the law making state. The reality is, of course, that countries making extraterritorial claims justify the effect those claims have on foreigners by pointing to the foreigners having consented to be so governed by acting in a manner that brings them within the reach of the extraterritorial claim. In light of all this, whether we can or cannot change the legal rules we are exposed to may not reasonably be determinative for the jurisprudential legitimacy of the extraterritorial claim.⁵⁰

those to which I have been able to give my own consent.”) (quoting Immanuel Kant, *Perpetual Peace*, POLITICAL WRITINGS 99 (1970)). A related, but considerably more balanced and nuanced, proposition was recently put forward by Dworkin:

In a world of strong and increasing economic interdependencies, however, people’s lives may be more affected by what happens in and among other countries than by what their own community decides. Dignity seems to require that people everywhere be permitted to participate in some way—even if only in some minimal way—in the enactment and administration of at least those policies that threaten the greatest impact on them.

Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 18 (2013). I suggest that the primary value of this observation for our context is that until we find an appropriate manner to permit people everywhere to participate in some way—even if only in some minimal way—in the enactment and administration of those policies that threaten the greatest impact on them, states and courts ought to restrict the best they can the regulatory spill-over effect they may have onto the people of other countries. On a practical level, this may, for example, take the form of courts ensuring that a judgment restricting certain Internet content to be blocked is only effective within the country in which the court sits.

50. Here, it is appropriate to pause to consider one of the key arguments presented by leading Cyber Law professor Chris Reed. One of his interesting claims is that: “A governance system is legitimate if it is accepted by the relevant community as an appropriate mechanism for making rules to govern the activity, and the community also accepts that these rules are devised in an appropriate way.” Chris Reed, *Governance in Cloud Computing*, QUEEN MARY UNIV. L. 8 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353764.

One can have no quarrel with this statement if read literally—such a governance system would indeed appear legitimate. However, reading the statement in the context of what else Professor Reed is writing on the matter, it seems he is suggesting that *only* where a governance system meets his test is it legitimate. Many interesting discussions could be had about such an assertion. To avoid straying too far from the main aim of this section, I will restrain myself to only making the following observation. I wonder whether Professor Reed

In any case, as I canvass in some detail below, it is my view that where carefully crafted and sensibly applied, extraterritorial claims need not necessarily offend democratic principles and norms.

B. Hans Kelsen

Hans Kelsen, most famous for his so-called Pure Theory of Law (a cornerstone in some positivist legal theory), was a leader in several academic disciplines, including legal theory, political philosophy, social theory, and international relations. Consequently, it is only natural that his writings provide a rich well for us to draw upon in our discussion of extraterritoriality.⁵¹ Indeed, so many aspects of his writings could be brought into the discussion that it is difficult to know where to start. One possible starting point is found in his discussion of “validity” of law on the one hand, and “efficacy” of law on the other hand. In Kelsen’s terminology:

Validity of law means that the legal norms are binding, that men ought to behave as the legal norms prescribe, that men ought to obey and apply the legal norms. Efficacy of law means that men actually behave as, according to the legal norms, they ought to behave, that the norms are actually applied and obeyed.⁵²

does not here overlook, or undervalue, the legitimacy-creating role of conflict of laws rules. It is generally not the case that states claim the right to regulate the entire Internet. They claim the right to regulate Internet activities that have some form of contact with that state. Admittedly, the conflict of laws rules used to delineate what contact suffices are imperfect, but that matters not if we are only concerning ourselves with the aims of such rules. Thus, in my view, it is not a question of lacking legitimacy in a general sense; questions of legitimacy only arise where the conflict rules are so poorly structured to claim jurisdiction where the contacts are too weak. In all other situations, the complexity stems from the simple practical fact that in cross-border interactions, more than one state has legitimate claims to regulate the conduct—there is not necessarily anything wrong in that both the country where the shot was fired and the country where the bullet kills express an interest in the murder. In fact, there may well be a duty to do so. And what level of acceptance by the relevant community must be demonstrated to give legitimacy to the country seeking to regulate the relevant activities? Just like when addressing the concerns about democratic principles and norms, we may ask whether it is enough if the person travels there despite not having voting rights there. Surely it is. So what if you are selling product to people of a foreign country? Or publishing something dealing with people there? Does that suffice as an expression of acceptance of the governance system of the foreign country? Here it is not easy to draw sharp lines, and I suggest we again need to fall back on the design of conflicts rules rather than make it an either-or matter of legitimacy.

51. In fact, with his impressive productivity (Kelsen published almost 400 separate works, including numerous books), it is quite simply impossible to properly do justice to his work. See BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 57 (Sweet & Maxwell, 5th ed. 2009). Here, I approach Kelsen’s work primarily from the perspective of what arguably may be seen as his *magnum opus*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg, trans., 2011).

52. KELSEN, *supra* note 51, at 39.

The first of these propositions, in particular, is associated with severe difficulties when immersed in a conflict of laws scenario. Imagine, for example, that a person in the U.S. is considering whether or not to place a particular statement on his website. Imagine further that while lawful in the U.S., the publication of such a statement would be deemed defamatory under, e.g., the laws of Australia. Ought that man behave as the Australian legal norms prescribe? Ought that man obey and apply the Australian legal norms? The answer to both these questions depends of a multitude of factors, but surely a negative answer to those questions cannot reasonably lead to the conclusion that the Australian law is not valid.⁵³

In addition, the discussion of validity and efficacy could usefully be supplemented by the introduction of an additional term: that is, enforceability. This is important, as enforceability—i.e., the law being applied where it ought to be applied—is only one cause for efficacy (as is illustrated below). It would then become clear that Kelsen’s description of efficacy unduly conflates and equates two separate things: a norm being applied on the one hand, and people behaving in accordance with the norm on the other hand. As has been stressed many times by a diverse range of scholars, people may well behave in accordance with a particular norm without doing so because of the norm. Indeed, they may be completely ignorant of the norm and yet behave in accordance with it. Thus, we need to keep efficacy (people behaving in accordance with a norm) separate from enforceability (the norm being applied and obeyed).

Nevertheless, having stressed the difference between validity of law and efficacy of law, Kelsen points to what he sees as “a very important relationship between the two.”⁵⁴

A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious.⁵⁵

Given the enforcement difficulties discussed above, this statement could be used as ammunition against extraterritoriality. But whether such a use is appropriate or not depends entirely on what is viewed as the relevant “system of norms” that “on the whole” needs to be efficacious. Kelsen explains that the legal order is a

53. Unless, of course, one limits the conclusion to saying that the negative answer means that the Australian legal norms are not valid in the U.S. in the circumstances of the scenario at hand. Or perhaps more usefully, the Australian legal norms are not valid in the contextual legal system due to their clash with the U.S. legal norms.

54. KELSEN, *supra* note 51, at 42.

55. *Id.*

system of norms and traces the interrelation between norms in a manner that takes him to a “basic norm” as the source binding together each system of norms:

A norm the validity of which cannot be derived from a superior norm we call a “basic” norm. All norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order. This basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order.⁵⁶

While it may be doubted that agreement can always be found on what constitutes the relevant “basic norm” in any given context, in light of this, almost all norms with extraterritorial effect must be seen as being part of systems of norms that, on the whole, are efficacious. For example, Swedish law, as a system of norms is, on the whole, efficacious, which means that norms with extraterritorial effect within Swedish law are “valid” in Kelsen’s meaning of the word, even where they cannot always be enforced.

A somewhat more serious attack on extraterritoriality found in Kelsen’s writings relates to the limits he sees time and space impose on norms:

Since norms regulate human behaviour, and human behaviour takes place in time and space, norms are valid for a certain time and for a certain space. . . . In order to be valid at all, it must be valid, not only for a certain time, but also for a certain territory. The norms of French law are valid only in France, the norms of Mexican law only in Mexico. We may therefore speak of the temporal and the territorial sphere of validity of a norm.⁵⁷

This links into my objection to the definition of validity above and provides Kelsen’s answer to my questions. Judging by the quote above, it may be imagined that Kelsen would say that the Australian norms in my example are valid in Australia, but not valid in the U.S. But is that really an accurate reflection of how one state approaches the laws of a foreign state? If we consider that a court in one state may well end up applying the law of another state, Kelsen’s views on this seem to clash with reality established by observation.

However, as any student of Kelsen would be aware, Kelsen does not perceive any application of foreign law. Instead, he sees the foreign norms as being incorporated into the system of norms of the state that applies them:

The true meaning of the rules of so-called private international law is: that the law of a State directs its organs to apply to certain

56. *Id.* at 111.

57. *Id.* at 42.

cases norms which are norms of the State's own law, but which have the same contents as corresponding norms of another State's law.⁵⁸

Whatever approach one takes to the above, Kelsen's definition may be reconciled with reality if by "validity" he actually means "applicability;" that is, if he meant to say that the norms of French law are applicable only in France, the norms of Mexican law only in Mexico. But where does this leave us in relation to the jurisprudential legitimacy of extraterritoriality? Under Kelsen's "principle of legitimacy," the validity of legal norms "is determined only by the order to which they belong."⁵⁹ If his reference to "validity" is in fact, as is suggested here, a reference to "applicability," then this suggests that only the state introducing a norm can determine the applicability of that norm. This speaks in favor of the validity of norms with extraterritorial effect. Of course, I hasten to stress that this conclusion only holds true if, indeed, the link between "validity" and "applicability" holds true.

Another aspect of Kelsen's writings that must not be overlooked in the discussion of the jurisprudential legitimacy of extraterritoriality is his discussion of "desuetudo." "Desuetudo" is, according to Kelsen, "the negative legal effect of custom."⁶⁰ Kelsen states that:

Within a legal order which as a whole is efficacious there may occur isolated norms which are valid and which yet are not efficacious, that is, are not obeyed and not applied even when the conditions which they themselves lay down for their application are fulfilled. But even in this case efficacy has some relevance to validity. If the norm remains permanently inefficacious, the norm is deprived of its validity by "desuetudo."⁶¹

Few relevant norms with extraterritorial effect are likely to meet the combined criteria of being "not obeyed," "not applied," and "permanently inefficacious" so as to render them deprived of validity by desuetudo.

Kelsen's well-known adoption of monism with international law supremacy⁶² also lends support for extraterritoriality. In the words of Spaak, Kelsen argues that "there are no, and cannot be any, sovereign states that are independent of international law, because it was international law, and international law only, that recognized them as states in the first place."⁶³ From this follows, as Spaak

58. *Id.* at 245.

59. *Id.* at 117.

60. KELSEN, *supra* note 51, at 119.

61. *Id.*

62. See also Torben Spaak, *Kelsen on Monism and Dualism*, BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW (Marko Novakovic ed., 2013), available at <http://ssrn.com/abstract=2231530>.

63. *Id.* at 12.

points out, that “any state that is recognized by international law will only be as sovereign as international law allows it to be.”⁶⁴ Given that international law (in particular, customary international law) recognizes extraterritoriality in certain circumstances,⁶⁵ Kelsen must thus be seen to be endorsing extraterritoriality, at least to the full extent allowed under customary international law.

Kelsen’s view on extraterritoriality is perhaps most clearly discernible in his discussion of the international legal order’s limitation of the territorial sphere of validity of national legal orders. In this context, Kelsen explains:

Actually, it is not impossible that a general or individual norm of the legal order of a certain State should prescribe that a coercive act shall be carried out within the territory of another State, and that an organ of the former State should execute this norm. But should such a norm be enacted or executed, the enactment of the norm and its execution, that is, the performance of the coercive act within the territory of the other State, would be illegal. The legal order violated by these acts is the international law.⁶⁶

This amounts to a strong opposition to extraterritoriality. However, and of great significance, Kelsen is here only referring to the extraterritorial performance of a coercive act. In contrast, he does not object to extraterritoriality generally:

That the validity of the national legal order is restricted by the international legal order to a certain space, the so-called territory of the State, does not mean that the national legal order is authorized to regulate only the behavior of individuals living within this space. The restriction refers in principle only to the coercive acts provided by the national legal order and the procedure leading to these acts. The restriction does not refer to all the conditioning facts to which the legal order attaches coercive acts as sanctions, especially not to the delict. A State can, without violating international law, attach sanctions to delicts committed within the territory of another State.⁶⁷

This quote represents an unequivocal endorsement of the jurisprudential legitimacy of extraterritoriality, at least in the context of delicts. A similar sentiment, with more general application, is expressed when Kelsen states that “the legal order of the individual State may attach the coercive act as a consequence to conditioning facts which have occurred even outside its territory.”⁶⁸ Despite his belief “that all legal norms could or should be understood in terms of an

64. *Id.*

65. Edwin D. Dickinson, *Introductory Comment to the Harvard Convention Research Draft Convention on Jurisdiction with respect to Crime*, 29 AM. J. INT’L L. 443, 443 (1935).

66. KELSEN, *supra* note 51, at 208.

67. *Id.* at 209 (emphasis added).

68. *Id.* at 308.

authorisation to an official to impose sanctions”⁶⁹ and his conviction that “[i]t is the essence of a legal order that it tries to bring about lawful and to prevent unlawful behavior by coercive measures—that is, by the forcible deprivation of life, freedom, property, or other values as a reaction against a violation of the order,”⁷⁰ this ought to put to rest any debate about whether Kelsen is for or against extraterritoriality as such.

C. H. L. A. Hart

Oxford professor Herbert Lionel Adolphus Hart is famous for his “soft” positivism. The fact that his influence is at least as imposing as his name is perhaps best illustrated by considering the attention that has been given to Hart’s “debates” with other legal philosophy giants such as Fuller and Dworkin. In fact, it may be said that those debates have been the most dominant feature of legal philosophy over the past 50 years.

In discussing the work of Hart, my focal point will be his best known publication, *THE CONCEPT OF LAW*,⁷¹ described by one of his primary sparring partners as “a contribution to the literature of jurisprudence such as we have not had in a long time.”⁷²

It is true that Hart makes several statements emphasizing that it is important for a legal system that its rules are obeyed, and as we already noted repeatedly, such a respect may indeed often be lacking in the context of extraterritorial claims. One of these statements of Hart’s is this: “[I]f a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary cooperation, thus creating authority, the coercive power of law and government cannot be established.”⁷³

Elsewhere in *THE CONCEPT OF LAW*, Hart also states that:

[E]xcept in very small closely-knit societies, submission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages

69. BIX, *supra* note 51, at 61.

70. Hans Kelsen, *Collective Security Under International Law*, NAVAL WAR C. INT’L L. STUD. 1, 101 (2001). Interestingly, Somek has argued, “At least in his later work, Kelsen was strongly inclined to reduce the ‘ought’ of the imposition of the sanction to the legal power of the organ to order the coercive act, or even the right to inflict it.” Alexander Somek, *Kelsen Lives*, 18 EUR. J. INT’L L. 409, 434 n.135 (2007). In support of this assertion, Somek points in particular to the following quote from HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 7 (1952): “[b]y the formula ‘ought to be applied’ nothing else is expressed but the idea that if the delict is committed the application of the sanction is legal.” Somek, *supra* note 70, 434 n.135. Thus, the central role Kelsen attributes to sanctions may be best seen as relating to enforceability, rather than actual enforcement.

71. H. L. A. HART, *THE CONCEPT OF LAW* (3rd ed. 2012).

72. FULLER, *supra* note 15, at 133.

73. HART, *supra* note 71, at 196.

of the system without submitting to its obligations. ‘Sanctions’ are therefore required not as the normal motive for obedience, but as guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary co-operation in a coercive system.⁷⁴

Furthermore, there can be no doubt that Hart sees territorial limitations on the law as a standard feature: “In a modern state it is normally understood that, in the absence of special indications widening or narrowing the class, its general law extend to all persons within its territorial boundaries.”⁷⁵ Importantly however, this quote also hints at an acceptance for extraterritoriality. After all, Hart states here that the law normally applies to all persons within its territorial boundaries but can be widened. Given that the starting point is an application to all persons within its territorial boundaries, any widening must involve persons beyond the territorial boundaries.

In relation to the first two quotes above—those pointing to the importance for a legal system that its rules are obeyed and are backed by sanctions—we may observe that Hart, when speaking of the necessity of “a general habit of obedience,” emphasizes that this is essentially a vague and imprecise notion. In fact he states that: “The question how many people must obey how many such general orders, and for how long, if there is to be law, no more admits of definite answers than the question how few hairs must a man have to be bald.”⁷⁶

And as to the importance of “sanctions,” we must recall that Hart is at pains to stress that international law—a system lacking organized sanctions—may well be referred to as law: “Yet once we free ourselves from the predictive analysis and its parent conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions.”⁷⁷

Even clearer evidence of an acceptance of law that lacks effective sanctions is found elsewhere in his classic text. For example, Hart states: “We need only remember that the statement that a group has a certain rule is compatible with the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or others.”⁷⁸

In light of the above, it seems difficult to argue that the theories Hart discusses in *THE CONCEPT OF LAW* present any barrier to the extraterritorial application of

74. *Id.* at 198.

75. *Id.* at 21.

76. *Id.* at 24.

77. *Id.* at 218.

78. *Id.* at 56.

law. However, let us nevertheless consider what is actually argued by those who suggest that the absence of enforceability makes an extraterritorial claim lack legitimacy. Is this claim not a distasteful expression of Darwinism in law? A “survival of the fittest” through the “right of the strongest”? After all, if we are arguing that the legitimacy of an extraterritorial claim stems from its enforceability, we are clearly endorsing the notion of “right” being on the side of the states that succeed in imposing their will on others. Viewed in this light, rather than imposing reasonable and well considered boundaries on extraterritorial claims, positivism framed as in the above may be seen to merely legitimize dominance based on brute strength.

D. Jack L. Goldsmith and Eric A. Posner

While one could identify a sizeable quantity of theories and theorists worthwhile of study in our setting, the line needs to be drawn somewhere. Thus, I limit myself to including one more theory; that is, a state-centered rational choice theory of international law. While this theory is focused on public international law, it is one of the most interesting recent additions to the arena, and its importance for the discussion in this article ought to be self-evident from the text below.

A particularly interesting work in this field is *THE LIMITS OF INTERNATIONAL LAW*⁷⁹ written by Harvard professor Jack L. Goldsmith and Eric A. Posner, professor at the University of Chicago. Their interesting book, and the theory it presents, have been severely criticized to the degree of having been described as “a remarkable specimen of bad social theory!”⁸⁰ Nevertheless, its relevance for the topic of this article cannot, and should not, be ignored.

Goldsmith and Posner’s central theory is that “international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.”⁸¹ In more detail, Goldsmith and Posner identify four state-centered rational choice reasons why states comply with international law: (1) coincidence of interest, (2) coordination, (3) cooperation, and (4) coercion.⁸² As I discuss below, it is interesting to examine the role of international law in controlling extraterritoriality through the useful lens provided by Goldsmith and Posner’s four state-centered rational choice reasons why states comply with international law. However, it is helpful to first consider aspects of the extensive criticism that has been directed at Goldsmith and Posner’s theory.

79. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006).

80. Somek, *supra* note 70, at 449.

81. GOLDSMITH & POSNER, *supra* note 79, at 3.

82. *Id.* at 13.

The criticism is too substantial to be reproduced here, and the reader may refer to the works of Somek⁸³ and that of Hathaway and Lavinbuk⁸⁴ for a fuller account of the theory's weaknesses. Here, we need only concern ourselves with two issues—the two issues I see as most fundamental for our context. First, Goldsmith and Posner seem to underestimate the significant relevance of reputation, a topic I will have reason to return to below. In more detail, Goldsmith and Posner decided to consistently exclude a preference for complying with international law from the state's interest calculation.⁸⁵ I am not seeking to argue that all states put greater importance on such compliance than they do on all other matters. But to point to the obvious error in Goldsmith and Posner's decision, one need only admit that a preference for complying with international law is one of several competing interests that states take into account in their rational choice. This claim is not even denied by Goldsmith and Posner themselves.⁸⁶

Second, while the theory advanced by Goldsmith and Posner amounts to a valuable contribution in that it brings attention to the way in which states typically act, it effectively kills off international law, at least as far as customary international law goes. I am not the first to point this out. For example, commenting on earlier works by Goldsmith and Posner, Guzman has noted that they deny the existence of customary international law.⁸⁷ However, Goldsmith and Posner persistently deny this accusation, stating that their claim is “not that customary international law does not exist, but rather that it is not an exogenous influence on state behaviour.”⁸⁸

In the end, Goldsmith and Posner's denial is unsustainable. It would be an odd notion of law that accepts law as not being an exogenous influence. Goldsmith and Posner's claim of customary international law as a non-binding endogenous influence may at best be characterized as second degree murder—it is a non-premeditated killing, resulting from an assault in which the death of customary international law was a distinct possibility.

In any case, ultimately the most interesting aspect of Goldsmith and Posner's theory for our purposes is this: if state-centered self-interest is all that matters, then any lacking enforceability of an extraterritorial claim cannot be a concern, since the state making the claim must be presumed to have anticipated the lacking

83. Somek, *supra* note 70, at 409.

84. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (reviewing *The Limits of International Law*, *supra* note 79).

85. GOLDSMITH & POSNER, *supra* note 79, at 9.

86. *Id.*

87. Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1875 (2002).

88. GOLDSMITH & POSNER, *supra* note 79, at 42-43.

enforceability. In other words, taking this perspective, international law imposes no limitations whatsoever on claims of extraterritorial jurisdiction.

Such a conclusion may be seen to render further discussion of the theory advanced by Goldsmith and Posner redundant. However, it is interesting indeed to examine in some more detail how Goldsmith and Posner approach customary international law in particular—the area of international law most commonly seen to regulate jurisdictional claims in public international law.

It is standard practice for writers in the field to take the Harvard Research Draft Convention on Jurisdiction with Respect to Crime (the Harvard Draft) as their point of departure when addressing how international law regulates jurisdiction. The Harvard Draft was focused on penal jurisdiction,⁸⁹ and despite, or perhaps due to, it having been written 80 years ago, there is little dispute as to the remarkable position it holds as a guide on the topic of jurisdiction in public international law.

Essentially, the Harvard Draft identifies a set of grounds for jurisdiction to varying degrees recognized under international law:

An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the

89. Dickinson, *supra* note 65, at 446.

generally recognized principle of jurisdiction. The fifth, asserted in some forms by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.⁹⁰

While the framework provided under the Harvard Draft represents the standard position amongst public international law scholars, it is a far cry from a solid comprehensive framework for determining the circumstances under which a state may claim jurisdiction under public international law. In many ways, it is nothing but a surrogate for a properly considered framework—a proxy making the task of textbook writers easier than it would have been in the absence of the general agreement gathered around the Harvard Draft.

Goldsmith and Posner do not specifically address the Harvard Draft in their book. However, it is interesting to consider extraterritoriality from the perspective of the four state-centered rational choice reasons why states comply with international law they identify. In doing so, at least two different perspectives could be adopted. One could consider how extraterritorial claims as such may be motivated by Goldsmith and Posner's four state-centered rational choice reasons why states comply with international law. For example, one could observe how the so-called universality principle fits rather well within Goldsmith and Posner's reference to coordination or, indeed, cooperation.

Alternatively, one may choose to consider how Goldsmith and Posner's four state-centered rational choice reasons why states comply with international law work in the context of other states seeking to impose limitations on the extraterritorial reach of a particular state's law. Why would such a state appear to yield to the pressure from other states? It is obvious that other states may coerce a state not to pursue extraterritorial claims. But in the end, it seems to me that the reality is that in most cases, the reason for lacking attempts of enforcing extraterritorial claims is—if we adopt Goldsmith and Posner's terminology—found in a coincidence of interest. This may seem surprising at a first glance, but I think that it often is the case that the state that could make an extraterritorial claim does not want to do so for reasons of cost and complications. It is thus in that state's interest not to pursue the extraterritorial claim it may claim to be entitled to pursue. As it is not in the interest of the other state to assist in the first state's extraterritorial claim, there is quite simply a coincidence of interest.

In the end, perhaps the most correct reading of the relationship between Goldsmith and Posner's four state-centered rational choice reasons why states comply with international law and the Harvard Draft's set of grounds for

90. *Id.* at 445.

jurisdiction to varying degrees recognized under international law is that an acceptance of the former renders the latter irrelevant.

IV. Analysis and Response

The study above lends itself to several conclusions, some of which are to be expected and others not so expected. For example, even as small a sample of theories, as the one presented here, brings attention to a considerable diversity of views ranging from Kelsen's view of monism with international law supremacy to Goldsmith and Posner's theory that does not see any limits being placed on extraterritoriality apart from state self-interests. This was no doubt to be expected. Yet despite this diversity of theoretical underpinnings, foundations, and ideals, the express or implied acceptance of extraterritoriality without necessarily effective enforcement was virtually universal. This was, perhaps, unexpected.

The above suggests that such claims may be supported regardless of which of the major schools of legal theory one bonds with. However, this is not to deny that extraterritoriality without necessarily effective enforcement may be more palatable under certain philosophical strands than others. For example, an acceptance of such extraterritoriality comes naturally under the concept of law I have presented elsewhere, where law L is $n(L_r + L_r(\text{Context}))$, where L_r represents legal rules created by legislative enactments and court judgments, and $L_r(\text{Context})$ represents those considerations, internal to the legal rule, that affect the application of the legal rule, i.e., the legal rule's context.⁹¹ As the context of a legal rule so defined may be broad indeed, this theory of law may easily embrace extraterritorial claims made without any real prospect of enforcement.

Another conclusion we can draw is that the work of some theorists is multifaceted to the degree that it may be read both to support and to oppose the idea of extraterritoriality with enforcement difficulties. For example, the works of Kelsen and Hart have been relied upon by some leading scholars to suggest that laws that lack the means of being enforced can be seen to undermine the legal system.⁹² This is not necessarily an invalid conclusion. But given the aspects of Kelsen and Hart's works identified above, it may be a proposition that needs to be somewhat pruned; after all, as was illustrated above, both Kelsen and Hart recognize a role for extraterritoriality, including extraterritoriality with enforcement difficulties.

At least one of the conclusions that must be conceded from the study above

91. See Svantesson, *What is "Law," supra* note 18, at 457.

92. Christopher Kuner, *The 'Internal Morality' of European Data Protection Law 6* (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443797.

leaves a somewhat bitter taste. Despite my serious commitment to carefully analyzing the work of the examined commentators, there remain several perspectives I felt I needed to leave un-, or at least under-explored. For example, I could well have devoted (more or clearer) attention to how the interaction between “competence”⁹³ and “validity” affects the legitimacy of extraterritorial claims.

On that matter, drawing upon the writings of Hohfeld, Kelsen, Ross, and Hart, Scandinavian legal philosopher Torben Spaak concludes that “[a]t least Kelsen, Hart and Ross seem to think that competence is a necessary condition for validity, but the same can probably be said of Hohfeld, too.”⁹⁴ Consequently, Spaak identifies a relatively widespread agreement on the significance of competence for validity.

Spaak puts forward the following definition of competence, where p refers to a “person,” LP stands for “legal position,” a is “action,” and S means “situation:” p has the competence to change LP if, and only if, there is an a and an S such that if p in S performs a, and thus goes about it in the right way, p will, through a, change LP.

Importantly, this formulation suggests that it is the change of legal position (LP) that is important for validity, not the effective enforcement of the new LP. Thus, under this definition of competence, the competence to perform a legal act, and indirectly the validity of that act (such as the creation of a legislative provision or the rendering of a judgment) does not depend on actual effective enforcement of the legal position created by that act.⁹⁵ This is no doubt an important observation for our purposes, and an observation that further supports extraterritorial claims.

In the end, it seems that jurisprudence provides an overwhelmingly rich environment for discussions of the legitimacy of extraterritorial claims, and any researcher wishing to avoid exhausting her readers entirely will be forced to surrender before exploring every possible angle—unfortunately it is necessary to leave some, probably most, stones unturned.

93. Here, we are dealing with “competence,” as in “authorization.” In this sense, competence is a normative concept meaning that “a person has competence by virtue of a norm and that the exercise of competence changes a person’s normative position.” Torben Spaak, *Explicating the Concept of Legal Competence*, in CONCEPTS IN LAW 67, 67 (Jaap Hage et al. eds., 2008), available at <http://ssrn.com/abstract=1014402>. As Spaak points out by reference to a statement by Lindahl, we are here dealing with competence in the sense of what in the Common Law tradition often is referred to as “power:” “British and American writers prefer the term ‘power,’ while Scandinavian, Continental-European and Latin American writers speak rather of ‘competence.’” *Id.* at 67 n.1 (quoting LARS LINDAHL, POSITION AND CHANGE 194 (1977)).

94. Spaak, *supra* note 93, at 71.

95. However, it is important to keep in mind that Spaak also shows that “having competence does not entail having a right.” *Id.* at 78. Spaak proves his point by reference to how, *e.g.*, “a thief has the competence to sell stolen goods to a bona fide purchaser even though he is not permitted to do so.” *Id.*

Below, I will confine myself to exploring a limited set of key observations that may be made based upon the above.

A. “The dual, or triple, role of law”

As has been pointed to repeatedly, much, indeed too much, has been made of the impact enforcement difficulties have on extraterritorial claims. For example, leading commentators like Goldsmith have stated that:

Most Internet content providers will not be subject to any regulation other than the one in the territory in which they have presence . . . [T]hese Internet users might indirectly suffer consequences from another nation’s territorial regulation of the user’s Internet transmission. But these offshore users with no local assets are generally beyond the regulating nation’s enforcement jurisdiction. The Internet users that need to worry about the liability consequences of multiple, conflicting regulatory requirements are persons and firms with a multi-jurisdictional presence.⁹⁶

Goldsmith uses this reasoning to conclude that threats of simultaneous multiple national regulation of Internet transactions are significantly exaggerated. I do not fully share Goldsmith’s assessment.⁹⁷

The real litmus test for the value of extraterritorial claims is not to be found in whether such claims can be backed up by enforcement. It is not entirely correct, as Goldsmith states, that “[t]he true scope and power of a nation’s regulation is measured by its enforcement jurisdiction, not its prescriptive jurisdiction.”⁹⁸

Here, we may recall what I see as one of Hart’s most important contributions:

The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.⁹⁹

This observation may seem mundane indeed, and Hart may not necessarily be the only or first commentator to bring attention to what we can call “the dual role of law,” but it is one of the most important observations made in Hart’s THE

96. Jack Goldsmith, *Unilateral Regulation of the Internet*, 11 EUR. J. INT’L L. 135, 139-40 (2000).

97. However, I hasten to add that to properly evaluate what he is stating we must take note of two things. First, Goldsmith is conscious of the effect of what I below term “market destroying measures,” and second, he takes a traditional narrow view on what is extraterritorial and what is territorial with spill-over.

98. Goldsmith, *supra* note 96, at 139.

99. HART, *supra* note 71, at 40.

CONCEPT OF LAW, and something we must always keep in mind.¹⁰⁰

In light of the dual role of law, enforcement is not quite an as essential feature of law as one may first think on a superficial consideration of the matter. After all, the law's role as a tool to control, to guide, and to plan life out of court does not necessarily depend on enforcement.

Putting this in the context of extraterritoriality, then the real litmus test is the extent to which a State's extraterritorial claim can affect the conduct of foreign parties—whether the consequences of a breach of state A's laws is seen, by the targeted foreign actors, as having consequences of such a nature so as to make those actors prefer abiding by state A's law, rather than having to face those consequences. In this context, the potential enforcement is only one factor of at least three, the other two being the potential for reputational damage in case of breach and the potential impact of so-called “market destroying measures” at the disposal of state A. I will discuss these two matters below.

However, first I wish to suggest that perhaps we can identify a third role that the law serves. We can say that quite apart from being a tool to decide legal disputes and to provide a framework to control, to guide, and to plan life out of court, law is a tool to express and communicate the values of the society that created the law. This is important not least in the context of the discussion of what I below refer to as “bark jurisdiction.”

B. The “Reputational Dimension” of Extraterritoriality

The potential for reputational damages is rather self-explanatory and has been neatly described by Kohl in the following terms: “The fact is that being perceived as a law-breaker is not good for business.”¹⁰¹ To this I would, however, add the reservation that the damage done by being perceived as a law-breaker, at least in part, depends on whether the law being broken is seen as morally justifiable or not (a topic I will have reason to elaborate upon below). For example, the international reputation of a company that has been breaching the racial discrimination rules of Nazi Germany and of apartheid South Africa may indeed be boosted by the law-breaking activity.

100. Similar notions may also be found in more recent commentaries. For example, MacCormick notes: “Normative power is, then, the ability to take decisions that change what a person ought to or ought not to do, or may or may not do, or what a person is able or unable to do, in the framework of some normative order.” NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 154 (2007). The reference to normative power as the ability to make decisions that change what a person ought to or ought not to do clearly relates to law as a tool to guide and to plan life out of court. In contrast, the reference to normative power as the ability to make decisions that change what a person is able or unable to do is more in line with law's other role.

101. KOHL, *supra* note 1, at 208.

To address the topic of the reputational dimension of extraterritorial claims at the depth it deserves, we need also consider just how concerned business is about being seen violating laws. With his extensive experience from legal practice, Kuner is uniquely well-equipped to comment within his field of expertise; that is, data privacy law. Discussing the European Union's Data Protection Directive,¹⁰² he noted that: "Besides 'legal' enforcement methods such as fines, injunctions, criminal penalties etc., 'soft' penalties such as adverse publicity are an important incentive to comply with data protection law, since damage to a company's reputation can ultimately cause it more harm in the marketplace than can a fine."¹⁰³

Turning to public international law, it is worth noting how, in discussing the criticism raised against Kelsen's perception of public international law, Somek stated that: "It could be argued that even if all states disrespected their international obligations these obligations would be effective enough for the international legal system to exist as long as universal non-compliance is universally perceived as legally wrong. The whole system would be, at best, a system of universal hypocrisy."¹⁰⁴ This statement is no less relevant for our context here. In the end, the true value, and indeed legitimacy, of extraterritorial claims may not rest on the enforcement or enforceability of the claim. Instead, in our system of "universal hypocrisy" such claims have both value and jurisprudential legitimacy as long as non-compliance is perceived as legally wrongful. And I would argue that such a perception need not necessarily be universal in nature, as long as it is sufficiently widespread.

Given the above, we need not dwell on this matter further for it seems beyond intelligent dispute that the reputational dimension of extraterritorial claims is a relevant factor to be considered independently of the efficacy of the enforcement of that claim.¹⁰⁵

102. Directive 1995/46, of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 95/46/EEC, 1995 O.J. (L 281), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en>.

103. Kuner, *The 'Internal Morality' of European Data Protection Law*, *supra* note 92, at 9.

104. Somek, *supra* note 70, at 430 (internal footnote omitted).

105. I say this, acknowledging that there is a vast literature on the relationship, or lack thereof, between legal sanctions and reputational consequences. See, e.g., Edward M. Iacobucci, *On the Interaction between Legal and Reputational Sanctions* (2014), available at http://www.law.utoronto.ca/utfl_file/count/documents/iacobucci/iacobucci%20fines%20reputation%20jls%202014%20formatted.pdf (last visited Mar. 25, 2015).

C. “Domestic Enforceability of Extraterritorial Claims” through “Market Destroying Measures”¹⁰⁶

As has been noted already, it is commonly stressed that the real impacts of extraterritorial jurisdictional claims is severely limited by the intrinsic difficulty of enforcing such claims. For example, Goldsmith and Wu note that “[w]ith few exceptions governments can use their coercive powers only within their borders and control offshore Internet communications only by controlling local intermediaries, local assets, and local persons.”¹⁰⁷

However, perhaps we can see the true state of things more clearly if we remove the word “only” from the quoted statement made by Goldsmith and Wu, so as to end up with the following sentence instead: With few exceptions governments can use their coercive powers within their borders and control offshore Internet communications by controlling local intermediaries, local assets, and local persons. This, in my view, improvement alters the statement from what can somewhat harshly be called a meaningless cliché, to a highly useful description of principles well-established at least 400 years ago.¹⁰⁸

The word “only” misleadingly gives the impression that such powers are of limited or no significance for the overall question of extraterritoriality. After all, the power governments have within their territorial borders can be put to great effect against offshore Internet communications. A government determined to have an impact on foreign Internet actors that are beyond its directly effective jurisdictional reach may introduce what we can call “market destroying measures” to penalize the foreign party. For example, it may introduce substantive law allowing its courts to, due to the foreign party’s actions and subsequent refusal to appear before the court, make a finding that:

- (a) that party is not allowed to trade within the jurisdiction in question;
- (b) debts owed to that party are unenforceable within the jurisdiction in question; and/or
- (c) parties within the control of that government (e.g., residents or citizens) are not allowed to trade with the foreign party.

Parallels to such market destroying measures can be found in international relations. As seen most recently in Ukraine, the world’s response to the Russian

106. This part draws and expands upon the discussion of market destroying measures presented in Dan Svantesson, *The Extraterritoriality of E.U. Data Privacy Law: Its Theoretical Justification and Its Practical Effect on U.S. Businesses*, 50 STAN. J. INT’L L. 53, 53-102 (2014). See also SVANTESSON, EXTRATERRITORIALITY IN DATA PRIVACY LAW, *supra* note 2.

107. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 159 (2008) (emphasis added).

108. See generally, e.g., HUGO GROTIUS, THE LAW OF WAR AND PEACE (Stephen C. Neff ed., 2012).

invasion has so far been (mainly) in the form of sanctions we are used to in international relations. Thus, it is interesting to consider the role of sanctions in international relations. Sanctions in that setting are defined to mean:

The use or threat of use of economic capacity by one international actor, or group of such actors against another international actor or group of actors, with the intention of (a) punishing the latter for its breach of a certain rule or (b) preventing it from infringing a rule which the party applying sanctions deem important.¹⁰⁹

Perhaps put even more potently, sanctions are “a tool for coercing a target to change a course of action or forgo some future course of action by altering the cost-benefit calculus of a decision-maker to favor the preferred policy of the sender.”¹¹⁰

Thus, sanctions under international relations are very similar in nature and aim to the market destroying measures I am discussing here, and in exploring such measures further we have a wealth of materials to draw from in the literature on sanctions. In fact, as noted by Brockman-Hawe: “If there were a Top 10 List of topics most scrutinized by the international academic community, the issues of apposite objectives and justifications, not to mention the effectiveness, impact and suitable method of analysis of sanctions would probably turn up and occupy several spaces.”¹¹¹

In light of options of the mentioned type of market destroying measures, the enforceability of extraterritorial jurisdictional claims may not be as limited as it may seem at a first glance. Perhaps, we can usefully distinguish between the “extraterritorial enforceability of the extraterritorial claim” and the “domestic enforceability of the extraterritorial claim.” It is only the former that is suffering in efficacy, not the latter. The latter does not necessarily lack efficacy since states may take market destroying measures to penalize foreign parties within their own jurisdictions. This is a key point, indeed, because it defeats the argument that extraterritorial claims lack means for enforcement—at least from a jurisprudential perspective, and possibly in practice too, we have here found some “protective footwear” that addresses and overcomes the Achilles’ heel of extraterritoriality!

109. Sofie Heine-Ellison, *The Impact and Effectiveness of Multilateral Economic Sanctions: A Comparative Study*, 5 INT’L J. HUM. RTS. 81, 83 (2001).

110. Jason C. Nelson, *The United Nations and the Employment of Sanctions as a Tool of International Statecraft*, 29 LAW & PSYCHOL. REV. 105, 110 (2005).

111. Benjamin Brockman-Hawe, *Using Internet “Borders” to Coerce or Punish: The DPRK as an Example of the Potential Utility of Internet Sanctions*, 25 B.U. INT’L L.J. 163, 182 (2007).

D. “Bite jurisdiction” vs. “Bark jurisdiction”¹¹²

The above has highlighted that in addition to being pursued due to the often vain hope of effective overseas enforcement, extraterritorial claims may be pursued due to the reputational impact such claims may have and/or due to the possibility of using market destroying measures to enforce the extraterritorial claim domestically. It has also been suggested that law, including extraterritorial claims, may be a tool to express and communicate the values of the society that created the law and made the extraterritorial claim.

To reemphasize the importance of this, it means that there is more to the idea of extraterritoriality than the critics who focus on lacking enforcement seem to realize. Indeed, the fact that a lacking enforcement mechanisms is somewhat of a hallmark of international law is acknowledged also by proponents of international law. As noted by Guzman, “Whatever the strengths of international law, it remains almost entirely without coercive enforcement – the primary tool used to generate compliance in domestic systems.”¹¹³ This characteristic lack of effective enforcement mechanisms thus sets this legal arena apart so as to render inapplicable some truths generally applicable to the legal system as such.

Elsewhere I have introduced the distinction between what I call “bite jurisdiction” on the one hand and “bark jurisdiction” on the other. Not all jurisdictional claims are equally likely to be carried out in practice. Indeed, some jurisdictional claims are made despite the realization that they have virtually no prospect of being exercised in practice—they are merely attempts to bark; to make clear, to articulate, a particular legal position. Placed in Hart’s terminology, they fall in the category of law used to control, to guide, and to plan life out of court. Or, as I have argued, they may be made to express and communicate the values of the society that made the claims. In contrast, jurisdictional claims properly described as “bite jurisdiction” are aimed at actually being effectively enforced. Obviously, it may not always be easy to draw sharp lines between failed attempts at bite jurisdiction on the one hand, and genuine instances of bark jurisdiction on the other hand.

The difficulty of distinguishing between failed attempts at bite jurisdiction and genuine bark jurisdiction brings us to the first matter that must be discussed at some depth: Do, and should, states make clear whether the extraterritorial claims they make are bite or bark?

112. I first introduced this distinction in Svantesson, *The Extraterritoriality of E.U. Data Privacy Law*, *supra* note 106, at 58-60 and SVANTESSON, EXTRATERRITORIALITY IN DATA PRIVACY LAW, *supra* note 2, at 68-72.

113. ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY ix (2008).

My suspicion is that currently there is little, indeed too little, consideration amongst those making extraterritorial claims as to whether they are making a bite or bark claim. However, exceptions can be found. For example, in discussing the extraterritorial dimension of the then proposed Singaporean Personal Data Protection Bill (PDPB), the Ministry of Information, Communications and the Arts (MICA) observed:

MICA is cognisant of the implementation challenges. In particular, where the organisation in question has no presence in Singapore, it would be difficult to carry out investigations into any complaint made in relation to an activity of the organisation, or to proceed with any enforcement action against the organisation. However, such coverage would act as deterrence for overseas companies to engage in activities that might result in a breach of the PDPA, and provide consistent treatment for local vis-a-vis overseas organisations with data-related operations in Singapore.¹¹⁴

It would thus seem that there is an expectation that the grab for extraterritoriality, in part, is a conscious claim for “bark jurisdiction” rather than a real attempt at “bite jurisdiction.” Furthermore, while Australian consumer law has some extraterritorial reach, the body tasked with enforcing it—the Australian Competition and Consumer Commission (ACCC)—seems to view this largely as an instance of a mere bark claim: “All your usual consumer rights apply when you shop with an Australian online business. Those rights may also apply when you buy from an overseas online business although you might find it difficult to get a repair, replacement or refund because the business is not based in Australia.”¹¹⁵

Thus, it is clear that in some instances bark claims are more or less clearly identified as such, and perhaps their bark nature is quite widely accepted by the public. Nevertheless, any decision as to whether to announce an extraterritorial claim as bark jurisdiction must be guided by a balancing of the advantage of transparency and the risk that such an announcement will cause the claim to be ignored.

In any case, and it is here it gets interesting, one prominent scholar, Bygrave, has described bark jurisdiction using the term “regulatory overreaching:” “By ‘regulatory overreaching’ is meant a situation in which rules are expressed so generally and non-discriminately that they apply prima facie to a large range of

114. MINISTRY OF INFO., COMM., AND THE ARTS, PROPOSED PERSONAL DATA PROTECTION BILL, PUB. CONSULTATION (19 Mar. 2012) (Sing.).

115. *Shopping online*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, <http://accc.gov.au/consumers/online-shopping/shopping-online> (last visited Apr. 29, 2015).

activities without having much of a realistic chance of being enforced.”¹¹⁶ Like several other leading commentators such as Kuner,¹¹⁷ Maier,¹¹⁸ Reed,¹¹⁹ and Moerel,¹²⁰ Bygrave sees “regulatory overreaching” as a problem¹²¹—indeed, the acceptance of this negative view of bark jurisdiction seems nearly universal, although perhaps one can see hints at a softening in Bygrave’s approach in his most recent writings.¹²²

The widespread skepticism of bark jurisdiction may not necessarily come as a surprise in light of how law is viewed in practice. Drawing upon his practical experience in the field of data privacy law, Kuner points out:

The lack of widespread and consistent enforcement of data protection violations has a negative affect [sic] on the willingness of data controllers to comply with European data protection rules. . . . In the globalized economy, all factors affecting cost (including

116. Lee A. Bygrave, *Determining Applicable Law Pursuant to European Data Protection Legislation*, 16 *COMPU. L. & SEC. REP.* 252, 255 (2000).

117. Christopher Kuner, *Data Protection Law and International Jurisdiction on the Internet (Part 2)*, 18 *INT’L J. L. & INFO. TECH.* 227, 235 (2010).

118. Bernhard Maier, *How Has the Law Attempted to Tackle the Borderless Nature of the Internet?* 18 *INT’L J. L. & INFO. TECH.* 142, 161 (2010).

119. REED, *MAKING LAWS FOR CYBERSPACE*, *supra* note 17, at 49 (“The enforcement of a law also plays an important role in engendering respect for that law. If a state consistently fails to enforce a law it send a message to the law’s subjects that the state does not expect them to obey it. . . . Where a state wishes to enforce a law but is unable to do so in any consistent and effective way, the message is rather different but equally damaging to respect. Here the state desires that its commands should be obeyed, but is impotent to force individuals to do so. This weakens respect not merely for the particular law but for *all* that state’s laws.”). Further, in another publication, Reed stresses: “A regulator which is otherwise accepted as having legitimate authority can easily lose that authority if it has no effective way of enforcing its rules.” Reed, *Cloud Governance: The Way Forward*, *supra* note 50, at 374. Elsewhere in his interesting book, Reed seeks to incorporate enforceability into a “rule of recognition” for cyberspace, like the rule of recognition famously discussed by Hart:

Adopting Raz’s approach would suggest that what we might term the subject rule of recognition has two limbs: foreign laws have authority for a cyberspace actor if the risk...of their enforcement (or other adverse consequences) is sufficiently great that a prudent actor would follow them; and they also have authority if the actor has sufficient respect for that foreign legal system to create a moral obligation to comply with its laws, or at least some of them.

REED, *MAKING LAWS FOR CYBERSPACE*, *supra* note 17, at 86. Combining these quotes, it seems that while Reed has clear concerns about bark jurisdiction causing a loss of respect for the law, he nevertheless admits that bark jurisdiction may well meet the criteria of his rule of recognition.

120. Lokke Moerel, *The Long Arm of E.U. Data Protection Law*, 1 *INT’L DATA PRIVACY L.* 23, 24 (2011).

121. Bygrave, *Determining Applicable Law*, *supra* note 116, at 255.

122. Lee A. Bygrave, *Data privacy law and the Internet: policy challenges*, in *EMERGING CHALLENGES IN PRIVACY LAW* 259, 277 (Normann Witzleb et al. eds., 2014) (“[S]ceptical of giving law an extraterritorial dimension that remains dormant . . . [but] [i]t could be argued, however, that giving law an extraterritorial reach that is not followed up by practical enforcement is still valuable as a demarcation of jurisdictional lines.” (relating to the bite/bark distinction I outlined in SVANTESSON, *EXTRATERRITORIALITY IN DATA PRIVACY LAW*, *supra* note 2)).

legal compliance burdens) tend to be subject to a risk management exercise, with compliance being more likely when the risks and costs of non-compliance are higher than those of compliance. Thus, in many cases data controllers may regard data protection rules as a kind of bureaucratic nuisance rather than as “law” in the same category as tax and other laws, mainly because of the relative lack of enforcement and the relative mildness of the possible penalties.¹²³

This observation is important and undermines the strength and significance of what I here refer to as “bark jurisdiction.” However, while we must concede the correctness of Kuner’s assertion, it does not force us to abandon faith in extraterritorial bark jurisdiction as such. Kuner makes his statement in relation to one particular field, that is, EU data privacy law. He does not assert any wider scope for it than that. Thus, it need not have application for other areas such as, for example, transgressions of environmental law. Furthermore, in the same publication, Kuner also emphasizes that “there seems to be little relation between the legal force of the particular types of data protection rules and their practical importance.”¹²⁴ Certain sources, he notes, like the opinions of the Article 29 Working Party carry great weight even though they lack binding force.¹²⁵ This could, of course, only be possible where the value of the rules articulated does not depend on their practical enforceability. Thus, maybe it could be said that bark jurisdictions—on a certain interpretation of its meaning—has its parallels in other, substantive, areas of law.

While we are drawing comparisons to other, substantive, areas of law, it is also worth noting the extensive scholarship that suggests that the level of risk of enforcement has only a limited influence over criminal behavior.¹²⁶ For example, Tyler and Darley have observed that “[a]lthough research supports the basic premise of the deterrence model, it also suggests that estimates of the likelihood of being caught and punished have, at best, a minor influence on people’s law-related behavior.”¹²⁷

Be that as it may, we can further prune the scope of applicability of Kuner’s statement by bearing in mind that he speaks only of the EU situation. In other cultures the reputational dimension of data privacy law is marked more strongly. For example, anecdotal evidence suggests that the comparative lack of

123. Kuner, *The ‘Internal Morality’ of European Data Protection Law*, *supra* note 92, at 9.

124. *Id.* at 4.

125. *Id.*

126. I am indebted to Professor Chris Reed for bringing these materials to my attention.

127. Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 713 (2000).

enforcement possibilities in Japanese data privacy law is meant to be compensated for by a stronger sense of reputation loss in case of data privacy violations. And indeed as discussed above, Kuner himself stresses the important role the reputational dimension plays in whether laws will be respected in practice or not, and bark jurisdiction may well be justified by reference to the reputational impact of failing to meet the expectations of the extraterritorial claim.

At any rate, an analysis of the impact of Kuner's observation has helped tease out two important factors—area of law and cultural setting—affecting the relevance of bark jurisdiction. As I discuss in more detail below, we can link these two factors together as parts of the moral framework that dictates the effectiveness of extraterritorial claims lacking enforcement.

More generally, I do not see it as accurate to view “bark jurisdiction” or “regulatory overreaching” as a problem per se. After all, there may well be solid reasons why a State may wish to make clear its standpoint on a particular issue by legislating against it even though the effective enforcement of the law in question may be difficult, cumbersome, or indeed, unlikely. This is as true in the international extraterritorial context as it is in the context of domestic law with a clear territorial limitation (e.g., legislation making it a criminal offense to drive through a red light). Staying in the data privacy law environment, it is worth pausing to consider how the highly influential EU Article 29 Working Group has noted that: “There exist examples that the foreign web site may nevertheless follow the judgement and adapt its data processing with a view to developing good business practice and to maintaining a good commercial image [even where a third countries will not recognize and enforce the judgement].”¹²⁸

We can here reconnect to the reputational dimension brought into focus above. Support for this proposition can also be drawn from Hart's statement: “In fact I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.”¹²⁹ Hart, in the italicized text, is expressly referring to the law's role as “bark” jurisdiction; bark jurisdiction is all about providing standards of criticism of particular kinds of conduct.¹³⁰

128. Stefano Rodota, Article 29 Working Group, *Working Document on Determining the International Application of EU Data Protection Law to Personal Data Processing on the Internet by Non-E.U. Based Web Sites* 15 (The Working Party, Working Paper No. 56, 2002), available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2002/wp56_en.pdf.

129. HART, *supra* note 71, at 249 (emphasis added).

130. This point is in no way undermined by the fact that Hart follows the quoted statement with the observation:

This will not of course serve to distinguish laws from other rules or principles with the same general aims; the distinctive feature of law are the provision it makes by secondary

Thus, I see the point Kohl makes when she claims that “large-scale non-compliance with any legal rule is problematic not just in terms of the failure of achieving the law’s purpose, but also in terms of undermining the law’s and regulator’s credibility more generally”¹³¹ and Kuner’s similar claim that laws that lack the means of being enforced can be seen to undermine the legal system.¹³² And I can sympathize to a degree with Bygrave assertion that “posturing without punch or even potential punch tends to be counterproductive,”¹³³ and statements such as “[w]hen criminal laws have nothing but symbolic value . . . they are likely to erode rather than build confidence in the justice system, since they quickly come to be seen as paper tigers.”¹³⁴ However, I am not convinced these claims go deep enough to do justice to the complexity of the issue at hand. On my reading, they seem to (a) neglect or underestimate¹³⁵ the dual (or triple) role of law, (b) undervalue the reputational dimension of extraterritoriality, and (c) overlook what I above referred to as domestic enforceability of extraterritorial claims through market destroying measures. And indeed, in discussing Fuller above, using the example of how ineffective regulation of domestic violence also has legitimacy and utility, I have brought attention to what must be a fundamental flaw of statements such as those noted above.

Adding to what I have already remarked on this issue, I suggest that the risk that laws that lack the means of being enforced will undermine the legal system is small where the parts of the law that are difficult to enforce are not dominant or even close to being the dominant feature of the legal system in question. One need only consider those situations where people in abusive dictatorships cling onto the notion of human rights even though those rights are unlikely to be upheld; morally justifiable law¹³⁶—including morally justifiable law that cannot be enforced—has a quality that cannot, and should not, be ignored. And maybe this is exactly where we reach the core of this issue—moral justification.

In her excellent book on jurisdiction and the Internet, Kohl states: “It is

rules for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards.

Id. at 249.

131. KOHL, *supra* note 1, at 153.

132. Kuner, *Data Protection Law*, *supra* note 117, at 235-36.

133. Bygrave, *Data privacy law and the Internet*, *supra* note 122, at 277.

134. Coughlan et al., *supra* note 12, at 50.

135. Bygrave acknowledges the dual role of the law by observing that: “Demarcation of values and ideals is an integral element of all law.” Bygrave, *Data privacy law and the Internet*, *supra* note 22, at 277. However, he then returns to his starting point of a need for the law to “pack a punch.” *Id.*

136. Defining this term would take us into an interesting and fascinating area of debate that unfortunately goes beyond the scope of this article.

enforceability that really matters, not actual enforcement.”¹³⁷ She then proceeds to note that at least in the transnational context the reason for the importance of enforceability “lies often not simply, or even mainly, in inducing a fear of a sanction in the case of non-compliance, but rather in affirming the foreign law’s legitimacy.”¹³⁸ Thus, perhaps it can be said that the relevance and value of bark jurisdiction depends on whether the jurisdictional claim, and the substantive law it relates to, is morally justifiable.

Expanding on the reputational dimension introduced above, we can say that where the bark jurisdiction and the substantive law it relates to is morally justifiable, it is perilous for the target of the claim to ignore it; and where the bark jurisdiction and/or the substantive law it relates to is not morally justifiable, it is perilous for the country making the claim to make the jurisdictional claim. Revealing my idealistic (or even naïve) side, it may perhaps be said that this should have the dual positive effect of encouraging restraint amongst countries considering making too broad extraterritorial claims and should encourage compliance with rules that otherwise may have been ignored amongst the targets of the extraterritorial claims. But in Bygrave’s later writings we find a statement that should remind us that the landscape before us is more complicated than I so far have let on.

Having noted how “[d]emarkation of values and ideals is an integral element of all law,”¹³⁹ Bygrave states that “posturing without punch” may be particularly counterproductive to the general respect for those values where “the values are not otherwise widely respected in practice.”¹⁴⁰

In the above, I have linked the moral dimension of the extraterritorial claim with the morality of the substantive law. This has given us two options:

(x) Extraterritorial claim moral and substantive law moral.	(y) Extraterritorial claim immoral and/or substantive law immoral.
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The reality, however, is of course better described in the following matrix:

(a) Extraterritorial claim moral and substantive law moral.	(b) Extraterritorial claim immoral and substantive law moral.
(c) Extraterritorial claim moral and substantive law immoral.	(d) Extraterritorial claim immoral and substantive law immoral.

This somewhat increased sophistication forces us to consider the matter before

137. KOHL, *supra* note 1, at 205.

138. *Id.*

139. Bygrave, *Data privacy law and the Internet*, *supra* note 122, at 277.

140. *Id.*

us with greater precision. How do we view bark jurisdiction in these scenarios? Scenario a poses no problems—it remains the case that where both the extraterritorial claim and the substantive law it is seeking to give application to are morally justifiable, it is perilous for the target of the claim to ignore it. The scenarios labeled b, c, and d are, however, more complicated. Most interestingly, perhaps it could be said that an immoral extraterritorial claim, such as where there is a lacking nexus between the action and the claim, may undermine the substantive law it seeks to make applicable even where that substantive law is morally justifiable. I will happily concede that in such a situation (scenario b in the matrix above), bark jurisdiction is inappropriate; but then so is bite jurisdiction. The same can be said for scenarios c and d. It is only for situations like scenario a that I advocate bark jurisdiction.

But perhaps the expanded matrix is also too simplistic to do justice to the complicated matter before us. We may get closer to a satisfactory model if we expand it further in the following manner:

		Extraterritoriality		
		<i>Moral</i>	<i>Dubious</i>	<i>Immoral</i>
Substantive Law	<i>Moral</i>	Bark jurisdiction appropriate	Bark jurisdiction questionable	Bark jurisdiction inappropriate
	<i>Dubious</i>	Bark jurisdiction questionable	Bark jurisdiction questionable	Bark jurisdiction inappropriate
	<i>Immoral</i>	Bark jurisdiction inappropriate	Bark jurisdiction inappropriate	Bark jurisdiction inappropriate

This matrix acknowledges that it is too simplistic to view an extraterritorial claim as either moral or immoral; rather, the grey zone may be quite dominant with only limited black and white areas.

One last problem must be confronted before we draw any conclusions from the discussion here—does bark jurisdiction fit with the need to provide individuals with an effective remedy? As noted by Kuner in private correspondence,¹⁴¹ one of

141. E-mail from Dr. Christopher Kuner, Honorary Professor at the University of Cambridge and the University of Copenhagen, to Dan Jerker B. Svantesson, Professor and Co-Director, Centre for Commercial Law at Bond University (Mar. 19, 2014) (on file with author).

the fundamentals of, for example, European human rights law is that individuals must have a legal remedy for violations of the law (at least in terms of the fundamental rights provided under such human rights law). For example, according to Article 13 of the European Convention on Human Rights (ECHR): “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”¹⁴² If the law-maker enacts legislation that it knows in advance cannot be enforced and thus provides no feasible legal remedy, does that not raise questions about whether it has complied with basic principles of legality?

This issue is both of the greatest significance and of the highest complexity. And importantly, as Kuner also has brought to my attention, it is not merely an academic matter; it is a matter that has distinct practical implications.¹⁴³ Further, it is not merely a European problem. Article 3 of the International Covenant on Civil and Political Rights (ICCPR) states:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

142. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4 1950, 213 U.N.T.S. 221, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

143. Email from Dr. Christopher Kuner, *supra* note 141. See also *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. v. Minister for Communications, Marine, and Natural Resources*, 2014 E.C.R. I___ (“In the second place, it should be added that that directive [Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC] does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data”), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=145562&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=687205>.

(c) To ensure that the competent authorities shall enforce such remedies when granted.¹⁴⁴

Furthermore, Article 2(1) of the ICCPR states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴⁵

It seems possible to argue that the phrase “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” expresses two separate requirements rather than a double requirement.¹⁴⁶ As I have argued elsewhere,¹⁴⁷ from that vantage point each signatory state has an obligation to provide legal protection against unlawful attacks on the rights of people subject to its jurisdiction and those present within its territory, regardless of the origins of the attacks.

This interpretation is supported in ICCPR General Comment 16: “Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible.”¹⁴⁸ If, for example, the reputation of a person in state B is negatively affected by material posted on a website in state A, state B is arguably failing to provide “an effective remedy against those responsible” unless its laws provide for extraterritorial jurisdictional and legislative claims over the offender in state A. However, what is then the impact of difficulties in enforcing the extraterritorial claim? It can, of course, be said that even such a jurisdictional claim does not in itself provide “an effective remedy against those responsible” unless it can also be enforced. However, it would seem counterintuitive if state B in our example was to be required by international law to do more than what lies in its power to do. Parallels may be seen here to Dworkin’s reasoning in a recent article in which he presented his interesting new philosophy for international law:

If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then

144. International Covenant on Civil and Political Rights, G.A. Res. 21/62, art. 3, U.N. Doc. A/RES/21/2200 (Mar. 23, 1966), available at <http://www.un-documents.net/a21r2200.htm>.

145. *Id.* art. 2(1).

146. *Id.* (emphasis added). See generally MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS (2d ed. 1993).

147. See, e.g., Svantesson, *The Extraterritoriality of E.U. Data Privacy Law*, *supra* note 106, at 78.

148. UN Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (April 8, 1988), available at: <http://www.refworld.org/docid/453883f922.html>

it has a political obligation to do what it can in that direction. Of course that obligation demands only what, in the circumstances, is feasible. It does not require any state to ignore the division of the world into distinct states and suppose that it has the same responsibilities to citizens of other nations as it has to its own.¹⁴⁹

Perhaps the issue is a rather simple one after all; state B in our example has two alternatives. The first option is to make an extraterritorial claim, knowing that it may have a mere bark effect. The second option is to refrain from giving extraterritorial effect to its laws regulating defamation. If state B adopts this latter option, it avoids the criticism of having made law it cannot back up with an effective remedy. However, it is of course no closer to complying with the requirements of the ECHR or the ICCPR—after all, it then does not even make an attempt to uphold the relevant fundamental human rights against attacks originating abroad as it is obligated to do. Surely the conclusion must be that, at the minimum, it cannot be more wrong to try but fail to provide effective remedy than it is not to even try. If anything, one would think that in this setting bark jurisdiction is a better option than is complete and unconditional surrender to extraterritorial attacks.

In light of the above, my conclusion is that jurisdictional claims that can be seen as bite-less bark do indeed serve a function. Perhaps it could be said that “bark jurisdiction” signals a perceived right to regulate a particular matter while acknowledging the lacking ability to regulate that matter. Viewed from this perspective, I argue that bark jurisdiction has both jurisprudential legitimacy and practical utility. And while I would happily lead the charge in any attempt to subject extraterritoriality to appropriate checks and balances—not least as it applies to the Internet—I do not think an insistence on effective enforceability amounts to an appropriate yardstick for extraterritoriality.

V. A New Theoretical Framework for Assessing the Legitimacy of Extraterritoriality

The above has hopefully made some progress towards filling the gap I identified in the introduction; that is, the lack of attention given so far to the jurisprudential underpinnings of extraterritoriality and that of the enforcement difficulties commonly associated with extraterritorial claims. Put simplistically, perhaps too simplistically, it may be said that in pointing to the option of domestic enforceability of extraterritorial claims through so-called market destroying measures, the legal positivist’s insistence on legal rules being backed by legal

149. Dworkin, *A New Philosophy for International Law*, *supra* note 49, at 17.

sanctions has been satisfied. The analysis above ought to also bring joy to the legal realists and pragmatists, as both the reputational dimension of extraterritoriality and the market destroying measures are factually potent sanctions. Finally, I am hopeful that the above may also be pleasing to adherents to some form of natural law theory in that I have identified a strong link between the legitimacy of extraterritorial claims and the morality of the goal such claims pursue.

Be that as it may, I think it also important to try to make use of this jurisprudential advancement to draw out something of more clearly practical value. To that end, I will venture to outline the backbones of a new theoretical framework for assessing the legitimacy of extraterritoriality. Importantly, I am here departing from the idea or concept of “jurisprudential legitimacy” that I have consistently discussed above in favor of a broader—wishy-washy some would “legitimately” say—concept of “legitimacy.” While the former is easily defined to refer to whether or not an extraterritorial claim is consistent with the various legal theories discussed, the latter concept of legitimacy does not allow itself to be so easily pinned down. As noted by Reed, “‘legitimacy’ has a range of meanings.”¹⁵⁰

To avoid entering into, and indeed getting bogged down or even lost in, the rich literature of Internet governance, political science, and regulatory theory, I will here attach a most simplistic notion to the term legitimacy used in its broader sense. In doing so, I focus on consequences; a legitimate extraterritorial claim may be pursued while an illegitimate extraterritorial claim ought not be pursued. It is then through the eight principles I outline below that the factors taken into account in deciding whether such a claim is legitimate or not is fleshed out. Thus, in discussing legitimacy in a broader sense, I am essentially pointing to a theory of morality about the circumstances in which something ought or ought not to happen.

Before I proceed to outline the backbones of a new theoretical framework for assessing the legitimacy of extraterritoriality a brief detour is necessary, allowing me to outline the biases that have colored my thinking on this topic. First, while I disagree with several of Fuller’s propositions, it is in my mind clear that Fuller points to something of the greatest significance to our information age when he states:

Communication is something more than a means of staying alive. It is a way of being alive. . . . [I]f I were asked, then, to discern one central indisputable principle of what may be called substantive natural law – Natural Law with capital letters – I would find it in the injunction: Open up, maintain, and preserve the integrity of

150. REED, MAKING LAWS FOR CYBERSPACE, *supra* note 17, at 78.

the channels of communication by which men convey to one another what they perceive, feel, and desire.¹⁵¹

This central role of communication must, in my view, necessarily be borne in mind when we discuss extraterritorial claims in relation to Internet conduct. Put simply, I am admittedly and openly pro-communication across borders.

Given what has transpired from the discussion above, I propose the following eight principles—or dare I in Fuller’s footsteps call it, “inner morality of extraterritoriality”—to guide the assessment of the legitimacy of extraterritorial claims:

Principle 1: The legitimacy of an extraterritorial claim does not solely, or always, depend on the likelihood of its successful enforcement; but it must always be assessed in light of the substantive law it seeks to make applicable.

Principle 2: Extraterritorial claims are disruptive and should only be made where the goals they are used to pursue survive a proportionality test, comparing those goals with the disruptions they will, or may, cause.¹⁵²

Principle 3: Before an extraterritorial claim is made, less disruptive alternatives must be considered.

Principle 4: The application of extraterritorial claims must be guided by the “consequence-focused approach” and be sensitive to the object’s “contextual legal system,” including any contradictions or clashes between different rights and/or duties.

Principle 5: Extraterritorial claims must be as geographically limited as the goals they are used to pursue allow.

Principle 6: Extraterritorial claims must be as limited as to subject matter as the goals they are used to pursue allow.

Principle 7: Extraterritorial claims must be as limited as to whom they affect as the goals they are used to pursue allow.

Principle 8: Extraterritorial claims must be communicated in a manner and form that makes it possible for those (potentially) affected by the claim to become familiar with the rules they are exposed to.

The eight principles outlined above ought to be useful both for legislators

151. FULLER, *supra* note 15, at 186.

152. The proportionality test referred to in *Principle 2* ordinarily requires that an “Extraterritoriality Impact Assessment” is carried out so that the claim’s potential disruptive effect may be properly assessed. Guidance on this may be drawn from other areas such as so-called Privacy Impact Assessments. Where the extraterritorial claim will be made in legislation, the “Extraterritoriality Impact Assessment” can usefully be included in the *travaux préparatoires*. Where instead the claim is made through a court judgment, the judge ought to include the “Extraterritoriality Impact Assessment” in the judgment. *See, e.g.*, Roger Clarke, *An Evaluation of Privacy Impact Assessment Guidance Documents*, 1 INT’L DATA PRIV. L. 111 (2011).

considering giving extraterritorial effect to a certain law and for courts faced with the task of assessing whether an extraterritorial claim should be upheld.

As to the matter of courts using these principles, some will no doubt be tempted to conclude that the principles appear to provide the courts with too much discretion. However, one need only remind oneself of the common reference to *ordre public* or public policy in jurisdictional matters to see that courts are no strangers to discretion in this context.

The larger issue may be whether a person subject to an extraterritorial claim may protest that claim based on a perceived failure to adhere to these eight principles. It could be argued that such a failure robs the extraterritorial claim of any rational ground for asserting that a person can have a moral obligation to obey the claim, as Fuller may have asserted, if we allow ourselves the extravagance of assuming that he would be willing to place these eight principles on similar footing with his eight principles of an inner morality of law.¹⁵³ Or placed in Kantian terms, such a failure may mean that the extraterritorial claim lacks legitimacy to the degree of bringing obedience to it beyond the Categorical Imperative.¹⁵⁴ Indeed, at least in cases where the extraterritorial claim offends our genuinely held notions of fundamental personal or political rights, Dworkin may perhaps have been willing to allow the object of the claim to resist it as a form of civil disobedience.¹⁵⁵

Whether this is so is something I will leave for a later day when the discussion of extraterritoriality has matured. It suffices for now to note that these eight principles may provide useful guidance for the “international law doctrine of selective legal compliance” I have proposed elsewhere.¹⁵⁶ That is, in assessing whether certain actors, such as globally active Internet intermediaries, ought to enjoy protection shielding them from having to comply with all the laws from around the world that *prima facie* apply to them, these eight principles could be a useful yardstick. After all, where a state makes an extraterritorial claim that does not meet the test set by the eight principles above, the discussion here may support, or even legitimize, my proposed protection through a doctrine of selective legal compliance.

153. FULLER, *supra* note 15, at 39.

154. Kenneth R. Westphal, *Kant on the State, Law, and Obedience to Authority in the Alleged 'Anti-Revolutionary' Writings*, reprinted in SHARON BYRD & JOACHIM HRUSCHKA, *KANT AND LAW* 201, 219-20 (2006).

155. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 214-15 (1977).

156. See Svantesson, *Between a Rock and a Hard Place*, *supra* note 30.

VI. Concluding Remarks

The tale of how King Knut den store (Canute the Great), ruler of England, Denmark, Norway, and parts of Sweden, commanded the waves to stop rolling is well known. And the outcome—the unsurprising fact that the waves disregarded his command—is equally well known. This has led to widespread ridicule of King Knut, and the said event is frequently (mis)used as an example of foolish, arrogant, and futile attempts to prevent unstoppable forces.¹⁵⁷ Assuming the tale has any truth to it at all, the reality seems to be that King Knut did what he did in an attempt to demonstrate how limited his power was compared to that of the god people commonly believed in at that time in Europe.¹⁵⁸

It is no doubt tempting to misapply the tale of King Knut also to the context of extraterritorial claims over Internet activities—those who make such claims, conscious of the unlikely enforceability, may indeed be seen as brothers and sisters of King Knut in the misunderstood version of the tale. However, in this article I have sought to show that extraterritorial claims, even where their prospects of being enforced are dim, have support in several schools of jurisprudential thought. I have also illustrated that a country may make legitimate and meaningful extraterritorial bark claims. Thus, in many ways this article provides support for extraterritoriality. However, as also hinted at above, it must always be remembered that extraterritorial claims should only be made where they and the substantive law they enable the application of are morally justifiable. Thus, on a practical level, whenever a state considers making a claim of extraterritoriality, it should always consider at least three questions. First, it should investigate whether its domestic laws allow for the extraterritorial claim to be made. Second, it should investigate whether international law allows for the extraterritorial claim to be made. These first two questions seem uncontroversial, mundane even, and are typically part of standard conceptions of how we approach extraterritoriality. However, as is signaled by the framework I put forth above, the inquiry must not stop there. A state contemplating making an extraterritorial claim, as well as courts contemplating whether to uphold an extraterritorial claim, should also

157. See, e.g., John Perry Barlow, *Jackboots on the Infobahn: Clipping the Wings of Freedom*, 4 WIRED (Feb. 9, 1993), available at http://w2.eff.org/Misc/Publications/John_Perry_Barlow/HTML/infobahn_jackboots.html (bringing up “the folly of King Canute” in the context of arguably futile attempts to stop the use of encryption).

158. Kathryn Westcott, *Is King Canute Misunderstood?*, BBC NEWS (May 26, 2011), <http://www.bbc.co.uk/news/magazine-13524677>. See also James Baldwin, *King Canute on the Seashore*, in THE BOOK OF VIRTUES FOR YOUNG PEOPLE: A TREASURY OF GREAT MORAL STORIES (William J. Bennett ed., 1995), available at <http://canute2.sealevelrise.info/slr/Story%20of%20Canute>.

consider whether it ought to avoid pursuing the extraterritorial claim in light of considerations such as:

- What can be achieved through the extraterritorial claim?
- How will such a claim impact other states?¹⁵⁹
- How will those other states react to that impact?
- What advantages can be gained?
- What negative results may follow?
- Are there any alternatives to making the extraterritorial claim?
- Is the extraterritorial claim the option having the most favorable consequences for the future?
- Is there any way in which the reach of the extraterritorial claim can be geographically limited without losing the effect it is aimed at?
- Is there any way in which the reach of the extraterritorial claim can be limited as to subject matter without losing the effect it is aimed at?
- Is there any way in which the reach of the extraterritorial claim can be limited as to whom it impacts without losing the effect it is aimed at?
- Has the law sought to be applied in an extraterritorial manner been communicated in a manner making it accessible to foreigners?
- What substantive law is it that the extraterritorial claim seeks to make applicable?

In the case of a court contemplating whether to uphold an extraterritorial claim, the court should also take account of the extent to which the “contextual legal system” of the object of the claim includes any contradictions or clashes between different rights and/or duties.

In the end, perhaps the most important thing to remember is that the broader the extraterritorial claim, the lower its practical utility, and indeed, the harder it is to maintain both its jurisprudential legitimacy and its practical utility.

159. Reed goes as far as to suggest that “enforcement of a state’s laws against a foreign online actor makes a negative statement about the laws of the actor’s home state, thereby reducing respect for those laws.” REED, MAKING LAWS FOR CYBERSPACE, *supra* note 17, at 47.