THE MYOPIA OF U.S. v. MARTINELLI: EXTRATERRITORIAL JURISDICTION IN THE 21ST CENTURY

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I. INTRODUCTION

Beginning in January 1999 and continuing through January 2000, a U.S. soldier began frequenting an off-post Internet cafe in Darmstadt, Germany, called the Network Café.1 There he would download images of child pornography and search Internet websites, logging onto Internet chat rooms in order to communicate with individuals willing to send him images of naked children and children engaged in sex acts.2 This soldier was Specialist Christopher P. Martinelli.3

Sometimes Specialist Martinelli would get his child porn via email images from other individuals with the same sinister proclivity.4 Other times, he would be directed by individuals to illicit web pages from which he would take images of children.5 Either way, he would then download the images to the hard drive of a computer at the Network Café.6 In all, Specialist Martinelli received at least sixty-four images of child pornography.7

After receiving the images, Martinelli would copy and distribute them to other individuals in the form of attachments to e-mail transmissions, sending approximately twenty such messages over the year.8 He also copied the images from the hard drives of the computers at the Network Café to a separate disk, which he then

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2. Id.
3. Id. at 53–55.
4. Id. at 55.
5. Id.
6. Id.
7. Id.
8. Id.
took back to his barracks at a U.S. Army installation in Darmstadt, Germany. There, he would either keep the images on the disk or load them onto the hard drive of his own computer.

Specialist Martinelli was eventually caught and charged with various violations of 18 U.S.C. § 2252A for knowingly mailing, transporting or shipping child pornography in interstate or foreign commerce (by computer); knowingly receiving child pornography that had been mailed, shipped or transported in interstate or foreign commerce (by computer); knowingly reproducing child pornography for distribution through the mails, or in interstate or foreign commerce (by computer); and knowingly possessing child pornography on land and in a building used by and under the control of the U.S. Government (in this case by possessing approximately fifty diskettes containing child pornography in buildings at the U.S. Army installation in Germany). All four specifications were based on the Child Pornography Prevention Act of 1996. Martinelli pleaded guilty and was convicted of all four. On appeal before the U.S. Court of Appeals for the Armed Forces (CAAF), however, the defense challenged the jurisdictional basis for the convictions, arguing that the Child Pornography Prevention Act did not apply to Specialist Martinelli’s conduct because it occurred overseas.

The CAAF was certainly not the first court to face the issue of the extraterritorial application of a criminal statute—or even a criminal statute addressing child pornography or sexual exploitation of children. Likewise, Specialist Martinelli was not the first (nor will he be the last) to engage in such vile conduct abroad. In past years, federal courts had been contending with such offenders and slowly building a proper foundation by which laws criminalizing the sexual exploitation of children could reach pedophiles abroad. The weight of precedent and rationale was decidedly in

9. Id.
10. Id.
14. Id. at 54–55.
15. See, e.g., United States v. Harvey, 2 F.3d 1318, 1329 (3d Cir. 1993) (holding that laws criminalizing offenses relating to child pornography apply extraterritorially); United States v. Neil, 312 F.3d 419, 423 (9th Cir. 2002) (holding that laws criminalizing sexual contact with minors apply extraterritorially).
favor of Martinelli's conviction. But, instead, the CAAF found Specialist Martinelli's conduct could not be prosecuted under 18 U.S.C. § 2252A(a) because the statute did not apply extraterritorially.16

The holding in United States v. Martinelli was both disappointing and legally unsupportable. The CAAF had a constellation of reasons to apply 18 U.S.C. § 2252A extraterritorially.17 Instead, it adopted a myopic view of implied extraterritoriality, ignored the weight of federal precedent on this issue, ignored the multiple grants of extraterritorial jurisdiction allowed by international law, and misread (or failed to read) the legislative history of the statute in question. This Article will examine where the CAAF went wrong in the hope that its errors may be corrected at some later point and, at the very least, so that other federal courts might be dissuaded from emulating them.

First, this Article will discuss the concept of extraterritoriality and its development in the U.S. Supreme Court. The theoretical bases for extraterritorial jurisdiction and each theory's potential applicability to the sexual exploitation of children over the internet will then be reviewed. Finally, the specific errors made by the CAAF in United States v. Martinelli will be analyzed, illuminating the reasons why laws criminalizing the sexual exploitation of children via the internet must apply extraterritorially.

II. THE EPISTEMOLOGY OF EXTRATERRITORIALITY

Extraterritorial jurisdiction has been defined as jurisdiction exercised over an extraterritorial offense, even when the investigation and prosecution takes place within the forum state.18 Thus, "the term does not imply that the forum state performs any official act outside its own territory," but instead that the state wishes to punish an offense which occurred outside of its territorial limits.19

The Supreme Court of the United States has noted that there is a general presumption against the extraterritorial application of

19. Id. This is classic prescriptive, as opposed to enforcement jurisdiction. See infra note 71 (distinguishing prescriptive and enforcement jurisdiction).
domestic law.\textsuperscript{20} This presumption is rooted in a number of consid-
erations, including the notion that "Congress generally legislates with domestic concerns in mind."\textsuperscript{21} However, the presumption against extraterritoriality is just a presumption—and one which is not always applicable or appropriate. Today, contemporary U.S. jurisprudence recognizes that "Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness."\textsuperscript{22} The understanding of territoriality, extraterritoriality, and the limits of a state's juris-
diction, however, has been in a state of evolution throughout legal history and has been coextensive with social change.

A. Early Legal History

The notion of confining criminal jurisdiction within territorial boundaries was unknown in the ancient world.\textsuperscript{23} Throughout the majority of legal history, the criminal jurisdiction of the kingdom followed the subject no matter where he or she roamed.\textsuperscript{24} During the medieval period, a system of personal jurisdiction developed in Europe known as "the personality of laws,"\textsuperscript{25} according to which jurisdiction over the person depended on the person's citizenship—subjects carried their law with them as they traveled.\textsuperscript{26} Juris-

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\item \textsuperscript{20} Smith v. United States, 507 U.S. 197, 203-04 (1993).
\item \textsuperscript{21} Id. at 204 n.5.
\item \textsuperscript{22} United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003); see also Skiriotes v. Florida, 315 U.S. 69, 73-74 (1941) (noting that acts in some criminal statutes can still be injurious to the government when committed on the high seas or in a foreign country); Collazos v. United States, 368 F.3d 190, 200 (2d Cir. 2004) (noting that most crimes giving rise to civil forfeiture proceedings can be committed extraterritorially).
\item \textsuperscript{23} See Shih Shun Liu, Extraterritoriality: Its Rise and Decline 23 (2d ed. 1969) (1925).
\item \textsuperscript{24} Id. at 24. For example, Egyptians often allowed foreign merchants access to local judges of their own nationality in order to regulate questions and settle differences arising out of mercantile transactions, in accordance with the merchants' foreign laws and customs. Moreover, in Greece, a proxenus appointed by a foreign government exercised judicial powers within Greek territory. Id.
\item \textsuperscript{25} Id. at 27-28 ("[T]here developed in mediaeval Europe a complete system of personal jurisdiction, which has left in its wake many interesting survivals extending to modern times, and which has undoubtedly exercised an immense influence upon the development of extraterritoriality.")
\item \textsuperscript{26} Id. at 28 ("Thus, in the same country—and even in the same city at times—the Lombards lived under Lombard law, and the Romans under Roman law. This differentiation of laws extended even to the various branches of the Germanic invaders; the Goths, the Franks, the Burgundians, each submitted to their own laws while resident in the same country.").
\end{itemize}
diction was perceived as a metaphysical link between the sovereign and the subject that transcended international borders. As an example of the intellectual force of this concept, John Locke, writing in the late seventeenth century, questioned the authority of a sovereign to punish an alien for crimes committed within the sovereign’s territory, concluding the alien was not a citizen and, therefore, was not the subject of that particular sovereign.\textsuperscript{27} The link to the sovereign was deemed paramount, while the geographical location of the crime was seen as unimportant or, at most, a matter of secondary concern.\textsuperscript{28} Accordingly, by force of reason, the exercise of extraterritorial jurisdiction by the alien’s sovereign seemed appropriate.

This view held sway for centuries and only began to decline after the Treaty of Westphalia in 1648.\textsuperscript{29} With the rise of nationalism, sovereigns began to perceive geographical boundaries as more important and the notion of a sovereign’s absolute authority within its territory gained ascendancy.\textsuperscript{30} This theory quickly caught fire and, by the early nineteenth century, the growth of nationalism reached its climax in the West.\textsuperscript{31} It received its most famous articulation in \textit{The Schooner Exchange v. M’Faddon}, where Chief Justice John Marshall stated that the jurisdiction of the nation within its own territory is exclusive and absolute, susceptible to no sort of

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\textsuperscript{27} Locke wrote:

I doubt not but this will seem a very strange doctrine to some men; but before they condemn it, I desire them to resolve me by what right any prince or state can put to death or punish any alien for any crime he commits in their country. It is certain their laws, by virtue of any sanction they receive from the promulgated will of the legislature, reach not a stranger; they speak not to him, nor, if they did, is he bound to hearken to them. The legislative authority by which they are in force over the subjects of that commonwealth, has no power over him. Those who have the supreme power of making laws in England, France, or Holland are to an Indian but like the rest of the world—men without authority; and therefore, if by the law of nature every man has not a power to punish offenses against it as he soberly judges the case to require, I see not how the magistrates of any community can punish an alien of another country, since, in reference to him, they can have no more power than what every man naturally may have over another.

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\textsuperscript{28} See id.
\textsuperscript{29} Liu, \textit{supra} note 23, at 37.
\textsuperscript{30} \textit{Id.} at 103.
\textsuperscript{31} See James Mathieu, \textit{The Supreme Court’s Not So Clear Statement in Equal Employment Opportunity Comm’n v. Arabian American Oil Co.}, 21 Brooklyn J. Int’l L. 939, 943 (1996) ("[T]he presumption against the extraterritorial application of U.S. laws dates back nearly two hundred years to the \textit{Charming Betsy} case.").
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limitation imposed from without.\textsuperscript{32} This notion of exclusive territorial sovereignty within the borders of a nation-state would fundamentally impact the theory of extraterritorial jurisdiction, ushering out the theory of "personality of laws" and fostering the rise of insularity.

Nearly two decades after \textit{The Schooner Exchange}, in conformance with the prevailing notion of territoriality, the U.S. Supreme Court articulated a theory of jurisdiction that demonstrated the extent to which domestic law was considered constrained. In \textit{The Antelope}, the Supreme Court considered the case of a privateer, the \textit{Colombia}.\textsuperscript{33} This ship of thirty or forty U.S. nationals sailed under a Venezuelan commission, entered the port of Baltimore, then proceeded to sea, where it hoisted the Artegan flag, assumed the name \textit{Arranganta}, and headed out along the coast of Africa.\textsuperscript{34}

Once off the coast of Africa, the \textit{Colombia} captured a U.S. vessel and took twenty-five enslaved Africans who were on the ship.\textsuperscript{35} Additionally, the crew of the \textit{Colombia} captured several Portuguese ships and one Spanish vessel, called the \textit{Antelope}, from which they also took a considerable number of slaves.\textsuperscript{36} After this rash of piracy, these two vessels (the \textit{Colombia} and the \textit{Antelope}) sailed together to the coast of Brazil, where the \textit{Colombia} was wrecked, with its crew made prisoners and transferred to the \textit{Antelope}.\textsuperscript{37} The \textit{Antelope}, under the command of John Smith, a U.S. citizen, was found, with all the Africans on board, near the coast of the United States and was brought into the port of Savannah.\textsuperscript{38} Upon its arrival, the vessel and the Africans were claimed by numerous parties, including the United States and the Portuguese and Spanish Vice-Consuls.\textsuperscript{39}

The United States claimed the slave trade was illegal, and thus the foreign countries were not entitled to the return of any slaves.\textsuperscript{40} The Supreme Court, however, refused to grant safe haven for the slaves and stated that the foreign countries were entitled to the return of some slaves for the simple reason that the slave trade was

\textsuperscript{33} The Antelope, 23 U.S. (10 Wheat.) 66, 67 (1825).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 67-68.
\textsuperscript{37} Id. at 68.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
legal in the foreign countries, and the United States did not have the authority to nullify foreign laws.41 Accordingly, the foreign parties were permitted the return of those slaves over whom ownership was proven.42 The Court concluded:

No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be devested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.43

Thus, in a decision which strikes the modern reader as repugnant, the nineteenth century Supreme Court exposed an insular view of jurisdiction rooted in the prevailing principle of territoriality, which forbad one nation from creating the law of another. Even the evils of slavery, over which a civil war would later be fought, were not reason enough to act. The result was a cargo of sea-weary, enslaved Africans returned to a life of oppression in countries where the slave trade was allowed. This view held fast into the early twentieth century, with cases like American Banana Company v. United Fruit Company further articulating the notion that:

[A]nother jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.44

Therefore, the state of the law at the turn of that century was one of territorial absolutes and judicial insularity. A nation’s laws were bound by its borders—as was its population, the majority of communication, and most other things in the Victorian era. The world, however, was already starting to change. In the coming years, societal changes driven by technological and social innovations would drastically alter the stasis of national populations and the nature of national and international interaction. New inven-

41. Id.
42. Id.
43. Id. at 122.
tions like the wireless telegraph allowed for greater international communication, and new forms of transportation emerged to facilitate the mobility of the masses.

B. Bowman and Twentieth Century Legal History

In 1922, almost a century after its decision in The Antelope, the Supreme Court again faced the issue of asserting jurisdiction over conduct which occurred outside the territorial United States. In United States v. Bowman, the Court considered the case of a steam boat engineer (Bowman) who conspired to defraud the U.S. Shipping Board Emergency Fleet Corporation under section 35 of the U.S. Criminal Code. According to the indictment, the plot to defraud the United States was hatched by Bowman and his confederates while on board a steamer journeying to Rio de Janeiro. The overt act that consummated the crime was a wireless telegram sent from the vessel to certain agents while it was still on the high seas.

The sole objection made by the defense in this case was that because the crime was committed on the high seas, closer to Brazil than the United States, the United States lacked jurisdiction to prosecute the crime. This objection was consistent with the previously articulated view of extraterritoriality. In a new age of steam boats and wireless telegrams, however, Chief Justice Taft did not adhere to that outdated theory and instead articulated a more modern view of extraterritoriality. Noting that, for some crimes, the old rule of territorial limitations remained logical, the Court added:

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself

45. See The Encyclopedia of World History: Ancient, Medieval, and Modern, Chronologically Arranged 427 (Peter N. Stearns, 6th ed. 2001) (noting that Guglielmo Marconi invented the wireless telegraph in 1895 and others continued to contribute to wireless development until, at last, in 1901 when Marconi succeeded in sending a wireless signal across the Atlantic).

46. See id. For example, in 1900, Ferdinand Von Zeppelin "launched the first of the rigid airships that were to be called by his name," and on December 17, 1903, Orville and Wilbur Wright "made the first flight in a heavier-than-air craft" at Kitty Hawk, North Carolina. Id.


48. Id.

49. Id. at 96.

50. Id. at 96-97.

51. See infra Part II.A.
against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. 52

The Supreme Court noted that the statute at issue had been amended in 1918 to protect the U.S. Shipping Board Emergency Fleet Corporation from fraud. 53 The Court observed that because the Shipping Board Emergency Fleet Corporation engaged in a great deal of oceanic travel, it therefore followed:

We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section. 54

The nature of the crime Congress sought to combat was one which could not logically be dependent on territory, and section 35 of the U.S. Criminal Code, therefore, applied extraterritorially. 55 The importance of this analysis should not be underemphasized. The Supreme Court, in interpreting a statute that did not expressly state that it was to apply extraterritorially, took into consideration the international character of the activity likely to serve as the backdrop for the crime in question. 56

Congressional intent in a given instance may also rebut the presumption against extraterritoriality. 57 Thus, where a statute is silent as to its extraterritorial effect, the court must determine "whether Congress would have intended that federal courts should

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52. Bowman, 260 U.S. at 98.
53. Id. at 101-02.
54. Id. at 102.
55. See id.
56. See id.
57. See, e.g., Eric Allen Engle, Extraterritorial Jurisdiction: Can RICO Protect Human Rights? A Computer Analysis of a Semi-Determinate Legal Question, 3 J. HIGH TECH. L. 1, 13 (2004) (citing United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) ("In interpreting statutes, courts presume that laws do not have an extraterritorial effect, but that presumption can be overcome by a showing of contrary Congressional intent.").
be concerned with specific international controversies. A court should determine whether Congress intended to resolve the problem addressed by the law, which sometimes is not fully possible without extraterritorial jurisdiction.

Since Bowman, courts have routinely analyzed statutes to determine whether or not they are logically dependent on their locality for the Government’s jurisdiction and frequently ruled that criminal statutes have extraterritorial effect. This increased application of extraterritorial jurisdiction reflects a jurisprudential recognition of a fundamentally changing world. As Luc Reydams reflected:

[M]ass migration and high mobility erode the concept of nationality. Millions of individuals reside temporarily or permanently outside the State of their nationality, many more are transiently on foreign soil, and more people than ever hold citizenship in more than one nation. From a State’s perspective the numbers of nationals outside its territory and non-nationals or dual nationals within it increase continuously.

Technological advances, the more sophisticated structure of commercial organizations, and the growth of enterprises with transnational links erode the concept of territoriality. As a result[,] it becomes increasingly difficult to determine when and where offences of any complexity take place. The progressive erosion of both nationality and territoriality poses immense challenges to ‘ordinary’ [sic] law enforcement and compels us to rethink the traditional concept of jurisdiction.

In a world of stationary citizens and limited travel, it sufficed for earlier courts to maintain a theory of territoriality that limited the effectiveness of a nation’s laws to conduct occurring within its borders. With populations possessing limited means of transnational communication and limited ability to impact the lives and property of people across borders, there was little reason to expand the exercise of jurisdiction beyond territorial limits. The state of society and technology during that earlier era allowed for a theory of

58. Id. at 13 n.55 (quoting Alfadda v. Fenn, 935 F.2d 475, 479 (2d Cir. 1991)).

59. Id. (citing Alfadda, 935 F.2d at 479); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975); Foley Bros. v. Figaro, 336 U.S. 281, 285 (1949); United States v. Cotton, 471 F.2d 744, 750 (9th Cir. 1973); Vasquez-Velasco, 15 F.3d at 899 n.4.

60. See infra Part IV.A.

61. Reydams, supra note 18, at 26–27.

62. See LAWRENCE M. FRIEDMAN, LAW IN AMERICA 39 (2002) (“Nobody in 1850 had a telephone; it was not part of the market of goods. Nobody in 1900 could travel across the country by airplane. Nobody in 1920 had a computer.”).
jurisdiction that avoided extraterritorial application of domestic law at all costs.

Technological advances in communication—such as the advent of the telephone and the Internet—along with the ease of modern international travel, however, have diminished the relevance of territorial boundaries. This fundamental shift in the organization, mobility, and technological capability of society has resulted in a necessary shift in the exercise of jurisdiction. As society entered a new age of wireless communication and international travel, complete jurisdictional insularity was recognized as impractical and even injurious. Therefore, courts began to recognize that domestic laws addressing crimes capable of perpetration without regard to particular locality should be applied extraterritorially. The Supreme Court’s 1922 decision in United States v. Bowman, therefore, marks the end of the era of insularity and the emergence of the modern theory of extraterritorial jurisdiction.

III. TRADITIONAL BASES, PRINCIPLES AND THEORIES OF EXTRATERRITORIAL JURISDICTION

Before continuing, it is necessary to analyze the theoretical bases of extraterritorial jurisdiction. Fully extraterritorial theories are available for courts to apply to criminal statutes. Georges Delaume stated:

[O]nce a statute is promulgated, it is irrelevant whether its scope is limited to the punishment of nationals or to that of foreigners, or rather whether it combines the idea of jurisdiction based on allegiance with that of the punishment of only certain types of offenses. It is also irrelevant that such a statute is not express, provided there cannot be any doubt as to the legislative intent.

This has been the practice of U.S. courts. In United States v. Bowman, for example, extraterritorial jurisdiction was found even though the statute at issue did not expressly provide for such jurisdiction. Thus, national courts have been adept at interpreting legislation to authorize extension of jurisdiction to cover offenses committed beyond the nation’s territorial limits, especially when the proscription would be easily evaded due to the expanded extra-

65. Id. at 179.
territorial capacity of the wrongdoers. This is both natural and appropriate, and does not depend on any strained logic or application of precedent. Making the conceptual framework of extraterritorial application coherent, however, requires an understanding of the theoretical bases of extraterritorial jurisdiction.

Jurisdiction may be defined as the authority to affect legal interests—to prescribe rules of law, to adjudicate legal questions, and to compel or take enforcement action. The term “jurisdiction” derives from juris (law) and dictio (saying), “the implication being an authoritative legal pronouncement.” Jurisdiction is the means of making law functional; it is the way that states and legal institutions make law a reality. Any definition of crime and any institution that calls for the law’s application to its subjects or objects necessarily includes a jurisdictional breadth—the temporal and spacial scope of that application.

But the term jurisdiction is often used imprecisely. Effective analysis requires a clear distinction between rule-making and rule-enforcing jurisdiction. There are three forms of jurisdiction: prescriptive or legislative, adjudicative, and enforcement. The first issue in describing jurisdiction is the scope of the prescriptive jurisdiction—the rule-making. Adjudicative and enforcement jurisdiction are dependent on the existence of prescriptive jurisdiction—if the legislative scope is not broad enough to cover the proscribed conduct, obviously, no adjudication or enforcement is appropriate. This Article focuses on the latter types of jurisdic-

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66. For example, even though Title 15 of the U.S. Code, which includes various statutes governing securities exchanges, is silent on whether they are to be applied extraterritorially, U.S. federal courts have recognized that prescriptive jurisdiction may extend to transnational securities fraud. See generally Stuart M. Grant & Diane Zilka, Securities Litigation & Enforcement Institute 2004: The Role Of Foreign Investors In Federal Securities Class Actions, 1442 PLI/CORP 91, 111–12 (2004); W. Barton Patterson, Note, Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions, 74 FORDHAM L. REV. 213 (2005).


69. See id. at 753–54.

70. See The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (“The courts of no country execute the penal laws of another . . . .”); Huntington v. Attrill, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial [sic] effect only by the comity of other States . . . .”).

71. See Restatement (Third), supra note 67, § 401 cmt. a (“Jurisdiction to enforce through nonjudicial means depends on jurisdiction to prescribe the law sought to be enforced, but it may be exercised under certain conditions when there is no jurisdiction to adjudicate.”); Roger O’Keefe, Universal Jurisdiction: Clarifying the Basic Concept, 2 J. INT’L CRIM. JUST. 735, 737 (2004) (“As a result, a state’s criminal courts have no greater authority
tion—a state’s ability to interpret and enforce its laws. To do this, however, it is necessary to determine the prescriptive scope of the relevant jurisdiction.

In 1935, Harvard Research in International Law described five traditional bases of jurisdiction over international crime: territorial, nationality, protective, passive personality, and universal. There are two types of territorial jurisdiction—objective and subjective—although they overlap. Nationality jurisdiction applies when the perpetrator of a crime is a national of the prescriptive state. The protective principle applies when a state’s national security, national integrity, or other very important governmental interest is damaged or threatened. Passive personality jurisdiction applies where the victim of the crime is a national of the state. Universal jurisdiction applies where the alleged perpetrator’s conduct violates a virtually universally recognized proscription, sometimes called a jus cogens offense.

More than one jurisdictional theory may apply to a specific act. Terrorism planned in one state and perpetrated on a vessel or airliner, for example, invokes both the objective and subjective territoriality theories as well as the protective principle, nationality theory, the passive personality theory, and perhaps even universality. These theories of jurisdiction form the foundation for conceptualizing how nations have applied their laws to extraterritorial criminal conduct both domestically and incident to international law.

under international law to adjudge conduct by reference to that state’s criminal law than has the legislature of the state to prohibit the conduct in the first place."). But see O’Keefe, supra, at 741 (“Jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other.”).


73. Id. at 484, 487–88.

74. Id. at 445.

75. Id.

76. Id.


78. Although international law is permissive as to jurisdiction, extraterritorial application of a criminal law may be justified by any one of the five principles of extraterritorial authority. See, e.g., Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) (“Extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority.”).
A. The Territorial Theories

1. Theoretical Bases

The territorial theories traditionally have been the foundation of criminal jurisdiction. The very essence of sovereignty began with the nation-state which, by definition, is competent to proscribe conduct that occurs in whole or in part within its territory. This led to the notion of keeping “King’s Peace,” where any act threatening tranquility violated the allegiance owed to the sovereign. Professors Rollin Perkins and Ron Boyce succinctly relate “King’s Peace” to jurisdiction:

It would have been surprising if the common law had adopted any basis for criminal justice other than the territorial principle, because the beginning of our criminal justice in the troublous days of the dawn of civilization in the British Isles was concerned so exclusively with the keeping of the peace. This is evident from the old indictments which all concluded with some such phrase as “against the peace of the king.”

Thus, as Roger Merle and André Vitu wrote:

To affirm the territorially of criminal law (lex loci delicti) is to proclaim that penal law applies to all individuals whatever their nationality or that of their victims, who have committed an offense on the territory of the State in which the law is in force; a contrario, that law is refused all application outside the same territory.

With this historical context, the territorial theory covers crimes committed within a state’s territory, both “in whole”—when every essential constituent element is consummated within the territory—and “in part”—when any essential constituent element is consummated there. Two types of territorial jurisdiction exist:

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82. Perkins & Boyce, supra note 68, at 40.
83. Authors’ translation of:
Affirmer la territorialité de la répression (lex loci delicti), c’est proclamer que la loi pénale s’applique à tous les individus quelle que soit leur nationalité ou celle de leurs victimes, qui ont commis une infraction sur le territoire de l’État où cette loi est en vigueur; a contrario, on refuse à cette loi toute application en dehors de ce même territoire.
84. Harvard Research, supra note 72, at 495.
subjective (or ordinary); and objective (or the effects theory). Subjective territoriality applies where a material or constituent element of an offense occurs within the territory but is completed abroad. Similarly, objective territoriality is present where the effect or result of criminal conduct impacts on the asserting state, but the other elements of the offense take place wholly beyond its territorial boundaries.

2. Application in Extraterritorial Jurisdiction

Over the past several years, virtually all states have expanded the reach of their extraterritorial jurisdiction because of the complexities, inventions, and limitations of our modern, transient world. These changes include the velocity and capacity of individuals to commit criminal acts while finding ways to avoid capture. They also include attempts by legislatures to "keep-up" with criminals by promulgating new crimes. The expansion of extraterritorial jurisdiction has been accomplished, in part, by the use of fictions to encompass extraterritorial conduct within the idea of territoriality.

One of the more troubling of these factors is the claim that thwarted extraterritorial conspiracies are somehow territorial, even when no element or overt act of the conspiracy occurred in the territory. The U.S. Congress and courts in the so-called "war on drugs," for example, have prophylactically sought to discourage narcotics importation by asserting jurisdiction over extraterritorial conspiracies. Even when a narcotics conspiracy has occurred abroad and was thwarted before any effect of element occurs in the territory, the Restatement Third and the courts provide that territorial jurisdiction applies as long as the intent was to violate U.S. law or territory. A thwarted extraterritorial narcotics conspiracy or a thwarted conspiracy to commit terrorism fits or comes close to fit-

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85. Id. at 484, 487–88.
86. Id. at 387.
87. Id. at 387, 494–95
88. Id. at 484.
89. See Wendell Berge, Criminal Jurisdiction and the Territorial Principle, 30 Mich. L. Rev. 238, 238 n.2 (1931–32) (arguing for the need to catch up with the modern criminal).
90. Id. at 238.
91. Id.
93. See, e.g., United States v. DeWeese, 532 F.2d 1267, 1271–72 (5th Cir. 1980).
94. See Christopher Blakesley, Terrorism, Drugs, International Law, and the Protection of Human Liberty 149–70 (1992) [hereinafter Blakesley, Terrorism].
ting into several of the traditional theoretical bases of extraterritorial jurisdiction, but the territory theory is not one of them. Thus, "territorial" jurisdiction has been expanded to apply even when no element or effect of the offense has occurred in U.S. territory.95 This is a spurious application of the territorial theories and contradicts the very authorities cited to justify the position, namely Supreme Court cases such as American Banana Company v. United Fruit Company, Strassheim v. Dailey, and Ford v. United States.96 For example, it is clear from Justice Holmes' opinion in Strassheim and other historical precedent that the objective territorial principle is not designed to apply when parties merely intend their criminal activity to take effect within territorial boundaries, but contemplates only those cases in which the intended effects actually occur within those boundaries.97

Similarly, Congress has provided for jurisdiction over alleged terrorists who have committed violence outside U.S. territory, with the courts affirming jurisdiction.98 Although the result is appropriate and correct, the theory claimed as the basis for the expansion is invalid. When a conspiracy is thwarted, it never actually causes an effect. To claim that the "effects" theory provides jurisdiction obviously is a fallacy. Its application obliterates the theory's meaning.99

Objective territoriality is thus not the proper vehicle for assertion of jurisdiction over an act of terrorism, conspiracy to commit terrorism, narcotics conspiracy, or any other crime that has not actually had an impact within U.S. territory. This is the case even if the object of the conduct was U.S. citizens or interests abroad.100 European jurisprudence and doctrine are clear that the objective territoriality theory does not provide jurisdiction over thwarted

95. See id.
96. See Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); Strassheim v. Dailey, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing a cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.") (emphasis added); Ford v. United States, 273 U.S. 593, 623 (1927).
99. See, e.g., United States v. Winter, 509 F.2d 975, 982 (5th Cir. 1975) (illustrating how this erroneous perception has been developed or rationalized as the resulting jurisdiction was appropriate, but the objective territorial principle was not the appropriate theoretical vehicle); Chua Han Mow v. U.S., 730 F.2d 1308, 1312 (9th Cir. 1984) ("The objective territorial principle and the protective principle are equally applicable to the conspiracy count.").
100. The protective principle, passive-personality theory, or universality theory may be appropriate. See infra Parts III.C–E.
extraterritorial attempts or conspiracies: we cannot go so far as to assimilate the result which would have occurred here to one that has actually occurred here.\textsuperscript{101} Subjective territoriality is also inapt, unless a constituent element of the offense occurs on national territory. For example, if a part of a conspiratorial plan took place in U.S. territory, subjective territorial jurisdiction would obtain.

The territorial theories are also most likely insufficient for jurisdiction over other wholly extraterritorial offenses such as money laundering or cyber-crime, including the exploitation of children and women. When these offenses take place entirely abroad and no effect actually occurs within the United States, territoriality cannot apply. While it can be argued that even if no person saw or acted upon a cyber-communication it was somehow within the ether of every nation, this would be too broad an application of territorial jurisdiction and more akin to universal theory.\textsuperscript{102}

On the other hand, when a child or any other vulnerable citizen is actually involved and is the target of exploitation, conspiracy to exploit, or if an exploiter is intending to take advantage of a victim via an electronic message or digital images, jurisdiction should be found. Where the message recipient is located in U.S. territory, objective territoriality would be the appropriate theory. Where the exploitation occurs in U.S. territory, it would be subjective territoriality. If the sender simply attempts to cause or facilitate the exploitation, it would seem that jurisdiction should obtain on the basis of subjective or objective territoriality, as long as the exploiter is within United States jurisdiction.\textsuperscript{103} Other situations, however, must be addressed under different jurisdictional theories.

\textsuperscript{101} See Merle & Vitu, supra note 83, at 358 n.4 ("When nothing has actually happened in our country, will we go so far as to equate the result that would have occurred with that which was able to be completed? The answer seemingly must be negative, but in the special area of customs, the court of cassation preferred the opposite, more repressive solution"). But see Decision of Dec. 9, 1933, 61 J. Droit Int’l 898 (1934) (Fr.) (When a non-citizen commits crimes in the forum state and a different crime in another state, if the facts are indivisible, France can have jurisdiction over the crime committed wholly abroad, as long as it has proper jurisdiction over the other crime.).

\textsuperscript{102} See infra Part III.E.

\textsuperscript{103} If the victim is a U.S. national, the passive personality theory would also apply. See infra Part III.D. In addition, the protective principle could apply if the victim or potential victims are within U.S. jurisdiction. See infra Part III.C. Universality might even obtain when the victim or potential victim is in another jurisdiction. See infra Part III.E.
B. Nationality Jurisdiction

Nationality jurisdiction, or the active personality principle, applies when the perpetrator of a crime is a national of the prescriptive state. As a manifestation of sovereignty over nationals and a sovereign's ability to maintain sovereign order and respect around the world, all nations apply the nationality principle of jurisdiction to one degree or another. Differences in the breadth of application, of course, exist. But crimes involving the extraterritorial exploitation of children and women seem to present a quintessential appropriate application of the nationality theory when the focus citizen is the perpetrator.

1. Theoretical Bases

Although some limiting has occurred lately, countries of civil law tradition generally insist on nationality theory. These nations adhere to the idea that nationality is a link so strong that the state may prosecute any of its nationals for offenses they commit anywhere in the world. But most require that double criminality apply—that the offense be punishable in the place where it was committed as well.

104. Passive personality jurisdiction is the obverse of nationality jurisdiction, obtaining where the state claims jurisdiction over a criminal act in which the victim is a national of the state asserting jurisdiction. See infra Part III.D.

105. See United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006) ("[T]he nationality principle 'permits a country to apply its statutes to extraterritorial acts of its own nations.'") (citing United States v. Hill, 279 F.3d 731, 740 (9th Cir. 2002)).

106. See Harvard Research, supra note 72, at 519. Nationality jurisdiction may also obtain even though the national is also a national of the state in which the offense is committed. See Tomoya Kawakita v. United States, 343 U.S. 717, 732–33 (1952). Yet under nationality jurisdiction, the same act committed by an alien and a national might be punishable only against the national. See United States v. Bowman, 260 U.S. 94, 102–03 (1922).

107. See Harvard Research, supra note 72, at 519.

108. See id.

109. The passive personality theory is appropriate where the focus citizen is the victim. See infra Part III.D.


112. This is the principle of double criminality. See generally Christopher L. Blakesley, The Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality, 91 J. CRIM. L. & CRIMINOLOGY 1, 40–49 (2000–01).
Those countries that apply a strong nationality jurisdiction have clear-cut reasons for asserting jurisdiction over nationals who have committed offenses outside national territory.\textsuperscript{113} For example, nationals have the benefit and protection of their state, owe allegiance for this protection, and thus should be answerable to national jurisdiction for any offense they commit.\textsuperscript{114} Europeans contend, furthermore, that any offense committed by a national abroad actually injures the nation's reputation and respect in the world.\textsuperscript{115} Most persuasively, Europeans argue that if the perpetrator's home nation fails to have or assert extraterritorial jurisdiction, the offender might be immune from prosecution anywhere.\textsuperscript{116} Even in Europe, however, nationality jurisdiction is secondary to that of a state on whose territory the crime has been committed, unless it occurs under exceptional and specific circumstances.\textsuperscript{117}

Most nation-states—with the exception of the United States—have traditionally also maintained a concomitant exception to extraditing their nationals, although this is breaking down.\textsuperscript{118} Many nations, especially those of the civil law heritage, have long seen the non-extradition of nationals to be very important and nonnegotiable.\textsuperscript{119} The strength of this idea arose in antiquity, with Greek city-states, Rome, and other great civilizations exempting their citizens from extradition.\textsuperscript{120} But the historical strength of the

\begin{itemize}
\item \textsuperscript{113} Blakesley, Terrorism, \textit{supra} note 94, at 127–28.
\item \textsuperscript{114} \textit{Id.} at 127.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 127–28.
\item \textsuperscript{117} \textit{Id.} at 128.
\item \textsuperscript{118} See, e.g., Const. art. 26.1 (Italy) (allowing extradition of nationals only if a treaty allows for it); Feridun Yenisey, \textit{Some Legal Aspects of Terrorism in Western Europe and in Turkey}, 14 Kan. J.L. & Pub. Pol'y 643, 648 (2004–05) ("[C]ertain essential Articles of the Turkish Constitution [have] been amended to allow the extradition of Turkish nationals to fulfill Turkey's obligations arising from accession to the Convention on the International Criminal Court . . . ."); Extradition Act of March 9, 1967, Bulletin of Acts, Orders and Decrees, Stb. 139, as amended 1988, ch. 2 art. 4 (Neth.) (Netherlands Extradition Act, since 1988, has allowed the extradition of Dutch nationals, if done pursuant to an extradition treaty, though extradition treaties generally require that the person extradited be allowed to serve their custodial sentence in the Netherlands); Extradition Treaty, U.S.-Iraq, art. VIII, June 7, 1934, 49 Stat. 3380 ("Under the stipulations of this Treaty, neither of the High Contracting Parties shall be bound to deliver up its own citizens.").
\item \textsuperscript{119} Ivan Shearer, Extradition in International Law 96 (1971). According to Shearer:

Of the total of 163 extradition treaties printed in the League of Nations Treaty Series and the first 550 volumes of the United Nations Treaty Series, 98 except the nationals of the requested State absolutely, 57 give to the requested State a discretionary right to refuse to surrender its nationals, while only eight provide for extradition regardless of the nationality of the fugitive.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.} at 95.
\end{itemize}
nationality principle is also shown in an obligation to actually prosecute the perpetrator in these situations.121

2. Application in Extraterritorial Jurisdiction

Although the United States Supreme Court recognized early in its history the authority to punish offenses committed extraterritorially by U.S. nationals,122 the U.S. Congress has never promulgated a general rule relating to extraterritorial jurisdiction.123 Nevertheless, U.S. jurisprudence has approved jurisdiction over nationals who commit crimes abroad even though the relevant statute does not explicitly declare that it applies extraterritorially.124 The Supreme Court attempted to lay down a general rule of statutory interpretation with regard to extraterritorial offenses in United States v. Bowman:

The three defendants who were found in New York [but who committed the criminal acts while in Brazil] were citizens of the United States, and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.125

And again, in 1932, the Supreme Court stated in Blackmer v. United States: “[w]ith respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government.”126

The United States’ application of the nationality theory traditionally has not been as expansive as that in Europe.127 No general principle has ever been promulgated that U.S. criminal law should be applied to nationals wherever they may be.128 Often, the crimes

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121. Blakesley, Terrorism, supra note 94, at 126.
122. See Rose v. Himley, 8 U.S. (4 Cranch) 241, 279 (1808) (“It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.”).
124. See supra Part II.B.
127. Blakesley, Terrorism, supra note 94, at 131.
128. Id.
to which the nationality principle has been extended have been those that include a strong protectionist element or motive.\textsuperscript{129} Among the reasons jurisdiction was extended in \textit{Bowman}, for example, was the need to cover fraudulent acts committed extraterritorially by a national because of "the right of the government to defend itself against obstruction, or fraud wherever perpetuated, especially if committed by its own citizens, officers, or agents."\textsuperscript{130} Nevertheless, this combination of nationality and protective motive is neither required nor always applied.

Instead, nationality alone often plays a significant role in the application of U.S. legislation to extraterritorial conduct. Jurisdiction has been approved over U.S. nationals, for example, in the case of extraterritorial sexual exploitation.\textsuperscript{131} Nationality jurisdiction also has been applied to U.S. nationals assisting in the illegal immigration of alien contract laborers,\textsuperscript{132} and was even affirmed to prosecute a murder committed by a U.S. national on an uninhabited bat guano island.\textsuperscript{133} Courts have upheld a contempt judgment for failure to comply with a subpoena that had been served abroad by a consular officer,\textsuperscript{134} and sustained jurisdiction to require income tax payment by nationals domiciled abroad.\textsuperscript{135} In an ascribed nationality form of jurisdiction, Congress addressed shortcomings in jurisdiction over reservists by passing the Military Extraterritorial Jurisdiction Act in 2000, which extends federal jurisdiction over U.S. civilians accompanying the armed forces abroad.\textsuperscript{136} In sum, nationality or active personality jurisdiction has become increasingly important in U.S. law. Given the manner in which it has been interpreted, it would serve to grant jurisdiction over a U.S. citizen abroad who was engaged in or facilitating the exchange and dissemination of child pornography.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{See}, \textit{e.g.}, United States \textit{v.} Clark, 435 F.3d 1100 (9th Cir. 2006) (upholding a statute that made it a felony for any U.S. citizen who travels to a foreign country to then engage in an illegal commercial sex act with a minor).

\textsuperscript{132} \textit{See United States v. Craig}, 28 F. 795, 797 (1886).

\textsuperscript{133} \textit{See Jones v. United States}, 137 U.S. 202 (1890).

\textsuperscript{134} \textit{See}, \textit{e.g.}, Blackmer \textit{v. United States}, 284 U.S. 421, 437 (1932) (finding a U.S. citizen residing in France in contempt of court for failing to comply with a subpoena to be a witness in a criminal trial).

\textsuperscript{135} \textit{See}, \textit{e.g.}, Cook \textit{v. Tait}, 265 U.S. 47, 56 (1924) ("The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax.").

\textsuperscript{136} 18 U.S.C. §§ 3261–3267 (2000); \textit{see also} Tyler J. Harder, \textit{Moving Towards the Apex: Recent Developments in Military Jurisdiction}, \textit{Army Law.}, Apr./May, 2003, at 3.
C. The Protective Principle

The protective principle is the accepted traditional theory that allows jurisdiction over conduct posing a potential threat to certain important interests or functions of the asserting state. It is limited to recognized and stated interests or functions related to sovereignty and security. Most national penal codes or their jurisprudence recognize this principle and its limitations. The focus of the protective principle is the nature of the interest that is or may be injured, rather than the nationality of the perpetrator or the place of the harm or conduct. Some overlap between active nationality, objective territoriality, and the protective principles does exist. When a crime's effect infringes on the sovereignty or integrity of a state, for example, or impinges upon some important or basic governmental function, either theory may be appropriate depending upon whether the effect actually falls in some territorial situs. The objective territorial theory's applications are distinctions within, and expansions of, the general territorial principle, while the protective principle is an exception to it that does not require an actual territorial effect.

1. Theoretical Bases

Traditionally, the territorial theories were considered to be primary, but the protective principle, even though it does not require a territorial or nationality nexus, is not subsidiary to other theories. It provides jurisdiction over offenses committed wholly outside the forum state's territory when the offenses pose a danger of causing a serious adverse effect on a state's security, integrity, sovereignty, or a basic or important governmental function. Many

138. Id.; see also Restatement (Third), supra note 67, § 402(3) (“[A] state has jurisdiction to prescribe law with respect to ... certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”).
139. See, e.g., Harvard Research, supra note 72, at 543; The French Code of Criminal Procedure, in THE AMERICAN SERIES OF FOREIGN PENAL CODES 29 (Gerald L. Kock & Richard S. Frase trans., 1988) (“[A]nyone who, outside the territory of the [French] Republic, commits ... a felony or a delict against the security of the state ... shall be judged according to the provisions of French law.”).
140. Harvard Research, supra note 72, at 543.
141. See id. at 544-46.
142. See id. at 543.
143. Harvard Research described the traditional protective principle as follows: A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not
incidents of terrorism and other crimes against humanity committed against nationals or basic national interests will allow jurisdiction in the object state based on the protective principle. This may be true even if the conduct is aimed at or has an impact on individual nationals, as long as the violence or the offense in general is designed to intimidate, influence, or to extort some concession from the state or threaten its security, sovereignty, or important governmental function.

2. Application in Extraterritorial Jurisdiction

U.S. courts have generally assumed jurisdiction incident to the protective principle under two types of statutes:

(1) statutes which represent an effort by the government to protect itself against obstructions and frauds; and (2) statutes where the vulnerability of the United States outside its own territory to the occurrence of the prohibited conduct is sufficient, because of the nature of the offense, to infer reasonably that Congress meant to reach those extra-territorial [sic] acts.

The application of the protective principle is appropriate only if the violence is designed to intimidate the government or presents an actual or potential danger to U.S. sovereignty, security, integrity, or to an important governmental function.

committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

Harvard Research, supra note 72, at 543; see also Jackson Nyamuya Maogoto, Countering Terrorism: From Wiggled Judges To Helmeted Soldiers—Legal Perspectives on America’s Counter-Terrorism Responses, 6 San Diego Int’l L.J. 243, 258 (2005).

144. Harvard Research, supra note 72, at 553–54.


146. United States v. Layton, 509 F. Supp. 212, 218 (N.D. Cal. 1981) (relying on Strassheim v. Dailey, 221 U.S. 280, 285 (1911)), rev’d on other grounds, 720 F.2d 548 (9th Cir. 1983); see also United States v. Bowman, 260 U.S. 94, 98–99, 102 (1922) (extraterritorially applying a statute to protect against fraud on the U.S. Treasury when the defendants conspired to defraud a corporation in which the U.S. government had a significant interest); United States v. Pizzarutto, 388 F.2d 8, 9 (2d Cir. 1968) (extraterritorially applying statute prohibiting false statements in a visa application because it is natural to expect false statements in a visa application to be made outside the territorial limits of the United States).

147. See, e.g., Skiriotes v. Florida, 313 U.S. 69 (1941). The Supreme Court combined the protective and nationality principles as follows:

[A] criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the U.S. upon the high seas or in a foreign country, though there be no express declaration to that effect.

Id. at 73–74 (emphasis added); see also United States v. Cotten, 471 F.2d 744, 750 (9th Cir. 1973) (finding jurisdiction over the theft of government property overseas); Stegeman v. United States, 425 F.2d 984, 986 (9th Cir. 1970) (allowing jurisdiction for violations of bankruptcy laws relating to the concealment of assets, as the statute was enacted to serve
The distinction between the protective principle and the territorial theories was clearly articulated by the Second Circuit Court of Appeals in *United States v. Pizarusso*, where an alien was convicted of knowingly making false statements under oath in a visa application to a U.S. consul in Canada. The offense—making false statements—was completed entirely in Canada. Hence, no material element of the crime took place on U.S. territory. On the other hand, the crime's effect on U.S. sovereignty and basic governmental function supported jurisdiction on the basis of the protective principle. Lying to a consular officer in Canada constituted "an affront to the very sovereignty of the United States [and had] a deleterious influence on valid governmental interests." Attacking government officials working internationally is also within the protective principle.

Congress is free to extend jurisdiction extraterritorially if it wishes, including for protective reasons. As an exception to the general rule of freedom of the seas, Congress, for example, has been held to have recognized jurisdiction over "vessels in the high seas that are engaged in conduct that has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems." Similarly, the protective

*Important interests of government*, not merely to protect individuals who might be harmed by the prohibited conduct. *But see* United States v. Juda, 46 F.3d 961, 966–67 (protective principle alone is an insufficient nexus).


149. *Id.* at 9.

150. *Id.*

151. *Id.* at 10. The Second Circuit defined the protective principle clearly and aptly as:

"[The authority to] prescribe a rule of law attaching legal consequences to conduct outside [the state's] territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems."

*Id.* (quoting *Restatement (Second) of Foreign Relations Law of the United States § 33 (1965)*) (emphasis added).

152. *Pizarusso*, 388 F.2d at 10.


154. See *supra* note 147.


156. *United States v. Tiboco*, 304 F.3d 1088, 1108 (11th Cir. 2002) (quoting *Restatement (Second) of Foreign Relations Law of the United States § 33 (1965)*). Further, the Eleventh Circuit and others have not embellished the Maritime Drug Law Enforce-
principle justifies jurisdiction over conduct in international or foreign airspace.\footnote{157}

The protective principle's application to the Child Pornography Protection Act thus depends on whether rampant extraterritorial sexual exploitation of children in violation of U.S. laws, which is very difficult to track and prosecute, endangers U.S. citizens. The answer is self-evident.

D. \textit{The Passive Personality Principle}

The passive personality principle applies when a \textit{victim} of a crime is a national of the state asserting jurisdiction.\footnote{158} The theory provides a state with competence to prosecute and punish perpetrators of criminal conduct that is aimed at or harms nationals of the asserting state.\footnote{159}

1. Theoretical Bases

The principle can be traced back to the Middle Ages.\footnote{160} The notion was that since the essential object of criminal law was to protect the "King's Peace"—which included protecting public and private interests—the victim's national law had the best appreciation of what protection ought to be afforded.\footnote{161} Later, nineteenth century German criminalists promoted what they called \textit{Realsystem}, a combination of both the passive personality and the protective principle theories of jurisdiction.\footnote{162} Under \textit{Realsystem}, the nation of a victim had a right and a duty to protect itself, which it did by

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\item \footnote{157} See, e.g., United States v. Mena, 863 F.2d 1522, 1527 (11th Cir.1989) (rejecting a facial challenge to the MDLEA based on a lack of a "meaningful relationship" to the United States); United States v. Perez-Oviedo, 281 F.3d 400, 402-03 (3d Cir. 2002) ("Other Courts of Appeals have held that no nexus is needed between a defendant's criminal conduct and the United States in order for there to be jurisdiction, even when the vessel at issue is registered in a foreign country (as opposed to being stateless).")

\item \footnote{158} See, e.g., United States v. Felix-Gutierrez, 940 F.2d 1200, 1206 (9th Cir. 1991) ("Under the 'passive personality' principle, courts may assert extraterritorial jurisdiction on the basis of the nationality of the victim.").

\item \footnote{159} See, e.g., United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) (applying the passive personality principle because the nationality of the victims, United States government agents, "clearly" supported jurisdiction).

\item \footnote{160} Blakesley, \textit{Terrorism}, supra note 94, at 132.

\item \footnote{161} \textit{Id}.

\item \footnote{162} \textit{Id}.
\end{itemize}
\end{footnotesize}
protecting its citizens and prosecuting those who hurt them. Realsystem emphasized the protection of the state-injury manifested as an injury to a national—an injured victim constituted an injury to his state or sovereign.

2. Application in Extraterritorial Jurisdiction

As a basis of jurisdiction, the passive personality principle is not widely accepted. The Restatement of Foreign Relations Law provides the traditional repudiation: "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." Jurisdiction on the basis of the victim's nationality traditionally has not been well accepted in U.S. law and practice, except in certain specific and exceptional situations. The passive personality theory also "is generally frowned upon in international law"—or at least is seen as being of limited acceptability—but it is "unequivocally available in relation to international crimes."

Vigorous protestations have been sent by the U.S. State Department over assertions of jurisdiction based on the passive personality principle. One such protest was sent in the Cutting's Case. Mr. Cutting, a Texan and a U.S. national, was seized by Mexican authorities and jailed when he visited Mexico. He was to be

163. Id.
164. Id.
165. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965). This was not changed by the following Restatement. See generally RESTATEMENT (THIRD), supra note 67, §§ 402–03 (1987). Although § 402 of the Restatement (Third) is equivocal as to whether it rejects or accepts the passive personality principle, when read alongside comment (e), it appears to indicate that this theory is acceptable. See id. §§ 402–03 cmt. e. Certainly, given the wider acceptance of this principle, it would be difficult to say that international law bars a broad application of it.
166. Relevant court decisions seem to combine passive personality with other jurisdictional bases to offenses threatening national security and narcotics trafficking. See, e.g., United States v. Yousef, 327 F.3d 56 (2d Cir. 2003). The Second Circuit not only applied the passive personality principle to counts involving "a plot to bomb United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States," but also emphasized that the objective territorial principle was appropriate and that "there is no doubt that jurisdiction is proper under the 'protective principle . . . .'" Id. at 103.
168. See generally Cutting's Case, 1887 FOR. REL. 751 (1888), reported in 2 J.B. MOORE, INTERNATIONAL LAW DIGEST 232–40 (1906) [hereinafter Cutting's Case].
169. Id. at 229.
prosecuted for criminal libel, which he was alleged to have committed against a Mexican national while in Texas. The U.S. Secretary of State protested Mexico's assertion of jurisdiction, arguing that the passive personality principle was improper under traditional principles of international law:

[T]he assumption of the Mexican tribunal, under the law of Mexico, to punish a citizen of the United States for an offense wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government.

... [I]t is not now, and has not been contended, by this Government... that if Mr. Cutting had actually circulated in Mexico a libel printed in Texas, in such manner as to constitute a publication of the libel in Mexico within the terms of the Mexican law, he could not have been tried and punished for this offense in Mexico.

... As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction made in Article 186 of the Mexican Penal Code can be justified.

... [I]t has consistently been laid down in the United States as a rule of action, that citizens of the United States cannot be held answerable in foreign countries for offenses which were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state.

... To say that he may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility.

With regard to both international crimes and U.S. jurisdiction over terrorists the passive personality principle is in the ascendant, although usually connected to other bases of jurisdiction. The Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 and the USA PATRIOT Act, for example, have language suggesting use of the passive personality principle. The former articulates clearly that the purpose of the Act is to provide jurisdiction over,
prosecute and punish extraterritorial terrorism against U.S. Nationals. But they are both better interpreted as employing the protective principle. Although the passive personality principle could arguably be applicable to the victims of sexual exploitation over the Internet, the availability of other bases for jurisdiction makes its application unnecessary.

E. Universal Jurisdiction

Universal jurisdiction can be defined as "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction." These offenses are condemned by virtually all domestic law. Piracy is an example of one of these most ancient offenses of universal

1. Theoretical Bases

International law provides that there are certain offenses for which any nation that obtains jurisdiction over a person accused has a right and a duty to prosecute or to extradite. These offenses are condemned by virtually all domestic law. Piracy is an example of one of these most ancient offenses of universal

174. See supra Part II.C.
175. See id. In fact, the USA PATRIOT Act combines virtually all theories, without explicitly denominating them. Regardless, it is clear the nationality nexus provides jurisdiction when a U.S. national is a victim or perpetrator of terrorism. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §§ 917, 377, 804, 115 Stat. 272 (2006).
177. See, e.g., Demjanjuk v. Petrovsky, 776 F.2d 571, 581 (6th Cir. 1985) ("International law recognizes a 'universal jurisdiction' over certain offenses.") (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1965)); Attorney Gen. of Israel v. Eichmann, 36 Int'l L. Rep. 277, 304 (Isr. S. Ct. 1962) ("There exists a universal power vested in every State to prosecute for crimes of this type committed in the past—a power which is based on customary international law . . ."). Nations vary on the meaning of the term 'prosecute,' so that the rule has come to be defined as bringing one's prosecutorial mechanism to bear on an accused. See generally M.C. BASSIONI & EDWARD WISE, AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 5, 7 (1995).
178. Pinzauti, supra note 77, at 1095–97. Discussing a decision by Audiencia Nacional, one of the high appellate courts of Spain, Pinzauti summarizes that, "in the Court's opin-
interest.\textsuperscript{179} Several other crimes are so universally condemned that jurisdiction obtains in any nation in which the accused is found,\textsuperscript{180} and international conventions have provided universal jurisdiction in order to eliminate some of these crimes.\textsuperscript{181} These include, among other offenses: participation in the slave trade,\textsuperscript{182} air piracy, hijacking and sabotaging civil aircraft,\textsuperscript{183} war crimes,\textsuperscript{184} crimes against humanity,\textsuperscript{185} and genocide.\textsuperscript{186} Ad hoc international criminal tribunals have helped to make the idea of universal jurisdiction more concrete for several offenses and have helped to establish customary international law (\textit{jus cogens}) and true universal jurisdiction.\textsuperscript{187}

\textsuperscript{179} See, e.g., GREEN HAYWOOD HACKETT, 2 DIGEST OF INTERNATIONAL LAW 681 (1941) ("It has long been recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them.").


\textsuperscript{181} Although some do not consider these crimes universal in the classical sense because they are made so by convention, they function universally for all parties to the conventions and often become part of customary international law.

\textsuperscript{182} See, e.g., Geneva Convention on the High Seas arts. 13, 22, Sept. 30, 1962, 13 U.S.T. 2312, 450 U.N.T.S. 82 ("A warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting . . . [t]hat the ship is engaged in the slave trade.").


\textsuperscript{185} See, e.g., Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. The Rome Statute defines a "crime against humanity" as any of a number of listed acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (emphasis added).


\textsuperscript{187} For example, one court has noted:

The more recently established international criminal tribunals have continued to enforce norms against crimes against humanity and war crimes. The international criminal tribunal for the former Yugoslavia has also been enforcing
2. Application in Extraterritorial Jurisdiction

Terrorism is quickly becoming a crime of universal jurisdiction. Treaties and domestic criminal laws define “terrorism” to include several separate universally condemned offenses—including abducting people and intentional or wanton violence against innocent civilians.\textsuperscript{188} Each of these “terrorist” activities can easily be associated with the sexual exploitation of children over the Internet.

Recently, many multilateral treaties have condemned various international offenses that could be characterized as terrorism under this broad definition. International conventions proscribing genocide, apartheid, and hostage-taking provide examples of a type of universal jurisdiction established among states-parties that either reflects or has developed into customary international law.\textsuperscript{189} For example, the Hague Convention grants all contracting parties jurisdiction over unlawful seizures of control of aircraft and obligates the party obtaining custody of the alleged hijackers to prosecute or extradite them,\textsuperscript{190} and the Montreal Convention extends the Hague Convention to include acts of sabotage.\textsuperscript{191} The obligations in these treaties have likely become customary international law, as virtually all nations consider themselves legally obliged to abide by their rules. When this occurs, they become truly universal crimes. Domestic legislation has been promulgated to incorporate these conventions, notably in Europe and the United States.\textsuperscript{192} The U.S. legislation incorporating the Hague and

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prohibitions against war crimes and crimes against humanity. Several of the defendants have received prison sentences. Likewise, the international criminal tribunal for Rwanda has brought several cases charging crimes against humanity and has imposed prison sentences. Given that these tribunals have prosecuted and punished individuals for committing war crimes and crimes against humanity, the Court finds both of these claims to be binding international law norms. These past and ongoing proceedings demonstrate that these are “enforceable obligations.”


\textsuperscript{190} Hague Convention, supra note 183, arts. 1–4.

\textsuperscript{191} Montreal Convention, supra note 183, art. 1.

Montreal Conventions has been held to allow jurisdiction over child sexual abuse done by a foreign national aboard a foreign airliner in international airspace in the “special maritime and territorial jurisdiction” of the United States.193

But it is not always easy to determine the point at which customary international law and the application of true universal jurisdiction is created. The International Court of Justice, in the Arrest Warrant Case (Democratic Republic of The Congo v. Belgium), noted that although the “purpose of multilateral treaties is to assure universal punishment of the offences in question by denying perpetrators refuge in all States, it is incorrect to denominate this jurisdiction as true universal jurisdiction.”194 Judge Rosalyn Higgins, President of the International Court of Justice, has also made this point, noting that such conventions do not actually create true “universal jurisdiction,” or even “treaty-based universal jurisdiction,” because the treaties create obligations only in States Parties, not universally in all states.195 The latter does not occur until a customary rule of international law arises from the treaty regime or the practice of states (with opinio juris) surrounding the principles of the treaty.196 Thus, such multilateral treaties, unless they rest upon customary international law, “oblige contracting States to enact domestic (or ‘municipal’) laws that proscribe certain conduct.”197

place weapons, loaded firearms, and explosive or incendiary devices aboard an aircraft, including in the baggage).


195. Rosalyn Higgins, Problems and Process: International Law and How We Use It 64 (1994) (stating that jurisdiction created by treaty is never “universal jurisdiction stric to sensu” because only States parties are vested with jurisdiction by the treaty); see also United States v. Yousef, 327 F.3d 56, 95 n.29 (2d Cir. 2003) (citing both Arrest Warrant of 11 Apr. 2000 and Judge Higgins’s Problems and Process: International Law and How We Use It).

196. See Restatement (Third), supra note 67, § 201(3) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

197. Yousef, 327 F.3d at 95 n.29; see also Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents art. 2(2), Dec. 28, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (“Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.”); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1), Dec. 20, 1988, 28 I.L.M. 493, 500 (“Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when [certain offenses are] committed intentionally.”).
The Second Circuit Court of Appeals, in *United States v. Yousef*, noted that "confusion on this point is common among commentators and advocacy groups, who regularly speak of a State’s jurisdictional obligations that arise pursuant to a treaty as investing the State with ‘universal jurisdiction.’" But the Second Circuit is confused in its own right, unless it includes the caveat that such conventions can and do reflect customary international law when based on already extant customary international law or *jus cogens* principles. If the latter is true, the treaties are already part and parcel of true universal jurisdiction. The Second Circuit notes:

Principles of customary international law reflect the practices and customs of States in the international arena that are applied in a consistent fashion and that are generally recognized by what used to be called "civilized states." That is, principles of customary international law consist of the "settled rule[s] of international law" as recognized through "the general assent of civilized nations."

Although customary international law requires that the rule be "settled," it is settled because nations believe they are obligated to follow the rule. This may make the application of universal jurisdiction to the Child Pornography Prevention Act difficult, but not implausible—its true application would depend upon the current state practices.

Discerning these state practices returns us to the possible inclusion of Internet sex crimes against children under the definition of "terrorism." International law condemns terrorism and provides bases for all nations to assert jurisdiction over its perpetration and its perpetrators, whether they are state functionaries or rebel groups. Relative to the United States, the F.B.I. currently defines terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce government, the civilian population, or any segment thereof, in furtherance of political or social objectives." In addition, Executive Order 13,224 issued

198. *Yousef*, 327 F.3d at 95 (citing AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION ch. 13, at 1 (2001) ("There are a number of crimes other than war crimes, crimes against humanity, [and] genocide . . . over which states may exercise universal jurisdiction, usually pursuant to treaties imposing a prosecute or extradite obligation on the states parties.") (emphasis added)).

199. *Id.* at 92 (citing The Paquete Habana, 175 U.S. 677 (1900)).

200. RESTATEMENT (THIRD), supra note 67, § 102 cmt. c ("For a practice of states to become a rule of customary international law [sic] it must appear that the states follow the practice from a sense of legal obligation.").


by President George W. Bush on September 23, 2001, defines terrorism as follows:

[A]n activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.203

One could argue that the responsibility to desist from promoting or committing terrorism, and actively to combat it, devolves on all nations universally because terrorism consists of universally condemned conduct.204 Although no multilateral treaty explicitly states as much, clearly the universality principle would apply to many of today's terrorist activities. The crime of sexual exploitation of children through the Internet and human trafficking could certainly be included within these categories, if such conduct is designed to intimidate, coerce, or to cause fear in a government or population.

F. Jurisdiction Over Child Exploitation

Many bases for claiming extraterritorial jurisdiction over child exploitation exist. When the offense is deemed to be one of primary importance, such as when it impinges on national security, most nations claim primary jurisdiction under the protective principle.205 This might be most appropriate for jurisdiction over the Child Pornography Protection Act and others outlawing the use of cyber-space to exploit children and women because such crimes have an impact on a state's security, sovereignty and important governmental interests.206 The same cannot necessarily be said of


205. See, e.g., United States v. Kolly, 48 M.J. 795, 797 (N.M. Ct. Crim. App. 1998) ("[A]ct applies extraterritorially because] of the well-established principles behind extraterritorial application of statutes including the necessity of congressional intent and the inherent right of a sovereign to protect its Governmental functions and to regulate the conduct of its own citizens regardless of their location.").

206. It may also be argued that certain types of conduct in which one takes violent action, knowing there is a high degree of risk to innocents, may be termed terrorism. Risking the lives and well-being of innocent people is similar to conduct punished as felonious reckless homicide in substantive criminal law. Cf. PERKINS, supra note 68, at 59-61 (defining depraved-heart murder or wanton and willful disregard as unreasonable human risk).
drug trafficking or money laundering, and some U.S. courts have rejected the application of the protective principle as the sole basis for extraterritorial jurisdiction with the former.\textsuperscript{207} The universality theory of jurisdiction, which allows the assertion of jurisdiction over \textit{jus cogens} offenses\textsuperscript{208} even though they have no effect on the territory, security, or sovereignty of the asserting state, would also be a proper jurisdictional basis, especially when the conduct involves enslavement or an attempt to enslave. When the conduct in question is committed by or against a U.S. national—as was the case in \textit{United States v. Martinelli}—or when an element of the offense or a substantial effect occurs on U.S. territory, jurisdiction ought to be easily accepted.

IV. IMPLIED EXTRATERRITORIALITY AND AN ISOLATED OPINION

As noted above, there is ordinarily a presumption against the extraterritorial application of criminal statutes.\textsuperscript{209} Certain offenses, such as assault or arson, for example, are usually considered to be logically bound to the \textit{locus delictus} and, therefore, should only apply within the territory of the sovereign.\textsuperscript{210} The Supreme Court has held, however, that the territorial presumption does not govern the interpretation of criminal statutes or statutory schemes which, by their nature, would be greatly curtailed if limited to domestic application.\textsuperscript{211} These are a class of offenses not logically bound to the \textit{locus delictus} and, absent express language barring extraterritorial application, extraterritoriality is implied.\textsuperscript{212} In determining whether extraterritorial application is implied in a statute a court should examine all available evidence, including the text of the statute, its structure, its legislative history, the type of crime in question, and the impact on the relevant legislative scheme.\textsuperscript{213}

\textsuperscript{207} See, \textit{e.g.}, United States v. Juda, 46 F.3d 961, 966–67 (1995) (concluding that the prosecution of a stateless vessel does not require the government to prove a nexus between the defendant and the United States to obtain jurisdiction and satisfy the due process clause).

\textsuperscript{208} See generally Pinzauti, \textit{supra} note 77, at 1095.

\textsuperscript{209} See \textit{supra} notes 20–21 and accompanying text.


\textsuperscript{211} \textit{Id}.

\textsuperscript{212} \textit{Id}.

\textsuperscript{213} See, \textit{e.g.}, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993). The Supreme Court noted that it considered “all available evidence about the meaning of” the relevant section, including “the Government official at whom it is directed, its location in the Act, its failure to suggest any extraterritorial application, the 1980 amendment that gave it a
Since the holding of *United States v. Bowman*, federal courts have found implied extraterritoriality in numerous offenses, ranging from narcotics possession to terrorism.\(^{214}\) The CAAF, however, departed from this jurisprudence and adopted a rather myopic reading of *United States v. Bowman* and the theory of implied extraterritoriality—finding that a court could infer Congressional intent for extraterritorial application only in criminal statutes specifically pertaining to fraud or obstructions against the U.S. Government.\(^{215}\) As child pornography or sexual exploitation of a child does not fit beneath the rubric of “frauds or obstructions against the United States,” the CAAF limited the Child Pornography Prevention Act of 1996 to purely domestic application.\(^{216}\)

The court also based its ruling on the flawed theory that the multitude of cases which have found implied extraterritoriality for a host of offenses are based on a Fifth Circuit opinion with which the CAAF disagrees.\(^{217}\) A review of the law of other federal circuits, however, shows the CAAF’s view of legal history to be erroneous and its narrow view of implied extraterritoriality to be in complete legal isolation. Additionally, nothing in international or U.S. foreign relations law would bar extraterritorial application of the Child Pornography Prevention Act, and, in fact, several theoretical bases for jurisdiction exist.

A. *Around the Horn: A Look at the Federal Consensus*

The First Circuit has read *United States v. Bowman* to apply to the possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1).\(^{218}\) The First Circuit noted that the statutory dual reference to ‘deport or return,’ and the relevance of that dual structure to immigration law in general.” *Id.* at 177.

\(^{214}\) See, e.g., Collazos v. United States, 368 F.3d 190, 200 (2d Cir. 2004) (offering examples such as money laundering, drug trafficking, wire fraud, and international terrorism).


\(^{216}\) *Id.* The CAAF also stated:

> We do not believe that the CPPA can be viewed as a “second category” offense under *Bowman* and thus exempt from application of the presumption against extraterritoriality. The ultimate objective behind the criminal proscription of activities pertaining to child pornography is to protect children from abuse. While few crimes are more serious or morally repugnant, child abuse does not involve “fraud” or “obstruction” against the United States Government. Rather, child abuse epitomizes that class of “[c]rimes against private individuals [including children]” that “affect the peace and good order of the community” described in the first category of *Bowman*.

*Id.* (citation omitted).

\(^{217}\) *Id.*

\(^{218}\) *United States v. Hayes*, 653 F.2d 8, 15–16 (1st Cir. 1981).
provision itself made no mention of extraterritorial application,219 and stated an obligation to determine from the legislative history and nature of the offense whether one can infer a Congressional intent of extraterritoriality.220 The court analyzed the statute and the type of crime in question and held that, so long as it was clear that the intended distribution of marijuana would occur within the territorial United States, jurisdiction may be maintained—even where defendants are apprehended outside U.S. territory.221 Thus, the First Circuit read United States v. Bowman to apply to extraterritorial drug offenses in cases in which it was clear that the drugs would be imported into the United States.222

The Second Circuit, in United States v. Yousef, considered the extraterritorial application of crimes committed by defendants who violated 18 U.S.C. § 371 by conspiring to place bombs on board aircraft.223 In ruling that the statute applied extraterritorially, the court noted, “this conclusion is a simple application of the rule enunciated by the Supreme Court as long ago as 1922 in Bowman.”224 A conspiracy to blow up an airplane is obviously not a fraud or obstruction against the United States, as was the case in United States v. Bowman.225 Yet the Second Circuit read Bowman to give extraterritorial application to the laws criminalizing that conduct.226

The Third Circuit has expressly granted extraterritorial application to laws criminalizing child pornography and sexual predation.227 In United States v. Harvey, the court expressly held that, although no language in the Protection of Children Against Sexual Exploitation Act stated that the criminal statutes applied extraterritorially, United States v. Bowman permitted the court to find that provisions of that act applied to conduct overseas.228 Citing numerous cases, as well as the Act’s Congressional history, the court stated, “Congress enacted its statutory scheme ‘as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of [child pornography].’ To

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219. Id. at 15.
220. Id.
221. Id. at 15–16.
222. Id.
224. Id.
226. Yousef, 327 F.3d at 135–36.
228. Id. at 1927–28.
deny [extraterritorial application of the Act] would be to greatly
curtail the scope and usefulness of the statute[s].”229

The Fourth Circuit, considering the crime of conspiracy to
import heroin, also found extraterritorial application.230 This was
not as a result of the statutory language, but because United States v.
Bowman allowed such extraterritorial application to be inferred.231
The court noted that “[t]he present statutory sanctions against
importation of narcotics so precisely match the proscriptions in
Bowman that further citation would be superfluous.”232

The Fifth Circuit likewise held that statutes criminalizing the
illicit possession and trafficking of narcotics, though silent on the
issue of extraterritorial application, apply extraterritorially.233 The
court concluded, “[t]he statutes in the present case are silent as to
their extraterritorial application. Clearly, however, such statutes
may be given extraterritorial application if the nature of the law
permits it and Congress intends it.”234 In so ruling, the Fifth Cir-
cuit expressly found that United States v. Bowman applies to offenses
other than frauds or obstructions against the United States, stating:

The nature of the enactment here in question mandates an
extraterritorial application under the second category described
in Bowman. These two statutes are part of a comprehensive legis-
latve scheme designed to halt drug abuse in the United States
by exercising effective control over the various domestic and for-
eign sources of illegal drugs.235

Numerous decisions from this same circuit have since ramified
this expansive view of implied extraterritoriality.236

The Seventh Circuit has not yet had the opportunity to exten-
sively address the application of United States v. Bowman and its lim-
its. In obiter dicta, however, the court indicated that it would follow
the normal understanding of Bowman and apply the ruling to a
broad class of crimes, such as narcotics-related offenses:

The efforts of the defendant to avoid actual contact with the
United States while profiting from its illegal drug trade exemplify the sort of evasive tactics the Government must combat in

229. Id. at 1327 (quoting United States v. Wright-Barker, 784 F.2d 161, 167 (1986)
(quoting United States v. Bowman, 260 U.S. 94, 98 (1922)).
231. See id.
232. Id.
234. Id. at 136 (citing United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977)).
235. Id.
236. See, e.g., United States v. Villanueva, 408 F.3d 193, 199 (5th Cir. 2003); United
States v. Palella, 846 F.2d 977 (5th Cir. 1988).
attempting to control this traffic. Like the Fifth Circuit, we therefore might not be inclined to limit extraterritorial criminal jurisdiction over aliens whose intended actions, if successful, would compromise this sovereign’s control of its own borders.\textsuperscript{237}

The Ninth Circuit, in 2002, considered the breadth of United States v. Bowman vis-à-vis federal laws criminalizing sexual contact with a minor.\textsuperscript{238} Citing Bowman in discussing the extraterritorial application of 18 U.S.C. § 2244(a)(3), the court explained, “Because the statute in question here explicitly applies outside the United States and because exercising jurisdiction does not offend any principle of international law, we hold that extraterritorial jurisdiction is proper.”\textsuperscript{239}

The Eleventh Circuit has applied Bowman to give extraterritorial effect to federal law criminalizing smuggling, even absent express language in the statute.\textsuperscript{240} Explaining the general consensus that Bowman applies to a wide range of statutes, the court concluded: “On authority of Bowman, courts in this Circuit and elsewhere have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.”\textsuperscript{241}

Likewise, the Court of Appeals for the District of Columbia read United States v. Bowman to allow the extraterritorial application of statutes criminalizing conduct encouraging aliens to illegally enter, and attempting to bring unauthorized aliens into the United States.\textsuperscript{242} In so holding, the court stated that “the fact that this statute is international in focus shows that it applies extraterritorially. There is also specific textual evidence that . . . ‘the natural inference from the character of the offense[s]’ is that an extraterritorial location ‘would be a probable place for [their] commission.’”\textsuperscript{243}

The Sixth, Eighth, and Tenth Circuits have yet to extensively address United States v. Bowman and its extraterritorial implications.

\textsuperscript{237} United States v. Schmucker-Bula, 609 F.2d 399, 403 (7th Cir. 1980). It is worth noting that, though the court showed favor to the Fifth Circuit’s analysis, it never once referenced United States v. Baker.

\textsuperscript{238} United States v. Neil, 312 F.3d 419 (9th Cir. 2002).

\textsuperscript{239} Id.

\textsuperscript{240} United States v. Plummer, 221 F.3d 1298, 1304–06 (11th Cir. 2000) (“Congress need not expressly provide for extraterritorial application of a criminal statute if the nature of the offense is such that it may be inferred.”) (quoting United States v. McAllister, 160 F.3d 1304, 1307–08 (11th Cir. 1998)).

\textsuperscript{241} Id. at 1304–05.

\textsuperscript{242} United States v. Delgado-Garcia, 374 F.3d 1337, 1344 (D.C. Cir. 2004).

\textsuperscript{243} Id. at 1345 (quoting United States v. Bowman, 260 U.S. 94, 99 (1922)).
As demonstrated above, however, a review of every other federal circuit reveals unanimity of opinion that extraterritoriality can be applied in a broad range of criminal statutes—not merely frauds or obstructions against the United States.\textsuperscript{244} Thus, the CAAF's holding in \textit{United States v. Martinelli} is in complete dissonance with the consistent jurisprudence of every other federal circuit.

B. \textit{Revisionist Legal History}

The CAAF's reasoning also posits an erroneous legal history of implied extraterritoriality. The CAAF asserts that the standard interpretation of \textit{United States v. Bowman} (holding that it applies to a broad class of crimes) is rooted in the Fifth Circuit's \textit{United States v. Baker} decision.\textsuperscript{245} Finding fault in a single source from which all other opinions were derived could easily explain a court's deviance from a standard interpretation of the law, but a review of the jurisprudence regarding extraterritoriality does not support this view.

The Third Circuit, for example, has applied \textit{United States v. Bowman} to narcotics statutes, but has done so based on its own reading of the law. The case routinely cited by that circuit in its discussion of the law is \textit{United States v. Baker}.\textsuperscript{246} The view that the Third Circuit's jurisprudence is rooted in the logic of the \textit{Baker} case is, therefore, incorrect. Similarly, the Fourth Circuit ruled that extraterritoriality could be implied absent express language in narcotics statutes almost nine years before \textit{Baker} was decided.\textsuperscript{247} The Fifth Circuit had also ruled that extraterritoriality could be implied in smuggling statutes prior to \textit{Baker}.\textsuperscript{248} Ninth Circuit jurisprudence explaining the law of implied extraterritoriality does not rely on any Fifth Circuit jurisprudence, but rather a line of Ninth Circuit cases that date back to 1967.\textsuperscript{249} The Eleventh Circuit did not cite one specific case, instead relying on the established jurisprudence


\textsuperscript{246} 784 F.2d 161 (3d Cir. 1986).

\textsuperscript{247} United States v. Brown, 549 F.2d 954, 957 (4th Cir. 1977).

\textsuperscript{248} United States v. Mitchell, 553 F.2d 996, 1002, 1005 (5th Cir. 1977) (finding that extraterritoriality did not apply, yet demonstrating a willingness to apply a smuggling statute extraterritorially).

\textsuperscript{249} \textit{See} United States v. Vasquez-Velasco, 15 F.3d 833, 839 n.4 (9th Cir. 1994).
of the majority of federal courts to determine extraterritoriality could be implied in other criminal statutes.\textsuperscript{250}

Thus, the consistent jurisprudence finding that extraterritoriality can be implied in a broad range of offenses is not rooted in any single decision, but is based instead on the individual determinations of each individual federal circuit, many of which predate \textit{Baker}. Accordingly, the CAAF cannot point to a single poisoned root to explain its own deviance from the norm. Rather, it must contend with its own uniquely narrow view of the law that has no support in precedent.

C. \textit{Erroneous Statutory Interpretation}

With clear precedent for the extraterritorial application of a wide array of criminal statutes, we turn specifically to the Child Pornography Prevention Act. In determining whether or not extraterritorial application is implied in a statute, a court should examine all available evidence, including the text of the statute, its structure, its legislative history, the type of crime in question, and the impact on the relevant legislative scheme.\textsuperscript{251} The CAAF failed to properly consider the legislative history or the special nature of Internet child pornography and similar Internet-based sexual exploitation.

In its analysis of 18 U.S.C. § 2252A, the CAAF seemed to indicate that it could rest its analysis after a review of the statutory text,\textsuperscript{252} rather then engaging in the multi-level analysis required by the case law. Accordingly, the court only performed a cursory analysis of the statute's legislative history.\textsuperscript{253} Likewise, the CAAF compared the crime of Internet child pornography to physical child abuse,\textsuperscript{254} ignoring the unique aspects of Internet-based child exploitation and relegating them to the category of offenses logically dependant on the \textit{locus delictus}. The combination of both errors was a mistaken analysis of the nature of the crime under consideration and the intent of Congress when passing the legislation.

\textsuperscript{250} United States v. McAllister, 160 F.3d 1304, 1307–08 (11th Cir. 1998) ("Congress need not expressly provide for extraterritorial application of a criminal statute if the nature of the offense is such that it may be inferred."); see also United States v. Plummer, 221 F.3d 1298, 1304–05 (11th Cir. 2000) ("On authority of \textit{Bowman}, courts in this Circuit and elsewhere have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.").


\textsuperscript{253} See \textit{id.} at 61–62.

\textsuperscript{254} \textit{Id.} at 58.
Determining the legislative intent, of course, may be problematic. The "usual rules of statutory interpretation will not suffice," or are at least difficult to apply, in the area of extraterritorial jurisdiction and choice of law for two reasons: (1) it is rare that Congress provides an extraterritorial directive; and (2) judges may be hard-pressed rationally to assume that legislators thought about or discussed issues of extraterritorial jurisdiction when promulgating laws.\textsuperscript{255} Instead, legislative intent may sometimes be seen as "a judicial fiction."\textsuperscript{256}

On the other hand, on occasion it is possible to determine that a statute or set of statutes is meant to apply extraterritorially, especially when a law has evolved due to advances in technology and the concomitant development of new crimes. When legislation is amended to address new technologies or context that indicates the prior legislative scope was too limited, it is appropriate to infer intent to expand jurisdiction. This was the case with the Child Pornography Prevention Act of 1996. Regarding the Act's legislative history, the CAAF notes that "[t]he clear focus . . . is on the patent evils of child pornography and the new dimension that computer technology adds to those evils. . . . [T]he Act is devoid of any reference to issues of extraterritoriality, much less any clear expression of congressional intent in that regard."\textsuperscript{257} In so finding, CAAF completely disregarded the unique global aspect of Internet-based child exploitation—an aspect that Congress clearly considered when enacting and augmenting the legislative scheme that includes 18 U.S.C. § 2252A.

Enacted by the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A was subsequently updated and strengthened by the Protection of Children from Sexual Predators Act (PCSPA).\textsuperscript{258} In the legislative history of the PCSPA one finds that Congress was specifically concerned about the global aspect of the Internet:

The goal of H.R. 3494, and of the [Protection of Children from Sexual Predators Act] . . . is to provide stronger protections for children from those who would prey upon them. Concerns over protecting our children have only intensified in recent years with the growing popularity of the Internet and the World Wide Web. Cyberspace gives users access to a wealth of information; it


\textsuperscript{256} Id.

\textsuperscript{257} Martinelli, 62 M.J. at 61 (citation omitted).

connects people from around the world. But it also creates new
opportunities for sexual predators and child pornographers to
ply their trade.\textsuperscript{259}

Congress was thus aware of the international aspect of child
pornography and other Internet crimes. The rationale in \textit{United States
v. Martinelli} clearly indicates that CAAF was not. But not only did
the CAAF fail to properly consider the Congressional intent
behind the legislative scheme enacted by Congress to “provide
stronger protections for children from those who would prey upon
them,”\textsuperscript{260} it also misconstrued the nature of the crime it was consid-
ering. Just as the Supreme Court in \textit{United States v. Bowman} took
into consideration the context in which the criminalized conduct
was likely to occur, the modes of transport that were integral to its
commission, and the international character of crime under con-
sideration, so too should the CAAF have considered the context in
which child exploitation on the Internet is likely to occur.

One cannot combat Internet-based crime if one is limited to
domestic application of criminal laws. Technology has changed
the landscape of sexual exploitation of children. As a result of the
Internet and the concomitant advances in communication, a sex-
ual predator may operate without consideration of territorial
boundaries, and children in the United States are potential prey
for pedophiles around the globe.\textsuperscript{261} As one commentator noted,
“As an international system, the Internet . . . is considered
the ‘absolute best hunting ground (for a) pedophile,’ and ‘the most
efficient pornography distribution engine ever conceived.’”\textsuperscript{262}
The CAAF should have noted the intrinsically international char-
acter of Internet child predation and the absence of any logical terri-
torial tie.

Given the unique, international nature of the Internet, and the
Congressional intent to combat sexual exploitation of children
over the Internet, 18 U.S.C. § 2252A is clearly part of a legislative
scheme that would be greatly curtailed if not given extraterritorial


\textsuperscript{260} \textit{Id.}

\textsuperscript{261} See Blakesley, \textit{Wings for Talons}, supra note 17, at 111 (“Cyberspace has no bor-
ders[,] and distance [in] that realm is irrelevant. Today, a child in rural Alabama is poten-
tial prey for sexual predators in Munich, Germany.”).

\textsuperscript{262} Lesli C. Esposito, \textit{Regulating the Internet: The New Battle Against Child Pornography}, 30
July 3, 1995, at 1; Bill Frezza, \textit{Morality and Imagination: Technology Challenges Both}, COMM.
Wk., Jan. 13, 1997) (noting that, according to Interpol, an international police organiza-
tion, the Internet was the genesis of child pornography rings in Europe involving over
30,000 pedophiles).
application. Accordingly, all federal courts, including the CAAF, should infer from the legislative history, the type of crime in question, and the impact on the relevant legislative scheme, that 18 U.S.C. § 2252A applies extraterritorially.

D. International Law Allows Extraterritorial Jurisdiction

Domestic law obviously limits jurisdiction, and, on the enforcement side, may preclude prosecution or enforcement of a judgment rendered by a state that assumed jurisdiction or that sought extradition. In the United States, as in virtually all countries, jurisdiction must comply with constitutional principles, such as those relating to the separation of powers, federalism, and due process.

But international law also plays a role in the application of extraterritorial jurisdiction as it limits or expands a state’s authority to apply its domestic law to events that occur outside that state’s territory. Furthermore:

International law is the language by which nations attempt to resolve competing legal interests among themselves. As with any other language, if the definitions or essential concepts become muddled, it is difficult to communicate. ... Confusion over the traditional bases of jurisdiction therefore often leads to disagreement, diplomatic protest, or refusal to cooperate.

263. See Blakesley, Wings for Talons, supra note 17, at 112 (“To combat modern sexual predators, it is not enough to have talons. One must also have wings.”).
264. The U.S. Constitution provides:

The Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2; see also Willis L. M. Reese, Limitations on the Extraterritorial Application of Law, 4 DALHOUSE L.J. 589, 589 (1978).
265. See Adolf Homberger, Recognition and Enforcement of Foreign Judgments, 18 AM. J. COMP. L. 367, 375 (1970). This is a function of the principle of double criminality.
266. See, e.g., supra note 264. Cf. United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) (holding that the Due Process Clause of the U.S. Constitution may constrain the extraterritorial reach of the MDLEA, but that it does not necessarily impose a nexus requirement because Congress promulgated the law pursuant to the Piracies and Felonies Clause).
267. See, e.g., Cutting’s Case, supra note 168, at 238–39 (stating that the sanction for violating international law on jurisdiction may be an unfavorable diplomatic protest); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 14 (Sept. 7) (indicating that although international law is permissive, a sanction for a violation may be an unfavorable judgment in the International Court of Justice (ICJ)).
268. Christopher L. Blakesley, Extraterritorial Jurisdiction, in INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 34 (M. Cherif Bassiouni ed., 2d ed. 1999). The United States’ attempt to immunize all U.S. nationals from the jurisdiction of
This confusion also poses difficulties for courts in interpreting statutory, or even constitutional, language. Some of the potential for confusion in the United States, however, is resolved by the presumption that law in the United States is territorially bound.

When determining the potential extraterritorial effect of a statute, the Supreme Court noted that “if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: ‘[A]n act of congress [sic] ought never to be construed to violate the law of nations if any other possible construction remains.’” Thus, after deciding whether implied extraterritoriality can be read from the statute, the Court’s next step is to determine whether the assertion of extraterritorial jurisdiction violates international law. As Justice Scalia wrote, this analysis is “‘wholly independent’ of the presumption against extraterritoriality [and] is relevant to determining the substantive reach of a statute because ‘the law of nations,’ or customary international law, includes limitations on a nation’s exercise of its jurisdiction to prescribe.” Both international law and U.S. foreign relations law recognize the legitimate application of national criminal law outside of a nation’s borders unless international law prohibits a specific jurisdictional application, and recognize the right of a country to apply its statutes to the extraterritorial acts of its citizens abroad. Thus, in addition to not barring extraterritorial jurisdiction in United States v. Martielli, current U.S. and international legal regimes actually envision it.

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269. See supra Parts IV.A, IV.C.
270. See, e.g., United States v. Yakou, 428 F.3d 241, 252 (D.C. Cir. 2005) (“Federal laws are deemed to apply only to the territorial jurisdiction of the United States unless Congress provides ‘affirmative evidence’ to the contrary, which is ‘clearly expressed.’” (citations omitted)).
272. See, e.g., United States v. Yousef, 927 F.3d 56, 86 (2d Cir. 2003) (“In determining whether Congress intended a federal statute to apply to overseas conduct, ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.’” (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963))).
274. See, e.g., S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 14 (Sept. 7) (indicating that although international law is permissive, a sanction for a violation may be an unfavorable judgment in the ICJ).
275. See, e.g., United States v. King, 552 F.2d 833, 850–52 (9th Cir. 1976).
V. CONCLUSION

The legal principles detailed in this Article provide a constellation of reasons to apply U.S. laws on cyber-based sexual exploitation extraterritorially. Though U.S. jurisprudence still follows a general presumption against extraterritoriality, modern courts have recognized the need for addressing criminal acts that are capable of perpetration without regard to any particular locale. In such instances, contemporary jurisprudence recognizes that the extraterritoriality of a statute can be implied. Since the holding of the Supreme Court in United States v. Bowman, U.S. courts have found such implied extraterritoriality in a wide range of criminal statutes. This greater willingness to extend the extraterritorial effects of domestic criminal law has been coextensive with social changes and technological advances that have made extraterritorial jurisdiction increasingly necessary. In United States v. Martinelli, the CAAF ignored the overwhelming weight of jurisprudence addressing extraterritorial jurisdiction and stepped back a hundred years to adopt a myopic reading and place itself at odds with almost every contemporary federal court. The reasoning CAAF employed to arrive at its decision is legally suspect, and the results of its flawed decision are disturbing.

A review of the history of the contiguous legislative scheme criminalizing the sexual exploitation of children reveals it to be one designed to combat a pervasive, global, and borderless evil that relentlessly seeks to victimize the innocent. The legislative scheme enacted by Congress to combat this international malevolence would be greatly curtailed by limiting its effectiveness to national borders. Further, a review of the accepted international bases for jurisdiction show that several of the international legal principles of jurisdiction are applicable to this type of crime. Therefore, not only is extraterritorial jurisdiction over Internet pedophiles acceptable under domestic law and legal theory, it is also appropriate under international law.

Contemporary U.S. jurisprudence consistently recognizes that statutes combating certain crimes (terrorism, narcotrafficking, etc.) apply extraterritorially due to the borderless nature of the crimes they address. The decision by the CAAF in United States v. Martinelli stands as an anomaly in an otherwise consistent body of jurisprudence. Future courts faced with the issue of extraterritorial jurisdiction should seek guidance in the prescience of those other judicial opinions rather than emulate the myopia of United States v. Martinelli.