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### United States Jurisdiction Over Extraterritorial Crime

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# UNITED STATES JURISDICTION OVER EXTRATERRITORIAL CRIME

CHRISTOPHER L. BLAKESLEY\*

## I. INTRODUCTION

The term jurisdiction may be defined as the authority to affect legal interests—to prescribe rules of law (legislative jurisdiction), to adjudicate legal questions (judicial jurisdiction) and to enforce judgments the judiciary made (enforcement jurisdiction).<sup>1</sup> The definition, nature and scope of jurisdiction vary depending on the context in which it is to be applied. United States domestic law, for example, defines and applies notions of jurisdiction pursuant to the United States constitutional provisions relating to the separation of powers. Within the United States, jurisdiction is defined and applied in a variegated fashion depending on whether a legal problem is within the federal or the state sphere. Among the states, the definition and scope of jurisdiction also vary.<sup>2</sup>

The international setting gives rise to another set of definitions and applications of the notion of jurisdiction. International law has failed to develop jurisdictional rules that are as comprehensive or precise as the domestic jurisdictional laws of individual nations.<sup>3</sup> Indeed, international law has tended to focus on penal rather than civil jurisdiction. Moreover, the set of rules relating to criminal legislative, judicial and enforcement jurisdiction in the international setting is not as well developed as the parallel domestic laws of the various nations.<sup>4</sup> Generally, this article

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<sup>1</sup> L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 420 (1980) [hereinafter cited as HENKIN]; *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 401 (Tent. Draft No. 2, 1981) [hereinafter cited as *RESTATEMENT DRAFT*].

<sup>2</sup> Henceforth the term "state" when used in this paper, will indicate a nation-state or country, unless specifically stated otherwise. Thus, the separate states of the United States of America will be designated states of the Union or some similar denomination.

<sup>3</sup> HENKIN, *supra* note 1, at 421.

<sup>4</sup> *Id.*

will discuss the problem of jurisdiction over extraterritorial crime by analyzing the interaction between United States domestic and international law relating to jurisdiction. In 1935, *Harvard Research on International Law (Harvard Research)*<sup>5</sup> identified five theories of criminal jurisdiction: territorial; protective; nationality; universal; and passive personality. These theories, representing the possible bases for a state to claim jurisdiction over actions committed abroad and proscribed by its criminal law, provide the organizational format for this article.

As an introduction, a brief definition of each of these theories of jurisdiction is provided. The "territorial theory" allows for jurisdiction over conduct that takes place within the territorial boundaries of the state. The "nationality theory" bases jurisdiction on the allegiance or nationality of the perpetrator of the offenses as prescribed by the state of

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<sup>5</sup> Prescriptive and enforcement jurisdiction are considered in *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 474 (1935) [hereinafter cited as *Harvard Research*]; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 6-7 (1962). Both provide that while states may validly prescribe rules affecting the conduct of *people* outside their territorial limits, they may only enforce those rules within their own territory. See 18 U.S.C. § 3238 (1976), *United States v. Thompson*, 28 F. Cas. 102 (C.C.D. Mass. 1832) (No. 16492). See also Note, *Extraterritorial Jurisdiction in Criminal Law*, 13 HARV. INT'L L.J. 346 (1972). Prosecution by contumacy or default is covered by CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] arts. 627-41 (Dalloz 1966) (Fr.), and discussed in De-laume, *Jurisdiction over Crimes Committed Abroad: French and American Law*, 21 GEO. WASH. L. REV. 173 (1952).

Rollin Perkins lists only four theories of jurisdiction. He merges the passive personality theory with that of the protective principle. Professor Perkins replaces the Harvard designations, except for the territorial theory, with the following: "nationality jurisdiction" becomes the "Roman" theory; the "protective principle" becomes the "injured forum theory," and the "universal theory" becomes the "cosmopolitan." Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971). Professor Perkins' article was prepared for the Eighth Congress of the International Academy of Comparative Law, and was published in, LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES, AMERICAN ASSOCIATION FOR THE COMPARATIVE STUDY OF LAW, INC. 657-70 (1970).

Federal and state court decisions in the United States, as well as most course books and treatises on International Law, have adopted the Harvard Research designations. See, e.g., *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967); *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961); *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960); W. FRIEDMANN, O. LISSITZYN & R. PUGH, *INTERNATIONAL LAW, CASES AND MATERIALS* (1969); W. BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* (3d ed. 1971); HENKIN, *supra* note 1; 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* ch. XV (1968). See generally Feller, *Concurrent Jurisdiction in the International Sphere*, 16 ISRAEL L. REV. 40 (1981); ShachorLandau, *Extraterritorial Penal Jurisdiction and Extradition*, 29 INT'L & COMP. L.Q. 274 (1980); Hirst, *Jurisdiction Over Cross-Frontier Offenses*, 97 LAW Q. REV. 80 (1981); Lew, *The Extra-territorial Criminal Jurisdiction of English Courts*, 27 INT'L & COMP. L.Q. 168 (1978). See also R. MERLE & A. VITU, *TRAITE DE DROIT CRIMINEL* ch. 3 (2d ed. 1978); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10-19 (1965); RESTATEMENT DRAFT, *supra* note 1, § 402; Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 INTERNATIONAL CRIMINAL LAW 5 (M. Bassiouni & V. Nanda eds. 1973); Sarkar, *The Proper Law of Crime in International Law*, in INTERNATIONAL CRIMINAL LAW 60-76 (G. Mueller & E. Wise eds. 1965); G. LEWIS, *FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS* 30 (1859) (cited in *Harvard Research*, *supra*, at 483).

his allegiance, no matter where the offenses take place. The "protective principle" or "injured forum theory" emphasizes the effect or possible effect of the offense and provides for jurisdiction over conduct deemed harmful to specific national interests of the forum state. The "passive personality principle" extends jurisdiction over offenses where the victims are nationals of the forum state. The "universal theory" allows jurisdiction in any forum that obtains jurisdiction over the person of the perpetrator of certain offenses considered particularly heinous or harmful to mankind generally.<sup>6</sup>

A brief analysis of the parameters of four of the traditional theories of extraterritorial jurisdiction provides a foundation for criticism of recent developments in extraterritorial jurisdiction theory. This article establishes that the objective territorial theory (the most frequently articulated basis for assertion of extraterritorial jurisdiction) has always required that a significant adverse effect occur within the asserting state's territory. The protective principle (sometimes asserted as well), on the other hand, allows assertion of jurisdiction over offenses which are *intended* to have an effect within the asserting state's territory. The protective principle, however, is limited to those offenses which pose a threat to national security, sovereignty, or some important governmental function. The universality principle allows the assertion of jurisdiction over offenses, even though the offenses have no effect on the territory of the asserting state, if the offenses are recognized as being so heinous as to allow any state obtaining jurisdiction over the person of the perpetrator to assert jurisdiction over the subject matter.

Specifically, this article studies recent United States judicial assertions of jurisdiction over thwarted extraterritorial conspiracies. The author criticizes the expansion of the theoretical bases of jurisdiction to prescribe articulated by the courts and incorporated into the American Law Institute's draft of the *Restatement of the Foreign Relations Law of the United States (Restatement Draft)*<sup>7</sup> as a justification for the extension of jurisdiction.

The thwarted extraterritorial narcotics conspiracy aimed at importation of narcotics into the United States is chosen as the primary example and focus of this article because United States case law, in discussing

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<sup>6</sup> See generally *supra* note 5. Often, today, a sixth theory of jurisdiction is articulated. Under what is sometimes called the floating territorial principle, the "flagship" state is recognized as having jurisdiction over any offense committed on one of its craft or vessels. If this were not so, the law and judicial competence would change as the vessel moved from territory to territory. See generally *Lauritzen v. Larsen*, 345 U.S. 571 (1953); Note, *Jurisdiction*, 15 TEX. INT'L L.J. 379, 404 n.3 (1980); Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32 (1967); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966). See *infra* note 92.

<sup>7</sup> RESTATEMENT DRAFT, *supra* note 1, § 402(c).

this crime, has extended jurisdiction in a manner which obliterates the meaning of the traditional theories of jurisdiction over extraterritorial crime. The frustrated extraterritorial narcotics conspiracy comes close to fitting into several of the traditional theoretical bases of extraterritorial jurisdiction, but actually fits none.

In the case of a thwarted extraterritorial conspiracy, obviously, no significant effect has occurred to trigger the objective territorial theory. Unless the conspiracy threatens national security or impairs some governmental function, the protective principle is inappropriate. The universality principle is not properly applied since most conspiracies are not universally condemned. Thus, the attempt to force the thwarted extraterritorial conspiracy into the mold of any one jurisdictional theory effectively extends that theoretical basis to the point of making it meaningless. In such a manner, the *Restatement Draft's* suggested expansion of the objective territoriality theory as the means of including offenses intended to have an effect on United States territory, such as thwarted extraterritorial conspiracies, is deficient because, being thwarted, the offenses never actually cause such an effect.

This analysis of the *Restatement Draft* and the United States case law suggests that the traditional theories of jurisdiction remain the essential and sole bases for assertion of jurisdiction over extraterritorial crime and that adherence to those theories is required. The *Restatement Draft* adopts the traditional bases of jurisdiction over extraterritorial crime<sup>8</sup> and posits the rule of reasonableness as a means of *limiting* the assertion of jurisdiction in the international context.<sup>9</sup> The "rule of reasonableness" requires that even when an appropriate traditional basis for jurisdiction exists, assertion will not be proper if it is exorbitant or unreasonable. Assertion of jurisdiction will be exorbitant if there is significant interest by another state in asserting jurisdiction. Using the terminology of private international law or the conflicts of law, the rule of reasonableness is an attempt to determine the proper forum when two or more states have a traditional basis for asserting jurisdiction. Thus, no assertion of jurisdiction is proper without one (or more) of the bases, but even if such a basis exists, the rule of reasonableness may block the exorbitant or unreasonable assertion of jurisdiction. Assuming this to be true, it is necessary to define the categories or bases of jurisdiction conceptually, to determine whether there has been any *expansion* of the separate bases and to determine whether there is room for a new theory to accomodate assertion of jurisdiction over thwarted extraterritorial conspiracies.

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<sup>8</sup> *Id.* § 402.

<sup>9</sup> *Id.* § 403.

It is also important, therefore, to determine whether the assertion of jurisdiction over thwarted extraterritorial conspiracies is properly based on one or more of the traditional theories, or whether a new or hybrid theory of jurisdiction over extraterritorial crime ought to be or has now been implicitly adopted. This article articulates such a hybrid theory, which the *Restatement Draft* and case law implicitly adopt but improperly categorize. The article's purpose is to develop a proper theoretical vehicle to produce the correct results—assertion of jurisdiction; not to suggest that the thwarted narcotics conspiracy cases discussed herein ought to have been decided differently. The recent cases and the *Restatement Draft* are conceptually more sensible (and their correct results will maintain rather than detract from the conceptual validity and integrity of traditional jurisdictional theory) if this new theoretical basis is recognized.

This article will demonstrate that while the *Restatement Draft* does not recognize the rule of reasonableness as a new basis of jurisdiction in itself; it does suggest the possibility that the rule of reasonableness will allow several theories or bases to be combined to allow assertion of jurisdiction over offenses for which no single theory alone would be appropriate, as long as the assertion is not exorbitant. This is precisely what the courts have been doing, but they have inartfully articulated the theory of their approach to be the objective territorial theory alone or to be some other equally inappropriate theory. The new theory articulated herein combines the notions of the objective territorial theory, the protective principle and the universality principle to approve assertion of jurisdiction when the limits of each of the theories separately would not allow it, as long as such an assertion would not be exorbitant or unreasonable. Thus, the hybrid theory is designed to justify the assertion of jurisdiction over the thwarted extraterritorial narcotics or analogous conspiracy, when that conspiracy is conceptually close to meeting each of the three mentioned theories, but not close enough to fit. In such cases, intention to impact on the asserting state's territory clearly evidenced by the facts and the circumstances will be sufficient for assertion of jurisdiction as long as that assertion is not unreasonable. Assertion of jurisdiction on this theory will not stretch the boundaries of the objective territorial theory or any other separate traditional basis beyond meaningful limits. In addition, adoption of the jurisdictional approach articulated in this article would also resolve many of the problems relating to extradition in the case of extraterritorial crime.

In sum, this article first defines and develops the traditional theoretical bases in international law for asserting jurisdiction over extraterritorial crime. This is done in some detail so that the parameters of each basis will be clear. Next the recent judicial extension in the United

States of the bases of jurisdiction over extraterritorial crime is analyzed and criticized. The rectification of the conceptual deficiencies this case law has created will follow and lead into an analysis of the recent *Restatement Draft*. The analysis criticizes the *Restatement Draft's* deficiencies, but utilizes its rule of reasonableness as the springboard for the development of the new or hybrid theory which allows assertion of jurisdiction over thwarted extraterritorial conspiracies without eviscerating the traditional theories of jurisdiction.

## II. TERRITORIAL PRINCIPLE

The territorial principle is the most common basis of jurisdiction over crime in the United States. The criminal law, as it has developed in the nation-state, is territorial in principle; it has its basis in the conception of law enforcement as a means of keeping the peace within the territory.<sup>10</sup> Nation-states are generally considered competent to prescribe laws and to prosecute all offenses committed, in whole or in part, within their territory. *Harvard Research* describes the territorial principles:

(a) crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part within the territory" when any essential constituent element is consummated there. If it is committed either "in whole or in part" within the territory, there is territorial jurisdiction.<sup>11</sup>

Sovereignty requires that the power in control of the territory prescribe and enforce its laws in that territory; any state that does not maintain this prescriptive and enforcement jurisdiction within its territory is not sovereign.<sup>12</sup> Chief Justice Marshall, in 1812, expressed what has be-

<sup>10</sup> Perkins, *supra* note 5, at 1155. At about the time of the nascency of the "nation-state," the "kings peace" was the ideological tool used to promote the consolidation of power against "private justice." "In these transitions we observe the evolution among the Germanic people, and especially among the Franks, from blood-revenge, essentially anti-legal in character [but nevertheless, in reaction to acts considered common-crimes today] to a system in which rules of public law and procedure were developed and penalties prescribed, designed primarily to keep the peace. The retaliatory element gave way in large measure to public defense, but the elimination of the dangerous offender, whether by exile, death, or slavery, continued to be a primary means of protection. The objectives of general deterrence and individual prevention inhered in the establishment of the king's peace . . ." Tappan, *Pre-Classical Penology*, in *ESSAYS IN CRIMINAL SCIENCE* 45 (G. Mueller ed. 1961); Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L AND COMP. L.J. 39, 46-47 nn.28-35 (1981).

<sup>11</sup> *Harvard Research*, *supra* note 5, at 495.

<sup>12</sup> The clan, feudal, or national ruler anciently and during the middle ages considered it a duty of his honor and often a religious necessity to punish offenses against his sovereignty, his people or the gods. Acts, such as theft, murder or rape, considered common crimes today, were subject to "private justice" or individual reprisal rather than the modern reaction of a sovereign or state. Tappan, *supra* note 10, at 33. There is an interesting interrelationship

come the traditional United States' perception of sovereignty:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the same extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.<sup>13</sup>

It follows, Chief Justice Marshall declared, completing his notion of the relationship between sovereignty and territorial jurisdiction over crime, "[that], the courts of no country execute the penal laws of another."<sup>14</sup>

The territorial principle of jurisdiction has traditionally been very

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between the notions of sovereignty, jurisdiction, and extradition developing from the earliest of recorded history.

Because patriarchal families, tribes, and clans were in control of their own destiny and their own justice, the *pater familias* came to represent and had the duty to protect the "sovereignty" of the family, clan, or tribe. Moreover, in these ancient social cells, expulsion was the ultimate penalty for internal crime. For example, endangering the tribal food supply, usually incurred the sanction of banishment. Thus, if the ultimate sanction were banishment, the authority of the social cell certainly would not seek the return of individuals who had committed offenses within the cell. In addition to banishment, it was necessary that the cell purge itself from the "curse of the gods or the threat of the unknown." Blakesley, *supra* note 10, at 46; R. Fairbanks, A Discussion of the Nation Status of American Indian Tribes: A Case Study of the Cheyenne Nation 31 (1976) (unpublished LL.M. Thesis in Columbia University School of Law Library) [hereinafter cited as Fairbanks' Thesis]. Intra-tribal murder, for example, in Native American society "required the keeper of the arrows to cleanse the tribe of the spectre of death." Fairbanks' Thesis, *supra*. See also M. FUSTEL DE COULANGES, LA CITE ANTIQUE CH. XTH (1864) [hereinafter cited as FUSTEL DE COULANGES]. In addition to banishment and tribal purging, ancient society also developed a phenomenon called the *composition*. Composition was similar to what modern states reserve for tort claims. The injured individual was compensated by the perpetrator or his family for the damage done. See H. MAINE, ANCIENT LAW 358 (5th ed. 1978).

Composition was not entirely tort-like, however, as the social cell often felt obliged to purge itself of the threat of metaphysical dangers resulting from the occurrence of the wrongful act. See *supra* Fairbanks' Thesis; K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941); FUSTEL DE COULANGES, *supra*.

The *pater familias* or tribal chieftain, in keeping with whatever procedure was required by its law and custom, would determine what activities were to be deemed punishable, by different groups at different times. Murder, theft, or assault, were relatively rare although not unheard of conduct within the kinship group. When such conduct occurred as a result of external intervention into the social cell, retaliation, vengeance, or an attempt to acquire the return of the perpetrators often was needed, so that the "purging" of the crime could take place. If the fugitive were needed for the tribal expiation, his rendition would be sought. The sanction for another tribe's refusal to return such a fugitive was often war or an attack to punish the entire refusing tribe, thus purging the taint through punishment by proxy. Notwithstanding the "private justice" caveat, attempts to obtain rendition of fugitives were sometimes not too dissimilar from modern extradition. See Blakesley, *supra* note 10, at 46-47.

<sup>13</sup> The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

<sup>14</sup> The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).



strictly applied in the United States,<sup>15</sup> it has had negative as well as positive application. For example, in 1906, jurisdiction was refused in a case in which a French citizen was suspected of murdering an American citizen in China. The Secretary of State, referring to this case, stated:

[T]he United States government does not exercise jurisdiction over crimes committed beyond the territorial limits of this country, except a few involving [this case] is not included. Our [consular officials] have no authority to try a French citizen charged with a crime in that country [China] even though the victim should happen to be an American.<sup>16</sup>

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<sup>15</sup> *E.g.*, the Cutting Case, 1887 Foreign Rel. 757.

<sup>16</sup> M.S. Department of State, file no. 226/16 (Sept 17, 1906), *quoted in* II G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 179 (1942). Any acceptance of jurisdiction under the circumstances of this case would have been on the basis of the passive personality principle. The passive personality theory of jurisdiction is generally considered to be anathematic to United States law. The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30(2) comment e (1965) [hereinafter cited as RESTATEMENT], clearly states the traditional repudiation of the principle: "A state does not have the 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." See also J. BRIERLY, LAW OF NATIONS 302 (1955). This has not been changed in the recent RESTATEMENT DRAFT, *supra* note 1, §§ 402-403.

The United States government has vehemently protested any foreign courts' assertion of jurisdiction over acts of United States nationals committed against nationals of the forum state outside that state's territory. The Cutting Case, 1887 U.S. Foreign Rel. 757, reported in 2 J. MOORE, INTERNATIONAL LAW DIGEST 232-40 (1906); reproduced in M. HUDSON, CASES AND OTHER MATERIALS IN INTERNATIONAL LAW 585 (1929), provided the opportunity for the most famous protest. Mr. Cutting, a United States national, had been seized by Mexican authorities upon a visit to Mexico. He was jailed to await prosecution for criminal libel that he allegedly perpetrated in Texas against a Mexican national. The United States Secretary of State's protest presents the unequivocal United States position repudiating the passive personality theory of jurisdiction.

[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 libel in Mexico within the terms of 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. . . .

It 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 with them the penal laws of the country from which they come, and thus, subject citizens of the United States in their own country to an indefinable criminal responsibility. 2 J. MOORE, *supra* at 234-38.

In 1940, a case similar to *Cutting* arose, and the Counselor of the Department of State instructed the American Consul General in Mexico City, as follows:

This Government continues to hold the views which it expressed to the Mexican Government in the Cutting Case mentioned in your dispatch, in which case there was

Later, the United States Supreme Court declared that American law provides that legislative and judicial jurisdiction in criminal matters rests solely with the legislative and judicial branches of government of the state or country in which the crime is committed.<sup>17</sup> Stating the *a contrario* logic of the same concept, the United States Supreme Court held, "[a] local criminal statute has no extraterritorial effect and a party cannot be indicted in the United States for what he did in a foreign country."<sup>18</sup>

On its face, the territorial theory of jurisdiction is deceptively simple. The United States, however, applies fictions and exceptions which transmute actions taken abroad into its legal notion of territorial jurisdiction or, alternatively, which allow assertion of jurisdiction based on an exceptional theory even though there may be no true territorial connection. Statutory authority is required to authorize the extension of judicial jurisdiction to offenses committed beyond territorial limits. As explained below, the courts have been adept at interpreting statutory authority so as to allow such jurisdiction.<sup>19</sup>

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involved the validity of Mexican legislation . . . . This Government continues to deny that, according to the principles of international law, an American citizen can be justly held in Mexico to answer for an offense committed in the United States, simply because the object of that offense happens to be a Mexican citizen, and it maintains that according to the principles of international law, the penal laws of a State, except with regard to nationals thereof, have no extraterritorial force.

Accordingly, it is desired that your office should refrain from recognizing the above quoted provisions of Mexican law in the event that another American citizen shall be detained in Mexico charged with an offense committed within the jurisdiction of the United States.

Instruction from counselor of the Department of State involving M.S. Department of State, File 312.1121, Seidler, Richard/ 1 (cited and quoted in M. WHITEMAN, *supra* note 5, at 103-04).

Certainly, where a principle of jurisdiction in one state is anathema and in another an ascendant and important principle, disputes will arise when the state claiming the validity of the theory of jurisdiction seeks extradition from the other.

<sup>17</sup> *Huntington v. Attrill*, 146 U.S. 657 (1892). See also *Brown v. United States*, 35 U.S. App. 548 (1910); *Stewart v. Jessup*, 51 Ind. 413 (1875).

<sup>18</sup> *United States v. Nord Deutscher Lloyd*, 223 U.S. 512, 517-18 (1912). Of course this flat statement must be qualified today by the realization that there are some substantive crimes and theories of jurisdiction which provide legislative or judicial jurisdiction.

<sup>19</sup> While the United States law has tended more to modify the territorial principle in order to provide for jurisdiction over extraterritorially committed crime, French law and commentary, for example, have promoted a more elaborate extension by way of establishing separate theories—the nationality theory (*personalité active*), the passive personality theory (*personalité passive*), and the protective principle—as exceptions to the territorial principle. The extensions and exceptions exist to correct certain specific vexing problems and to fill gaps that would arise in a system based solely on the territorial principle. The French exceptions are contained in C. PR. PEN. art. 689-96. Professor Delaume explains the limits of this notion:

[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. Delaume, *supra* note 5 at 181.

A. JURISDICTION OVER EXTRATERRITORIAL CRIME, A CONSTITUENT ELEMENT OF WHICH OCCURS WITHIN UNITED STATES TERRITORY (SUBJECTIVE TERRITORIALITY)

It is not uncommon for the United States to extend jurisdiction

Case law in the United States has approved jurisdiction over nationals in situations in which the appropriate statute did not explicitly declare that it applied extraterritorially. Indeed, United States citizenship or nationality often appears to play a significant role in the application of United States legislation to extraterritorial conduct. See, e.g., *Steel v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Ramirez and Feraud Chile Co. v. Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Cal. 1956), *aff'd per curiam*, 245 F.2d 874 (9th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958); *Cf. Vanity Fair Mills, Inc. v. T. Eaton Co.* 234 F.2d 633 (2d Cir. 1956). This latter case held that the Lanham Act did not apply to a Canadian Corporation, even though harm was done in the United States by offenses committed by that corporation. Jurisdiction has been approved, for example, in the case of a violation outside the United States of a penal clause in an absentee voting statute. *State v. Maine*, 16 Wis. 398, 421 (1863). American nationals, assisting in the illegal immigration of alien contract laborers have been prosecuted on the basis of nationality jurisdiction. *United States v. Craig*, 28 Fed. 795, 801 (1886). Even a murder which a United States national committed on an uninhabited Guano island was considered proper subject matter for a United States court. *Jones v. United States*, 137 U.S. 202 (1890). Interestingly, the same philosophy as that which motivates France to apply nationality jurisdiction, namely the accused's likelihood of escaping justice altogether, motivated United States application of the principle here. A contempt judgment for failure to comply with a subpoena that a consular officer had served has been upheld, see *Blackmer v. United States* 284 U.S. 421 (1932), and jurisdiction to require income tax payment by nationals domiciled abroad has been sustained. *Cook v. Tate*, 265 U.S. 47 (1924). Sometimes the same act committed by an alien and a national might only be punishable against the national. *United States v. Bowman*, 260 U.S. 94 (1922). Nationality jurisdiction, where it is deemed appropriate, is applicable even though the national is also a national of the state in which the offense is committed. *Coumas v. Superior Court*, 31 Cal. 2d 682, 192 P.2d 449 (1948); *Kawakita v. United States*, 343 U.S. 717 (1952).

The United States Supreme Court declared its basic attitude toward nationality jurisdiction in *United States v. Bowman*:

The three defendants who were found in New York 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 not offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. 260 U.S. at 102. And again, in *Blackmer v. United States*, 284 U.S. 421, 436 (1932), the Supreme Court stated, "[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."

Thus, the nationality theory of jurisdiction has become an important means of obtaining jurisdiction even in the United States. Its application is not as expansive as that in France, although the trend in the United States has been to expand even its application. Nevertheless, no general principle exists that United States nationals are liable under United States law for violations of United States law wherever they may be. The extension of the nationality principle by legislation or by case law has been limited. In fact, the crimes to which the nationality principle has been extended have generally been those which indicate a strong protectionist motive. For example, in *Bowman*, jurisdiction was extended to cover a United States national's fraudulent acts committed abroad which were directly injurious to the government. The Court stated, nationals, are "certainly subject to such laws as [the United States] might pass to protect itself." 260 U.S. at 102. See also *Blackmer v. United States*, 284 U.S. 421 (1932).

Delaume cites an interesting statute from Texas, now rescinded, that exemplifies the

over an offense consummated outside United States territory, when a constituent element of that offense occurs within the United States (subjective territorial principal). The United States federal system has provided fertile ground for the development of the subjective territorial principle. Indeed, since the United States' jurisdictional scheme in criminal law and procedure is established upon a composite of variegated legislation and case law of the several states (and territories), as well as that of the federal authority, maintenance of a strictly applied territorial principle would render any question of legislative or judicial jurisdiction very difficult to resolve. The possible difficulties that could arise under a strictly applied territorial system have been mitigated by an application of the subjective territorial principle.<sup>20</sup>

The various states of the United States have applied this subjective theory of jurisdiction to acts consummated in other states of the Union, as well as to those consummated in foreign countries. This has been done notwithstanding the language of the sixth amendment to the United States Constitution, which indicates that a person must have his trial "in the state and district wherein the crime shall have been committed. . . ."<sup>21</sup> Thus, a crime is deemed to have been committed within the territory, as long as an element of it occurs there.

The subjective territorial principle is promoted in the *Model Penal Code*,<sup>22</sup> which many states have adopted in modified form.<sup>23</sup> States embracing the subjective principle have extended the principle in one of

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legislative extension of jurisdiction over offenses committed abroad. The Texas statute provided:

Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter which do not in their commission necessarily require a personal presence in this state, the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without the State.

TEX. PENAL CODE ANN. art. 1009 (Vernon 1936). The validity of this statute was upheld in *Hanks v. The State*, 13 Tex. Crim. 289 (1882); see *Delaume, supra* note 5, at 181 n.25. See also UTAH CODE ANN. § 76-1-201 (1953) discussed *infra* in note 23.

<sup>20</sup> *Harvard Research, supra* note 5, at 484.

<sup>21</sup> U.S. CONST. amend. VI; *CF.* *United States v. Jackalow*, 66 U.S. (1 Black) 484 (1861). There is possibly a constitutional basis for such jurisdiction over extraterritorially committed crime. U.S. CONST. art. III, § 2, provides that, "[t]he trial of all crimes, excepting cases of impeachment . . . shall be held in the State where the said crimes shall have been committed but when not committed within any State, the trial [of a federal crime] shall be at such Place or Places as the Congress may by law have directed." The drafters of the Constitution, however, undoubtedly had in mind crimes committed on the high seas or in other places outside the territorial jurisdiction of any state, not crimes committed in other sovereign jurisdictions. See, 18 U.S.C. § 3238 (1976). Note, *Extraterritorial Jurisdiction—Criminal Law*, 13 HARV. INT'L L.J. 346, 347 n.4 (1972) was very helpful in the development of this section.

<sup>22</sup> Section 1.03 of the proposed official *Model Penal Code* provides:

Territorial Applicability.

(1) Except as otherwise provided in this Section, a person may be convicted under the

law of this State of an offense committed by his own conduct or of another for which he is legally accountable if:

- (a) either the conduct which is an element of the offense or the result which is such an element occurs within this State; or
  - (b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; or
  - (c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State; or
  - (d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this State; or
  - (e) the offense consists of the omission to perform a legal duty imposed by the law of this State with respect to domicile, residence or a relationship to a person, thing, or transaction in the State; or
  - (f) the offense is based on a statute of this State which expressly prohibits conduct outside the state, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.
- (2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.
- (3) Subsection (1)(a) does not apply when causing a particular result is an element of an offense and the result is caused by conduct occurring outside the State which would not constitute an offense if the result had occurred there, unless the actor purposely or knowingly caused the result within the State.
- (4) When the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a "result", within the meaning of Subsection (1)(a) and if the body of a homicide victim is found within the State, it is presumed that such result occurred within the State.
- (5) This State includes the land and water and the air space above such land and water with respect to which the State has legislative jurisdiction.

MODEL PENAL CODE § 1.03 (Proposed Official Draft 1962).

<sup>23</sup> See, e.g., UTAH CODE ANN. § 76-1-201 (1978), which provides:

- (1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:
  - (a) The offense is committed either wholly or partly within the state; or
  - (b) The conduct outside the state constitutes an attempt to commit an offense within the state; or
  - (c) The conduct outside the state constitutes a conspiracy to commit an offense within the state and an act in furtherance of the conspiracy occurs in the state; or
  - (d) The conduct within the state constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense under the laws of both this state and such other jurisdiction.
- (2) An offense is committed partly within this state if either the conduct which is an element of the offense, or the result which is such an element, occurs within this state. In homicide, the result is either the physical contact which causes death, or the death itself; and if the body of a homicide victim is found within the state, the death shall be presumed to have occurred within the state.
- (3) An offense which is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the offender at the time of the omission.

See also, e.g., CAL. PENAL CODE § 778(a) (West 1970), which provides:

Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this State.

two ways: in the form of a general rule relating to all crimes;<sup>24</sup> or in a piecemeal fashion in the case of specific offenses. Anti-dueling legislation, for example, common in the past and still extant today, provides an interesting and clear example of the application of the subjective territorial principle over a specific crime by statute. Section 779 of the California Penal Code reads:

When an inhabitant . . . by previous appointment or engagement, fights a duel or is concerned as a second therein, out of the jurisdiction of this state, and in the duel a wound is inflicted upon a person, whereof he dies in this State, the jurisdiction of the offense is in the Country where the death happened.<sup>25</sup>

This statute applies an interesting combination of the principles of subjective territoriality, objective territoriality and elements of the nationality principle not often applied in the United States.<sup>26</sup>

The commentary to the *Model Penal Code* explains that where conduct within the territory of the forum state causes harm outside the state, jurisdiction will usually be allowed if the conduct within the state, standing alone, would constitute an attempt to commit the offense

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See also CAL. PENAL CODE § 27 (West 1970), which provides: (a) The following persons are liable to punishment under the laws of this state:

1. All persons who commit, in whole or in part, any crime within this state;
  2. All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state;
  3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.
- (b) Perjury, in violation of Section 118, is punishable also when committed outside of California to the extent provided in Section 118.

<sup>24</sup> See, e.g., CAL. PENAL CODE § 27 (West 1970); UTAH CODE ANN. § 76-1-201 (1978).

<sup>25</sup> CAL. PENAL CODE § 779 (West 1970). Note that jurisdiction under this statute obtains for the crime of dueling beyond state boundaries, not homicide. See also *id.* § 231 (leaving the state with intent to evade laws against dueling).

<sup>26</sup> *Id.* § 231 states:

Every person who leaves this State with intent to evade any of the provisions of this Chapter [Duels & Challenges], and to commit any act out of this State such as is prohibited by this Chapter, and who does any act, although out of this State, which would be punishable by such provisions if committed within this State, is punishable in the same manner as he would have been in case such act had been committed within this State.

See also MASS. ANN. LAWS ch. 265, § 3 (Michie/Law. Co-op. 1980).

State laws prohibiting cruelty to animals have been made to apply extraterritorially. *E.g.*, N.Y. AGRI. & MKTS. LAW § 367 (McKinney 1965) provides:

A person who leaves this state with intent to elude any of the provisions of this article or to commit any act out of this state which is prohibited by them or who, being resident of this state, does any act without this State, pursuant to such intent, which would be punishable under such provisions, if committed within this state, is punishable in the same manner as if such act had been committed within this state.

Similar provisions existed in former New York laws prohibiting masked and disguised persons from assembling, see N.Y. PENAL LAW ch. 41, § 712 (Consol. 1923)(repealed 1970), and that prohibiting assemblages of anarchists, see N.Y. PENAL LAW § 165 (Consol. 1923)(repealed 1970).

charged.<sup>27</sup> Jurisdiction over larceny by fraud, for example, will usually be asserted even though the delivery and acceptance of the goods occur outside the territory, as long as false representations have occurred within the forum's territory.<sup>28</sup> Similarly, jurisdiction over a homicide may be allowed when the conduct within the forum state constitutes an attempt to commit homicide, even though the death occurs outside the state.<sup>29</sup> Generally, for jurisdiction to obtain, it is necessary that the act within the forum state be so related to the offense consummated elsewhere that, even if nothing else happened in the furtherance of the offense, the act within the state would still have constituted an attempt.<sup>30</sup>

Thus, territorial jurisdiction will be asserted on a subjective theory over offenses committed partially within a state, but consummated outside that state's boundaries.<sup>31</sup> Jurisdiction under the *Model Penal Code* will also apply when an offense is commenced outside a state's territory but consummated within, or over offenses committed completely outside the territory, if the effect or result of the offense occurs within the state.<sup>32</sup> The theory behind the application of jurisdiction, therefore, moves from subjective territoriality to objective territoriality.<sup>33</sup> The *Model Penal Code*<sup>34</sup> and the proposed *Federal Criminal Code*<sup>35</sup> encourage an expansive

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<sup>27</sup> MODEL PENAL CODE, comment to § 1.03 at 5-6 (Tent. Draft No. II) (submitted to the Council of the American Law Institute for discussion at the meeting of March 15, 16, and 17, 1956).

<sup>28</sup> See *People v. Zayas*, 217 N.Y. 78, 111 N.E. 465 (1916).

<sup>29</sup> See *People v. Botkin*, 132 Cal. 231, 64 P. 286 (1901). This is the famous case in which California courts took jurisdiction over a person and convicted him of mailing poisoned candy from California to his intended victim in Delaware. The victim ate the candy and died in Delaware.

<sup>30</sup> See *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925), and cases cited in *Harvard Research*, *supra* note 5, at 484-87.

<sup>31</sup> Decisions of courts in the United States over the years have construed this type of legislation so as to approve the assertion of jurisdiction where any element of an offense occurs within the state. See, e.g., *People v. Botkin*, 132 Cal. 231, 64 P. 286 (1901); *State v. Sheehan*, 33 Idaho 553, 196 P. 532 (1921); *People v. Licenziata*, 199 A.D. 106, 191 N.Y.S. 619 (1921); *People v. Zayas*, 217 N.Y. 78, 111 N.E. 465 (1916). In *Licenziata*, the defendant sold wood alcohol in New York as a beverage. The alcohol was taken to Massachusetts where someone drank it and consequently died. The victim died in Massachusetts but the defendant was convicted in New York of manslaughter. This conviction was based on N.Y. Crim. Proc. Law § 134 (Consol. 1930)(repealed 1970), which provided, "when a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county." See additional cases and statutes reviewed in Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931); Levitt, *Jurisdiction over Crimes*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 316 (1925). Some cases construing newer statutes similar to the old New York laws are: *People v. Utter*, 24 Cal. App. 3d 535, 101 Cal. Rptr. 214 (1972); *Connors v. Turner*, 29 Utah 2d 311, 508 P.2d 1185 (1973) and cases cited in Schwab, *Have Crime Will Travel: Borderlines and Criminal Jurisdiction*, 50 S.B.J. 30 (1975).

<sup>32</sup> MODEL PENAL CODE § 1.03 (Tent. Draft No. II, 1956).

<sup>33</sup> See *infra* notes 38-62 and accompanying text.

<sup>34</sup> MODEL PENAL CODE § 1.03. (Proposed Draft 1962).

application of both the subjective and objective theories for assertion of territorial jurisdiction.

United States law will usually allow the assertion of jurisdiction over acts of participation within United States territory in offenses consummated abroad, over extraterritorial attempts to commit offenses within the United States and over acts of participation abroad in offenses consummated within United States territory. Since early common law development, the United States has asserted jurisdiction over participation locally in offenses perpetrated abroad.<sup>36</sup> Although Professor Wharton has suggested that the common law would still allow such jurisdiction to be asserted, today a statute is generally considered necessary.<sup>37</sup>

B. JURISDICTION OVER OFFENSES COMMITTED OUTSIDE THE TERRITORIAL LIMITS OF THE UNITED STATES, BUT WHOSE EFFECT OR RESULT OCCURS WITHIN THAT TERRITORY (OBJECTIVE TERRITORIALITY)

American law has traditionally allowed the assertion of jurisdiction over offenses when the conduct giving rise to the offense has occurred extraterritorially, as long as the harmful effect(s) or result(s) take place within the jurisdiction's territorial boundaries (objective territoriality).<sup>38</sup>

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<sup>35</sup> NATIONAL COMMISSION FOR THE REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT 21 (1970); Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. LAW & CRIMINOLOGY 385 (1981). For the first time the United States Legislature has provided a general rule regarding the nature and scope of extraterritorial jurisdiction over crime. See, S. 1722, 96th Cong., 1st Sess. § 204 (1979); H.R. 6915, 96th Cong., 2d Sess. § 111(c) (1979).

<sup>36</sup> *Id.* § 233. See, e.g., CAL. PENAL CODE § 778(b) (Deering 1909) (as amended), provides that the following people are liable to punishment under the laws of California:

3. Every person, who, being out of this state, causes, aids, advises, or encourages any person to commit a crime within this state, and is afterwards found within this state, is punishable in the same manner as if he had been within this state when he caused, aided, advised or encouraged the commission of such crime.

<sup>37</sup> See I.F. WHARTON, WHARTON'S CRIMINAL LAW § 333 (12th ed. 1932) and cases cited therein.

<sup>38</sup> John Bassett Moore stated that objective territoriality is "[t]he principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries." J. MOORE, *supra* note 16, at 232-40. Other noted jurists have similarly stated, that, "[t]he setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain." 1 C. HYDE, INTERNATIONAL LAW 798 (2d ed. 1945). The objective territorial principle has essentially three applications: (1) to assert jurisdiction over offenses committed abroad when the effect or result occurs within the territory of the asserting state; (2) to seek extradition of the person accused of committing such an offense and; (3) to approve extradition of an accused who has committed such an offense against the requesting state.

It should be noted that in the United States it is necessary that legislation provide for jurisdiction in situations in which either the subjective or objective territoriality theories



Probably the most often cited United States Supreme Court decision enunciating this principle of objective territoriality is *Strassheim v. Dailey*.<sup>39</sup> In *Strassheim*, the defendant fraudulently sold as new, secondhand machinery to the State of Michigan by bribing the warden of the Michigan State Prison who was to receive the machinery. The false pretenses and the bribery actually occurred in Chicago rather than in Michigan. Nevertheless, in the appeal from the habeas corpus discharge of the defendant, Mr. Justice Holmes, for the United States Supreme Court stated, "[a]cts 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."<sup>40</sup> It is clear from Mr. Justice Holmes' opinion and from historical precedent that the objective territorial principle is not designed to apply when parties *merely intend* their criminal activity to have effect within territorial boundaries, but contemplates only those cases in which the intended effects actually occur within those boundaries.

The objective territorial principle is designed to allow the state to

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should obtain. See Perkins, *supra* note 5, at 1157 n.9; see also *Commonwealth v. McCloon*, 101 Mass. 1 (1869), where the court makes it clear that statutory authority is required for judicial competence in a homicide case in which the victim was wounded on board a British vessel on the high seas, but died in Massachusetts. The problem, of course, in all of these cases is the determination of what is "the evil effect" or result which will allow the assertion of jurisdiction. See Comment, *Jurisdiction over Interstate Homicides*, 10 LA. L. REV. 87 (1949). See also *Hunter v. State*, 40 N.J.L. 495 (1878); *State v. Lang*, 108 N.J.L. 98, 154 A. 864 (1931); CAL. PENAL CODE § 778 (West 1970), which provides:

When the commission of a public offense, commenced without the state, is consummated within its boundaries by a defendant, himself outside the state, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable for punishment therefore . . . .

See also *People v. Utter*, 24 Cal. App. 3d 535, 101 Cal. Rptr. 214 (1972); *People v. Anderson*, 55 Cal. 2d 655, 361 P.2d 32, 12 Cal. Rptr. 64 (1961); *Connors v. Turner*, 29 Utah 2d 311, 508 P.2d 1185 (1973). It should also be noted that United States courts in civil matters have now moved away from the so-called pure "effects" theory of jurisdiction which was initially asserted and accepted by analogizing to the objective territorial principle in international law. See the development of the rule in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and the retrenchment of the rule in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); see also Note, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 VA. L. REV. 175 (1979). Jurisdiction in criminal matters, on the other hand, is *expanding* to cover extraterritorial offenses more comprehensively.

<sup>39</sup> *Strassheim v. Dailey*, 221 U.S. 280 (1911).

<sup>40</sup> *Id.* at 285 (emphasis added). The Supreme Court in *Strassheim* cites the following cases as supporting the objective territorial principle historically; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893); *Commonwealth v. McCloon*, 101 Mass. 1 (1869); *Commonwealth v. Smith*, 11 Allen 243 (1874). See also *United States v. King*, 533 F.2d 852 (9th Cir. 1976); *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); *United States v. Layton*, 509 F.Supp. 212 (N.D. Cal. 1981); *People v. Fea*, 47 N.Y.2d 70, 390 N.E.2d 286, 416 N.Y.S.2d 278 (1979).

take jurisdiction and to prosecute, convict and punish the perpetrator of conduct which *causes* harm within the territory of the forum state, even though none of the conduct occurs there. The harmed state obviously has a significant interest in doing so. For example, Kansas deemed it important to assert jurisdiction over a Missouri man for the crime of abandonment, when the man's wife and child became domiciled in Kansas after he abandoned them in Missouri. The continuing effect or harm of the Missourian's neglect or abandonment clearly occurred in the place in which the wife resided.<sup>41</sup>

It is sometimes true that the substantive definition of the crime provides that the crime itself comes into legal existence at the moment and in the place where the criminal consequences arise. This is a clear statutory adoption of the objective territorial principle by substantive definition. In Louisiana, for example, homicide is defined as "the killing of a human being by the act, procurement or culpable omission of another,"<sup>42</sup> and the criminal code provides that the crime of homicide occurs where the criminal consequences take place.<sup>43</sup> Thus, if a person shoots a gun and mortally wounds a person in Mississippi but the person succumbs to his wounds in Louisiana, the perpetrator will have committed a homicide in Louisiana, although all of his actions took place in Mississippi.<sup>44</sup> Or, if a person illegally sends from one state, where simi-

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<sup>41</sup> *State v. Wellman*, 102 Kan. 503, 170 P. 1052 (1918). See also *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974); *Fry v. State*, 36 Ga. App. 312, 136 S.E. 466 (1927); *In re Fowles*, 89 Kan. 430, 131 P. 598 (1913); *State v. Klein*, 4 Wash. App. 736, 484 P.2d 455 (1971). But compare *United States v. Columbia-Colella*, 604 F.2d 356 (5th Cir. 1979) (court held that United States courts have no jurisdiction over an agreement made in Mexico to sell in Mexico a car that had been stolen in the United States).

<sup>42</sup> LA. REV. STAT. ANN. § 14:29 (West 1974).

<sup>43</sup> *Id.* § 8. Criminal consequences are those described as such in the criminal code. *Id.* § 9. Traditionally in the United States, if fatal force is received in one state and the victim succumbs in another, jurisdiction obtains in the state in which the fatal force was received. *Perkins*, *supra* note 5, at 1157. But see statutes cited and quoted in note 19 and 22 and see MODEL PENAL CODE, § 1.03(4) (Proposed Official Draft 1962), which states, "[w]hen the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a 'result', within the meaning of Subsection (1)(a). . . ."

<sup>44</sup> See LA. REV. STAT. ANN. §§ 8, 9, 29 (West 1974). This is what would occur in other states also. *Cf. Commonwealth v. McCloon*, 101 Mass. 1 (1869), in which jurisdiction was obtained and a conviction of murder was upheld in Massachusetts, although the deceased had been wounded on board a British vessel on the high seas but had died in Massachusetts. Similarly, in *Tyler v. People*, 8 Mich. 319 (1860), the State of Michigan asserted jurisdiction over a homicide of a man who had been wounded on board an American flag vessel in Canadian waters, but who died in Michigan. Of course, in this case, jurisdiction would also have been appropriate on the basis of the fact that the crime had been committed upon an American flag vessel.

This is the type of offense that Glanville Williams has denominated a "terminatory offense," because the offense is deemed to occur where the last constituent element occurs—in the case of homicide, either the place of the receipt of the deadly force or the place of the death, depending on the substantive definition of the crime. Williams, *The Venue and Am-*

lar jurisdictional notions apply, medication connected with an illegal abortion in another state, the latter state may prosecute the sender for illegal procurement of an abortion.<sup>45</sup> Traditionally in the United States, however, if fatal force is received in one state and the victim succumbs in another, in the absence of a statute, only the state where the fatal force occurred has had jurisdiction over the homicide.<sup>46</sup>

Even if the substantive definition of the crime does not conceive the crime itself to occur where the criminal consequences occur, jurisdiction can be obtained when the harmful effects take place within the territory of the state claiming jurisdiction.<sup>47</sup> One of the most interesting older applications of the objective territorial principle is presented in *Simpson v. State*,<sup>48</sup> where the court severely strained the term "territory." The defendant in this case stood in South Carolina and fired a gun at a person who was in a boat on the part of the Savannah River which is within the territorial boundaries of Georgia. The bullet missed its target, but did hit the water on the Georgia side of the river. The Georgia courts held that they had subject matter jurisdiction to try the accused for assault with intent to murder; they reasoned that the constructive presence of the accused followed his bullet over to the Georgia side of the river.<sup>49</sup>

Thus, the basis for the expansion of jurisdiction over actions in vio-

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*bit of the Criminal Law*, 81 L.Q. REV. 518 (1965). It is what Professor Gordon calls a "result offense," for obvious reasons. G. GORDON, *THE CRIMINAL LAW OF SCOTLAND* (2d ed. 1978). See also *People v. Puig*, 85 Misc. 2d 228, 378 N.Y.S.2d 925 (Sup. Ct. 1976).

<sup>45</sup> *State v. Morrow*, 40 S.C. 221, 18 S.E. 853 (1893). In this case, the woman who had been sent the "medication" was killed in South Carolina as a result of its use. See *State v. Wells*, 249 S.C. 249, 259, 153 S.E.2d 904, 909 (1967).

<sup>46</sup> *Perkins*, *supra* note 5, at 1157 n.9 (citing the tragic case of *State v. Carter*, 27 N.J.L. 499 (1859)). This was because the situs of the crime usually was considered to be the place where the fatal force impinged on the victim. *Perkins*, *supra* note 5, at 1157; *King v. Coombs*, 168 Eng. Rep. 296 (1785); *United States v. Davis*, 25 F. Cas. 786 (C.C.D. Mass. 1837) (No. 14,932), cited in *Perkins*, *supra* note 5; cf. cases and statutes cited *supra* notes 22, 23 and 44.

<sup>47</sup> *People v. Adams*, 3 Denio 190 (N.Y. 1846) *aff'd*, 1 Comst. 173 (N.Y. 1848); *Lamar v. United States*, 240 U.S. 60 (1916) (jurisdiction was held to have been asserted properly in New York where the out-of-state phone call was received whereby the out-of-state defendant impersonated an officer of the United States in order to defraud).

In *Updike v. People*, 92 Colo. 125, 18 P.2d 472 (1933), Colorado courts properly asserted jurisdiction where the victim of a scheme to defraud posted in Colorado a letter and enclosed a check from his account in Colorado to the defendant who was in Idaho.

See also *Ford v. United States*, 273 U.S. 593, 621 (1926); *Benson v. Henkel*, 198 U.S. 1 (1905); *In re Palliser*, 136 U.S. 257 (1890).

<sup>48</sup> *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893); see also *Hyde v. United States*, 225 U.S. 347 (1912); *State v. Chapin*, 17 Ark. 561 (1856).

<sup>49</sup> In Louisiana and other states with similar definitions of assault, there would be no difficulty if the defendant had been trying to put the victim in fear of receiving great bodily harm or if the victim were actually put in fear of great bodily harm, since one of the definitions of assault is the putting of a person in fear of receiving greatly bodily harm. See La. Rev. Stat. Ann. § 14:36 (West 1974).

lation of United States antitrust laws has usually been the objective territoriality principle, in so much as the effect of such violations occurs within United States territory.<sup>50</sup> The same may be said of jurisdiction over violations of the securities laws.<sup>51</sup>

United States federal or state tribunals have expansively used the subjective and objective theories and have interpreted legislation to in-

<sup>50</sup> *E.g.*, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Bulova Watch Co. v. Steele*, 194 F.2d 567 (9th Cir. 1952); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780; *see also* *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978), *cited and discussed in Recent Developments—Sovereign Immunity Jurisdictional Problems Involving the Foreign Sovereign Immunities Act and Extraterritorial Application of United States Antitrust Laws*, 13 VAND. J. TRANSNAT'L L. 835 (1980); International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, No. 78-5012-AAH(SX) (C.D. Calif. filed Sept. 18, 1979). *See also* W. FUGATE, *FOREIGN COMMERCE AND ANTITRUST LAWS* (2d ed. 1973); K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1976); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* (1977); Note, *Extraterritoriality of Anti-trust and Other Commerce Acts*, 11 COLUM. J. TRANSNAT'L L. 317 (1972); Note, *Extraterritoriality—Anti-trust Law*, 69 MICH. L. REV. 888 (1971); Note, *Extraterritorial Application of American Anti-trust Law and Export Expansion Act of 1971*, 5 N.Y.U.J. INT'L L. & POL. 531 (1972). Jennings, *Extraterritorial Jurisdiction and the U.S. Antitrust Laws*, 1957 BRIT. Y.B.I.L. 146, presents a critical view of the extension of United State jurisdiction of extraterritorial antitrust violations. *See also* *Rio Tinto Zinc v. Westinghouse Electric Corp.*, [1978] All E.R. 434, in which the court particularly disagrees with this far-reaching extension of the objective territorial theory.

*See also* Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 LAW & POL. INT'L BUS. 895 (1976); Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato"*, 11 INT'L LAW. 415 (1977); Kintner & Griffin, *Jurisdiction over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977); Ongman, *"Be No Longer Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NW. U.L. REV. 733 (1977); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978); Klinowski, *Multinational Business Beware: The Long Arm of the United States Antitrust Laws May Reach You*, 12 LOY. L.A.L. REV. 285 (1979); Note, *Antitrust—Extraterritorial Jurisdiction Under the Effects Doctrine—A Conflicts Approach*, 46 FORDHAM L. REV. 354 (1977); Note, *Conflicting Interpretations of the Sherman Act's Jurisdiction Requirement*, 32 VAND. L. REV. 1215 (1979).

<sup>51</sup> *See* discussion in VI M. WHITEMAN, *DIGEST OF INT'L LAW* 126-27, 118-60 (1963), and antitrust cases and commentary in *supra* note 29. *See also* E. STEIN & P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* 684 (1967); Aileo, *Judicial Role in Extraterritorial Application of the Securities Exchange Act of 1934: Vesco*, 4 GA. J. INT'L & COMP. L. 192 (1974); Note, *The Extraterritorial Application of Section 10(b), and Rule 10-b-5*, 34 OHIO ST. L.J. 342 (1973); Note, *Extraterritorial Application of United States Securities Laws Section 30(b) of Securities Exchange Act of 1934—Liability of Foreign Insiders For Short-Swing Transactions in American Listed Securities: Roth v. Fund of Funds*, 10 COLUM. J. TRANSNAT'L L. 150 (1971). For more discussion on the extraterritorial application of United States securities law, *see* Note, *Extraterritorial Application of United States Securities Laws*, 42 MO. L. REV. 158 (1977); Note, *Securities Law—Subject Matter Jurisdiction in Transnational Securities Fraud*, 9 N.Y.U.J. INT'L L. & POL. 113 (1976); Note, *Securities Transnational Application of Antifraud Provisions of the Federal Securities Laws Expanded*, 8 SETON HALL L. REV. 795 (1977); Note, *Securities Regulations—Extraterritorial Application of the Antifraud Provisions—Federal Securities Laws Grant Jurisdiction Where There is Some Activity in Furtherance of a Fraudulent Scheme Committed Within the United States*, 11 VAND. J. TRANSNAT'L L. 173 (1978); Note, *Extraterritorial Application of the Federal Securities Code: An Examination of the Role of International Law in American Courts*, 11 VAND. J. TRANSNAT'L L. 711 (1978).

fer legislative intent to assert jurisdiction over extraterritorial conduct which violates federal or state law.<sup>52</sup> The territorial theories, therefore, have been extended liberally to mitigate the evils that would arise from a strict application of the territorial basis of jurisdiction.<sup>53</sup> Thus, with the ever expanding notion of territorial jurisdiction over extraterritorial offenses in the United States, jurisdiction will be deemed appropriate as long as the offense itself, its result or effect, or any of its constituent or material elements occur within the sovereign territory of the United States.<sup>54</sup> The expansion of these territorial theories, however, has gone

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<sup>52</sup> Indeed, United States extension of jurisdiction over extraterritorial conspiracies is clearly overtaking that of countries such as France, which has a reputation for extensive assertion of jurisdiction. See discussion *infra* at notes 85-131 and accompanying text. The discussion in the following sections of this article will graphically indicate the extent to which United States courts will go to find territorial jurisdiction. In *United States v. Bowman*, 260 U.S. 94 (1922), jurisdiction was extended to cover fraudulent acts committed abroad which were directly injurious to the United States government. Jurisdiction was actually based on the nationality and protective principle, but the decision was couched in language suggesting objective territoriality. Certainly, there is no reason that multiple theories would not be appropriate upon the facts of *Bowman*. The defendants were charged with violating what is now known as 18 U.S.C. §§ 80, 82-86. The offense was committed partly on the high seas, and partly in the harbor at Rio de Janeiro. The statute was construed to cover these acts, although the statute does not expressly state that it extends to offenses committed beyond the territory of the United States. See *supra* note 19 and accompanying text for a discussion of this case. The court in *United States ex rel. Majka v. Palmer*, 67 F.2d 146 (2d Cir. 1933), applied similar reasoning to take jurisdiction over an act of perjury in Poland by an alien seeking entry into the United States. II. HACKWORTH, DIGEST OF INTERNATIONAL LAW 202 (1963), reports a case wherein a United States' consul was prosecuted for accepting bribes in Vancouver, Canada relating to a request for a visa from a Chinese citizen.

See also *United States v. Johnson*, 227 F.2d 745 (3d Cir. 1955), *aff'd*, 351 U.S. 215 (1956), which held that one need not be physically present to be guilty of an offense within the territory if the immediate result of the force set in motion outside the territory occurs within the territory. See cases cited *infra* note 65.

<sup>53</sup> The evils of the too strict application of the territorial principle are graphically presented in the case of *In re Lo Dolce*, 106 F. Supp. 455 (W.D.N.Y. 1952), in which a United States Army sergeant was charged with a murder that took place in Italy during World War II. Since Italy did not assert jurisdiction over the crime involved and an Italian-American treaty relative to extradition had no application because of jurisdictional issues, extradition was never granted and the accused was never prosecuted. See also *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956); *State v. Hall*, 114 N.C. 909, 19 S.E. 602 (1894).

<sup>54</sup> One of the benefits of the expansion of the objective territoriality theories of jurisdiction is in their accommodation of the extradition process, which is rife with problems relating to jurisdiction. For example, article I of the 1909 Extradition Treaty between France and the United States, for example, provided that the governments "mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting parties . . . ." Arbitration Treaty, Jan. 6, 1909, United States-France, art. I, 37 Stat. 1526, T.S. No. 561 [hereinafter cited as 1909 Extradition Treaty]; 7 C. Bevans, *Treaties and Other International Agreements of the United States of America* 872 (1968). See also Supplementary Convention to the Extradition Convention of January 6, 1909, Feb. 12, 1970, United States-France, 22 U.S.T. 407, T.I.A.S. No. 7075 [hereinafter cited as Supplementary Convention of 1970]. See Blakesley, *supra* note 38, at 663. The language of the treaty has not been altered. Thus, this treaty, on its face, could be construed to provide for jurisdiction to extradite when-

too far.

ever an extraditable offense is committed in such a way as to trigger jurisdiction of either contracting party as defined by the laws of either state. The term "jurisdiction" as used in extradition treaties, however, was traditionally interpreted by United States courts and commentators to connote territorial jurisdiction exclusively. See *In re Stupp*, 23 F. Cas. 281 (C.C.S.D.N.Y. 1873) (No. 13,562). See also J. MOORE, *Report on Extraterritorial Crime and the Cutting Case, 1887 For. Rel. 757* in 2 INTERNATIONAL LAW 232-40 (1906) (citing *In re Stupp*); *In re Stupp* was also discussed in 1 J. MOORE, A TREATISE ON EXTRADITION AND INTER-STATE RENDITION 135 (1891) and in Pente, *Principles of International Extradition in Latin America*, 28 MICH. L. REV. 665, 704 (1930); S. BEDI, EXTRADITION IN INTERNATIONAL PRACTICE, 64 (1966). In *In re Stupp*, the court held that Stupp, a German subject, whose extradition was asked by the German government for a crime committed in Belgium, should be surrendered under the Treaty of Extradition of 1852, between the United States and Prussia, which provided for surrender when the offense was committed "within the jurisdiction" of either party. The Secretary of State declined the rendition based upon the recommendation of the Attorney General. This article will show that notions regarding extraterritorial jurisdiction in United States law have been evolving.

The Attorney General of the United States' opinion on this matter written for the case of *In re Stupp*, states:

I am quite clear that the words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liability of the criminal, but to the *locality*. The *locus delicti*, the place where the crime is committed, must be within the jurisdiction of the party demanding the fugitive.

14 Op. Att'y Gen. 281, 283 (emphasis in the original). The Attorney General's language fairly sums up the traditional official United States' position on the interpretation of the term "jurisdiction" in extradition treaties. This has been the consistent traditional AngloAmerican interpretation of the term "jurisdiction." In 1931, for example, France requested extradition from Great Britain, of a fugitive from French justice. The extradition was denied on jurisdictional grounds. The court stated that the 1873 Convention of Extradition applies only to

crimes committed within the territory of the Power which is seeking extradition . . .

[I]n their Lordships' opinion, no one of the appellants was liable to be extradited under the treaty, unless the crime of which he was convicted was, in fact, committed within the territory of the French Republic. *Kossekechatko v. Attorney-General of Trinidad*, Annual Digest of Public International Law Cases, years 1931-32, 302, 303 (1938).

French notions of jurisdiction clearly transcend the territorial concept. French law provides for a rather broad authority for application of its criminal laws to events which occur beyond its national territory and, thus, to prosecute and punish individuals who have committed "extraterritorial offenses." See, e.g., *supra* note 19.

Difficulties may arise when one of the parties attempts to extradite an offender who has committed an extraditable offense deemed by the requesting state to be within its notion of jurisdiction, but which would not be considered by the law of the requested state to be within its jurisdiction under similar, but obverse, circumstances. For example, if a French national accosted and robbed another French national on foreign soil, French law may admit jurisdiction of its courts over the subject matter, as long as the courts could obtain jurisdiction over the person. French courts could assert jurisdiction on the basis of the nationality of either the accused or the victim. Under United States law and its territorial interpretation of jurisdiction, on the other hand, extradition would be denied. *Blakesley, supra* note 38, at 694. The drafters of the Supplementary Convention of 1970, between France and the United States, attempted to resolve the problem by adding the following provision:

Without prejudice to the jurisdictional provision of Article I of this Convention, when the offense has been committed outside the territory of both contracting Parties, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

Supplementary Convention of 1970, *supra* at art. I. It would be chimerical to believe that this article changes the traditional United States interpretation of the term jurisdiction. Although this new article might appear to provide for an exception to the tradi-

In 1927, in *Ford v. United States*,<sup>55</sup> a case which may be seen today as a precursor to the classic and widespread misapplication of the objective territorial theory, the United States Supreme Court upheld the conviction for conspiracy to violate United States liquor laws of several British subjects who had been on board a British vessel on the high seas about twenty-five miles off the coast of San Francisco at the time of the offense.<sup>56</sup> The assertion of jurisdiction actually was appropriate, as it was made pursuant to a treaty between Great Britain and the United States which authorized the seizure of vessels and the prosecution of British subjects suspected of committing such offenses. Indeed, the Court stated that since the parties were seen to be within United States jurisdiction by virtue of the specific treaty provision, they could not be proceeded against in any manner not permitted by the treaty.<sup>57</sup> The Court

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tional United States interpretation of the term "jurisdiction" in extradition treaties, it does not. If the drafters' purpose was to make such an exception, they essentially failed by connecting jurisdiction for extraditability to the law of the requested party. In practical effect, this changes very little. It simply makes United States law on jurisdiction determinative for most extradition requests. The provision would allow the United States, the party with the most restrictive law of jurisdiction, to seek extradition from France, the party with the more expansive law of jurisdiction and to apply the French (the requested state's) law of jurisdiction to determine extraditability. The United States would not normally request extradition unless its more restricted laws on jurisdiction would allow prosecution. The language also incorporates a strict adherence to the special and general double criminality condition.

There appear to be at least two explanations for the wording of article I. The United States negotiating team could have presented the article as an attempt to allow the flexibility to expand the notion of jurisdiction for extradition beyond the territorial principle as United States domestic law expands beyond that principle. Alternatively, it could have been a bungled attempt to allow France to obtain jurisdiction over the person through extradition, if the law of France allowed it over the subject matter, even when United States law would not allow jurisdiction in similar circumstances. Either view is a reversal of the judge-made principle that jurisdiction in extradition treaties means territorial jurisdiction. This reversal would not have violated the language of article I on its face.

It is likely that the former explanation is the more accurate. United States law on jurisdiction over extra-territorial crimes has been expanding. This expansion is apparent in relation to violations of: (1) antitrust laws, see *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); (2) securities laws, see *Schoenbaum v. Firstbook*, 405 F.2d 200, (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc); (3) conspiracy to import narcotics, see *United States v. Conroy*, 589 F.2d 1258 (5th Cir. 1979); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979); *United States v. Williams*, 589 F.2d 210 (5th Cir. 1979) *modified*, 617 F.2d 1063 (5th Cir. 1980); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). See also Note, *Drug Smuggling and the Protective Principle: A Journey Into Uncharted Waters*, 39 LA. L. REV. 1189 (1979). The United States delegation proposed the additional article, and apparently both negotiating teams agreed that the new clause would be helpful in countering narcotic and counterfeiting offenses, areas in which United States courts have transcended the pure territorial theory to take jurisdiction. The French delegation probably decided that a little expansion of extraditability beyond the territorial principle, as previously required by the courts, is better than none. Portions of this footnote were derived from Blakesley, *supra* note 38, at 664, 665.

<sup>55</sup> *Ford v. United States*, 273 U.S. 593 (1927).

<sup>56</sup> Convention for Prevention of Smuggling of Intoxicating Liquors Jan. 23, 1924, United States-Great Britain, 43 Stat. 1761, T.S. 685, 12 Bevans 414.

<sup>57</sup> 273 U.S. at 597.

suggested, however, that the theory or jurisdiction was that of objective territoriality. The Court, however, did not appear to believe strongly this clearly mistaken suggestion. The Court felt constrained to state that the conspiracy itself had its *situs* within the territory of the United States. As discussed above, the objective territorial principle obtains when the offense itself occurs outside the territory, but its harmful effect(s) or result(s) occur within the territory. Of course, a conspiracy outside the sovereign territory, by definition, cannot have any effect within the territory as it is an inchoate offense; it has no effect at all, until the substantive offense to which the parties are conspiring has occurred within the sovereign territory (or has occurred outside the territory with its own effects impacting within the territory).<sup>58</sup>

When a conspiracy is perceived not as an inchoate offense, but as a harm in and of itself, it poses an interesting question as to where the "harm" is perceived to occur. Is it in the place of the agreement or the place of the intended impact or result of the agreement? Clearly, it would be a strain on the objective territoriality theory to suggest that this "harm" has impacted on the intended state the moment the agreement is made outside the territory. It would appear that a new theory of jurisdiction needs to be developed for such an offense.<sup>59</sup> Indicating its confusion or its need to find that the conspiracy itself had its *situs* within the United States, the Court in *Ford* explained that the conspiracy to import alcoholic liquor into the United States occurred among co-conspirators, some of whom were within and some beyond the sovereign territory of the United States. These co-conspirators were, of course, agents of each other for the purpose of the conspiracy. Indeed, four of the overt acts giving rise to the conspiracy took place within the United States territorial limits and all of them were designed to violate United States law within United States territory. The Court then stated that in such a case all are guilty of the offense of conspiracy to violate the United States law, regardless of whether they are within or outside of the country.<sup>60</sup> The parties actually conspired, therefore, within the United States. The Court thus established the conspiracy as one which

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<sup>58</sup> Of course the purpose of having a crime of conspiracy is to prevent the effects from occurring by attaching a sanction to the undesirable activity very early in its development. It is the potential effects that we wish to prevent. Nevertheless, the objective territorial theory is not appropriate for this prophylaxis, since no effect occurs within the territory. If the potential effect is what triggers the jurisdiction, some other theory needs to be asserted, unless we are to fictionalize territoriality to the point of rendering it insignificant. Perhaps a hybrid (objective territorial/protective principle) theory needs to be developed, wherein the state's jurisdiction may be asserted when the conspiracy has reached a point at which it is clear that the effects of the conspiracy would affect the territory if intervention does not occur. Such a theory will be presented below.

<sup>59</sup> See *infra* text accompanying notes 157-89.

<sup>60</sup> 273 U.S. at 620.



actually has its *situs* within the United States. Although the Court used the term, this is not an example of the objective territorial theory! The cases the Court cited as supporting its position on objective territoriality are also telling in their indication that the Court did not clearly understand the objective territorial theory. In all of the cases the *effects* of the extraterritorial crimes were not only intended to occur within the United States territory, but actually did occur there.<sup>61</sup> Courts in the United States have subsequently taken the *Ford* dictum and its confused analysis as authority and rationale for the proposition that extraterritorial conspiracies which have not yet caused any harmful effects to occur within United States territory, but which are intended to do so, trigger an application of the objective territorial principle of jurisdiction.<sup>62</sup> This interpretation certainly goes beyond the holding in *Ford* or its cited authority.

Because it is not conceptually proper under international law to apply the objective territorial theory in such situations, there is a need to find or develop a theory which would allow the assertion of jurisdiction when one cannot find that the conspiracy actually had its *situs* within the United States and when no effect has occurred within the territory. The question is whether or not there is a theory which will allow legislatures in the United States to promulgate legislation (consistent with proper conceptualization of international jurisdiction theory) which will properly extend jurisdiction over certain extraterritorial conspiracies intended to and about to cause harmful effects within the United States. Objective territoriality clearly is not the proper vehicle. Before presenting a new theory of jurisdiction which may resolve the problem, it is necessary to consider the protective principle which will form one of the new theory's components and which has been suggested as a vehicle on its own for the assertion of jurisdiction in such cases.

### III. THE PROTECTIVE PRINCIPLE

The discussion of the territorial principle together with the nationality principle<sup>63</sup> suggests that whatever theory of jurisdiction over extra-

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<sup>61</sup> The *Ford* Court cites *Lamar v. United States*, 240 U.S. 60 (1916); *Strassheim v. Daily*, 221 U.S. 280 (1911); *Benson v. Henkel*, 198 U.S. 1 (1905) (a bribe was offered in California, but received in Washington, D.C., where jurisdiction over the subject matter was properly asserted, on the basis of the objective territoriality principle); *In re Palliser*, 136 U.S. 257 (1890) (jurisdiction was deemed proper in the place where a letter was received over an offense perpetrated by letter); *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893); *Commonwealth v. Macloon*, 101 Mass. 1 (1869).

<sup>62</sup> For a discussion of this issue, see *infra* notes 85-133 and accompanying text.

<sup>63</sup> In addition to the traditional (essentially territorial) function of keeping the peace, one of the functions of a municipal criminal justice system is simply to control its citizens conduct; to prohibit and attempt to limit conduct deemed to be socially harmful. This may be con-

territorial offenses is applied, an important motivation is the protection of the forum state. However, the fact that self-protection was the motive for assertion of jurisdiction does not by itself place the assertion within

trusted with the policy of keeping the King's peace, which obviously is the essence of territoriality. This function may be considered necessary and apt whether or not the conduct occurs within or without the state's territory. There have been periods in which the factor which determined the incidence of municipal criminal law was the citizenship or non-citizenship of the accused offender. *See Feller, supra* note 5, at 5, 12. This may still be found today. Soviet citizens are subject to Soviet criminal law regarding their conduct wherever it occurs. *Id.* at 12 n.5.

The United States Supreme Court recognized very early in its history the existence of the power to punish offenses committed extraterritorially by United States nationals. *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808)(dictum). *See also* Address of Chief Justice John Marshall before the United States House of Representatives, 1820 (text in full *quoted* in 18 U.S. (5 Wheat.) app. I; *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360)).

The application of any statute to extraterritorial offenses is exceptional to the territorial principle and the determination must be made on a case by case basis, since the United States Congress has never made a general rule relating to extraterritorial jurisdiction. Note, *supra* note 21 at 348-49. The Supreme Court attempted to lay down a general rule of statutory interpretation with regard to extraterritorial offense in *United States v. Bowman*, 260 U.S. 94 (1922), discussed at *supra* note 19. It has not, however, become a general rule. But see a legislative attempt to establish a general rule in S. 1772, 96th Cong., 1st Sess. § 204 (1979) and H.R. 6915, 96th Cong., 2d Sess. § 111(c) (1979).

Certain specific statutes expressly apply to offenses committed by nationals abroad. For example, 18 U.S.C. § 953 (1948), punishes unauthorized attempts by United States nationals "wherever they may be" to influence a foreign government in its relations with the United States. *See also* 18 U.S.C. § 2383 (1948) ("whoever incites, sets on foot, or assists or engages in any rebellion or insurrection against the authority of the United States" shall be fined or imprisoned, but statute gives no limitation or jurisdiction); 18 U.S.C. 2388 (1948), (applies to activities affecting American armed forces during war, specifically applies to offenses committed on the high seas as well as in United States territory. 28 U.S.C. § 1783 (1970), is incorporated by reference into the Federal Rules of Criminal Procedure, Rule 17(e)(2), and the Federal Rules of Civil Procedure, Rule 45(e)(2). They incorporate a provision that a United States court may order the issuance of a subpoena requiring the appearance as a witness of any "national or resident of the United States who is in a foreign country." *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (held "[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service").

Payments, promises to pay and authorizations of the payment of any money or anything of value to any foreign official or foreign political party to assist in obtaining or retaining business with a foreign concern is prohibited under the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 30 A, 78 (dd-1), 78(e) (1976). Under the Act "any employee or agent of such domestic concern who is a United States citizen, national, or resident, or person who is otherwise subject to the jurisdiction of the United States" is subject to the provisions of the Act. 15 U.S.C. §§ 78(dd-2), 104(b)(1)(B)(3). Interestingly, the Act requires that "an instrumentality of interstate commerce" be used in furtherance of the proscribed activity or scheme. 15 U.S.C. § 103, 104. This establishes an interesting territorial connection to go along with the nationality or personal basis of jurisdiction. Apparently, any United States citizen, national, or resident conducts business with the benefit of the mails or other instrumentality of interstate commerce in a country in which certain government officials above the prescribed rank are "known" to be corrupt or if one "has reason to know" they are corrupt, one has violated the Act and would be subject to criminal sanction. *See Note, Questionable Payments by Foreign Subsidiaries: The Extraterritorial Jurisdictional Effect of the Foreign Corrupt Practices Act of 1977*, 3 HASTINGS INT'L. & COMP. L. REV. 151, 156 (1979); Note, *Comparison of the Foreign*

the theoretical ambit of the protective principle. Nor does the fact that some harm was done to the forum state as an effect of the extraterritorial offense render the assertion of jurisdiction a manifestation of the protective principle.<sup>64</sup> Rather, to come under the protective principle,

*Corrupt Practices Act and the Draft International Agreement on Illicit Payment*, 13 VAND. J. TRANS-NAT'L L. 795 (1980).

This article does not consider the interesting problems related to the impact of the Foreign Corrupt Practices Act on conduct by foreign subsidiaries of United States entities through sanctioning the parent entity. In this regard see Note, *Questionable Payments by Foreign Corrupt Practices Act of 1977*, 3 HASTINGS INT'L & COMP. L. REV. 151, (1980). See also The Antarctic Conservation Act of 1978, 16 U.S.C. §§ 2401-2412 (1978 & Supp. 1981), which provides another example of United States legislative application of the nationality principle. Section 2403 dealing with prohibited acts provides:

- (a) In general.—It is unlawful— (1) *for any United States citizen*, unless authorized by regulation prescribed under this chapter or a permit issued under section 2404 of this title—
  - (A) to take within Antarctica any native mammal or native bird,
  - (B) to collect within any specially protected area any native plant,
  - (C) to introduce into Antarctica any animal or plant that is not indigenous to Antarctica,
  - (D) to enter any specially protected area or site of special scientific interest, or
  - (E) to discharge, or otherwise to dispose of, any pollutant within Antarctica;
- (2) for any United States citizen wherever located, or any foreign person while within the United States, unless authorized by regulation prescribed under this chapter or a permit issued under section 2404 of this title—
  - (A) to possess, sell, offer for sale, deliver, receive, carry, transport, or ship by any means whatsoever, or
  - (B) to import into the United States, to export from the United States, or to attempt to so import or export, any native mammal or native bird taken in Antarctica or any native plant collection in any specially protected area . . . .

16 U.S.C. § 2403 (1976 & Supp. 1981)(emphasis added). Section 2410 dealing with the jurisdiction of courts provides, "[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter or of any regulation prescribed, or permit issued under this chapter." 16 U.S.C. § 2410, (1976, & Supp. 1981).

State and federal treason statutes similarly provide for application of jurisdiction for extraterritorial commission of the offense. The federal statute declares, "[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." 18 U.S.C. § 2381 (1970). See also *Kawakita v. United States* 343 U.S. 717 (1952); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert.denied*, 336 U.S. 918 (1949) (both cases holding that American citizens living abroad may be found guilty of treason). Another statutory provision is noteworthy. The Internal Revenue Code imposes an income tax on "all citizens of the United States wherever resident." I.R.C. § 1 (1976). Vermont's fairly typical treason statute states that "a person owing allegiance to this state, who levies war or conspires to levy war against the same, or adheres to the enemies thereof, giving them aid and comfort, within the state or elsewhere, shall be guilty of treason against this state." VT. STAT. ANN. tit. 13, § 3401 (1974). See also *supra* discussion in note 19.

<sup>64</sup> Cf. Professor Perkins' discussion in his excellent article, *The Territorial Principle in Criminal Law*, *supra* note 5, at 1163, of the Hanks Case, 13 Tex. App. 289 (1882), in which he states that the Texas statute relied on by Texas for jurisdiction over a forgery done in Louisiana, which had caused a cloud over Texas land titles, was, nevertheless, an application of the protective principle because the forgery "could not by any extension be brought under the

the offense must have harmful or possibly harmful effects to specific national interests of the forum state.

Most United States courts and commentators confuse or at least fail to distinguish the objective territorial theory and the protective principle. Often, the courts' language will indicate that the objective territorial theory was the basis of an assertion of jurisdiction when the facts make it clear that the protective principle was the true basis. Other times, the protective principle will be the articulated basis when the facts indicate that the objective territorial principle would have been the proper theory.<sup>65</sup> Before analyzing the extent of this confusion and attempting to resolve it, discussion of the concepts of the protective principle and universal theory of jurisdiction are required.

Notwithstanding many courts' and commentators' failure to perceive, hesitancy to accept, or confusion there is a clear distinction between the protective and the objective/subjective territoriality principles. If the theories are to retain any integrity, the distinction must be observed. The objective territorial theory provides for jurisdiction over crimes committed wholly outside the forum state's territory,

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territorial principle." 13 Tex. App. at 290. It is true that this would have been a matter of the protective principle if, indeed, there had been no impact on Texas land titles (only the potential of impact) and if, *and only if*, the effect on the land titles would be injurious to Texas' security, integrity, treasury or governmental function. No doubt, this could have been. On the other hand, it certainly could have been an application of the objective territorial principle if an impact on the titles had actually occurred. Indeed, the language used by the Texas court appears to indicate that the harm, at least in the perception of the court, had actually occurred in Texas. The court believed that jurisdiction was proper, "when this forgery was committed against, *and injury done* to the State of Texas, because it *affected* title to lands within her sovereignty." 13 Tex. App. at 291 (emphasis added).

<sup>65</sup> A good example of court confusion or at least hesitancy to apply the protective principle is *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961), in which the accused alien had made false statements to a consular official of the United States abroad. The conviction was affirmed and the court articulated the protective principle as the basis for properly asserting jurisdiction. The assertion of jurisdiction was correct because such conduct certainly does harm governmental functions and could well injure or be a danger to security of sovereignty. The interesting feature of the case, however, is the court's compulsion to explain that a major element of the appropriateness of the assertion of jurisdiction was the adverse effects of the defendant's entrance into the United States. This hesitancy, or more likely the confusion, has become rampant in the past few years. *See, e.g.*, *United States v. Jonas*, 639 F.2d 200 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980), *cert. denied*, 451 U.S. 902 (1981); *United States v. Arpa*, 630 F.2d 836 (1st Cir. 1980); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1981); *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *United States v. Williams*, 589 F.2d 210 (5th Cir. 1979), modified, 617 F.2d 1063 (1980); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978); *United States v. Brown*, 549 F.2d 954 (4th Cir. 1977); *United States v. Winter*, 509 F.2d 957 (5th Cir.) *cert. denied sub nom.*, *Parks v. United States*, 423 U.S. 825 (1975); *United States v. Streifel*, 507 F. Supp. 481 (S.D.N.Y. 1981).

when the effects or results of those crimes occur within the territory.<sup>66</sup> The subjective territorial theory provides for jurisdiction over crimes in which a material element has occurred within the territory.<sup>67</sup> The protective principle, on the other hand, provides for jurisdiction over offenses committed wholly outside the territory of the forum state even when no effect occurs within the territory, but only when these actions potentially have adverse effect on or pose a danger to the state's security, integrity, sovereignty, or governmental function.<sup>68</sup> There may be some

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<sup>66</sup> See *supra* discussion at notes 38-64 and accompanying text.

<sup>67</sup> See *supra* discussion at notes 20-35 and accompanying text.

<sup>68</sup> *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968), is a case which most accurately articulates this distinction. An alien was convicted of knowingly making false statements under oath in a visa application to a United States consular officer in Canada. The court was careful to point out that the violation of 18 U.S.C. § 1546 (1976), took place entirely in Canada; the accused's entering the United States was not an element of the offense. Compare to the Ninth Circuit's apparent compulsion to articulate some territorial base for jurisdiction in *Rocha v. United States*, 288 F.2d 545, *cert. denied*, 366 U.S. 948 (1961). In *Pizzarusso*, the Second Circuit Court of Appeals was careful to indicate that it was the potential damage to institutions or governmental functions or national interests that provided the basis for jurisdiction under the protective principle.

Interestingly, in *United States v. Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955), the district court refused to convict the accused defendant for providing false information to a consular officer abroad. It held that withholding information and falsifying information relating to immigration into the United States *does not* provide jurisdiction to United States courts. It distinguished *United States ex rel. Majka v. Palmer*, 67 F.2d 146 (7th Cir. 1933), in which an alien was deported for perjury in similar circumstances. The *Baker* court explained the jurisdiction taken to deport for perjury "is far different from indicting and trying him for crime committed abroad." 136 F. Supp. at 548. See also *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943). In *Archer*, an alien was convicted under 22 U.S.C. § 131 (1976), for committing perjury before a United States consul or diplomatic officer. The District Court for the Southern District of California stated:

The Congress having thus conferred on its consular representatives the right to administer an oath, to make effective, it had to attach a punishment to its abuse . . . First, the consul is given the power to take the oath. Then, the section declares that the oath shall be as effective as if given by a magistrate having similar powers, within the United States. And then, as a final provision, to make it effective, a penalty is provided by the clause reading, "if any person . . . obtains an advantage in the United States, by securing by means of an oath taken before a consul, a document which has validity in the United States, be guilty of perjury, as that word is defined at common law, punishment is provided." If perjury has thus been committed, the offense is not committed in a foreign territory. It consists in having corruptly secured an advantage, *and in harming the United States. The fraud is not in the act, but in the result to be attained.* It is a sound principle of criminal law that such a result may be punished . . . 51 F. Supp. 709-10. (emphasis added).

In *Archer*, as in many other obvious applications of the protective principle, the court felt constrained to couch its opinion in terms similar to those of the territorial principle. Even though the district court argues that offenses violating the sovereignty of the United States may be punished, as if they were exceptions to the territorial principle, it felt constrained to state that the offense was "not committed in a foreign territory," but on the United States, as "the fraud is not in the act, but in the result to be obtained." 55 F. Supp. at 709-10. Even though no frank admission of the exception to the territorial principle is made, the exception exists in the protective or injured forum principle.

In *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd sub nom. Rocha v.*

overlap between the objective territorial principle and the protective theory: when an effect actually occurs (but it is upon the abstraction of sovereignty or of state integrity or it impinges upon some governmental function) either or both of the theories may be appropriate, depending on whether or not the effect is perceived to fall upon some territorial *situs* as well. It may be said that the objective and subjective territorial theories are extensions of the territorial principle, while the protective principle is an exception to it, since the latter does not require an actual effect to occur within the territory.

The protective principle has been clearly defined as the authority to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens [the state's] 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.<sup>69</sup>

The focus of this theory or principle of jurisdiction, therefore, is the nature of the interest that may be injured, rather than the place of the harm or the place of the conduct causing the harm or, for that matter, the nationality of the perpetrator.<sup>70</sup> Thus, lying to a consular outside of the United States territory may be perceived as constituting "an affront to the very sovereignty of the United States,"<sup>71</sup> and as having "a deleterious influence on valid governmental interests."<sup>72</sup> The protective theory is designed to allow a state to protect itself and to punish the perpetra-

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United States, 288 F.2d 545 (9th Cir. 1961), the district court cited the *Archer* decision as authority for denying the defendant's motion to dismiss charges of making false statements before a consular officer. The court observed that an offense is within the scope of the protective theory, "when the detrimental effect takes place through the effect upon the sovereignty of the state," 182 F. Supp. at 494 and it explicitly disagreed with the district court's opinion in *United States v. Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955).

See also the following decisions which do not mention the protective principle by name, but whose language strongly suggests it as the essential theory of jurisdiction in the cases: *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289, 290 (1888); *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 269 (1808); *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); *But see American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (held that the only proper base for jurisdiction in United States law is the territorial theory). See also J. BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 425.1-425.3 (1935).

<sup>69</sup> *United States v. Pizzarusso*, 388 F.2d at 10 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES § 33 (1965)). See also, *Harvard Research*, *supra* note 5, at 543; RESTATEMENT DRAFT, *supra* note 1, § 402(3).

<sup>70</sup> RESTATEMENT DRAFT, *supra* note 1, § 402(3); *Harvard Research*, *supra* note 5, at 543.

<sup>71</sup> *United States v. Pizzarusso*, 388 F.2d at 9-10.

<sup>72</sup> *Id.* at 10. A small minority of courts and some commentators, criticizing the confusion reigning among many of the federal circuits, have suggested that the protective principle alone applies to potential damage. *Pizzarusso* appears to suggest this. *Id.* See also Note, *Drug Smuggling and the Protective Principle: A Journey into Uncharted Waters*, 39 LA. L. REV. 1189 (1979). This is not absolutely accurate, however, in as much as damage actually done to the abstraction of sovereignty or the institutions or functions of government would be an appro-

tors of actual and inchoate offenses which damage or threaten to damage state security, sovereignty, treasury, or governmental function. It is the only accepted theory which allows jurisdiction over conduct which threatens potential danger to the above-mentioned abstractions or functions. Because of the significant dangers the protective principle poses to relations among nations, application of the theory is limited to those recognized and stated abstractions or functions.<sup>73</sup> With very few exceptions, national penal codes throughout the world recognize this principle and its limitations.<sup>74</sup>

appropriate trigger for the protective principle. Of course, it is very difficult to determine whether or not such damage has actually occurred. Thus, potential damage or danger is sufficient.

See, RESTATEMENT DRAFT, *supra* note 1, §§ 402-03, which refines § 33 of the old *Restatement* but retains the traditional bases of extraterritorial jurisdiction. This refinement will be discussed in detail *infra* in text accompanying notes 147-77. With regard to the protective principle, *Harvard Research*, *supra* note 5, at 440, describes the traditional theory:

7. 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 committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.
8. A state has jurisdiction with respect to any crime committed outside its territory by an alien which consists of falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instrument or credit, stamps, passports, or public documents, issued by the state or under its authority.

The RESTATEMENT DRAFT, *supra* note 1, § 402(3), provides that jurisdiction to prescribe obtains with regard to "Certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests."

<sup>73</sup> *United States v. Pizzarusso*, 388 F.2d at 10; *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.C.P.R. 1978); Note, *supra* note 72, at 1193.

<sup>74</sup> See, e.g., C. Pr. Pén. art. 694; *Harvard Research*, *supra* note 5, at 543, 547-51; Shavia & Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 311, 363-64 (M. Sorensen ed. 1968).

Probably the most famous international case actually involving the principle of objective territoriality also involved, and well illustrates, the protective principle. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10 (judgment of Sept. 7). The *Lotus* case stands for the principle of objective territoriality (perhaps including the floating territorial principle). In the *Lotus* case, Turkey prosecuted and convicted the French officer of the French flag merchant vessel, the *Lotus*, for manslaughter. The *Lotus* had collided with the Turkish flag vessel, the *Boz-Kourt*, causing much property damage and the loss of eight Turkish lives. France objected to the Turkish prosecution, claiming that Turkey had no basis for jurisdiction under any principle of international law. France and Turkey submitted the dispute to the Permanent Court of International Justice for resolution of this dispute over jurisdiction.

France argued that an officer of a ship on the high seas can only be held to obey the laws and regulations of the flag state and that international law prohibited Turkey from taking jurisdiction simply by reason of the nationality of the victims; France argued that the passive personality principle was not sufficient for Turkey to take jurisdiction. The Permanent Court of International Justice declined to decide the passive personality issue, but held that Turkey's assumption of jurisdiction could be predicated on the fact that the effects had occurred on the *Boz-Kourt*, which, being a Turkish flag vessel, was a place assimilated to Turkish territory for the purposes of the case. See RESTATEMENT, *supra* note 16, at 86. This type of jurisdiction may more aptly be called the "floating objective territorial principle." See Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q.

In sum, foreign and domestic commentators have considered the United States traditionally to be essentially adherents of the territorial theory. However, adherence to a strict interpretation of territorial jurisdiction has been tempered by fictional extension of the concept of territoriality, via the objective and subjective territorial theories, and by exception to it in theories such as the protective principle.

#### IV. UNIVERSAL JURISDICTION

International law provides that there are certain offenses for which any nation may assert jurisdiction once the nation obtains personal jurisdiction over the accused; such offenses are those so heinous that any of the community of nations may prosecute. The most ancient offense of universal interest is probably piracy. With regard to universal jurisdiction over piracy, Hackworth writes: "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."<sup>75</sup> The Geneva Convention on the High Seas, in 1958, article 19, states:

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32 (1967); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966). The French and the dissent in the case argued that the law of the flag-vessel should govern the pilot. This position was later adopted by two major international conventions relating to navigation on the high seas and probably reflects customary international law today. See, e.g., *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980); D. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 93 (2d ed. 1979). The French opposition to the assertion of jurisdiction in cases occurring on vessels on the high seas eventually won out, at least with regard to the signatories at the 1952 Brussels International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation. The parties to this convention were: *Signatories*: Germany, Belgium, Brazil, Denmark, Spain, France, United Kingdom, Greece, Italy, Monaco, Nicaragua, Yugoslavia; *Ratifications*: United Kingdom, France, Spain, Yugoslavia, Vatican, Egypt, Portugal, Belgium, Argentina; *Accessions*: Switzerland, Costa Rica, Cambodia, French Overseas Territories, the Republic of Togo and the Cameroons, Haiti, Vietnam. *Quoted in* 4 BRITISH SHIPPING LAWS COLLISIONS AT SEA No. 1285, 902-03 (McGuffie ed. 1961); 1958 Geneva Convention on the High Seas, April 29, 1958, art. 11, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. at 82 [hereinafter cited as Geneva Convention], states:

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or of the state of which such a person is a national.
2. In disciplinary matters, the state which has issued a masters certificate or a certificate of competence or license shall alone be competent. After due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the state which issued them.
3. No arrest or detention of the ship, even as a measure of investigation shall be ordered by any authorities other than those of the flag state.

*Quoted in* 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 240 (1968).

<sup>75</sup> 2 G. HACKWORTH, *INTERNATIONAL LAW* 681 (1940). See R. MERLE & A. VITU, *TRAITE DE DROIT CRIMINEL* 319 (1967).



On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.<sup>76</sup>

In addition to piracy, several other crimes are of universal or nearly universal interest. These crimes, many of which have been made subjects of international conventions aimed at their elimination, include slave trading,<sup>77</sup> war crimes,<sup>78</sup> hijacking and sabotage of civil aircraft,<sup>79</sup> genocide,<sup>80</sup> and terrorism.<sup>81</sup> There is a growing trend to include

<sup>76</sup> Geneva Convention, *supra* note 74, at art. 19. See, Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334 (1925); The *Marianna Flora*, 24 U.S. (Wheat) 1, 40 (1826): "Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they, are in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war."

<sup>77</sup> Geneva Convention, *supra* note 74, at arts. 13, 22.

<sup>78</sup> See generally T. TAYLOR, NUREMBERG AND VIETNAM (1970); U.S. ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL, FM 27-10 (rev. ed. 1976); *In re Yamashita*, 327 U.S. 1 (1946); *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973); I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); Bond, *Application of the Law of War to International Conflicts*, 3 GA. J. INT'L & COMP. L. 345 (1973); Taubenfeld, *The Applicability of the Laws of War in CIVIL WAR*, in LAW AND CIVIL WAR IN THE MODERN WORLD 499 (J. Moore ed. 1974); H. KISSINGER, THE WHITE HOUSE YEARS 1454, 1460 (1979).

<sup>79</sup> See Tokyo Convention (Convention on offenses and certain other acts committed on board aircraft), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768; The Hague Convention (for the Suppression of Unlawful Seizure of Aircraft), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192. The Hague Convention's major provisions create "universal" jurisdiction for signatories for prosecution of hijackers; the signatories have the obligation either to prosecute or extradite. The Hague Convention, *supra* at arts. 1, 4. Montreal Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation), Sept. 23, 1971, 24 U.S.T., T.I.A.S. No. 7570. See French L. 72-623, of July 5, 1972. 32 Gazette du Palais (Legislation) 360 (1972) which provides:

Art. L. 121-7. French courts have jurisdiction over any infraction committed aboard an airplane registered in France. They have jurisdiction as well over any crime or tort committed against such plane outside of the French territory.

Art. L. 121-8. French courts have jurisdiction with respect to a crime or a tort committed aboard a plane which is not registered in France when the author or the victim has French nationality, when the plane lands in France after the commission of the crime or tort, or when the infraction was committed aboard a plane which is rented without crew to a person who has his principal place of establishment or, if there be none, his permanent residence in France.

Moreover, in case a plane is forced off its course (i.e. hijacked) which is not registered in France, French courts have jurisdiction over the infraction and over every other act of violence against the passengers or the crew done by the person alleged to have forced the plane off its course in the commission of (literally, in direct relationship to) the offense, when the person is found in France.

*Cited and translated in* N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 278 (1973). See also 49 U.S.C. § 1472(k)(2)(1976), which states:

whoever, while aboard an aircraft within the special aircraft jurisdiction of the United

trafficking in narcotic drugs to the list.<sup>82</sup> Universal interest in the suppression of trafficking in narcotic drugs is moving toward, but has not yet reached, sufficient intensity to warrant recognition, either on the basis of custom or universal participation in international agreement.<sup>83</sup> In some instances, however, countries are obligated either to extradite or prosecute narcotics law violators, aircraft hijackers, and counterfeiters, pursuant to treaty obligations, if the offense was committed within the jurisdiction of the requesting state.<sup>84</sup>

#### V. RECENT EXTENSION OF THE BASES OF JURISDICTION OVER EXTRATERRITORIAL CRIME IN UNITED STATES LAW

Courts and commentators in the United States, with some notable exceptions,<sup>85</sup> have improperly extended the bases of jurisdiction over extraterritorial crime. In so doing, they have failed to perceive or have been reticent to apply or articulate a clear distinction between the protective and objective territoriality principles.<sup>86</sup> The *Restatement Draft* has followed the trend of United States courts in this error.<sup>87</sup> The cases and the *Restatement Draft* inappropriately designate the extension as being within the ambit of the objective territorial principle. Section 402(l)(c) of the *Restatement Draft* provides that jurisdiction over an extraterritorial crime will obtain when it "has or is *intended* to have substantial effect within its [the United States] territory."<sup>88</sup> The court cases provide es-

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States, commits an act, which, if committed in the District of Columbia would be in violation of section 9 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia," (citation omitted), shall be punished as provided therein. See Severson, *International Law and the Export of Terrorism*, 67 DEP'T ST. BULL. 645 (1972).

<sup>80</sup> Genocide Convention (Convention on the Prevention and Punishment of the Crime of Genocide), Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1957). The United States Government, although instrumental in developing the convention, has not yet received the advice and consent of the Senate. See 62 DEP'T ST. BULL. 350 (1970) wherein the Secretary of State urges its ratification.

<sup>81</sup> See Drafting of International Convention Against Taking of Hostages, Dec. 18, 1979, 18 I.L.M. 1456; European Convention on Suppression of Terrorism, Dec. 4, 1979, 19 I.L.M. 325; United Nations Resolution Regarding Terrorism, 14 U.N. GAOR at 355, U.N. Doc. A/RES/3034 (1972). The United States voted against the document for not being strong enough. See, 68 DEP'T ST. BULL. 81 (1973); Convention on Terrorism, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (entered into force for United States on Oct. 20, 1976).

<sup>82</sup> See U.S. DEP'T OF JUST., STUDY OF INTERNATIONAL CONTROL OF NARCOTICS AND DANGEROUS DRUGS (1972). This study discusses 12 international agreements dating from 1909 to 1961 on the control of narcotics.

<sup>83</sup> See generally RESTATEMENT, *supra* note 16, § 34, reporter's note 2, at 97.

<sup>84</sup> See, e.g., *supra* notes 79 & 81.

<sup>85</sup> E.g., *United States v. Pizzarusso*, 388 F.2d 8, 11 (2d Cir. 1968); Note, *supra* note 72, at 1189.

<sup>86</sup> See *supra* notes 38-74 and accompanying text.

<sup>87</sup> RESTATEMENT DRAFT, *supra* note 1, § 402(l)(c).

<sup>88</sup> *Id.* (emphasis added).

entially the same conceptualization. The following three sections of this article will analyze this trend to indicate that although the cases and the *Restatement Draft* provide the appropriate result and attempt properly to allow jurisdiction in cases of thwarted extraterritorial conspiracy, they make a conceptual error in placing the extension within the objective territorial theory. It would theoretically be more accurate and more consistent with traditional international law if the extension was recognized as being based upon a new hybrid theory of jurisdiction, derived from policies underlying the objective territorial, the protective principle, and the universality theories of jurisdiction.<sup>89</sup>

The trend of United States courts to extend the bases of jurisdiction began seriously with the the United States Supreme Court's inappropriate articulation of the objective territorial principle as the basis for jurisdiction in *Ford v. United States*, as discussed above.<sup>90</sup> Another very good example of the inaccurate application of the objective territorial theory is in *Rocha v. United States*.<sup>91</sup> Although the *Rocha* facts were perfect for the application of the protective theory, the Ninth Circuit Court of Appeals felt constrained to articulate a territorial basis for jurisdiction. An accused alien had made false statements to a consular official abroad. The district court had convicted the accused and the court of appeals properly upheld the conviction. The facts clearly show that the accused's conduct certainly violated the integrity of United States governmental operations and was an insult to its sovereignty, if not a danger to its security. Nevertheless, the appellate court explained that a major reason for its assertion of jurisdiction was the fact that United States territory had been adversely impacted upon when the defendant entered illegally. The offense, of course, was making false statements to a consular official; this occurred entirely extraterritorially. The interesting feature of the case is the court's need to emphasize the objective territorial theory.

Similarly, in *United States v. Archer*,<sup>92</sup> the Southern District of California properly asserted jurisdiction and applied United States law to convict an alien of committing perjury to a consular official abroad. The court made a statement suggesting the protective principle: "[the

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<sup>89</sup> Some may suggest that the Restatement Draft creates a new basis of jurisdiction pursuant to the "Rule of Reasonableness" (similar to that in conflicts cases) which finds the state with the most significant interest in the crime to be the proper one for jurisdiction. This writer believes that the Restatement Draft does not actually do this, but recognizes the traditional bases of jurisdiction. The Rule of Reasonableness is a mechanism of imitation, not expansion.

<sup>90</sup> *Ford v. United States*, 273 U.S. 593 (1927), see *supra* notes 55-62 and accompanying text for a detailed discussion of this case.

<sup>91</sup> *Rocha v. United States*, 288 F.2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961).

<sup>92</sup> *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943).

fraud] consists in having corruptly secured an advantage, and in harming the United States. The fraud is not in the act, but in the result [the advantage or harm] to be attained."<sup>93</sup> The court, nevertheless, felt constrained to couch its opinion in terms suggesting the objective territorial theory. Even though the Court argued well that offenses violating the sovereignty of the United States (absent territorial *situs*) may be punished as if they were exceptions to the territorial principle, the court stated that, "the offense was not committed in a foreign territory," but in the United States.<sup>94</sup> Even though the protective principle would have been a proper and sufficient basis for asserting jurisdiction, the courts felt constrained to apply the objective territorial theory.

The confusion or misapplication of the objective territorial theory has been taken to greater lengths more recently, especially in cases relating to the crime of conspiracy to import narcotics, in which the parties are arrested and the conspiracy thwarted beyond the United States territorial limits.<sup>95</sup> The courts have factually perceived the problem in four conceptual forms. First, as in the *Ford* case,<sup>96</sup> courts have construed the facts to find that the conspiracy actually took place or had effects within United States territory. If the *situs* is found to be within United States territory, this poses no problem for the purposes of this section of the article.<sup>97</sup> Nor does the related method of finding that the offense which has occurred upon a United States flag vessel essentially has occurred on United States territory. This is an application of the so-called floating-territorial principle.<sup>98</sup> A third related method of conceptualizing the

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<sup>93</sup> *Id.* at 710.

<sup>94</sup> *Id.* See also *United States v. Rodriguez*, 182 F. Supp. 479, 491-92 (S.D. Cal. 1960) and other cases cited *supra* note 68. But see *United States v. Baker*, 136 F. Supp. 546, 549 (S.D.N.Y. 1955), wherein the court refused jurisdiction because, "providing false information to a consular officer abroad" does not occur within the territorial jurisdiction of the United States. The court did not recognize the protective principle as a basis for taking jurisdiction.

<sup>95</sup> See cases cited *supra* note 65 and those discussed *infra* notes 106-53 and accompanying text.

<sup>96</sup> 273 U.S. 593, 619 (1927).

<sup>97</sup> See, e.g., *United States v. Harper*, 617 F.2d 35 (4th Cir. 1980); *United States v. Coats*, 611 F.2d 37 (4th Cir. 1979).

<sup>98</sup> *Lauritzen v. Larsen*, 345 U.S. 571 (1953); see *Empson*, *supra* note 6, at 32; *George*, *supra* note 74, at 613; cited in *Note*, *supra* note 6, at 404, n.3.

In the *Wildenhus* case, 120 U.S. 1 (1887), a Belgian national was on board a Belgian ship in port at Jersey City. The decision stated that if there is a treaty, and perhaps even by comity, the flag-ship authority through its consular offices controls in situations of offenses on board ship, except that when the offense endangers the repose of the port, local United States authority can intervene. Most countries as well as the United States provide for the assertion of jurisdiction over offenses committed aboard their respective flag vessels on the high seas or flag aircraft in international airspace. See, e.g., FR. C. L'AVIATION CIV., Decr. no. 67-333, of March 30, 1967, D. 1967, at 184; B.L.D. 1967, at 320; C. L'AVIATION CIV., art L. 121-7, L. no. 72-623, of July 5, 1972; L. 121-8, L. no. 76-450 of May 24, 1976; L. 121-9, L. no. 72-623, of July 5, 1972; cited and quoted in CODE DE PROCÉDURE PÉNALE, following art. 689; V. KOER-

facts to legitimize the assertion of jurisdiction is to determine that a significant or constituent element of the offense has occurred within United States territory, but that the offense was actually consummated abroad.<sup>99</sup> This is an obvious application of the subjective territorial theory, although the courts often inaccurately describe the basis for their taking jurisdiction as that of the objective territorial principle.<sup>100</sup> Finally, the perception which causes the major conceptual problems and which will be the main focus of this portion of the article, allows for jurisdiction when no element or effect of the conspiracy occurs within United States territory.

The subjective territorial theory is often a valid vehicle for the assertion of legislative, judicial and enforcement jurisdiction over conspiracies which culminate or are thwarted abroad, since all that is required for competent use of that theory is that a constituent element of the offense occur within the territorial limits of the United States.<sup>101</sup> If the courts consider that an overt act in furtherance of the conspiracy is "a constituent element" of the crime, the subjective territorial principle properly applies. Until very recently, the courts have considered an overt act by at least one of the conspirators within United States territory necessary before jurisdiction could be obtained. The theoretical problem in most of these cases is that the courts have articulated, as the basis of their taking jurisdiction, the objective rather than the subjective territorial theory.<sup>102</sup> Where no harmful effects actually occur within the territory—no contraband actually smuggled in, for example—the objective territorial principle, as it has traditionally been conceptualized, clearly cannot be the proper theory for the assertion of jurisdiction. An

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ING-JOULIN, DALLOZ JURISCLASSEUR DE DROIT INTERNATIONAL CONFLICTS DE LOIS ET DE COMPÉTENCE §§ 9-25 (1977). Article 696 of the French Code de Procédure Pénale provides a legislative basis for jurisdiction over offenses in application of international conventions. It extends jurisdiction over "crimes, délits, and contraventions," committed extraterritorially for which an international convention, signed and ratified by France, attributes jurisdiction to France. C. Pr. Pén. art. 696. There are several conventions of this type which have entered into force in the past decade. *E.g.*, the Hague Convention for the Repression of Aircraft Hijacking, *see supra* note 79; The Montreal Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation) *supra* note 79; Convention Unique sur les Stupéfiants (Single Convention on Narcotic Drugs), March 25, 1973, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.

<sup>99</sup> *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980). The subjective territorial principle is discussed *supra* at 21 text accompanying notes 21-35.

<sup>100</sup> *Id.* and cases cited *supra* note 65.

<sup>101</sup> *See supra* notes 2-35 and accompanying text.

<sup>102</sup> *See, e.g.*, *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980); *United States v. Cadena*, 585 F.2d 1285 (5th Cir. 1979); *United States v. Winter*, 509 F.2d 975 (5th Cir.) *cert. denied sub nom. Parks v. United States*, 423 U.S. 825 (1975); *Marine v. United States*, 352 F.2d 174 (5th Cir. 1965). *See also*, *Ford v. United States*, 273 U.S. 593 (1927); *Rivard v. United States* 375 F.2d 889 (1967) (in both cases significant harmful effects had actually occurred within United States territory so the objective territorial theory could properly be asserted).

inchoate offense, still inchoate, has no effects, but an element of an inchoate offense (here an overt act) can take place within the territory. If it does, the subjective territorial theory will properly authorize jurisdiction. In addition, it appears that a conspiracy seen not as an inchoate offense but as a completed offense having its own intrinsic harmful effects, has its territorial *situs* where that conspiracy takes place. Although the place of the conspiracy's intended impact clearly has a strong interest in stopping it from occurring, the objective territorial theory cannot be the vehicle for the assertion of jurisdiction, in as much as no harmful effect has actually occurred on the asserting state's territory.

Thus, the courts have confused the substantive elements of the crime of conspiracy with the jurisdictional requirements of the objective territorial theory. The latter theory requires that an actual detrimental effect occur within the territory of the state asserting jurisdiction. An overt act may be a constituent element of the crime of conspiracy, but it certainly is not a harmful effect,<sup>103</sup> unless it is argued that the overt act conceptually moves the *situs* of the conspiracy to the place of the overt act, or alternatively, that the harm represented by the conspiracy itself has now found a *situs* via the overt act in the territory in which the overt act occurred. This may be a proper application of the combined subjective/objective territorial theories. Certainly, however, to say that a co-conspirator's overt act triggers the traditional objective territorial theory of jurisdiction is to confuse that theory with the subjective territorial theory.<sup>104</sup>

This confusion, represented by the tendency to apply the objective territorial principle of jurisdiction indiscriminately, becomes even more important when we consider the cases in which no overt act occurs within United States territory. The United States federal laws prohibiting illegal conspiracies to import narcotics into the United States do not

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<sup>103</sup> *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975), provides a good example of how this erroneous perception has been developed or rationalized. The Fifth Circuit Court of Appeals admitted that in *Ford*, 273 U.S. 593 (1927), and *Rivard*, 375 F.2d 889 (1967), illegal contraband had actually been imported into the United States—thus establishing a harmful effect. The court, however, discounted the distinction as being without significance under the facts of the case because the conspiracy had been thwarted before importation could occur, and “because it is immaterial to the commission of the crime of conspiracy whether the object of the conspiracy is achieved.” *Winter*, 509 F.2d at 982. The court said, “[a]n overt act, seemingly innocent in itself yet in furtherance of the conspiracy, is sufficient under the law of conspiracy.” 509 F.2d at 982. The court continued, “[w]e see no reason why it should be any different for jurisdictional purposes, to the extent that proof of an overt act is required.” 509 F.2d at 982. See also reasoning in *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1979). This result, of course is appropriate, but the objective territorial principle is not the appropriate theoretical vehicle to accomplish it.

<sup>104</sup> If the courts are holding that the *intended* effect of an inchoate offense is sufficient to trigger jurisdiction in the state of intended impact, a new theory of jurisdiction has been established. See discussion *infra* at notes 136-89 and accompanying text.

require an overt act as a substantive element of the offense.<sup>105</sup> The courts recently have reasoned that, since no overt act is required in order to commit a conspiracy to import narcotics into the United States, the objective territorial principle will apply to assert jurisdiction over such a conspiracy, even though no overt act or any effect has occurred within the United States, provided that the parties *intended* to violate United States law in the United States.<sup>106</sup>

Certainly, if the substantive definition of the offense does not require an overt act, such a crime occurs without one.<sup>107</sup> It is quite another thing, however, even if harm was intended to occur within United States territory, to hold that the objective territorial principle is the basis for asserting jurisdiction over this offense, when that theory requires that a detrimental effect occur within the territory. When a conspiracy as defined in the *United States Code* has occurred, applying non-sequiturs to extend the objective territorial principle to occasions in which no effect at all occurs within the territorial jurisdiction does violence to the principle of objective territoriality to the point of obliterating its meaning. The approach is even more troubling, in that without any element of the offense occurring within the territorial limits, the subjective territorial theory is not appropriate either.

The conceptual problem described above developed out of a need to find a way to effectuate United States laws prescribing conspiracies to import illegal drugs into the United States. Obviously, as the crime of conspiracy itself is designed to be a tool of prophylaxis, it must have an extraterritorial application if it is to regulate importation. The courts reasoned correctly that the Congress intended the laws to have an extraterritorial application; this legislative intent is clearly inferred (when not explicit) from the above-stated logic.<sup>108</sup> The need for extraterritorial application is one which properly ought to be satisfied. The difficulty has arisen from the courts' failure to articulate an appropriate theory for this application. A brief analysis of some key cases which have extended

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<sup>105</sup> 21 U.S.C. §§ 846, 963 (1976). Section 846 provides, "[a]ny person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.* §846. Section 963 states, "[a]ny person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.* § 963.

<sup>106</sup> *See, e.g.*, *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980); *United States v. Postal*, 589 F.2d 862, 886 n.39 (5th Cir. 1979). The RESTATEMENT DRAFT, *supra* note 1, 402(1)(c), has recognized this same notion.

<sup>107</sup> This article will not discuss the problems related to this issue.

<sup>108</sup> *See, e.g.*, cases cited *supra* note 100; *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981).

or applied jurisdiction extraterritorially and of the *Restatement Draft* follows. The faulty reasoning of the cases has created a confused conceptualization of the law on jurisdiction which risks doing harm to the integrity of the objective and subjective territorial theories. Analysis of their correct results and their conceptual defects will provide the vehicle for the development of a "new" or hybrid theory of extraterritorial jurisdiction.

In *Brown v. United States*,<sup>109</sup> a prototypical decision which both poses the problem and suggests the solution, the defendant was convicted of conspiracy to import heroin into the United States from West Germany. The defendant, a United States citizen in the military and stationed in Germany, conspired with others to use the United States Army mails to import heroin into the United States. Indeed, the parties to the conspiracy actually caused packages, which they believed to contain heroin, to be sent to the United States via the Army mail. The packages, however, contained corn starch and dextrose. Thus, a conspiracy to import heroin into the United States did occur and was proved. It occurred in Germany, however, and no overt act (of the conspiracy to import heroin) occurred within the United States. Although there was an impact on United States territory, this impact was benign. The defendant argued that for jurisdiction to obtain, there would have to be a detrimental effect which was intended to occur and indeed which did occur on United States territory or, alternatively, that there must be activity which portends potential damage to United States governmental interests. Neither the impact nor the required potential danger occurred.<sup>110</sup> The Fourth Circuit Court of Appeals held that, even though what was actually imported happened to be benign, "the conspiracy alleged implicated a crime that *would produce* detrimental effects within this nation and affront its denouncement of the possession and trafficking in drugs like those contemplated in this case."<sup>111</sup>

The court does not explain upon which theory of jurisdiction its decision is based. However, it cites as authority for its holding *Strassheim v. Daily*,<sup>112</sup> the classic case representing the objective territorial principle. It will be recalled that *Strassheim* held that an offense committed abroad whose harmful effects are intended to *and* do occur within United States territory did provide jurisdiction on that theory. The *Brown* court cites, in the same breath and immediately following its

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<sup>109</sup> *United States v. Brown*, 549 F.2d 954 (4th Cir. 1977) (the defendant was charged with violating 21 U.S.C. §§ 801, 952(a), 960, 963 (1976)).

<sup>110</sup> 21 U.S.C. § 956 (1976).

<sup>111</sup> *Id.* (emphasis added).

<sup>112</sup> *Strassheim v. Dailey*, 221 U.S. 280 (1911), discussed *supra* at notes 39-40 and accompanying text.



citation of *Strassheim*, *United States v. Pizzarusso*,<sup>113</sup> the classic case applying the protective principle of jurisdiction. In *Pizzarusso*, the court applies the protective principle to cases of *potential* damage, but the court makes it clear that there must be danger or potential damage to national security, integrity, sovereignty, or governmental operations before the protective theory may be appropriately asserted. The Fourth Circuit in *Brown*, after citing *Strassheim* and *Pizzarusso*, cites and quotes for effect *United States v. Bowman*,<sup>114</sup> which suggests the protective principle and, further, manifests the court's confusion over the distinction between the objective territoriality and protective principles: "certain crimes [such as conspiracy to defraud a corporation in which the United States is the sole stockholder] 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 open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."<sup>115</sup>

In *Bowman*, the defendants had conspired to order from and give a receipt for 1,000 tons of fuel from the Standard Oil Co. (whose agent was in on the ruse), but to take only 600 tons abroad, although they would collect cash for the total 1,000 tons and pocket the excess.<sup>116</sup> This, of course, would defraud the paying corporation, of which the United States Government was the sole shareholder. The United States Supreme Court in this decision articulates the purpose and the ambit of the protective principle, without denominating it as such. It cites and describes sections of the United States Code relating to "offenses against the operation of the government,"<sup>117</sup> which necessarily, due to the nature of the crimes involved, are designed to provide jurisdiction in United States courts when acts are done which are intended to damage the function of government, such as forging or altering a ship's papers,<sup>118</sup> or enticing desertions from the naval service.<sup>119</sup> The Court goes on to analogize the conspiracy to defraud a corporation in which the United States Government was the sole shareholder to those "offenses against the operation of the government."<sup>120</sup> Thus, the theory of jurisdiction invoked in *Bowman* is clearly the protective principle. The Fourth Circuit Court of Appeals in *Brown* cites *Bowman* as the proper analogue providing the solution to their jurisdictional problem, and, in-

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<sup>113</sup> *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968).

<sup>114</sup> *United States v. Bowman*, 260 U.S. 94 (1922).

<sup>115</sup> *Id.* at 98.

<sup>116</sup> *Id.* at 95-96.

<sup>117</sup> *Id.* at 98-99.

<sup>118</sup> *Id.* at 99.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 102.

cidentally, makes the same error as the *Bowman* court in not clearly focusing on or denominating the appropriate theory. The *Brown* court stated, "the statutory sanctions against importation of narcotics so precisely match the proscriptions in *Bowman* that further citation would be superfluous."<sup>121</sup> The court never clearly articulated what potential or actual danger or impairment of governmental operations, or damage to national security, sovereignty, or integrity it is contemplating, but one may speculate that it might be the abuse of the Army mail system, the violations of our customs barriers for these illicit and dangerous purposes, or, perhaps, even the danger to national security that is posed by the drug problem and the military.

The cases which, in the past year or so, have found jurisdiction appropriately to be asserted over extraterritorial conspiracies to import narcotics have degenerated from the lack of precision in *Brown* to improper application of the objective territorial theory of jurisdiction. In *United States v. Ricardo*,<sup>122</sup> the Fifth Circuit Court of Appeals affirmed convictions for conspiracy to import marijuana into the United States,<sup>123</sup> although the conspiracy, which took place entirely abroad (no overt acts within the United States), was thwarted before any marijuana was imported. It held that the district court had jurisdiction, pursuant to the objective territorial theory, to try the defendants and that United States drug smuggling conspiracy laws<sup>124</sup> had extraterritorial application, as long as the parties *intended* to violate United States law and to have the effects of the conspiracy occur within United States territory.<sup>125</sup> The court reasoned as follows. First, the law does not require an overt act to be alleged or proved in order to convict a person of conspiracy to import marijuana. The Fifth Circuit has always adhered to the principle of objective territoriality, "which attache[s] criminal consequences to extraterritorial acts that are *intended* to have effect in the sovereign territory, at least where overt acts within the territory can be proved,"<sup>126</sup> and "[i]mplicit in these statutes is the notion that the prescribed prohibitions apply extraterritorially,"<sup>127</sup> and "when the statute itself does not require proof of an overt act, jurisdiction attaches upon a mere showing of *in-*

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<sup>121</sup> *United States v. Brown*, 549 F.2d 954, 957.

<sup>122</sup> *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980).

<sup>123</sup> 21 U.S.C. §§ 846, 963 (1976).

<sup>124</sup> *Id.*

<sup>125</sup> *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980) (citing *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980). *See also* *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); RESTATEMENT DRAFT, *supra* note 1, § 402(1)(c).

<sup>126</sup> *United States v. Ricardo*, 619 F.2d at 1128 (citing *United States v. Postal*, 589 F.2d 862, 885 (5th Cir. 1979)). Of course, this is an incorrect statement of the objective territorial principle. Jurisdiction may be appropriate under the facts described in the statement, but on the basis of the subjective, not objective, territorial theory.

<sup>127</sup> *Id.* at 1128 (citing *United States v. Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978)).

tended territorial effects."<sup>128</sup>

*United States v. Mann*<sup>129</sup> is a major decision in the judicial development of the notion that jurisdiction over extraterritorial conspiracies is appropriate under the objective territorial theory even though no effect actually occurs within United States territory. In *Mann*, the defendants were convicted of conspiracy to import marijuana into the United States with the intent to distribute it there.<sup>130</sup> The Fifth Circuit declared that it was not necessary for the government to allege or prove an overt act to obtain convictions under the controlled substance conspiracy statutes<sup>131</sup> because, "[w]hen a conspiracy statute does not require proof of overt acts, the requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders."<sup>132</sup> The court then stated that any other rule would make it too difficult to enforce our laws and would "*defeat the objective territorial theory*."<sup>133</sup> Of course, the court is correct to say that unless jurisdiction can be asserted to apply to these inchoate offenses, "it will be difficult to enforce them."<sup>134</sup> Amazingly, however, in the name of "saving" the objective territorial theory, the Fifth Circuit transubstantiates an intent into a jurisdiction triggering territorial effect. This is surely extending territoriality beyond its borders.

The courts may be recognizing that jurisdiction over an inchoate offense properly obtains when the offense has as its aim the commission of a crime on the territory of the forum state. It is conceptually inaccurate, however, to place this extension of jurisdiction within the objective territorial theory. It is suggested that assertion of jurisdiction in such a case is proper and, indeed, is acceptable under international law, but that the extension represents a new theory of jurisdiction based on the combined notions of objective territoriality, the protective principle and

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<sup>128</sup> *Id.* at 1129 (citing *United States v. Postal*, 589 F.2d 862, 885 n.39 (5th Cir. 1979)). Thus the court asserted jurisdiction over the conspiracy, because its aim was to import narcotics into the United States. Jurisdiction was approved, even though no overt act or effect occurred on United States territory, because no overt act is required as an element of the crime.

<sup>129</sup> *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980).

<sup>130</sup> 21 U.S.C. §§ 846, 963 (1976).

<sup>131</sup> *United States v. Rodriguez*, 615 F.2d 906, 919 n.37 (5th Cir. 1980).

<sup>132</sup> *Id.* at 671.

<sup>133</sup> *Id.* See also *United States v. Jonas*, 639 F.2d 200, 205 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980); *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); which held that, as long as the parties intend that the conspiracy be consummated within United States territorial boundaries, the jurisdictional requirement is met.

See also *United States v. Willis*, 639 F.2d 1335 (5th Cir. 1981) (no discussion at all of the problem of jurisdiction); *United States v. Espinosa Cerpa*, 630 F.2d 328 (5th Cir. 1980) (no mention of jurisdictional problem); *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980); *United States v. Streifel*, 507 F. Supp. 480, 483 (S.D.N.Y. 1981).

<sup>134</sup> 615 F.2d at 67.

the universality theory of jurisdiction. As will be argued, the *Restatement Draft's* new tentative "standard of reasonableness" does not properly work to extend the objective territorial theory, but functions to limit the application of this theory.<sup>135</sup>

## VI. RECTIFICATION OF CONCEPTUAL DEFICIENCY

If it is important that United States narcotics conspiracy laws be applicable extraterritorially, it is also important that the theoretical basis for their application be valid. One attempt to develop a proper conceptual basis for their extraterritorial application might be found in the analysis of the *Pizzarusso* case,<sup>136</sup> which at least clearly distinguished the objective territorial and the protective principles. A few insightful courts and commentators have detected the validity of the distinction.<sup>137</sup>

*United States v. Layton*,<sup>138</sup> provided the Federal District Court for the Northern District of California with the vehicle to apply, among other theories, both the objective territorial and the protective principles of jurisdiction.<sup>139</sup> The defendant, Larry Layton, was charged with the following counts relating to the killing of Congressman Leo Ryan and the wounding of the American deputy chief of mission in Guyana: (1) conspiracy to murder a United States Congressman;<sup>140</sup> (2) aiding and abetting in the murder of a United States Congressman;<sup>141</sup> (3) conspiracy to murder an internationally protected person;<sup>142</sup> (4) aiding and abetting in the attempted murder of an internationally protected person. The district court found that it had proper subject-matter jurisdiction over all counts, "[t]he courts of the United States have repeatedly upheld the power of Congress to attach extraterritorial effect to its penal statutes, particularly where they are being applied to citizens of the United States,"<sup>143</sup> including "the objective territorial principle, which

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<sup>135</sup> See *infra* text accompanying note 158 for a discussion of this issue.

<sup>136</sup> *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968).

<sup>137</sup> See *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981); *United States v. Egan*, 501 F. Supp. 1252, 1257, 1258 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631 (D.P.R. 1978); *United States v. Daniszewski*, 380 F. Supp. 113 (E.D.N.Y. 1974); Note, *supra* note 72; N. LEECH, C. OLIVER & J. SWEENEY, *supra* note 79, at 136.

<sup>138</sup> *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981).

<sup>139</sup> The court believed that at least the following theories would be appropriate for assertion of jurisdiction: (1) objective territoriality; (2) protective principle; (3) nationality; (4) passive personality. *Id.* at 216.

<sup>140</sup> 18 U.S.C. § 351(d) (1976).

<sup>141</sup> *Id.* § 351(a).

<sup>142</sup> *Id.* § 1117.

<sup>143</sup> *Id.* at 215. The court cites: *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *United States v. King*, 552 F.2d 833, 850-51 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

allows countries to reach acts committed outside territorial limits, but intended to produce, and producing, detrimental effects within the nation."<sup>144</sup> Of course, if there was an actual impact on the territory of the United States, it might have been in Washington, D.C. and in Northern California where Congressman Ryan served.

The protective principle, however, is the more apt theory for asserting jurisdiction since the effect of the killing clearly ended Congressman Ryan's ability to continue functioning as a congressman (hence impairing an important governmental function). The murder could also be construed as a threat to or actual damage to the abstraction of United States sovereignty. The court clearly saw this application, "[t]he alleged crimes certainly had a *potentially* adverse effect upon the security or governmental functions of the nation, thereby providing the basis for jurisdiction under the protective principle."<sup>145</sup>

The court in *Layton*, held that Congress is free to extend jurisdiction extraterritorially if it wishes.<sup>146</sup> It stated:

Courts have generally inferred such jurisdiction for 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 extraterritorial offenses.<sup>147</sup>

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<sup>144</sup> 509 F. Supp. at 215-16 (citing *Strassheim v. Dailey*, 221 U.S. 280 (1911); *United States v. King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1974).

<sup>145</sup> 509 F. Supp. at 216. In *United States v. Pizzarusso*, 388 F.2d at 10-11 the court determined that Congress intended to apply these statutes extraterritorially. In making this decision the court explained that the statutes implicitly and necessarily suggest an extraterritorial application. The court cites *United States v. Bowman*, 260 U.S. 94, 97-98 (1922), to the effect that when a statute does not explicitly state that it is to apply extraterritorially, the scope of jurisdiction depends on the purpose of Congress, as evidenced by the description and nature of the crime. "When the crime is of a nature that, unless it is applied extra-territorially, the government will be powerless to *protect itself* in many instances. In such cases, we will infer that Congress intended to extend its application extraterritorially." 260 U.S. at 217.

In *Bowman*, it will be recalled that jurisdiction was extended to cover a fraud which damaged United States' integrity and governmental function. Note also, that the nationality of the participants played a significant role in *Bowman*, as the conviction of the three United States nationals was affirmed on the ground that they were "certainly subject to such laws as [the United States] might pass to protect itself and its property." 260 U.S. at 102.

To analogize the statutes proscribing conspiracies to murder Congressmen or internationally protected persons to narcotics conspiracy statutes is apt, only if we consider conspiracies to import narcotics to be a potential danger to United States sovereignty, security, integrity or governmental function.

<sup>146</sup> 509 F. Supp. at 216. See *supra* note 145.

<sup>147</sup> 509 F. Supp. at 218. See *Skirotes v. Florida*, 313 U.S. 69 (1941), wherein the United States Supreme Court combines 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

This latter type, of course, would be appropriate only if the offense portended danger to one of the above-articulated national interests.

The *Layton* court made it evident that the protective principle was its primary basis for asserting jurisdiction, when it explained that the statutes relating to attacks on elected representatives are more of a threat to the operation and function of government and to United States national security than the acts which triggered jurisdiction over extraterritorial theft of government property, violations of the bankruptcy laws and uttering of forged treasury notes.<sup>148</sup> It stated: "[a]n attack upon a member of Congress, wherever it occurs, equally threatens the free and proper functioning of government."<sup>149</sup> This is different from the standard murder statute as, "congressmen were singled out for protection because of the position they hold in our constitutional government, because their protection is important to the integrity of the national government and therefore serves an important interest of the government itself."<sup>150</sup> Thus, explained the court, if Congress assigns its members to function in the arena of foreign relations, they must often travel abroad. If it were possible to escape jurisdiction by attacking congress people while abroad, obstruction and injury to the governmental function, sovereignty, and integrity would occur.<sup>151</sup>

The possible analogy between *Layton* and extraterritorial conspiracies to violate United States narcotics laws should not be ignored. The extremely high level of drug abuse in the United States, the tremendous amount of money available for the purpose of violating drug trafficking laws, and the damage drug trafficking and drug abuse causes, could all possibly be construed as threats to United States integrity, or even to its security, or to be an obstruction to the proper functioning of our governmental operations when a United States customs area is violated. Indeed, since drug smuggling bypasses United States customs laws and directly challenges that governmental function, conspiracy to smuggle drugs clearly presents a potential threat to a governmental function.<sup>152</sup>

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to citizens of the United States 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.) cert. denied, 411 U.S. 936 (1973) (jurisdiction over theft of government property overseas); *Stegmon v. United States*, 425 F.2d 984, 986 (9th Cir.), cert. denied, 400 U.S. 837 (1970) (jurisdiction allowed over violations of bankruptcy laws relating to the concealment of assets, as the statute "was enacted to serve important interests of government, not merely to protect individuals who may be harmed by the prohibited conduct.") (emphasis added). See also *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974).

<sup>148</sup> 509 F. Supp. at 219; see *supra* cases cited in note 147.

<sup>149</sup> 509 F. Supp. at 219.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1981). See Note, *supra* note

Thus, the protective principle might be a conceptual vehicle which would allow the extraterritorial application of United States laws prohibiting conspiracy to import narcotics without violation by the courts of accepted and distinct principles of jurisdiction over extraterritorial crime. The problem, of course, is the possible extension of the notions of what constitutes a threat to national security, sovereignty, or governmental function to the point of danger or absurdity.<sup>153</sup> The application of the protective principle as discussed above is more apt conceptually, however, than that of the objective territorial theory as the former has always contemplated the assertion of jurisdiction for potential danger from inchoate offenses.

#### A. POSSIBILITY AND PARAMETERS OF A NEW THEORY

The traditional conceptual distinctions are important for proper legal analysis. Conceptual integrity is lost if jurisdiction may extend extraterritorially on a territorial theory, without any connection with the territory at all, or on a protective principle, without an important national or governmental interest having been violated or threatened. The

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72, at 1200. The problem with this, of course, is that all conspiracies to violate customs regulations would then trigger the protective principle.

<sup>153</sup> It should be noted that the extension of the application of the protective principle as explained above is not without extreme risk. The application of the protective principle in the name of self-defense or protection of sovereignty to extraterritorially committed offenses may easily be abused to cover unjust and politically oriented judgments. Even if the protective principle is theoretically a sound basis for assertion of jurisdiction over extraterritorial conspiracies (which do not have any elements of effects occur within the territory), its extended application should not be undertaken lightly.

Consider, for example, the following description of the case of Mr. Esmail, a Brooklyn-born American of Arab descent, who was convicted in Israel in June of 1978, of being a member of a proscribed organization—the People's Front for the Liberation of Palestine. Israel had amended its criminal law in 1972, as follows:

2(a). The courts in Israel are competent to try under Israeli law a person who has committed abroad an act which would be an offense if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communication links with other countries.

PENAL LAW AMENDMENT (Offences Committed Abroad)(amend. No. 4) 5432-1972, Laws of the State of Israel No. 26 (1971/1972).

Pursuant to this law, Mr. Esmail was arrested and jailed when he arrived in Israel to visit his dying father. The New York Times reported the event.

Mr. Esmail was arrested and jailed when he arrived in Israel last December to visit his dying father. Israeli authorities concede that they have no evidence he intended harm while in the country. But they argue that since the P.F.L.P. is committed to Israel's destruction, and since Mr. Esmail received training in guerrilla warfare during a month's visit to Libya in 1976, his associations are ample ground for conviction. The Israeli prosecutor has asked for a jail term to discourage other foreigners from joining groups like the P.F.L.P., which recruited Mr. Esmail at Michigan State. But would-be terrorists should need no persuasion that they will be sternly dealt with if they attempt violence in Israel. N.Y. Times, June 11, 1978, § IV, at 20, col. 1, cited and quoted in N. LEECH, C. OLIVER & J. SWEENEY, *supra* note 79, at 120.

traditional theories are available to provide for the assertion of jurisdiction without abuse. They should not be violated as they have been for reasons of expediency, especially when they lend themselves to the development of a new or hybrid theory. The courts have been struggling to assert jurisdiction by expanding the notion of territoriality too far. This struggle suggests the need to articulate an appropriate theory and the *Restatement of the Foreign Relations Law of the United States* has provided the model for its development.<sup>154</sup> Neither the court decisions nor the *Restatement*, however, articulate the existence or parameters of the new theory. Indeed, both place the needed development of the law into the wrong conceptual rubric. One of the aims of this article is to place the extension of jurisdiction over extraterritorial conspiracies into an appropriate and traditionally valid conceptual mode. Thus, rather than suggesting the extension of either the objective territorial theory or the protective principle exclusively, the appropriate (or the least theoretically risky) approach to take may be to allow jurisdiction over extraterritorial conspiracies to import narcotics (or other offenses which have been universally condemned) when they have reached a stage which makes it clear that the intent is to impact on the territory or on the significant interests of the forum state. This approach would be based on the *Restatement's* notion of "reasonableness" and upon the need to allow the state on whose territory the offense will impact (which has the most significant interest in the crime) to assert jurisdiction. Of course, jurisdiction would not be appropriate when it is "exorbitant," that is, according to the *Restatement of the Foreign Relations Law*, when the state with an accepted theoretical basis for asserting jurisdiction nevertheless has a less significant interest than another state which also has a valid basis.<sup>155</sup> This new approach would be a hybrid theory combining the protective universal and objective territorial principles, in that no effect will actually have occurred within United States territory, but the culmination of the conspiracy or other inchoate offense is close enough to fruition that it may be considered sufficient to trigger jurisdiction. Thus, for jurisdiction to obtain, the conspiracy will have to relate to a significant state interest, universally recognized as such, and will have to have clearly gone far enough to establish both the intended goal of the conspiracy and the fact that the impact or effect of the crime would have been certain to have occurred, had intervention not prevented it. This is essentially what the courts in many of the cases described above have attempted to do, either by not clearly articulating a theory or by applying the wrong theoretical basis. In such cases the *Restatement of the Foreign Relations*

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<sup>154</sup> See *infra* notes 157-89 and accompanying text.

<sup>155</sup> This approach is discussed fully in the following section.



*Law* has recognized the validity of the assertion of jurisdiction. Again, however, no clear theory of jurisdiction is articulated.

It is important to recognize that assertion of jurisdiction in such cases must be based on a new theory of jurisdiction, different from both the objective or subjective territorial theories and from the protective principle. No effect or element of the offense has occurred within the asserting state's territory and no danger is posed to the requisite significant national interests. It will not do simply to suggest that jurisdiction will properly obtain when the state with the most significant interest or the state with the proper law is found, unless the *only* pertinent basis for the assertion of jurisdiction over extraterritorial crime is found based on the "most significant interest" test. The *Restatement Draft* does not contemplate such a notion.<sup>156</sup> It does provide, however, the mechanism for developing a new hybrid theory of jurisdiction.

VII. ANALYSIS OF THE TENTATIVE DRAFT OF THE RESTATEMENT  
OF THE FOREIGN RELATIONS LAW OF THE UNITED  
STATES—AN ATTEMPT AT THE DEVELOPMENT  
OF A THEORY

In its introductory note to its section on jurisdiction, the American Law Institute describes its perception of the current approaches to the question of jurisdiction:

[t]erritoriality and nationality have remained the principal points of departure for evaluating the exercise of jurisdiction, but in determining their meaning rigid concepts have been displaced by broader criteria embracing principles of *reasonableness* and *fairness* in accommodating *overlapping or conflicting* interests of states, and meeting concerns for affected individuals and other private interests. This means that courts (and other decision makers), learning from the approach to comparable problems in private international law, are increasingly inclined to analyze various interests, examine contacts and links, give effect to justified expectations, search for the center of gravity of a given situation, and develop priorities. This Restatement articulates this approach as the principle of reasonableness.<sup>157</sup>

The *Restatement Draft's* approach actually is a modified application of the above-described and analyzed traditional approach to jurisdiction. The only modification of the traditional principles of jurisdiction relates essentially to *limiting* the exercise of jurisdiction. The notion of reasonableness functions to disallow or to find unlawful the exercise of jurisdiction, even pursuant to a traditional basis for it, when such exercise would be "exorbitant."<sup>158</sup> The *Restatement Draft* accepts the long-

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<sup>156</sup> RESTATEMENT DRAFT, *supra* note 1.

<sup>157</sup> *Id.* at 92-93.

<sup>158</sup> *Id.* § 403(1), "Although one of the bases for jurisdiction under Section 402 is present, a

established proposition that international law forbids a state to exercise jurisdiction to prescribe other than on an accepted basis of jurisdiction.<sup>159</sup> This is only a recognition of what states of the world have long maintained. States have traditionally "refused to give judgments of other states based on assertions of jurisdiction which were considered extravagant; increasingly they have begun to object to the exercise of jurisdiction itself as a violation of international principles."<sup>160</sup> Thus, a state cannot properly prescribe activity or exercise jurisdiction unless it is pursuant to an "accepted" basis of jurisdiction. It has been shown above that the international law controlling the jurisdiction to prescribe and to adjudicate long ago transcended the limitations of formal and strict reliance on territoriality as the basis of state power.<sup>161</sup> It is accepted in international law and state practice to prescribe activity and to exercise adjudicatory jurisdiction based on the defendant's nationality or the defendant's conduct which occurs: (1) partially within the state;<sup>162</sup> (2) outside the state producing certain kinds of injury within the state;<sup>163</sup> (3) outside the nation creating threats to the national security or important governmental functions.<sup>164</sup> These bases of jurisdiction have been deemed to be and are accepted as "reasonable,"<sup>165</sup> while reliance on nationality of the injured person is seen by the *Restatement Draft* as "exorbitant."<sup>166</sup>

It is clear, however, that jurisdiction cannot be properly asserted unless it is based on an accepted theory or principle of jurisdiction.<sup>167</sup> Nevertheless, as demonstrated above, United States courts have asserted jurisdiction over extraterritorial conspiracies to import narcotics (and other crimes), even when no actual effect has occurred within United States territory, and have articulated the assertion as being on the basis of the objective territorial theory.<sup>168</sup> Such an application of jurisdiction

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state may not apply law to the conduct, relations, status, or interest . . . if the exercise of such jurisdiction is unreasonable . . ." See also *id.* § 403 comment a.

<sup>159</sup> S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. ser. A, No. 10 (judgment of Sept. 7, 1927); RESTATEMENT DRAFT *supra* note 1, § 403 comment a.

<sup>160</sup> RESTATEMENT DRAFT, *supra* note 1, at 94. The fact that there have been no objections to the assertion of jurisdiction over narcotics conspiracies indicates acceptance of the practice, if not its theory.

<sup>161</sup> See the development of this transcendence in *supra* notes 10-74 and accompanying text; see also RESTATEMENT DRAFT, *supra* note 1, at 94, § 441(i) (jurisdiction to adjudicate based in part on objective territoriality theory).

<sup>162</sup> See *supra* notes 20-129 and accompanying text.

<sup>163</sup> See *supra* notes 36-62 and accompanying text; see also, RESTATEMENT DRAFT, *supra* note 1, at 94.

<sup>164</sup> See *supra* notes 63-74 and accompanying text.

<sup>165</sup> RESTATEMENT DRAFT, *supra* note 1 at 94.

<sup>166</sup> *Id.* at 94, § 402 comment c. It is clearly not seen as exorbitant by other states.

<sup>167</sup> *Id.* § 403, comment a.

<sup>168</sup> See *supra* notes 84-135 and accompanying text.

does not fit within the traditional objective territorial theory. The questions now become: (1) whether nations of the world have come to accept the assertion of jurisdiction in such cases; and (2) whether the theory of such assertion is appropriate. It is arguable that the recent *Restatement Draft* suggests an affirmative answer to both questions by expanding, without explanation, the objective territorial theory to include offenses in which effects are simply intended to impact on the asserting state's territory. This section will attempt to determine: (1) whether this has occurred; (2) whether the *Restatement Draft* actually suggests that the notion of "reasonableness" functions as a "new" and independent theory for asserting jurisdiction, or whether it serves simply as a tool for limiting the assertion of jurisdiction when a traditional basis for it already exists; and (3) if the notion of "reasonableness" functions as the vehicle for extending the objective territorial theory to include intended effects, whether this effect is theoretically proper.<sup>169</sup>

Section 402 of the *Restatement Draft* provides in relevant part:

Subject to Section 403, a statute may, under international law, exercise jurisdiction to prescribe and apply its law with respect to

(1) (a) conduct a substantial part of which takes place within its territory;

(b) civil (not criminal) jurisdiction;

(c) *conduct outside its territory which has or is intended to have substantial effect within its territory*;

(2) the conduct, status, interests or relations of its nationals outside its territory; or

(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests.

The bases of jurisdiction provided or described in section 402 are clear enough. Sub-parts (1)(a) and (1)(b) relate to the traditional notions of subjective<sup>170</sup> and objective<sup>171</sup> territoriality. The objective territorial principle traditionally has applied to extraterritorial offenses whose effects are intended to and actually occur within the territory of the state asserting jurisdiction.<sup>172</sup> Sub-part (1)(c) does recognize an *extension* of the traditional objective territorial principle to include intended effects within ambit by providing for jurisdiction to be asserted for "conduct outside [the asserting state's] territory which has or is *intended* to have substantial effect within its territory."<sup>173</sup>

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<sup>169</sup> RESTATEMENT DRAFT, *supra* note 1, § 402.

<sup>170</sup> *Id.* § 402(1)(a).

<sup>171</sup> *Id.* § 402(1)(c).

<sup>172</sup> This is also the theoretically correct approach, as the *objective* territoriality is based on effects within the territory. The United States courts in civil matters have rejected extending the effects theory to intended effects. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

<sup>173</sup> RESTATEMENT DRAFT, *supra* note 1, § 402(1)(c).

The reporters' comments state that, "the bases indicated in section 402 have been accepted in general."<sup>174</sup> But has this extension of the objective territorial principle in fact been accepted in international law and, if so, is this extension conceptually valid or wise? The *Restatement Draft* cites no authority for this proposition. Presumably, the United States narcotics conspiracy cases discussed above would be domestic authority for such an extension and the dearth of international protest might suggest acceptance of the result, but neither of these factors suggests that there is any conceptual validity to the extension.<sup>175</sup> It is submitted that it has no conceptual validity.

The *Restatement Draft*, however, does help to answer a pertinent question that the United States narcotics conspiracy cases raise. Even if intended effects are sufficient to allow assertion of jurisdiction, what limitations to this assertion exist?

It could be argued that the rule of reasonableness derived from factors or choice of law principles, such as those listed in section six of the *Restatement Of the Conflicts of Laws*,<sup>176</sup> represents the policy basis of the extension of the objective territorial theory to include intended effects. Certainly, the result would be desirable in some cases. The rule of reasonableness may suggest the need to, and the appropriateness of, expanding or extending the traditional jurisdiction principles to include thwarted extraterritorial narcotics and other conspiracies when they are *intended* to have substantial effect within the forum state's territory. Factors indicating that the expansion would be reasonable or appropriate include: (1) the internationally condemned nature of the offense and the need of the international systems of justice (e.g., to curtail narcotics trafficking);<sup>177</sup> (2) the need of the forum state to curtail and to preempt narcotics conspiracies aimed at that state;<sup>178</sup> (3) the non-existence of any factors which would suggest that the assertion of jurisdiction would be considered unreasonable.<sup>179</sup> This, however, does not necessarily suggest

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<sup>174</sup> *Id.* § 402 comment.

<sup>175</sup> French Law No. 70-1320 of Dec. 31, 1970 (codified at C. SANTÉ PUBLIQUE, ART. L. 627), provides for prescriptive adjudicatory and enforcement jurisdiction over attempts to violate and combinations ("*ententes*" or "*associations*") with a view to violate French narcotics laws. These "inchoate" offenses will be punished like the completed offense. There have been French cases in which jurisdiction was asserted and approved for negotiations with regard to the sale and purchase of narcotics for "use" in France. *See, e.g.*, Criminal Decision of Aug. 18, 1973, Dalloz, Sommaire 131 (1973); Decision of Oct. 25, 1962, Bull. Crim. No. 292 (1962)(cited in IV DROIT PENAL, ENCYCLOPEDIA DALLOZ, STUPEFIANTS § 48). No theory for the assertion of jurisdiction is articulated.

<sup>176</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

<sup>177</sup> *Id.* § 6(2)(a).

<sup>178</sup> *Id.* § 6(2)(b).

<sup>179</sup> RESTATEMENT DRAFT, *supra* note 1, § 403. Of course this would generally only be true when the conspiracy is intercepted on the high seas and not on another state's territory. *See*

that the extension of the objective territorial theory is proper.

By its own terms the *Restatement Draft* appropriately does not consider the rule of reasonableness as a new theory or basis for asserting extraterritorial jurisdiction or for allowing an extension of any of the traditional bases of jurisdiction. Interestingly, all references in the *Restatement Draft* to the rule of reasonableness (and all analogy to conflict of law rules) relate to the question of *limiting* the assertion of jurisdiction over conduct when *traditional bases* of jurisdiction already exist. There is no indication that the rule of reasonableness was intended to be an independent basis of jurisdiction.<sup>180</sup>

Thus, it is clear that the essential purpose of the rule of reasonableness in the *Restatement Draft* is to *limit* the assertion of jurisdiction even when there is a legitimate basis for it. The only possible argument for interpreting the rule of reasonableness to be the authority for the *extension* of the objective territorial theory of jurisdiction to include those inchoate offenses which have as their goal to impact on the United States, is to suggest that if the rule of reasonableness, designed to prevent the assertion of jurisdiction when it is exorbitant, would not find an assertion jurisdiction over such offenses to be exorbitant, and therefore, the assertion must be appropriate. Thus, one could reason by the bootstrap, that the courts have recognized the appropriateness of asserting jurisdiction in such cases and so have extended the scope of the objective territorial principle. It is suggested, however, that although the assertion of jurisdiction in such cases may provide a needed and proper result, to pin this result on the territorial principle obliterates that theory's coherency.

Perhaps the "rule of reasonableness" should be the theoretical basis for an expansion of the bases of jurisdiction in a manner which will maintain the conceptual integrity of the traditional jurisdictional theory. This article has attempted to establish the theoretical weakness of making the expansion uniquely via the objective territorial principle. Rather, a hybrid theory based on the objective territorial, universality and protective principles may legitimize the extension without doing violence to the integrity of the theories.

It appears that courts in the United States and the authors of the *Restatement Draft* have developed the notion that jurisdiction may be asserted over cases of at least serious and nearly universally condemned extraterritorial conspiracies or other offenses as long as the offense was intended to have "substantial effect" on the territory of the United

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*id.* § 403, reporters' note 7, which states in part: "In applying the principle of reasonableness, the exercise of criminal jurisdiction in relation to acts committed in the territory of another state may be perceived as particularly intrusive upon that state's sovereignty."

<sup>180</sup> *Id.* at reporters' note 10, § 402 comment.

States, and as long as the assertion of jurisdiction is reasonable.<sup>181</sup> It is suggested that such an assertion comports with international law. Although it is a proper assertion, when the courts and the *Restatement Draft* articulate the assertion as being based on the objective territorial principle, it becomes conceptually defective. It is more conceptually accurate to provide that jurisdiction is based on a combination of notions underlying the protective principle, the objective territorial, and universality theories. This is a hybrid theory. It is consistent with traditional jurisdictional theory and with the *Restatement Draft*'s rule of reasonableness

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<sup>181</sup> Section 403 of the *Restatement Draft* provides:

Limitation on Jurisdiction to Prescribe:

(1) Although one of the bases for jurisdiction under Sec. 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

- (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
- (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (e) the importance of regulation to the international political, legal or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity;
- (h) the likelihood of conflict with regulation by other states.

(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).

(4) Under the law of the United States:

- (a) a statute, regulation or rule is to be construed as exercising jurisdiction and applying law only to the extent permissible under Sec. 402 and this section, unless such construction is not fairly possible; but
- (b) where Congress has made clear its purpose to exercise jurisdiction which may be beyond the limits permitted by international law, such exercise of jurisdiction, if within the constitutional authority of Congress, is effective as law in the United States.

Finally, with regard to the conceptual validity of the extension of the objective territorial principle alone, it should be noted that the *Restatement Draft* recognizes that when Congress has made clear its purpose to assert jurisdiction and such assertion is constitutional albeit violative of international law, it will still be effective law. Thus, although the *Restatement Draft* states that such extension is appropriate and, although United States courts have approved such an extension, it may still be a violation of international law.

and provides a conceptually valid means of reaching the results sought by the United States thwarted narcotics conspiracy case.

Of course, assertion of jurisdiction over a conspiracy, even when it has as its goal a criminal effect in the United States, which is intercepted while it is centered on the territory of another country could be considered exorbitant and unreasonable by international law and the *Restatement Draft*.<sup>182</sup> This poses an interesting problem with regard to many of the narcotics conspiracy cases. It has been shown that acts upon vessels and aircraft are deemed to occur upon the "floating territory" of the flag state or within the state's "special maritime jurisdiction."<sup>183</sup> The problematical cases representing the focus of this article, of course, are those in which the conspiracy is ongoing upon a foreign vessel which is intercepted on the high seas.<sup>184</sup> The United States Department of State generally asks permission of the flag state to board the vessel, to arrest and to prosecute the conspirators.<sup>185</sup> If permission were not granted, the appropriateness of any assertion of jurisdiction would have to be decided on the basis of principles such as those indicated in Section 403 of the *Restatement Draft*, which applies the notion of reasonableness as a means of limiting the exercise of jurisdiction.<sup>186</sup> Section 403 generally considers assertion of jurisdiction over acts committed on foreign territory as being exorbitant, unless the acts are universally condemned.<sup>187</sup>

Seen in this light, decisions of United States courts which have approved the assertion of jurisdiction over foreign nationals for narcotics conspiracies thwarted on board foreign vessels upon the high seas may reflect either an accepted expansion of the traditional bases of jurisdiction as described above or a recognition by the United States government that it has no basis for asserting jurisdiction valid in international law other than comity of the approving state.<sup>188</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> See *supra* note 98 and accompanying text; see also RESTATEMENT DRAFT, *supra* note 1, at reporters' note 8; see also 18 U.S.C. § 7 (1976); 49 U.S.C. §§ 1301(38), 1472(i) (1976).

<sup>184</sup> See *supra* cases cited in notes 84-135. These cases all reflect the recent United States extension of the objective territorial principle.

<sup>185</sup> The writer's experience in the Office of the Legal Advisor substantiates this, as does discussion with Knute E. Malmberg, Assistant Legal Advisor, Office of the Legal Advisor, United States Department of State (Dec. 17, 1981); see, e.g., *United States v. Williams*, 589 F.2d 210 (5th Cir. 1979).

<sup>186</sup> See *supra* note 182. It is possible to suggest that the assertion of jurisdiction without permission may always be inappropriate (exorbitant) when the conspiracy occurs or is thwarted on board a foreign flag-vessel on the high seas, as this is essentially foreign "territory." RESTATEMENT DRAFT, *supra* note 1, § 403.

<sup>187</sup> RESTATEMENT DRAFT, *supra* note 1, at reporters' note 7.

<sup>188</sup> *Id.* § 403(4)(b), states that this expansion of the bases of jurisdiction may be beyond the pale of acceptability in international law while still being valid United States law.

## VIII. CONCLUSION

Recent United States case law has expanded jurisdiction over extraterritorial crime (especially in narcotics conspiracies) in a manner which violates international legal notions of jurisdiction. If our courts are to avoid problems and confusion in the development of a coherent reaction to crime on an international scale involving matters of extradition and international judicial cooperation, a coherent and consistent theory or set of theories are necessary to provide subject-matter jurisdiction over extraterritorial offenses. Clearly, a more reasoned approach to the problem of jurisdiction over extraterritorial offenses needs to be developed. The hybrid theory of jurisdiction provides such an approach.<sup>189</sup>

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<sup>189</sup> The hybrid theory will be developed further, especially in its relation to extradition, in a forthcoming article by the author.