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Christopher L. Blakesley

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Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, The Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law

Christopher L. Blakesley*
Otto Lagodny**

ABSTRACT

This Article examines extradition and jurisdiction over extraterritorial crime, focusing on the relationship between jurisdiction and extradition in the broader context of human rights law. The authors challenge what they argue are chimerical, although strongly held beliefs in the incompatibility of European and United States criminal justice systems and extradition practices. They argue that cooperation in matters of international criminal law may be enhanced, while protection of human rights is promoted. The authors establish this possibility by breaking down the barriers to understanding that stem from the divergent European versus Anglo-American modes of analysis.

* Professor of Law, Louisiana State University Law Center; J.S.D., Columbia University; LL.M., Columbia University; M.A., Fletcher School of International Law and Diplomacy, Tufts University; J.D., University of Utah; B.A., University of Utah. Professor Blakesley is a former Attorney Adviser, Office of the Legal Adviser, the United States Department of State.

** Dr. Jur., Tübingen University. Professor Lagodny is Head of the Branch of Criminal Law at the Max-Planck Institute for Foreign and International Criminal Law, Freiburg i. Breisgau, Germany.

The authors first analyze the five traditional bases of prescriptive jurisdiction in the United States. Next, these principles are compared to their counterparts in French and German law. The authors then focus their discussion on the German principle of ubiquity and its United States parallel, which is a combination of both the objective territoriality theory (the effects doctrine) and the subjective territoriality theory, which arises when an element of the crime occurs in the United States. The objective and subjective territoriality theories have expanded to mitigate conflicts resulting from a traditional strict application of territoriality principles.

Next, the authors discuss the question of what jurisdictional principles allow extradition when an offense has no specific territorial basis. The protective principle, the passive personality principle, the nationality principle, and the universality principle are analyzed in this context. The authors compare United States application of these principles to that of European states and suggest that the differences are less than usually is purported. The authors also examine the special use of double criminality in extradition cases, which requires simultaneous jurisdiction in two states for an individual to be extraditable. They question its viability in each system. The authors next suggest that the United States Government ought to consider the application of vicarious administration of justice, which is common in European states.

The authors then apply these principles to mutual assistance in criminal matters, especially extradition, and discuss two possible situations: first, when only one state proscribes the conduct in question; second, when two or more states proscribe the conduct and one state enlarges the proscription. Theoretical principles, policy perspectives, and contrasting modes of analysis are compared in the context of extradition and mutual assistance. Theoretical problems are indicated and solutions are proposed. The authors conclude that if a strict doctrine of territoriality were the only basis of extraterritorial jurisdiction, then competing jurisdiction would not be a problem although a strict territorial approach would make both the domestic and the internal systems dysfunctional. The recognition and application of active and passive personality principles, along with the protective and universality principles are needed to make criminal law viable in the modern world. Their application, however, causes problems in matters of jurisdiction and cooperation. The authors propose several new ideas to resolve the jurisdictional and substantive problems, including the application of vicarious administration of justice when extradition is not possible.

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I. INTRODUCTION

This Article is an application of international and comparative law. It is an attempt to combine understanding and perceptions of international and domestic criminal law developed in the European and United States legal cultures. It is an attempt to break down barriers to understanding and cooperation in the arena of international criminal law. The authors challenge some of the staid perceptions of disagreement in matters of international criminal law and cooperation, which have maintained a sense of basic incompatibility of certain significant aspects of the theory and practice of international cooperation in criminal matters and the protection of human rights. By developing an understanding of each other's basic premises and analytical style, cooperation in this arena may be enhanced, while the protection of human rights is promoted. The authors contend that this study shows that international and comparative law are connected inextricably. Thus, if international law scholars and practitioners are going to understand each other and break down barriers to cooperation, each is going to have to understand the other's basic premises and methods of analysis. The authors attempt to apply their comparativistic understanding and techniques to certain heretofore believed important and seemingly insurmountable barriers to understanding and cooperation in the realms of international extradition and cooperation.

This Article considers certain aspects of extradition and jurisdiction over extraterritorial crime and focuses on two misunderstandings that are so fundamental that they take on the character of substantial disagreements. The first misunderstanding is that jurisdiction over extraterritorial crime in United States law exists not as a basic principle in its own right, but only as an exception to the substantive principle that jurisdiction contemplates territorial jurisdiction. The second misunderstanding is that human rights only restrict interstate activity in the field of extradition. The first part of this Article analyzes substantive¹ juris-

1. Whereas in the United States there has been a tendency to proceduralize substantive rights, in Europe, especially Germany, there is a very important distinction between substantive and procedural law that borrows from Roman traditions. Substantive law concerns the contents of rights and duties of the state as the public power or of the individual. Procedural law, however, regulates the manner in which these rights can be realized by means of judicial decisions. *See, e.g.,* H. KAUFMANN, *STRAFANSPRUCH, STRAFKLAGERECHT* 9 (1968). In the United States, the distinction in principle is similar, but in fact there is more blurring of the line between substance and procedure. In international law as well as the domestic law of all states, it is not clear whether the rules relating to extraterritorial application of criminal law are in the procedural or the substantive category. Some commentators argue that they occupy a category that has a logi-

diction to prescribe in conjunction with the reach of substantive criminal law in the United States. The Article establishes that many of the perceived drastic differences between the law of the United States and that of other states are largely chimerical. The Article then focuses on the interrelationship between jurisdiction over extraterritorial crime and extradition with regard to the reformatory and limiting function of human rights law and the corresponding impact on existing legal institutions. The Article further analyzes the interrelationship between mutual assistance in criminal matters with an emphasis on extradition.

II. JURISDICTION, EXTRADITION, AND COOPERATION

Law is the language by which nations assert their interests and attempt to resolve problems created by confrontation with competing legal interests.² Communication problems, however, are significant.³ This Article is designed to counterbalance United States and European law and language to provide better understanding that results in better relations in the realm of international criminal law. Some United States governmental functionaries have suggested that some of the propositions presented and discussed in this Article are interesting, but too theoretical and impractical to merit application.⁴ On the other hand, some Europeans contend that the United States "practical" approach is short-sighted and lacks depth.⁵ Additional commentators argue that Anglo-American

cal priority to both substantive and procedural law. *See, e.g.,* H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* 145 (4th ed. 1988). For purposes of this Article, these rules will be treated as substantive law.

2. *See* C. BLAKESLEY, *TERRORISM, DRUG TRAFFICKING, AND THE PROTECTION OF HUMAN LIBERTY IN INTERNATIONAL LAW* ch. 3 (1991); Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685.

3. *See* Eser, *Common Goals and Different Ways in International Criminal Law: Reflections From a European Perspective*, 31 HARV. INT'L L.J. 117, 118-21, 125-27 (1990). In reference to the Harvard Conference on International Cooperation in Criminal Matters, Professor Eser noted that "it was clear that the organizers and participants from the two sides of the Atlantic were habituated to quite different ways of thinking." *Id.* at 118.

4. Author's notes, Harvard Conference on International Cooperation in Criminal Matters; *see generally* 31 HARV. INT'L L.J. 1 (1990) (reporting the proceedings of this conference).

5. Recently, ample evidence of the weakness was manifest in a Conference on International Cooperation in Criminal Matters. *See* 31 HARV. INT'L L.J. 1 (1990). A United States participant, for example, remarked that the "rule of reasonableness" should replace principles of jurisdiction as if imposition of a United States term of art would work. The European's reply that the "rule of reasonableness" must be based on a set of

theory is practical, but unsystematic, and casuistic, while European theory tends to analyze and solve legal problems with a theoretical, abstract, doctrinaire, and conceptualistic bent.⁶ These differences sometimes make it difficult for either side to appreciate what the other is attempting to set forth.

This Article is an attempt by the authors to overcome these deficiencies and to combine insight. German writers in the Pandectist tradition⁷ provide a significant practical and functional model for refined conceptual legal reasoning and problem solving from which Anglo-American legal thinkers could profit. Similarly, Germans need to unravel the United States proceduralistic language and result-oriented approach to legal problem solving in order to build a broader base of understanding and cooperation. Thus, combining analytical methodology would be beneficial to all parties.

Theory and practice are inextricable. Misunderstanding this concept of inextricability renders a practitioner ineffectual, if not dysfunctional. To understand the practical function of the law, one must understand conceptual and theoretical bases. Ad hoc casuistry ultimately is impractical and self-defeating, especially in the international arena where diverse cultural and legal traditions interact. To solve problems in this arena, one must perceive problems and possible solutions in the same manner as

principles. See Eser, *supra* note 3, at 119 (not suggesting a deficiency, simply reporting the difference in approach).

6. See A. YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* 41 (1971).

7. The German and the French Civil Codes provide the world with the two great civilian code-based systems. States around the world essentially have adopted and adapted either the French or the German paradigm. Christian Wolff (1679-1754) founded the German Pandectist School, which was fruitful especially during the nineteenth century. It, like the French tradition, began with the premise that territorial and political unity required a comprehensive, accessible, systematic, and coherent body of law. The Pandectists esteemed mathematical precision in legal inquiry. Herman & Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1019 (1980).

Wolff's approach excluded all inductive and empirical elements through deduction, without gaps, of all natural law rules from axioms down to the smallest details. Every particular rule is derived from the previous, more general one, and so on, in the strictest logical sequence. Structure and analysis require the exactness of geometrical proof, which is achieved by a logical chain of reasoning through exclusion of the opposite. Thus, a closed system is produced, whose validity is based in its freedom from logical contradiction of all its assertions. This tradition was expanded and developed over the years to its culmination as a movement in 1862 in the work of Windschied. *Id.* (quoting F. WIEACKER, *PRIVATRECH-TSGESCHICHTE DER NEUZEIT* 193; translated in DAWSON, *THE ORACLES OF THE LAW* 237 (1973)); see also S. SYMEONIDES, *AN INTRODUCTION TO THE LOUISIANA CIVIL LAW SYSTEM* 50-52 (5th ed. 1989).

one's counterparts. Thus, to accomplish this goal, an understanding of the theory behind the function is necessary.

Unless the capacity to understand legal theories and practices of other states is developed further, international cooperation will continue to be difficult. Confusion over other states' application of legal principles relating to jurisdiction causes disagreement and ultimately will result in denial of extradition and diminished cooperation in the arena of international criminal law.

This section attempts to analyze some of the basic concepts in the legal theory relating to jurisdiction over matters of international criminal law. Interestingly, United States jurisdictional theory has developed in a manner that interfaces well with that in German law. Although United States law develops legal principles in a piecemeal, inductive, and sometimes incoherent fashion, once the principles are developed the analysis used in applying them is very similar to analysis of deductive or code-based principles. The key in analyzing United States legal theory is to determine the precise scope of the relevant principles. Consequently, this section will concentrate first on United States notions of prescriptive jurisdiction that have evolved into principle. The authors then will compare this conceptualization to its counterparts in French and German law. This comparison indicates that United States jurisdictional principles and their application are actually much closer to those in European law than both sides generally believe them to be. In fact, United States law possibly could accommodate the German concept of vicarious administration of justice⁸ if it were understood properly. Although many bilateral treaties incorporate this concept, which is known widely in European law, many United States commentators are unfamiliar with it.⁹

The traditional substantive bases of prescriptive jurisdiction are well known:¹⁰ territorial, protective, nationality, universal, and passive-personality.¹¹ These bases provide the foundation upon which a state may

8. Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L L.J. 108, 116 (1990); D. Oehler, *Agreements and Disagreements over International Criminal Law* (unpublished manuscript on file with the Center for Criminal Justice, Harvard Law School); cf. Eser, *supra* note 3, at 127.

9. See Eser, *supra* note 3, at 119.

10. *Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter *Harvard Research*] (part of an effort by the American Society of International Law to codify international law).

11. See M. BASSIOUNI, *INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1925* (1986) (providing references to jurisdictional clauses in international criminal law conventions). The *territorial theory* allows jurisdiction over

assert jurisdiction over extraterritorial conduct that violates the asserting state's criminal law.

Defenses based on the "special use of double criminality"¹² may arise when the jurisdictional laws of the requested and the requesting states differ. If the requesting state seeks the extradition of a fugitive who has committed an offense that is subject to extradition under a treaty and within the requesting state's prescriptive jurisdiction, the state's domestic law must provide prescriptive jurisdiction and extradition should be permitted. If, however, the requested state's law would not contemplate the fugitive's conduct to be of a type or to have been done in a manner to trigger its prescriptive jurisdiction under similar, but obverse, circum-

criminal conduct, providing that a material element of the crime or its effect occurs within the territorial boundaries of the state. The *subjective territorial theory* is the basis of jurisdiction when an element of an offense occurs within the territory. The *objective territorial theory* is the basis of jurisdiction when an effect of an offense impacts on the asserting state's territory. The *nationality theory* bases jurisdiction on the allegiance or nationality of the perpetrator of the offenses as proscribed by the state of his allegiance, no matter where the offense takes place. See *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (in dictum, the Court recognized the existence of the power to punish offenses perpetrated extraterritorially by United States nationals); Blakesley, *Extraterritorial Jurisdiction*, in 2 INTERNATIONAL CRIMINAL LAW 3, 23-27 (M. Bassiouni ed. 1986) (extensive discussion of and authority for the nationality principle); 21 U.S.C. § 955a(b) (1984) (making it unlawful for any citizen of the United States on board any vessel intentionally to possess a controlled substance with intent to distribute). The *protective principle* applies whenever the criminal conduct has threatened or had an impact on the asserting state's national sovereignty, security, or important governmental function. *Passive personality theory*, on the other hand, applies simply on the basis of the victim's nationality. The *universality theory*, which allows any forum to assert jurisdiction over particularly heinous or universally condemned acts, may be asserted when no other state has a prior interest in asserting jurisdiction.

The *passive personality theory* is not widely accepted and has been rejected in the United States, except perhaps in relation to recent anti-terrorism legislation. See Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, Pub. L. No. 99-399, 1987 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853 (codified in scattered sections of 18 U.S.C.) (§ 1202, inserting ch. 113A into 18 U.S.C. as § 2331) [hereinafter Omnibus Diplomatic Security and Anti-Terrorism Act]. Although the language of this legislation provides for jurisdiction over violence committed against United States nationals, the intended anti-terrorism application of the law suggests the protective principle, which is more appropriate under the legal tradition of the United States. See *infra* text accompanying notes 92-98. All three branches of the United States Government traditionally have rejected the passive personality basis because it generally has not been deemed appropriate or wise to assert jurisdiction over common crimes committed abroad against United States nationals. Moreover, because of the paramount nature of the territorial principle in criminal law, it is undesirable to extradite a defendant who has committed such an offense against a foreign national in the United States.

12. See *infra* text accompanying notes 137-43.

stances, extradition should be denied. The nationality basis for jurisdiction provides an example. If a French national accosted and violently robbed another French national in the United States, French law provides jurisdiction to prosecute. On the other hand, extradition would be denied under United States traditional territorial interpretation of jurisdiction because United States law does not provide for jurisdiction under obverse circumstances.¹³

Jurisdiction-based problems facing other states seeking extradition from the United States are diminishing as United States law on jurisdiction over extraterritorial crime has expanded to meet and surpass that of Europe.¹⁴ The existing problem, however, arises when the United States seeks extradition from European and other states. Unfortunately, perhaps because of zeal, frustration, or impatience, the United States sometimes resorts to abduction as a solution to unsuccessful extradition.¹⁵

The territorial principle is the primary basis of jurisdiction over crime in virtually all states.¹⁶ United States rhetoric and early jurisdictional development, which indicated a strict territorial vision of jurisdiction, have caused many European commentators to misunderstand the scope of United States jurisdiction over crimes committed wholly or partly abroad. Many Europeans without access to the plethora of recent United States decisions have missed the recent expansive evolution of jurisdiction assertion by the United States. Many have accepted at face value the historically strongly held and forcefully articulated United States reluctance to assert jurisdiction over criminal conduct that takes place wholly or partly abroad. This reluctance, however, clearly is breaking down.

European law has expanded to cover extraterritorial crime, so long as

13. This may not be true if the alleged criminal conduct is "terroristic violence." See Omnibus Diplomatic Security and Anti-Terrorism Act, *supra* note 11: "(a) Homicide.—Whoever kills a national of the United States while such national is outside the United States . . . (c) whoever outside the United States engages in physical violence—(1) with intent to cause serious bodily injury to a national of the United States . . .") For analysis of what "terroristic violence" might include, see C. BLAKESLEY, *supra* note 2.

14. For an extensive discussion of this expansion, see Blakesley, *supra* note 11, at 33-50.

15. See *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990); see also *United States v. Yunis*, 681 F. Supp. 896, 909 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988); *United States v. Yunis*, 924 F.2d 1086, 1090-93 (D.C. Cir. 1991); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990); Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law* in *United States v. Yunis*, 15 YALE J. INT'L L. 121 (1990).

16. See D. Oehler, *supra* note 8, at 13-15; see also GERMAN CRIMINAL CODE § 9, para. 1; Blakesley, *supra* note 11, at 8 (discussing of jurisdiction in the United States, France, and other countries).

there is some meaningful connection with the asserting state.¹⁷ For example, the German Penal Code (GPC) provides for jurisdiction over extraterritorial crime when a special connecting factor exists, such as the need to protect certain domestic¹⁸ or international legal interests.¹⁹

The European trend is to make extradition more of an administrative process,²⁰ and some proponents argue that the United States should mirror this trend. Such a movement, however, would be a serious mistake. Unlike the United States, it is easier for European states to make extradition more of an administrative process while still protecting individual rights. This process is facilitated by the existing European systems of administrative or constitutional courts, which are designed both to protect against administrative abuses of power and to avoid violations of civil liberties by agents of the state.

For example, the French *conseil d'état*²¹ has entered the arena of extradition to "protect" civil liberties. The manner in which the administrative courts fit into the extradition process, however, is somewhat like an appeal or habeas corpus action based on alleged civil liberties abuses. Thus, confusion, and perhaps dysfunction from a civil liberty viewpoint, arises in France in that a person found extraditable by the appropriate *chambre d'accusation* generally is sent immediately to the requesting state. As a result, some commentators have criticized severely the *conseil d'état* for entering this arena to protect individual liberties in a manner that will apply only to an already extradited fugitive.²² The criticism

17. In German, *sinvoller Anknüpfungspunkt* is quite similar. See Eser, *supra* note 3, at 119.

18. Important domestic legal interests include planning a war of aggression, treason, endangering external security, abduction, and casting political suspicion on one domiciled or customarily resident within Germany.

19. Important international legal interests include crimes involving atomic energy, explosives and radiation, attacks on air traffic, unauthorized dealings in narcotics, dissemination of pornography, encouraging prostitution, counterfeiting, and economic subsidy fraud. GERMAN PENAL CODE §§ 3-7, 9 reprinted in 28 THE AMERICAN SERIES OF FOREIGN PENAL CODES, FEDERAL REPUBLIC OF GERMANY (1987) (appendix).

20. R. MERLE & A. VITU, TREATÉ DE DROIT CRIMINEL 424-34 (5th ed. 1988) (describing Portugal and Panama).

21. French law establishes an Administrative Court system, culminating in the *conseil d'état*, which hears cases involving abuses of power (*des abus de pouvoir*), in relation to extradition. *Id.* The *conseil d'état*, however, is limited to considering the *légalité externe* (the procedures applied) and cannot consider the *légalité interne* (the merits of the extradition decision) of the extradition order, issued by the *chambre d'accusation*. *Id.* (listing authority).

22. *Id.*; G. LEVASSEUR, LES AVATARS DU DROIT ET DE LA PRATIQUE DE L'EXTRADITION 148-49, 152 (1985).

stems from the recognition that this is the domain of the Extradition Law of 1927, which does not provide recourse to the *conseil d'état*.²³ The French system could work, however, if extradition were stayed pending decision and if the *conseil d'état* were inserted into the process. Civil liberties would be protected by allowing "appeal" of extradition decisions in a manner that some commentators have argued ought to happen in the United States.²⁴ Such an "appeal" in the United States would have to be judicial, as the United States does not have the equivalent administrative court system. The United States system has not developed an administrative structure that would protect against governmental abuse. United States Constitutional notions of checks and balances have left such protection for the judiciary. Thus, adopting an administrative approach to extradition would be a mistake.²⁵

In a manner similar to most United States extradition treaties, article I of the 1909 Extradition Treaty between France and the United States provided in pertinent part that the parties "agree to deliver up persons who, having been charged with or convicted of any of the crimes or of-

23. R. MERLE & A. VITU, *supra* note 20, at 430.

24. There is currently no direct appeal by either the government or the fugitive from a magistrate's decision that certifies the individual for extradition. *David v. Attorney General*, 699 F.2d 411, 413 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983); *Ornelas v. Ruiz*, 161 U.S. 502, 508 (1896). The 1984 Draft Extradition Reform Act, § 3195, allows appeal by the government or the accused fugitive. See 2 M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 509 (2d ed. 1987).

25. In the context of the United States constitutional system, it is necessary that extradition, which requires the deprivation of a person's liberty, be judicial in nature. Extradition, since it impacts directly on a person's physical liberty, is proper only after a judicial hearing, although it appears that some Eastern European states, along with Panama, Portugal, and Ecuador, place extradition under exclusive executive control. Nuir, *A Guide to the Law and Practice of International Extradition*, in 1 *MODERN LEGAL SYSTEMS CYCLOPEDIA*, at ch. 8, § 11(c)(2); R. MERLE & A. VITU, *supra* note 20, at 424 (mentioning Portugal and Panama). In the United States, an accused fugitive is entitled not to a full scale trial on the merits, but to an evidentiary hearing that allows "extensive inquiry [into] whether each charge satisfies the treaty requirements." *Caplan v. Vokes*, 649 F.2d 1336, 1344 (9th Cir. 1981). An extradition hearing is required for purposes of constitutional due process, because the fugitive's liberty is in jeopardy. A judicial hearing is clearly a criminal proceeding, see *Rice v. Ames*, 180 U.S. 371, 375 (1901) (noting that extradition is a proceeding of a criminal nature), although some United States courts have not understood or recognized the criminal nature. See, e.g., *United States v. Galanis*, 429 F. Supp. 1215, 1224 (D. Conn. 1977) (refused prosecution safeguards). The fugitive will be incarcerated immediately, and, if found extraditable, will be sent to trial in the requesting state. Therefore, the judiciary of the requested state is the proper authority to determine, from its own perspective, whether there is sufficient evidence to extradite, the equivalent of holding a person over for trial. See C. BLAKE-SLEY, *supra* note 2.

fenses specified in the following article, committed within the jurisdiction of one of the contracting parties."²⁶ This treaty, on its face, can be construed to provide jurisdiction to extradite whenever an extraditable offense triggers jurisdiction of either contracting party as defined by the laws of either state. The term "jurisdiction" as used in extradition treaties, however, traditionally has been interpreted by United States courts and commentators exclusively to connote territorial jurisdiction,²⁷ which historically has been the exclusive basis of jurisdiction over crime in Anglo-American²⁸ and European law.²⁹

Difficulties arise when a party attempts to extradite a fugitive who has committed an extraditable offense for which the requesting state claims jurisdiction, and the law of the requested state does not provide for jurisdiction under similar, but obverse, circumstances. For example, if a French national accosted and robbed another French national on foreign soil, French law would admit jurisdiction of its courts over the subject matter as long as the court could obtain jurisdiction over the person. French courts could assert jurisdiction on the basis of the nationality of either the accused or the victim. On the other hand, extradition would be denied under United States law.³⁰

The drafters of the 1970 United States-French Supplementary Extradition Convention (Extradition Convention) attempted to resolve this

26. Treaty of Extradition, Jan. 6, 1909, United States—France, 37 Stat. 1526, T.I.A.S. No. 872, art. I [hereinafter 1909 Extradition Treaty]; see also Supplementary Convention to the Convention of Jan. 6, 1909, 22 U.S.T. 407, T.I.A.S. No. 7075 [hereinafter 1970 Supplementary Convention].

27. J. BRIERLY, *THE LAW OF NATIONS* 299-304 (6th ed. 1963); 1 J. MOORE, *TREATIES ON EXTRADITION AND INTERSTATE RENDITION* 135 (1891); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1988) [hereinafter RESTATEMENT (THIRD)]; RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965) [hereinafter RESTATEMENT (SECOND)]; Moore, *Report on Extraterritorial Crime and the Cutting Case*, 1887 FOREIGN REL. 757, reprinted in E. DICKENSON, *THE LAW OF NATIONS, CASES AND READINGS* 673 (1929); discussed in Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895 (1987) [hereinafter Blakesley, *Jurisdiction as Protection*]; Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982) [hereinafter Blakesley, *United States Jurisdiction*]; Blakesley, *supra* note 2, at 685.

28. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971).

29. D. Oehler, *supra* note 8, at 13-15; see also GERMAN CRIMINAL CODE § 9, para. 1; Blakesley, *supra* note 11, at 8 (discussing jurisdiction in the United States, France, and other states).

30. This may not be true if the alleged criminal conduct is terrorism. See *supra* note 11.

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."³¹ Although this language appears to provide an exception to the traditional United States interpretation of "jurisdiction" in extradition treaties, it has not been interpreted in this fashion. If the drafters' purpose was to provide such an exception, this purpose was negated by connecting jurisdiction for extraditability to the law of the requested party. In practical effect, the Extradition Convention changes very little. In the hypothetical situation, it simply makes United States law on jurisdiction determinative for any extradition request. The provision would allow the United States, which heretofore has had a more restrictive law of jurisdiction, to seek extradition from France, which has had a more expansive law of jurisdiction, and to apply the French law of jurisdiction to determine extraditability. In the past, the United States normally would not have requested extradition unless its more restrictive laws on jurisdiction would allow prosecution.³²

There are at least two explanations for the wording of this addition to the Extradition Convention. First, it could have been an attempt to allow flexibility to expand the notion of jurisdiction for extradition beyond the territorial principle as United States domestic law expands. Alternatively, it could have been a bungled attempt to allow France to obtain jurisdiction over the person through extradition, if French law allowed, even when United States law would not allow jurisdiction in similar circumstances. Either explanation reverses the judicial principle that jurisdiction in extradition treaties means territorial jurisdiction, and neither violates the language of article I on its face. The former explanation, however, is likely the more accurate, because it is emblematic of the difficulties facing negotiators in this arena. Indeed, jurisdictional law in the United States has expanded to render the Treaty language workable and fair.

United States law on jurisdiction over extraterritorial crimes is expanding.³³ The United States delegation proposed the additional provision, and apparently both sides agreed that the new clause would aid in

31. 1970 Supplementary Convention, *supra* note 26, art. I.

32. This result has changed in the past 10 years, as United States law has expanded jurisdiction over extraterritorial crime. See Blakesley, *supra* note 11, at 3; C. BLAKESLEY, *supra* note 2, at ch. 3.

33. See *supra* note 32 and accompanying text.

countering narcotic and counterfeiting offenses. The French delegation decided that minimal expansion of extraditability beyond the territorial principle is better than none. Since that time, United States law relating to territorial jurisdiction has expanded through the creation of exceptions and development of fictions to expand the concept of territoriality. Further, the United States adopted theories of prescriptive jurisdiction and executive authority to effectuate such expansion.³⁴

Many European commentators³⁵ suggest that United States law generally does not allow jurisdiction under circumstances in which the result of a crime occurs abroad. While this has been true in the past, expansion of and exceptions to territorial theory recently have eroded heretofore rigid notions of territoriality. Courts apply fictions and exceptions, even to transfuse actions taken abroad or effects occurring abroad, into the United States notion of territoriality.³⁶

34. *Id.* The passive personality jurisdiction appears applicable to terroristic violence. Indeed, the Justice Department recently "authorized" the Federal Bureau of Investigation (FBI) to make arrests in foreign states without the authorization of the foreign government. It is highly questionable, however, whether the Justice Department can authorize such action. See *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989) (statement of William Barr, U.S. Assistant Attorney General) [hereinafter Barr Statement]; Press Conference with Judge William Sessions, Director, Federal Bureau of Investigation, Fed. News Service (Nov. 7, 1989); Recent Development, *The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil*, 26 STAN. J. INT'L L. 573 (1990); Marcus, *FBI Told It Can Seize Fugitives Abroad*, The Washington Post, Oct. 14, 1989, at A15.

This power was later extended to the military. See *Second Barr Statement*, San Francisco Chron., Dec. 21, 1989, at A21; see also *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988); *United States v. Yunis*, 924 F.2d 1086, 1090-93 (D.C. Cir. 1991). If an FBI agent or military person makes such an arrest or abduction, the agent is subject to arrest by the local authorities. The avowed reason for the expansion of jurisdiction and abduction is United States frustration over its perceived difficulties in extraditing fugitives. It is also part of an overall expansion of executive power in both the criminal and international arenas.

35. See D. Oehler, *supra* note 8; D. OEHLER, *INTERNATIONALES STRAFRECHT* 497 (2d ed. 1983); see also P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 1325 (1969); R. MERLE & A. VITU, *TRAITÉ DE DROIT CRIMINEL: PROBLÈMS GÉNÉRAUX DE LA SCIENCE CRIMINELLE* 329 n.2 (2d ed. 1973); I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 94 (1971); Meyer, *supra* note 8; cf. Meyer, *German Criminal Law Relating to International Terrorism*, 60 U. COLO. L. REV. 571 (1989); Lagodny, *The European Convention on the Suppression of Terrorism: A Substantial Step to Combat Terrorism?*, 60 U. COLO. L. REV. 583, 586-88 (1989).

36. Indeed, objective territoriality has expanded so far that an effect is deemed to

Most commentators also suggest that United States law does not provide for jurisdiction based on the "active personality" or the nationality principle.³⁷ This still is true to a degree, but United States law has accepted a limited active personality or nationality theory of jurisdiction.³⁸ The United States even has introduced the notion of passive personality into law, at least insofar as it relates to terrorist violence against United States nationals.³⁹ Moreover, recent United States decisions have allowed assertion of jurisdiction over extraterritorial crime even when no territorial basis existed.⁴⁰ Thus, while some attention still is given to the notion of territoriality being the basis of jurisdiction, United States jurisdiction over crimes committed wholly or partly abroad is as expansive as that of European states. Analysis of the bases of jurisdiction currently followed in the United States indicates that it is not as inconsistent as heretofore perceived with those in Europe. Consequently, international cooperation in this modern setting should be easier today than in the past.

III. TERRITORIALITY IN GENERAL: THE PRINCIPLE OF UBIQUITY

The German principle of ubiquity provides that a crime is deemed to have occurred in the place where the perpetrator acted or in the place where the statutorily proscribed harm occurred.⁴¹ Some commentators contend that the German principle of ubiquity does not exist under United States law.⁴² In reality, however, United States law has developed a parallel. Although this parallel suffers from development in an ad hoc, casuistic fashion and requires clearer articulation, it does exist.

The United States parallel to the German concept of ubiquity is the combination of the objective territoriality or effects theory and the subjective territoriality theory in which a constituent element of the offense occurs in the United States.⁴³ United States jurisdiction law has long allowed prosecution of alleged criminal offenders who caused or per-

have occurred in the United States, even when a conspiracy is thwarted extraterritorially, and when no conduct or impact at all has taken place. For a full discussion and critique of this aberration, see C. BLAKESLEY, *supra* note 2, at ch. 3.

37. See D. Oehler, *supra* note 8; D. OEHLER, *supra* note 35, at 497; Meyer, *supra* note 8, at 31.

38. Blakesley, *supra* note 11, at 25-27.

39. See Omnibus Diplomatic Security and Anti-Terrorism Act, *supra* note 11, at 853.

40. United States case law has adopted the protective principle, the passive personality principle (when connected with terrorism), and the universality principle.

41. GERMAN CRIMINAL CODE § 9, para. 1; D. Oehler, *supra* note 8.

42. D. Oehler, *supra* note 8, at 15-17.

43. Blakesley, *supra* note 11, at 8-19.

formed a material element of their offense on United States territory.

A. *The Subjective Prong of the Ubiquity Theory*

The subjective territorial principle is best exemplified in the following hypothetical. An individual sends poisoned cookies from a European state to a United States resident. The victim, as intended, eats the cookies and dies.⁴⁴ This raises the question of whether United States law would provide for jurisdiction or extradition.⁴⁵ Most European states would consider the murder to have been committed in the state from which the poisoned cookies were sent, and the criminal would be punished in that state for the completed murder. This exemplifies the subjective territorial theory, which provides that a forum state will have jurisdiction over a homicide when the conduct within the forum state constitutes an attempt to commit homicide, even though the death occurs outside the state.⁴⁶

Some European commentators believe that extradition would not be available for such an occurrence under the current United States-German Extradition Treaty (German Treaty or Treaty).⁴⁷ The Treaty provides that extradition is available "for an offense committed within the territory of the Requesting State"⁴⁸ Although an appropriate jurisdictional basis exists to extradite the defendant, the United States traditionally has interpreted the term "jurisdiction" in extradition treaties to mean "territorial jurisdiction."⁴⁹ The conduct involved, however, would fit within the modern notions of territorial jurisdiction in the United States. The same would hold true for extradition relations between the United States and most other European states.

The crime described in the hypothetical falls within the German con-

44. D. Oehler, *supra* note 8 (presenting the hypothetical).

45. See Treaty of Extradition Between the Federal Republic of Germany and the United States of America, art. 1, § 1, 32 U.S.T. 1485, T.I.A.S. No. 9785 (entered into force Aug. 29, 1980) [hereinafter German Extradition Treaty]; 1986 Supplementary Extradition Treaty with the Federal Republic of Germany, Treaty Doc. 100-6, 100th Cong., 1st Sess. (1987) ("Extraditable offenses under the Treaty are offenses which are punishable under the laws of both Contracting Parties.") (ratified by the Federal Republic of Germany, 1988 B.G.B.II 1086 (W. Ger.) (has not yet received the advice and consent of the United States Senate)).

46. See *People v. Botkin*, 132 Cal. 231, 64 P. 286 (1901); see also MODEL PENAL CODE § 1.03 (proposed draft) (1962).

47. See German Extradition Treaty, *supra* note 45, art. 1.

48. *Id.* art. 1, § 1.

49. *In re Stupp*, 23 F. Cas. 281 (S.D.N.Y. 1873); 2 J. MOORE, INTERNATIONAL LAW DIGEST 232-40 (1906); 1 J. MOORE, *supra* note 27, at 135; Moore, *supra* note 27, at 757.

cept of ubiquity. Therefore, Germany would consider itself to have jurisdiction. Similarly, United States law provides for jurisdiction under the subjective territoriality theory if the obverse circumstances were to occur. The federal system in the United States has necessitated the development of the United States equivalent of the ubiquity principle. Indeed, the reality of more than fifty state or territorial jurisdictions interrelating with a system of federal criminal law would render a strictly applied territorial theory dysfunctional.

The United States commonly asserts jurisdiction over offenses consummated outside United States territory when a constituent element of the offense occurs in the United States.⁵⁰ Individual states within the United States also have asserted jurisdiction in obverse circumstances when an element of the offense charged has taken place within that state, even though the result occurred elsewhere.⁵¹ The sixth amendment to the United States Constitution provides that a criminal defendant enjoys the right to a "jury of the State and district wherein the crime shall have been committed."⁵² Thus, courts consider the crime to have occurred within the territory of a state either when the proscribed result—under the objective territoriality theory—or a constituent element—under the subjective territoriality theory—has taken place therein.

United States law considers the crime to have occurred where the effect or result impacted, which is the objective territoriality principle. In the previously discussed hypothetical, the United States would recognize that the country from which the poison was sent also would have jurisdiction. Thus, concurrent or conflicting jurisdiction would exist, and the issue of extradition would depend on determining a hierarchy of jurisdictional bases.⁵³ The defendant would be extraditable from the United States either before or after prosecution and enforcement, depending on

50. *United States v. Inco Bank & Trust Corp.*, 845 F.2d 919, 920 n.4 (11th Cir. 1988) (the subjective territorial theory, without resort to any theory of extraterritorial jurisdiction, supports prosecution of a conspiracy occurring partly within the United States).

51. See *People v. Werblow*, 241 N.Y. 55, 148 N.E. 686 (1925); *People v. Zayas*, 217 N.Y. 78, 111 N.E. 465 (1916); *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. Botkin*, 132 Cal. 231, 64 P. 286 (1901) (mailing poisoned candy from California to victim in Delaware, who died in Delaware; California exercised jurisdiction); see generally Blakesley, *United States Jurisdiction*, *supra* note 27, at 1118-23 (discussing additional authority).

52. U.S. CONST. amend. VI; cf. *United States v. Jackalow*, 66 U.S. (1 Black) 484 (1861); UTAH CODE ANN. § 76-1-201 (1990); CAL. PENAL CODE §§ 778(a) (West 1985); Blakesley, *supra* note 11, at 13-16.

53. See *infra* notes 300-314 and accompanying text; see also C. BLAKESLEY, *supra* note 2.

the hierarchy and priority of the case, because there is an appropriate jurisdictional basis that both states recognize. The German Treaty⁵⁴ provides that the fugitive would be extraditable under the subjective territoriality theory.⁵⁵

Thus, a state could assert and approve jurisdiction over larceny by fraud, for example, even though the delivery and acceptance of the goods occurred outside the territory, as long as a material element of the offense occurred within the territory from which the goods were sent.⁵⁶ Similarly, jurisdiction over a homicide is considered appropriate when the conduct within the forum state constitutes an attempt to commit the homicide, even though death occurs outside the state.⁵⁷

The subjective territoriality theory requires that a material element occur within the state.⁵⁸ The Model Penal Code,⁵⁹ the proposed Federal Criminal Code,⁶⁰ and the law of many states all require that the conduct which occurs within the state constitute at least an attempt to commit the crime before jurisdiction may be asserted over a crime consummated elsewhere.⁶¹ In addition, United States law traditionally has allowed jurisdiction over participants in this country when their cohorts have committed offenses abroad.⁶² Thus, in this hypothetical, United States jurisdiction would arise under the subjective prong of the German ubiquity theory of jurisdiction.

54. See German Extradition Treaty, *supra* note 45, art. 1, § 1.

55. Blakesley, *supra* note 11, at 13-16.

56. *People v. Zayas*, 217 N.Y. 78, 111 N.E. 465 (1916).

57. *Conners v. Turner*, 29 Utah 2d 311, 508 P.2d 1185 (1973); *People v. Botkin*, 132 Cal. 231, 64 P. 286 (1901); see also Schwab, *Have Crime, Will Travel: Borderlines and California Criminal Jurisdiction*, 50 CAL. ST. B.J. 30 (1975); Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931).

58. Blakesley, *supra* note 11, at 13-16.

59. MODEL PENAL CODE § 1.03 (1962) (proposed draft).

60. See S. 1722, 96th Cong., 1st Sess. § 204 (1979-80); H.R. 6915, 96th Cong., 2d Sess. § 111(c) (1979) (Criminal Code Revision Act of 1980). In the proposed Federal Criminal Code, the United States Congress for the first time provided a general rule regarding the nature and scope of jurisdiction over crime that occurs in whole or in part extraterritorially. See also 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. L. & CRIMINOLOGY 385 (1981).

61. See, e.g., *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925); *People v. Botkin*, 132 Cal. 231, 286 (1901).

62. F. WHARTON, WHARTON'S CRIMINAL LAW § 333 (12th ed. 1932).

B. *The Objective Prong of the Ubiquity Theory*

United States law traditionally calls for jurisdiction to arise over conduct that takes place abroad, but results in harmful effects within the United States.⁶³ Justice Holmes, for example, noted that “[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.”⁶⁴ Thus, the United States could exercise jurisdiction in the hypothetical under the effects or objective territorial prong of the ubiquity theory.

The objective and subjective territorial theories, therefore, have been expanded liberally to mitigate conflicts that arose in the past because of strict application of the territoriality principle. The difficulties suggested by European commentaries relating to those offenses in which an effect or a constituent element occurs within either state’s territory, can therefore be avoided.

63. John Bassett Moore stated long ago that objective territoriality is “[t]he principle that a man [sic] 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.” Moore, *supra* note 27, at 771, *Strassheim v. Dailey*, 221 U.S. 280 (1911); *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); *Commonwealth v. McCloon*, 101 Mass. 1 (1869).

64. *Strassheim*, 221 U.S. at 285; *cf.* *Tyler v. People*, 8 Mich. 319 (1860) (Michigan asserted jurisdiction over homicide defendant in case in which victim was wounded on board a United States flag vessel in Canadian waters, but died in Michigan). The British system similarly recognizes jurisdiction over such offenses, generally denominating them “terminatory.” Williams, *Venue and the Ambit of Criminal Law*, 81 L.Q. REV. 518, 518 (1965); G. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 63 (2d ed. 1978) (recognizing the subjective territorial basis in “conduct” crimes). For a general overview of British jurisdiction theory, see Hirst, *Jurisdiction Over Cross-Frontier Offences*, 97 L.Q. REV. 80 (1981); *Treacy v. Director of Public Prosecution*, 1971 App. Cas. 537, 543 (1970) (defining blackmail as a conduct crime, thus creating jurisdiction if any of its elements occur in England).

Murder is considered a result crime providing jurisdiction in England, if “any part of the proscribed ‘result’ takes place in England.” *Secretary of State for Trade v. Markus*, 1976 App. Cas. 35, 61 (1975). French law provides for jurisdiction in these circumstances as well. For a detailed analysis of French law relating to subjective and objective territoriality, see Blakesley, *supra* note 2, at 691-94, 695-99; C. BLAKESLEY, *supra* note 2, at ch. 3.

IV. CRIMES COMMITTED IN THIRD STATES OR CRIMES AGAINST OR BY NATIONALS OF THE REQUESTING STATE—OTHER “MEANINGFUL TOUCHPOINTS”⁶⁵

The United States-German Extradition Treaty provides that “[w]hen the offense has been committed outside the territory of the Requesting State the Requested State shall grant extradition subject to the provisions described in this treaty [if] its laws would provide for the punishment of such an offense committed in similar circumstances”⁶⁶ This provision raises the issue of what common jurisdictional principles exist to allow extradition when the offense has no territorial basis. Professors Eser, Oehler, and Meyer suggest that the unavailability of means to assert jurisdiction under United States law in circumstances in which the German doctrines of ubiquity and “vicarious administration of justice”⁶⁷ would work in Germany results in a significant strain on the cooperation between the United States and Germany in international criminal law matters. This may be true to a degree, but as the following discussion indicates, much of what triggers German jurisdiction also is sufficient under United States law. Thus, either extradition or prosecution under an equivalent to the vicarious administration of justice doctrine will be possible.

A. *The Protective Principle*

Law in Europe and in the United States provides jurisdiction on the basis of the protective principle. Under United States law, this principle is relevant when an extraterritorial offense has or could have an adverse effect on or pose a danger to United States security interests, integrity, sovereignty, treasury, or other important governmental functions. In the objective and subjective territorial theories, an effect or material element of an offense occurs on the asserting state’s territory. Under the protective principle, however, no impact or element need occur within that state’s territory. The asserting state has jurisdiction over conduct meeting the requisites, whether committed by a national or foreigner.⁶⁸ The focus

65. In German, *sinnvoller Anknüpfungspunkt*, Eser, *supra* note 3, at 117.

66. German Extradition Treaty, *supra* note 45, art. 1, § 2.

67. In German, the term *stellvertretende Strafrechtspflege* is translated roughly to mean vicarious administration of justice or the “representation principle,” as there is no corresponding expression in United States law. Lagodny, *supra* note 35, at 587; Meyer, *supra* note 35, at 571. It also is called “substitutionary jurisdiction.” See Jescheck, *Development and Future Prospects*, in 1 INTERNATIONAL CRIMINAL LAW 83 (M. Bassiouni ed. 1986).

68. See *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968); see also *United*

of this principle is the nature of the interest that is or may be injured, rather than the place where the harm occurs.

*United States v. Layton*⁶⁹ is an example of United States application of the protective principle. The defendant, Larry Layton, was charged with conspiracy to murder Leo Ryan, a representative of the United States Congress;⁷⁰ aiding and abetting the murder of a United States congressional representative;⁷¹ conspiracy to murder an internationally protected person;⁷² and aiding and abetting the attempted murder of an internationally protected person.⁷³ The United States district court found that it had proper subject matter jurisdiction over all counts.⁷⁴ The court applied several bases of jurisdiction,⁷⁵ including objective territoriality,⁷⁶ the protective principle, the nationality theory, and the passive personal-

States v. Layton, 509 F. Supp. 212 (N.D. Cal. 1981); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978); Blakesley, *supra* note 2, at 701-06 (providing a full discussion of this assertion of jurisdiction).

69. *Layton*, 509 F. Supp. at 212.

70. See 18 U.S.C. § 351(d) (Supp. 1990) (proscribing conspiracy to kill or kidnap members of Congress, among other officials). The defendant was indicted on four criminal counts arising from events occurring at the Port Kaituma airport in Guyana on November 18, 1978. These events resulted in the death of Congressman Leo Ryan and the wounding of Richard Dwyer, the Deputy Chief of Mission for the United States in the Republic of Guyana. *Layton*, 509 F. Supp. at 214.

71. See 18 U.S.C. § 351(a) ("whoever kills a member of Congress [or other officials] . . . shall be punished . . .").

72. Layton was charged also in connection with the wounding of a diplomat, the United States deputy chief of mission in Guyana. *Layton*, 509 F. Supp. at 214; see also 18 U.S.C. § 1117 (1972) (providing punishment for these offenses).

73. See 18 U.S.C. § 1116(a)2 ("[w]hoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title.").

74. *Layton*, 509 F. Supp. at 216.

75. The court noted, for example, that "the 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." *Id.* at 215 (citing *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)). The court found jurisdiction appropriate under the objective territoriality theory, the protective principle, the nationality theory, and the passive personality principle. *Layton*, 509 F. Supp. at 216.

76. The *Layton* court relied on the objective territorial theory, stating, "[t]he objective territorial principle, which allows countries to reach acts committed outside territorial limits, but intended to produce, and producing, detrimental effects within the nation . . ." *Layton*, 509 F. Supp. at 215 (citing *Strassheim v. Dailey*, 221 U.S. 280, 285 (1911)).

ity theory.⁷⁷

The court, however, emphasized the protective principle and held that the effect of killing Representative Ryan effectively impaired an important governmental function. The court noted that the murder also caused damage to United States sovereignty⁷⁸ in that "[a]n attack upon a member of Congress, wherever it occurs, equally threatens the free and proper functioning of government."⁷⁹ The court noted further that if it did not have jurisdiction over action in which members of Congress were attacked while abroad, the United States would have no legal recourse to remedy or punish clear obstruction of and injury to important governmental function, sovereignty, and integrity.⁸⁰

The killing of Representative Ryan constituted an extraterritorial act of terrorism and generally met the requisites of the protective principle⁸¹ and the vicarious administration of justice doctrine. Statutes and a multilateral convention provided jurisdiction for this type of proscribed conduct.⁸² Until 1986, however, United States laws and conventions did not address extraterritorial violence against non-internationally protected persons unless the violence occurred pursuant to a hijacking, sabotage of aircraft, or other specifically articulated form of internationally prohibited conduct.

To ensure legislative, adjudicatory, and enforcement jurisdiction over matters of extraterritorial violence committed against United States nationals not within the scope of the "internationally protected," Congress promulgated the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (Anti-Terrorism Act or Act).⁸³ Judicial development and com-

77. *Layton*, 509 F. Supp. at 216.

78. The court stated that "[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." *Id.*

79. *Id.* at 219.

80. *Id.* For additional discussion on the protective principle and citation to additional authority, see Blakesley, *Jurisdiction as Protection*, *supra* note 27, at 932-38; C. BLAKESLEY, *supra* note 2.

81. See *United States v. Yunis*, 681 F. Supp. 896, 903 n.14 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988); *United States v. Yunis*, 924 F.2d 1086, 1090-93 (D.C. Cir. 1991); see also Blakesley, *Terrorism, Law, and Our Constitutional Order*, 60 COLO. L. REV. 471 (1989).

82. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (entered into force by the United States Feb. 20, 1977); see also 18 U.S.C. 351; 18 U.S.C. 1116, 1117; discussed in *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981).

83. 18 U.S.C. § 2331 (Supp. 1990) (jurisdiction over extraterritorial violence). Arti-

mentary since the adoption of the Act suggests that it covers use of violence against a national to gain some advantage or other end in a manner that impacts on the sovereignty, foreign policy machinery, or decision-making process, or otherwise influences, intimidates, or impacts on some important governmental function. Thus, since 1986, the other "meaningful touch points" (*sinnvoller Anknüpfungspunkt*)⁸⁴ currently existing in German law appear to have established a place in United States law, at least with regard to conduct related to terrorism or combined with the protective principle.

Whether the German concept of the protective principle is more expansive than that of the United States is unclear. Professor Meyer reports that the basic premise of Germany's protective principle is that the state will subject "offenses committed abroad by foreigners (as well as by citizens) to its punitive power if thereby domestic interests are endangered or violated."⁸⁵ Thus, the first element of the protective principle, which provides jurisdiction over offenses that endanger state security, is similar to that in United States law. The protective principle in Germany also obtains jurisdiction over conduct impacting or threatening impact on other important public interests, such as protection of the national economy, false statements, perjury, and breach of trade secrets.⁸⁶

In the United States, jurisdiction similarly will arise either when courts view criminal conduct as an affront to the sovereignty of the United States or as having a deleterious influence on valid governmental interests.⁸⁷ With very few exceptions, the nations of the world adhere to this principle and its limitations.⁸⁸

cles (a)-(c) proscribe actual and attempted "terrorist" murder, manslaughter, violent assault, and conspiracy to commit homicide. The theory supporting this legislation appears to be the protective principle, not the passive personality theory, in that it is designed to prohibit "terrorist violence" against United States nationals. See generally Blakesley, *Jurisdiction as Protection*, *supra* note 27, at 938; Blakesley, *supra* note 81, at 471.

84. These include active and passive personality, and universality. Eser, *supra* note 3, at 117.

85. Meyer, *supra* note 8 (citing Eser, *Schönke/Schröder*, in *STRAF-GESETZBUCH: KOMMENTAR* §§ 8-7 (22d ed. 1985)); Eser, *Die Entwicklung des Internationalen Strafrechts*, in *FESTSCHRIFT FÜR HANS-HEINRICH JESCHECK* 1353-77 (1985); H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* 127 (3d ed. 1978).

86. GERMAN PENAL CODE § 5; Meyer, *supra* note 8, at 112-14.

87. Blakesley, *supra* note 11, at 21-22; C. BLAKESLEY, *supra* note 2.

88. E.g., French C. Pr. Pén. art. 694 (Dalloz 1987-88); reviewed by Blakesley, *supra* note 2, at 702-04.

B. *Passive Personality*

German law sometimes categorizes the passive personality principle as a form of the protective principle.⁸⁹ The German Penal Code extends the application of German criminal law to offenses committed extraterritorially against German nationals.⁹⁰ United States law traditionally has rejected the passive personality principle.⁹¹ Even with regard to passive personality, however, the gap between the United States and other nations' jurisdictional principles has diminished. Although the passive personality principle is still in disrepute, at least in the arena of international terrorism, the United States has asserted jurisdiction over certain attacks committed abroad against United States nationals.⁹² The passive personality principle standing alone still is not part of United States law. It has been used, however, in conjunction with the protective and universality principles in relation to allegations of terrorism to assure United States legislative, adjudicatory, and enforcement jurisdiction.

The passive personality theory grants a state the authority to prosecute and punish perpetrators of criminal conduct that harms or is intended to harm a national of the asserting state. The *Restatement (Second) of Foreign Relations Law* provided the traditional repudiation of the principle in United States law.⁹³ The *Restatement (Third)* also does not list passive personality as a basis for jurisdiction,⁹⁴ and the United States Government vehemently protested attempts to assert jurisdiction

89. Meyer, *supra* note 8, at 112-14.

90. GERMAN PENAL CODE § 7(1); Meyer, *supra* note 8, at 112-13. This theory of jurisdiction is applicable only if the conduct is punishable under the law where the conduct occurred or, less likely, if there is no law enforcement where the crime was committed. *Id.* at 113. Germany may punish the conduct more rigorously than would the nation in which the offense occurred.

91. Blakesley, *supra* note 11, at 28-31.

92. *United States v. Yunis*, 681 F. Supp. 896, 901-03 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988); *United States v. Yunis*, 924 F.2d 1086, 1090-93 (D.C. Cir. 1991); Blakesley, *Jurisdiction as Protection*, *supra* note 27, at 938-42. At least one federal circuit has relied explicitly on the passive personality principle to assert jurisdiction over foreign nationals who commit offenses abroad against United States nationals. *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984) (Columbian charged with conspiracy to murder DEA agent). That case, however, could be read to fit more properly within the protective principle.

93. "A State does not have jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." RESTATEMENT (SECOND), *supra* note 27, § 30(2) comment e. This repudiation remained unchanged after the recent revision. RESTATEMENT (THIRD), *supra* note 27, §§ 402-403.

94. RESTATEMENT (THIRD), *supra* note 27, § 402.

based on the passive personality principle.⁹⁵ Nevertheless, the United States Congress promulgated the Anti-Terrorism Act, which applies United States law to terrorist violence inflicted on United States nationals abroad.⁹⁶ As a result of this Act⁹⁷ and recent judicial decisions,⁹⁸ the aspect of the passive personality involving terroristic violence may trigger United States jurisdiction.

C. *The Active Personality or Nationality Principle*

European states, unlike the United States, apply a broad active personality principle. They maintain that nationality is a link so strong that the state may prosecute any of its nationals for offenses they commit anywhere in the world, so long as the offense is punishable in the place where it was committed. This theory underlies the importance of the state maintaining its sovereignty over each national and in maintaining its respect internationally by punishing its own wrongdoers. European nations generally do not extradite their own nationals,⁹⁹ and old treaties

95. Moore, *supra* note 27, at 757.

96. See *supra* note 11 and accompanying text. The Act actually was intended to provide for a protective or universality principle type of jurisdictional basis and to limit its application to terror-violence. Section 2331(e) provides: "No prosecution for any offense described in this section shall be undertaken by the United States except [when] . . . in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population." The legislative history to the Act provides: "[T]he committee of conference does not intend that chapter 113A reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision." H.R. REP. NO. 494, 99th Cong., 2d Sess., 87 *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1865, 1960.

97. 18 U.S.C. § 2331 (Supp. 1989) (ch. 113A, "Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals").

98. Ahmad v. Wigen, 726 F. Supp. 389, 399 (E.D.N.Y. 1989) ("The United States recognizes nationality of the victim as the basis for criminal jurisdiction.") (citing 18 U.S.C. § 2331); United States v. Yunis, 681 F. Supp. 896 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988). See Abramovsky, *supra* note 15, at 121; Recent Development, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?*, 18 VAND. J. TRANSNAT'L L. 915, 916 n.2 (1985); see also Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE I. INT'L L. 158, 164-68 (1987).

99. See, e.g., The Extradition Law of the Federal Republic of Germany. Gesetz über die Internationale Rechtshilfe in Strafsachen, of 1982, BGB1.I 2071 (1982) [hereinafter Extradition Law of the Federal Republic of Germany]; France, La loi relative à l'Extradition des Etrangers [1927] D.P. IV, Mar. 10, 1927, *reprinted in* Code de Procédure Pénale, immediately after art. 696 (Dalloz 1989-90) [hereinafter Extradition Law of 1927].

between the United States and European states provided that "neither party shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention."¹⁰⁰ Exempting nationals from extradition is not uncommon from either historical or contemporary viewpoints.¹⁰¹ Greek city-states, Rome, and other great civilizations exempted their citizens from extradition.¹⁰² Similarly, Native American tribes refused to deliver their members to outsiders.¹⁰³

The modern practice of exempting nationals from extradition appears to have been initiated and developed by France. In the mid-eighteenth century, the extradition treaties between France and its adjacent neighbors exempted nationals of the requested state from extradition.¹⁰⁴ Napoleon attempted to reverse the trend by issuing a decree that French nationals could be extradited. The decree, however, was never executed.¹⁰⁵ Professor Billot maintains that French public law prohibited the extradition of nationals as early as 1788,¹⁰⁶ although others claim that the Parliament of Paris declared the exemption as early as 1555.¹⁰⁷

The French Minister of Justice formally promulgated a *circulaire* in

100. 1909 Extradition Treaty, *supra* note 26, art. V. For a discussion of the extradition of nationals generally, see I. SHEARER, *supra* note 35, at 34; R. RAFUSE, *THE EXTRADITION OF NATIONALS* (1939); Baltatzis, *La non-extradition des nationaux*, 13 REV. HELLENIQUE DUE DROIT INT'L 190 (1960).

101. See T. Stein, J. Meyer & D. Oehler, Extradition Issues (papers presented at the Harvard Conference on International Cooperation in Criminal Matters; papers on file with the Harvard Journal International Law). 31 HARV. INT'L L.J. 5, 108 (1990) (providing summaries of Stein's and Meyer's papers). Of the 163 extradition treaties printed in the League of Nations Treaty Series and the first 550 volumes of the United Nations Treaty Series, 98 treaties except the national of the requested state absolutely, 57 provide the requested state a discretionary right to refuse to surrender its nationals, while only eight provide for extradition regardless of the nationality of the fugitive. I. SHEARER, *supra* note 35, at 96, app. II.

102. I. SHEARER, *supra* note 35, at 95; Baltatzis, *supra* note 100, at 190, 197. The Germanic tribes of Europe followed the same principle.

103. Crimes committed by members of the tribe against outsiders usually were not considered to be crimes, and "extradition" was refused. The most severe penalty for intratribal crimes, however, was banishment. See Fairbanks, *A Discussion of the Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation* 31 (1976) (unpublished thesis on file in the Columbia University Law Library).

104. Aupecle, *L'Extradition et la Loi de 10 mars 1927* 15 (Paris, 1927) (unpublished thesis on file in the Columbia University Law Library).

105. See BILLOT, *TRAITÉ DE L'EXTRADITION* 70-72 (1874); see also I. SHEARER, *supra* note 35, at 104.

106. See I. SHEARER, *supra* note 35, at 104.

107. Manton, *Extradition of Nationals*, 10 TEMP. L.Q. 12 (1935-36); I. SHEARER, *supra* note 35, at 104 n.3.

1841¹⁰⁸ that prohibited the extradition of its nationals. Although France subsequently negotiated extradition treaties with Great Britain and the United States without including the clause exempting nationals, it has never extradited one of its nationals under the treaties.¹⁰⁹ Since 1884, French treaty practice consistently has exempted nationals from extradition,¹¹⁰ and the French Extradition Law of 1927 specifically exempts French citizens from extradition.¹¹¹

The clause exempting nationals in the 1909 United States-French Extradition Treaty states that "neither party shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention."¹¹² On its face, this clause falsely appears to allow discretionary extradition of nationals. In fact, the French Extradition Law of 1927 expressly prohibits the extradition of French nationals.¹¹³ In addition, the United States Supreme Court held unequivocally that the exemption of nationals clause in the 1909 Treaty creates an absolute bar to the extradition of

108. *Circulaire du Ministre de la Justice*, Apr. 4, 1841, para. 2, cited in I. SHEARER, *supra* note 35, at 104 n.5.

109. I. SHEARER, *supra* note 35, at 104; BILLOT, *supra* note 105, at 73. These were the last French extradition treaties that did not contain the exemption in some form. Both treaties were negotiated in 1843.

110. This practice began with the Extradition Treaty between France and Luxembourg.

111. Extradition Law of 1927, *supra* note 99, art. 5, para. 1.

112. 1909 Extradition Treaty, *supra* note 26, art. V.

113. "Extradition is not granted: 1. When the person, the object of the request, is a French citizen or a person under French protection, the status of citizen or protected person being determined as of the time of the offense for which the extradition is requested." Extradition Law of 1927, *supra* note 99, art. 5, para. 1. With regard to the issue of the timing of the determination of the accused's nationality, the Court of Appeals at Aix-en-Provence, V.C. Aix (chambre d'accusation), held that under this article of the Extradition Law of 1927, France could surrender a fugitive from the justice of Italy who had committed certain extraditable offenses in 1945, even though he had acquired his French citizenship by naturalization in 1950. Decision of Mar. 15, 1951, 1951 J.C.P. II No. 6243; 1951 I.L.R. 324 (No. 101) (1951). The Franco-Italian Extradition Treaty of 1870, then in effect, exempted the extradition of nationals, but extradition was approved on the basis of the nationality at the time of the offense, as required by the law in 1927.

The determination of nationality for prosecution in France of French nationals committing crimes outside French territory is the opposite. The French *Code de Procédure Pénale*, art. 639 para. 3 provides that, before French courts have jurisdiction over offenses committed abroad by French nationals, the nationality of the accused must be established as of the day of the prosecution, not the day of the offense. French practice with regard to the timing of the determination of nationality for extradition exemption purposes is different from general international extradition practice. The determination of nationality for purposes of the exemption from extradition usually occurs as of the time of the extradition hearing.

United States citizens to France.¹¹⁴

Although the United States Government would prefer simply to incorporate a clause explicitly allowing extradition of nationals, it has taken four different approaches in extradition treaties to the extradition of nationals. The first approach, like the 1909 Convention between France and the United States,¹¹⁵ provides that the parties to the Convention are not bound to extradite their nationals. This is a complete and absolute bar to extradition. The reports of international conferences¹¹⁶ and many commentators, however, have disparaged the practice of exempting nationals from extradition.¹¹⁷ The second approach, which the 1970 Supplementary Convention adopted, creates no obligation to extradite nationals, but expressly endows the executive branch with discretionary authority to extradite nationals on a case-by-case basis.¹¹⁸ The third ap-

114. *Valentine v. United States*, 299 U.S. 5 (1936). The Court stated that this was a matter of legal authority, not a matter of policy. The Court reasoned that the power to extradite from the United States must be granted specifically in the terms of the extradition treaty. Extradition requires an affirmative statement of the power to extradite. The Court considered the "exemption of Nationals" clause in the 1909 Extradition Treaty between France and the United States, Art. V stated that: "Neither [p]art[y] shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention." The Court refused to construe such a negative phrase as a grant of power to the executive branch. *Id.* at 9-10.

115. 1909 Extradition Treaty, *supra* note 26, art. V.

116. The *Institute of International Law Conference Report* (1880) and the *Conférence pour l'Unification du Droit Pénal* (1935) provide for the extradition of nationals in their reports. *Cf.* Tenth Conference of International Criminal Law (1969) (provides discretion to extradite nationals); The European Convention on Extradition, Dec. 13, 1957, Europ. T. S. No. 24, art. 6 (allows the contracting parties the discretion to refuse the extradition of nationals) [hereinafter European Convention on Extradition].

117. This includes French commentators. *E.g.*, R. MERLE & A. VITU, *supra* note 20, at 329; P. BOUZAT & J. PINATEL, *supra* note 35, at 1325-26.

118. Thus, many treaties have been amended. For example:

There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, insofar as the legislation of that State permits, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.

Supplementary Convention of 1970, Between France and the United States, art. III, amended art. V of the 1909 Extradition Treaty between France and the United States. The minutes to the negotiations of this Proclamation read:

The United States representative explained to the French delegation the inability of the United States to extradite its own nationals under the present Convention and expressed a strong desire to rectify this situation. He explained that the United States Supreme Court had decided (in *Valentine v. United States*, 299 U.S. 5 (1936)) that the French Convention did not, as indirectly required by the United

proach is to remain silent on the subject of the extradition of nationals.¹¹⁹ The fourth approach provides expressly for extradition without regard to nationality.¹²⁰

The United States Government extradites its nationals pursuant to the latter three approaches. When discretion to extradite nationals is expressly allowed, the courts have found that the executive branch has the discretion, but not the obligation, to do so.¹²¹ With regard to treaties that are silent on the question of the extraditability of nationals, the United States Supreme Court has held that nationals are extraditable.¹²²

Many European commentators, noting that the United States Government generally does not prosecute its nationals for crimes committed abroad, suggest that while the United States Government may be willing to extradite its nationals who commit crimes abroad, it may not be able to do so because of lack of reciprocity.¹²³ European states cannot extra-

States Constitution, grant the executive authority to extradite United States citizens. He noted that very few U.S. penal laws provided any form of extraterritoriality and that therefore unless such persons were returned to France, they would not be able to be prosecuted in the United States. The French delegation explained that their extradition law generally prohibited extradition of nationals and expressed opposition to the formula proposed by the United States. The United States representative then suggested the article used in the United States-Brazil Treaty of 1961 (article VII) to which the French delegation agreed.

Gaither, *Minutes, Treaty Supplement Negotiations* 5-6 (Paris, Nov. 1969) (Jan. 5, 1970) (on file in the Office of the Legal Adviser, U.S. Dep't of State); *see also* Convention on Extradition, Oct. 24, 1961, United States-Sweden, 14 U.S.T. 1845; T.I.A.S. No. 5496; Treaty of Extradition Jan. 13, 1961, United States-Brazil, 15 U.S.T. 2093; T.I.A.S. No. 5691.

119. *See, e.g.*, Extradition Treaty, Dec. 22, 1931, United States-Great Britain and Northern Ireland, 47 Stat. 2122, T.S. No. 849.

120. *See, e.g.*, Convention on Extradition, Dec. 10, 1962, Israel-United States, 14 U.S.T. 1707, T.I.A.S. No. 5475.

121. *In re Lucke*, 20 F. Supp. 658, 659 (N.D. Tex. 1937).

122. In *Charlton v. Kelly*, 229 U.S. 447 (1913), the Supreme Court stated

[T]here is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons."

Id. at 467-68 (emphasis original). Canadian courts take the same view. *In re Burley*, 1 CAN. L.J. 34 (1865).

123. *See, e.g.*, D. Oehler, *supra* note 8, at 20; R. MERLE & A. VITU, *supra* note 20, at 413.

dite their own nationals.¹²⁴ The first point is correct as a matter of general principle because of the traditional Anglo-American predilection for territorial jurisdiction. Often, however, a basis for jurisdiction other than the nationality of the perpetrator is available. A state may seek extradition whenever a United States national commits a crime that fits within one of the other bases of jurisdiction accepted by United States law. If, however, an existing extradition treaty prohibits extradition of a United States national from the United States, extradition cannot be obtained.¹²⁵

Since the early 1960s, extradition treaties have provided courts with judicial discretion in extradition matters, and extradition of United States nationals is clearly available and encouraged by the United States Government.¹²⁶ In some circumstances, generally when facts are too insignificant to trigger the protective principle standing alone, parties will assert the nationality principle under United States law. Based on the notions of state sovereignty, the United States Supreme Court has noted that the state has legal authority under international and domestic law to pass laws asserting jurisdiction over extraterritorial conduct of those nationals, even if such nationals are travelling or residing outside its territory.¹²⁷

Although United States jurisprudence generally disfavors application of the nationality principle, courts do apply it in some situations. The United States Supreme Court has noted that a state has legal authority under international and domestic law to pass laws asserting jurisdiction over the extraterritorial conduct of its nationals. This jurisdiction is based on notions of state sovereignty.¹²⁸ Indeed, United States citizenship or nationality often plays a significant role in applying United States legislation to extraterritorial conduct.¹²⁹ The Wisconsin Supreme Court,

124. Extradition Law of the Federal Republic of Germany, *supra* note 99; Extradition Law of 1927, *supra* note 99; D. Oehler, *supra* note 8, at 20.

125. See *Valentine v. United States*, 299 U.S. 5 (1936) (the phrase: "Neither . . . [p]art[y] shall be bound to deliver up its own citizens or subjects under the stipulations of this convention" construed to be a negative statement and an absolute bar to extradition of nationals); see also Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law*, 13 VAND. J. TRANSNAT'L L. 121, 689-94 (1980).

126. Blakesley, *supra*, note 125, at 689-94.

127. See *Blackmer v. United States*, 284 U.S. 421 (1932); *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808) (dictum); see also Chief Justice Marshall's speech, *Livingston's Resolution*, United States House of Representatives, *quoted in* *The Venus Case*, 18 U.S. (5 Wheat.) 127 n.1 (1820); *Henfield's Case* 11 F. Cas. 1099 (C.C.D. Pa. 1793).

128. See *infra* note 129 and accompanying text.

129. See *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal. 1981); 18 U.S.C. § 953 punishes unauthorized attempts by United States nationals, "wherever

for example, approved jurisdiction in the case of an extraterritorial violation of a penal clause in an absentee voting statute.¹³⁰ A federal district court in Michigan asserted nationality jurisdiction and prosecuted United States nationals who assisted the illegal immigration of foreign contract laborers.¹³¹ Similarly, a murder committed by a United States national on an uninhabited island was subject to prosecution in the United States,¹³² as were contempt judgments for failure to comply with a subpoena served by a consular officer.¹³³ Sometimes the same conduct committed by an alien and a national will be punishable only against the national.¹³⁴ Thus, although the nationality principle is not as important in United States law as it is in Europe, it is still a force in those areas where nationality impacts on some other important state interest.

[they] may be," to influence a foreign government in its relations with the United States; 18 U.S.C. § 2383 ("[W]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States" shall be fined or imprisoned. No jurisdictional limits are established.).

Nationality jurisdiction also has led to the prosecution of United States nationals assisting the illegal immigration of foreign contract laborers. *United States v. Craig*, 28 F. 795, 801 (E.D. Mich. 1886). The Foreign Corrupt Practices Act of 1977 applies to "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." 15 U.S.C. §§ 78(dd-2), 104(b)(a)(B)(3); see also Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211 (1987); 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). Jurisdiction extends to extraterritorial failure to report under the Bank Secrecy Act or the Money Laundering Control Act. The Currency & Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) [hereinafter Bank Secrecy Act], (codified, variously, and significantly amended in 12 U.S.C. §§ 1730d, 1829b, 1951-1959, 31 U.S.C. §§ 321, 5311-5324, and throughout 15 U.S.C.), reviewed by Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465, 469 n.16 (1989) (providing an excellent analysis of the new crimes and official reaction to them); Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69 (1986). Money Laundering Control Act of 1986, part of Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 100 Stat. 2307, 3218-39 (codified in scattered sections of 12 U.S.C.; 18 U.S.C.; and 31 U.S.C.); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified in scattered sections of 12 U.S.C.; 18 U.S.C.; and 31 U.S.C.).

130. *State v. Main*, 16 Wis. 422, 446 (1863).

131. *United States v. Craig*, 28 F. 795, 801 (E.D. Mich. 1886).

132. *Jones v. United States*, 137 U.S. 202 (1890).

133. *Blackmer v. United States*, 284 U.S. 421, 441 (1932).

134. *United States v. Bowman*, 260 U.S. 94 (1922).

Clearly, however, the United States Government is not interested in prosecuting most common crimes against its nationals simply because they are United States nationals. As a result, the United States will extradite its nationals to foreign states when the requesting state has a basis for jurisdiction.

The United States, without requiring reciprocity,¹³⁵ will extradite its nationals to nations that have an appropriate basis of jurisdiction.¹³⁶ The policy preference of the United States Government is to extradite fugitives regardless of their nationality, and United States treaty negotiators always attempt to include a clause expressly allowing extradition of nationals. When domestic extradition law, such as that of France or Germany, precludes inclusion of these clauses, the United States generally suggests including language that expressly provides the executive branch with the discretion to extradite nationals. This allows the United States to maintain its policy of extraditing its nationals whether or not the other party reciprocates. Most commentators from outside the United States believe that such clauses are meaningless, because the foreign state will require reciprocity. They make the error, however, of perceiving the United States position from the European perspective, which is that nationality is a fundamentally important concept. To the contrary, treaties include these clauses precisely for the purpose of allowing extradition despite lack of reciprocity. Moreover, United States policy allows for flexibility without renegotiation in case the foreign state changes its internal extradition law or, in the case of Germany, its Constitution. The discretionary extradition of nationals clauses allow the extradition of United States nationals without either accepting or deprecating the internal extradition law of the other contracting party.

D. *The Special Use of Double Criminality*

International cooperation still suffers from the problem presented by the 1873 extradition decision *In re Stupp*.¹³⁷ In *Stupp*, a New York court decided that the defendant, a Prussian subject whose extradition had been requested by the Prussian government for the crimes of murder, arson, and robbery committed in Belgium, should be surrendered to Germany pursuant to the United States-German Extradition Treaty of 1852. The Treaty of 1852 provided that extradition should be allowed for offenses committed "within the jurisdiction" of the requesting party.

135. Blakesley, *supra* note 125, at 689-94.

136. There is a problem with the "special use of double criminality." See Blakesley, *supra* note 2, at 743-53.

137. 23 F. Cas. 281 (S.D.N.Y. 1873).

Despite Prussia's claim of jurisdiction over Stupp, the United States followed the recommendation of the United States Attorney General and declined surrender of the defendant to Prussia.¹³⁸

The *Stupp* case presents the special use of the double criminality principle in extradition and its relation to the nationality principle. This special use requires that the charged offense be punishable in each state and that the theory of jurisdiction asserted over the offense be one recognized by each state before the individual is extraditable.¹³⁹ In one case, for example, a United States District Court in California deemed improper an extradition of an individual from the United States to France based on narcotics charges. The court considered it dispositive that there was no evidence that the fugitive from France had conspired with anyone in France, had performed any element of the offense in France, or had caused any effect in France.¹⁴⁰

138. The Attorney General stated:

I am quite clear, that the words, "committed within the jurisdiction," as used in the treaty, do not refer to the personal liabilities 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.

Id. at 294 (quoting an opinion of the United States Attorney General).

139. For a detailed study of the special use of the double criminality principle, see C. BLAKESLEY, *supra* note 2, at ch. 3; Blakesley, *supra* note 2, at 743-60; see also *Ex parte* John Anderson, [1860] L.T.R. 622, reviewed in Ryan, *Ex Parte* John Anderson, 6 QUEENS L.J. 382 (1981); *Richard Fiedler Case*, MS Dep't of State file no. 312/1121 (1940) (instruction from counselor of United States Department of State to United States Consul General in Mexico), cited in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 103-04 (1968). The double or dual criminality principle in extradition requires that the conduct of the fugitive be criminal in both the requesting and the requested state. *Emami v. United States Dist. Court*, 834 F.2d 1444, 1450 (9th Cir. 1987); Blakesley, *supra* note 125, at 672. This is based on the notion of *nulla poena sine lege* and ensures that the accused will not be punished for conduct that is not criminal under the law of the requested state. The dual criminality requirement is satisfied if the conduct upon which the extradition request is based presents the "essential character" of the conduct criminalized by the law of each state. *Theron v. United States Marshall*, 823 F.2d 492, 496 (9th Cir. 1988), quoting *Wright v. Henkel*, 190 U.S. 40, 58 (1903). The conduct allegedly perpetrated must be "generally criminal" in each state. *Valentine v. United States*, 299 U.S. 5, 11 (1936); *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Emami*, 834 F.2d at 1450; *United States v. Kaulukukui*, 520 F.2d 726, 731 (9th Cir. 1975); *United States v. Lehder-Rivas*, 668 F. Supp. 1523 (M.D. Fla. 1987). It is the nature of the conduct that is important, not its name. *Emami*, 834 F.2d at 1450. Moreover, "each element of the offense purportedly committed in a foreign country need not be identical to the elements of the similar offense in the United States." *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986).

140. *Republic of France v. Moghadam*, 617 F. Supp. 777 (D.C. Cal. 1985).

*In re Lo Dolce*¹⁴¹ graphically illustrates the problem that strict territorial jurisdiction causes when combined with the special use of double criminality. In *Lo Dolce*, a United States Army sergeant committed a murder in Italy during World War II. Italy did not assert jurisdiction over the offense, and the offender returned to the United States. The United States District Court held that the extradition treaty was inapplicable because the offense did not occur within the territorial jurisdiction of the United States, and, consequently, the perpetrator escaped prosecution.¹⁴²

If Germany were to request extradition from the United States of a German national for prosecution of a crime under circumstances in which United States law would not allow assertion of jurisdiction, the United States possibly would deny the extradition pursuant to the special use of the double criminality principle. This special use notion, however, may be falling into disfavor. In 1979, the United States Court of Appeals for the Seventh Circuit held that even though "the United States generally does not prosecute citizens for crimes committed outside [its] borders," extradition was proper when a Swedish national was sought by Sweden for having committed arson and insurance fraud for fires that burned his own merchandise and buildings in Sweden and Denmark.¹⁴³ Thus, this holding exemplifies the United States trend to eliminate prior limitations to extradition.

E. *The Universality Principle*

Customary international law provides that certain offenses exist for which any nation obtaining personal jurisdiction over an accused may exercise and prosecute.¹⁴⁴ The notion of universality is growing in importance and acceptance internationally.¹⁴⁵ The German Penal Code

141. 106 F. Supp. 455 (W.D.N.Y. 1952).

142. *Id.*; see also *Kinsella v. United States*, 361 U.S. 234 (1960); *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1948); *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956); *State v. Hall*, 114 N.C. 909, 19 S.E. 602 (1894).

143. *Matter of Assarsson*, 635 F.2d 1237 (7th Cir. 1979).

144. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 581-82 (6th Cir. 1985) *cert. denied*, 475 U.S. 1016 (1986) (extradition decision explicitly recognizing the universality principle and its application in relation to conduct akin to genocide and war crimes); 2 H. GROTIUS, *DE JURE BELLI AC PACIS LIBRIS TRES* 504 (F. Kelsey trans. 1925); C. BLAKESLEY, *supra* note 2, at chs. 2, 3; Blakesley, *Jurisdiction as Protection*, *supra* note 27, at 911-20; Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

145. *United States v. Yunis*, 681 F. Supp. 896, 901 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988) (citing Blakesley, *United States Jurisdiction*, *supra* note 27, at 1140);

subjects much more conduct to universality jurisdiction than does United States law,¹⁴⁶ and Professor Meyer notes that the universality theory of jurisdiction has a broad application in Germany.¹⁴⁷ Although parties may assert universality jurisdiction in the United States for certain conduct condemned under United States law and condemned universally, many problems of definition and designation remain. There is much discussion, for instance, over whether narcotics offenses fall in the category of universality jurisdiction. The recently promulgated Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN Drug Convention), for instance, moves the world much closer to universal jurisdiction over narcotics offenses.¹⁴⁸ Expanding the universality principle causes many problems, however, and it probably still will be difficult to find a consensus as to which narcotics offenses fit within the principle.¹⁴⁹ Nevertheless, international convention and custom provide that several crimes trigger universal jurisdiction. These include piracy, slave trade, war crimes, crimes against humanity, hijacking and sabotage of civil aircraft, genocide, and apartheid.¹⁵⁰ Thus, the problem of jurisdiction and international cooperation may not be as grave as suggested by many European commentators.

see also C. BLAKESLEY, *supra* note 2, at ch. 2; Blakesley, *Jurisdiction as Protection*, *supra* note 27; Blakesley, *supra* note 81, at 471; Randall, *supra* note 144, at 785.

146. Germany recognizes more significant connecting factors. GERMAN PENAL CODE § 6 (Regardless of the law of the place of commission, the German criminal law also is applicable to the following acts committed outside of Germany: genocide, crimes involving atomic energy, explosives and radiation, attacks on air traffic, encouragement of prostitution, unauthorized dealings in narcotics, dissemination of pornography, counterfeiting, and others made punishable by the terms of an international treaty binding on the Federal Republic of Germany).

147. Meyer, *supra* note 8, at 114; Meyer, *supra* note 35, at 571.

148. U.N. Doc. E/CONF.82/15, Dec. 19, 1988, *reprinted in* 28 INT'L LEGAL MATERIALS 493 (1989) (signed by 106 states, including the United States). See Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DEN. J. INT'L L. & POL'Y 339, 340-48 (1990); Zagaris, *U.N. Drug Convention Signed*, 5 INT'L ENFORCEMENT L. REP. 80-87 (March 1989); cf. Bassiouni, *Critical Reflections on International and National Control of Drugs*, 18 DEN. J. INT'L L. & POL'Y 311 (1990) (current international and national approaches to international control of drugs are woefully deficient and prospects of the control method extremely remote).

149. For discussion of some problems relating to its expansion, especially in relation to narcotics offenses, see Blakesley, *supra* note 2, at 728-61; C. BLAKESLEY, *supra* note 2, at ch. 3.

150. See Blakesley, *Jurisdiction as Protection*, *supra* note 27, at 913.

F. *The Notion of Vicarious Administration of Justice*

The current desire to find solidarity among nations attempting to combat international and transnational crime suggests that the United States is ready for the application of the doctrine of vicarious administration of justice. Also, *aut dedere aut punire* (or *aut iudicare*)¹⁵¹ suggests that if the United States refuses to extradite a person who has committed an offense against the law of a foreign requesting state, the United States ought to prosecute that person if the conduct committed constituted a crime under United States law. This is the principle of the vicarious administration of justice,¹⁵² which provides that if a state refuses to extradite an individual, that state shall prosecute him as long as the conduct involved serious and punishable behavior in the state in which the conduct occurred.¹⁵³

Vicarious administration of justice is common in Europe and has been adopted in several extradition treaties, although many commentators and government representatives have difficulty accepting jurisdiction based solely on the basis of a refusal to extradite.¹⁵⁴ The United States always has taken *aut dedere aut punire* less seriously than have European states,¹⁵⁵ but jurisdiction under this theory could proceed on the refusal to extradite and an applicable theory of jurisdiction under United States law. Such an approach would cause less consternation among United States jurists. This approach presents a limited version of European vicarious administration of justice, but the significant expansion of United States prescriptive jurisdiction results in a functionally similar principle.

It is uncertain whether current principles of jurisdiction in United

151. This is a latin maxim which essentially means that one either [*aut*] has to extradite or give back [*dedere*] or [*aut*] to punish [*punire*]. The more appropriate is *aut dedere aut iudicare* [either to extradite/give back, or adjudicate/initiate prosecution in Anglo-American terms]. 2 H. GROTIUS, *DE JURE BELLI AC PACIS* ch. XXXI, § 76, 77 (1758).

152. See Meyer, *supra* note 8, at 115-16; see also H. JESCHECK, *supra* note 1, at 143-64; D. OEHLER, *supra* note 35, at 413-15; Eser, *Abschnitt. Das Strafgesetz*, in A. SCHÖNKE & H. SCHRÖDER, *STRAFGESETZBUCH KOMMENTAR* 56-85, §§ 3-7 (T. Lenckner, A. Eser, P. Cramer & W. Stree 23d ed. 1988); Eser, *Die Entwicklung des internationalen Strafrechts im Lichte des Werkes von Hans-Heinrich Jescheck*, in 2 *FESTSCHRIFT FÜR HANS-HEINRICH JESCHECK* 1353-77 (1985); Jescheck, *Gegenstand und neueste Entwicklung des internationalen Strafrechts*, in *FESTSCHRIFT FÜR REINHART MAURACH* 579 (1972).

153. Meyer, *supra* note 8, at 115.

154. Eser, *supra* note 3, at 119.

155. See Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 *HARV. INT'L L.J.* 37, 69 (1990).

States law will in all situations accommodate extradition to a foreign state having jurisdiction under the foreign state's law based on the nationality or active personality principle, the passive personality principle, the protective principle, or the universality theory. Certainly in the arena of terrorism and in circumstances in which the passive personality principle converges with policies relating to the universality and protective principles, the notion of vicarious administration of justice may have a viable analogue in United States law. Although many United States governmental officials do not understand the notion of jurisdiction based on the refusal of extradition, prosecution for conduct arising in the United States or in circumstances under which some United States theory of jurisdiction would apply is more acceptable. This is true, even if the impetus for prosecution is the refused request for extradition and a subsequent request to prosecute made by the foreign country. This is an application of the principle *aut dedere aut punire* (or *iudicare*) and should be acceptable under the expanding principles of jurisdiction in United States law.

United States law relating to jurisdiction over extraterritorial crime and extradition, especially that involving terrorist violence, is not as incompatible with the laws of Germany or other European states as many commentators suggest. The nationality principle (active personality) is not a primary basis of asserting jurisdiction under United States law, but neither is it wholly anathema. The conjunction of the expanding nationality, protective principle, and universal jurisdictional bases in United States law and the fact that the United States often does not require reciprocity in the manner demanded under European law accommodates many of the difficulties presented by the European commentators. Considering this rapprochement, it is uncertain whether the explicit development of a "new" doctrine denominated vicarious administration of justice is necessary. Scholars, judges, and practitioners in the United States, however, must study the notion of vicarious administration of justice and its correlation and compatibility with extant principles under United States law. Likewise, the European counterparts must do the same with the expanding United States notions of jurisdiction over extraterritorial crime.

Vicarious administration of justice, therefore, may be a notion of significant benefit. German criminal law applies in some instances to offenses committed outside Germany by foreigners as long as some theory of jurisdiction, including vicarious administration of justice, addresses the

conduct, and the conduct constitutes an offense under German law.¹⁵⁶ German law apparently applies and Germany will prosecute when the state in which the criminal conduct occurred does not request extradition, or if Germany denies extradition, or if extradition otherwise is not feasible.¹⁵⁷ Principles similar to those of double criminality and the special use of double criminality appear to be at work in the notion of vicarious administration of justice.

For punishment to occur in Germany, the conduct must be punishable by the law of the state where the conduct occurred, unless no criminal law enforcement exists in that state.¹⁵⁸ Moreover, the conduct must be of the type that is usually (barring some technical blockage) extraditable under a treaty or relevant law of each state for the particular offense involved. Apparently, this indicates that the offense must not be of a political nature¹⁵⁹ and must be grave enough to incur sufficient punishment in each state to make it extraditable.¹⁶⁰

Vicarious administration of justice is subsidiary to extradition. It does not apply unless a treaty or legally based bar to extradition arises in a given case. In addition, even though German law applies to the prosecution and punishment, the punishment provided under the law of the state where the conduct occurred cannot be exceeded. In other words, the parameters of punishment are controlled by the state where the offense occurred. This accommodates notions of *légalité* (the requirement of no punishment without a promulgated law) and the need for the conduct to be proscribed in both places.

Vicarious administration of justice would resolve situations in which one state would not be able to extradite. It seems, however, that the concept of vicarious administration of justice already is functioning to a significant degree. If a state refuses to extradite a national, it has the obligation under international law, and probably under its own domestic law, to seek prosecution of that person and impose appropriate punishment. An interesting difference between vicarious administration of justice and current United States law is that the former recognizes the limits in its application of criminal law, based on notions similar to double criminality. Thus, it appears that prosecution of a fugitive pursuant to extradition would require accommodation of the requested state's inter-

156. Meyer, *supra* note 8, at 115-16.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* This is a double criminality approach; extradition being available only for offenses which give rise to a minimum level of punishment.

ests and values. This works to diminish the size of the world in terms of protection of rights. The principle of vicarious administration of justice may make denial of extradition more palatable to states requesting it. Its recognition also may prompt increased understanding and accommodation. The majority of the problems suggested as reasons for the doctrine's inapplicability, however, appear to have been resolved. Thus, continued discussion of the merits of vicarious administration of justice is important to its full implementation.

V. MUTUAL ASSISTANCE IN CRIMINAL MATTERS

This section operates under the European analytical predilection to postulate in terms of principles.¹⁶¹ This analysis differs from many United States approaches in which the underlying basics are discussed in the context of a given current problem or theme of international law enforcement, such as terrorism, organized crime, money laundering, or drug trafficking. In each of these specific spheres, the underlying questions of law are reduced to the problems of *dedere iudicare punire*¹⁶² in the sense of Grotius' still-valid distinction.¹⁶³

In principle, there are only two ways to resolve problems that arise in a manner which interrelates the substantive and procedural penal law of more than one state. First, a state can assert prescriptive jurisdiction, even though the human behavior in question occurs outside the asserting state. Grotius noted that this is part of the still-existing dichotomy of national power and authority to punish a wrongdoer for transnational conduct.¹⁶⁴ The second principle involves one nation assisting other jurisdictions by means of mutual assistance in the largest sense. This includes not only extradition or other forms of traditional mutual assistance, such as letters rogatory, but also recognition of foreign judgments, transfer of sentenced persons, and transfer of proceedings. This principle can be denominated *dedere*,¹⁶⁵ as one state provides (gives) its assistance to another rather than creating or asserting its own jurisdiction.

The methods today are based on multiple national jurisdictions, and other propositions currently are becoming prominent. Professor Bassiouni has promoted the idea of an international criminal tribunal to be

161. See *supra* notes 6-7 and accompanying text.

162. These are the basic national tools of international law enforcement: deliver, adjudicate, and punish.

163. See 2 H. GROTIUS, *supra* note 151.

164. *Id.*

165. *Dedere* is from the latin verb "to give" or "to give back." Hence, to give assistance or to extradite, in modern criminal procedure terms.

established for the most important and serious international and transnational crimes.¹⁶⁶ The conventional adoption of an international or regional criminal tribunal would be a significant new step in combatting international crime. This would provide an independent organ on the international level to prosecute international and transnational crime. While there is significant interest in either an international tribunal or a set of regional tribunals, the road to adoption may be long and difficult. The prospect of these tribunal proposals raises significant questions, such as, who would have prescriptive jurisdiction? Would all states be bound by a mere majority of these states? What about the minority that did not agree? Of course, these are questions that public international law has contemplated from its inception. Creating supranational¹⁶⁷ substantive norms of criminal law, enforced by a supranational organ, however, is a significant initiative that could create intensive interference with national entities and with individuals through international law. Thus, the significant new developments in emerging international law and practice need to be scrutinized. This type of tribunal or tribunal system should function on the basis of a substantive code of offenses promulgated by the member states in an organic convention.¹⁶⁸ The ju-

166. ISTITUTO SUPERIORE INTERNAZIONALE DE SCIENZE CRIMINALI, *Draft Statute, International Criminal Tribunal, Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Criminality and for the Establishment of an International Criminal Court*, Organized by the International Institute of Higher Studies in Criminal Sciences, Under the Auspices of the Italian Ministry of Justice, in Cooperation with The United Nations Crime Prevention & Criminal Justice Branch (C. Blakesley, Rapporteur, June 1990) (drafts and analysis may be found in 62 REVUE INT'L DE DROIT PÉNAL (1991)) [hereinafter *Draft Statute*]; M. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

167. These questions also are addressed in The Analysis of the Proposed International Criminal Court in *Draft Statute*, *supra* note 166. There is a differentiation of the three levels of international criminal law: national, international (national criminal law influenced by treaty obligations as well as interstate cooperation), and supra-national (criminal law existing "above" national states; e.g., on the level of the United Nations, or relating to general principles that have taken on the nature of *ius cogens*). See Eser, Basic Issues Concerning Transnational Cooperation in Criminal Cases: A Problem in Outline, in Prevention of Crime and Treatment of Offenders, 15-18 Eighth United Nations Congress in Havana, Cuba, Aug. 27-Sept. 7, 1990, U.N.-Doc., A/Conf. 144/G/Federal Republic of Germany, July 1990 (English translation); see also Information: La Cooperation Internationale dans le Domaine de la Prévention du Crime et de la Justice Pénal au XXI^e é Siecle, VIII^e éme Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants, La Havane (Cuba), 27 août—7 septembre 1990, 77 Revue de Droit Pénal et de Criminologie 253 (Belg. 1991).

168. Further questions remain regarding such a tribunal: What sort of trial would

jurisdiction of any tribunal should include all international crimes, as defined by current international conventions, or jurisdiction could be limited to terroristic offenses and narcotics trafficking. Any list of offenses ought to be based on currently existing international conventions, but the substantive elements of the crimes would have to be provided explicitly.

A convention creating an international criminal court could provide a listing of the offenses subject to the jurisdiction of the court. In effect, this would provide an international criminal code. The relationship between such an international tribunal and national courts and prosecutorial offices, however, is uncertain. The relationship should be based on cooperation and collaboration between the tribunal and the various party-states. The tribunal would not replace domestic prosecutorial or judicial prerogative, but rather would be an additional forum to be utilized if desired. If it is not possible to draft an entire international penal code, the notion of transfer of criminal proceedings would allow prosecution based on the substantive law of the transferring state. The court could interpret the law in such a case in the manner it believed the domestic courts of the transferring state would act.

Even if such an international tribunal were to be developed, ordinary domestic offenses involving international substantive or procedural issues still would be left to national systems. Furthermore, the tribunal itself would be a possible conduit for international cooperation. Thus, questions of jurisdiction and extradition, as well as other forms of mutual assistance, would remain important. Moreover, an international tribunal based on cooperation and the further development of domestic criminal justice systems would enhance their domestic ability to function in relation to transnational crime. The tribunal would facilitate cooperation and coordination of nations in matters of international criminal justice. Thus, even if an international criminal tribunal were to be adopted, the need for understanding the principles of jurisdiction, extradition, and other forms of mutual assistance would continue.

In conceptualizing the relationship between *punire* and *dedere* in the international context, this Article now will consider two basic situations.¹⁶⁹ The first situation, in which only one state proscribes certain specific conduct as criminal, poses the problem of determining under

the accused have? Will there be a jury? If so, what role would it have? Will the trial be adversarial or not so adversarial? Will proof beyond a reasonable doubt be required? Will there be cross examination by defense counsel? What rules of evidence will apply? These questions are also addressed in *Draft Statute*, *supra* note 166.

169. See also Lagodny, *Grundkonstellationen des internationalen Strafrechts*, 101 ZEITSCHRIFT FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT 987-1011 (1989).

what conditions the promulgating state appropriately may implement the prescription by punishing the offender. The second situation, in which more than one promulgating nation proscribes the conduct, presents the problem of determining which state appropriately may punish the offender.

A. The First Situation: When Only One State Proscribes a Given Human Behavior

It is helpful in clarifying the various possibilities involved with this situation to distinguish two separate groups of norms.¹⁷⁰ The first relates to a determination of how criminal conduct, regardless of where the conduct occurred or where it had its effect, should be punished.¹⁷¹ The second deals with the conditions that subject extraterritorial conduct to the state's substantive law. Punishment of acts committed extraterritorially requires the presence of a special connecting factor, such as the need to protect certain domestic¹⁷² or international legal interests.¹⁷³ Under German law, these connecting factors are listed in sections 3 through 7 and 9 of the GPC.¹⁷⁴ Only by combining both groups of norms can one make a determination whether a given behavior is punishable under the domestic substantive law. These distinctions may clarify the appropriate resolution of different problems that arise when either the suspect or the means of developing evidence¹⁷⁵ are outside the territory of the state that has criminalized the behavior.

This section considers three possible circumstances in which only one state proscribes a particular behavior. The first is when a state other

170. This Article attempts to apply neutral nomenclature to escape the debate over whether these questions are based essentially in procedural or substantive law.

171. Under United States criminal law, this group includes offenses, defenses, and sentencing rules. According to the European paradigm, this group consists mainly of offenses, grounds of justification, and excuse. *See, e.g.,* A. ESER & G. FLETCHER, RECHTFERTIGUNG UND ENTSCHULDIGUNG (dealing with this differentiation and norms concerning sentencing). United States law does not expressly make a differentiation in this manner.

172. Important domestic interests are threatened by planning a war of aggression, treason, endangering external security, abduction, and casting political suspicion on one domiciled or customarily residing within Germany.

173. Important international interests are threatened by crimes involving atomic energy, attacks on air traffic, unauthorized dealings in narcotics, dissemination of pornography, encouraging prostitution, counterfeiting, and economic subsidy fraud.

174. *See* 28 THE AMERICAN SERIES OF FOREIGN PENAL CODES, FEDERAL REPUBLIC OF GERMANY 48-51 (1987).

175. The basic notions presented may be applied equally to extradition or other forms of mutual assistance.

than the asserting state proscribes the conduct, but lacks extraterritorial range. The second is when other states do not proscribe that particular conduct. The third is when behavior is not proscribed as such in the state on whose territory the conduct occurred, but is proscribed extraterritorially by the law of another state.

1. When the Law of Other States Lacks Extraterritorial Range: Abolition of Traditional Bars to Extradition

The following situation is an example of when a state's laws lack extraterritorial range: A German citizen kills another German citizen in Germany, without impacting the interests of any foreign state. If the offender escapes to the United States, it would not be possible to punish him in the United States because United States law does not cover such circumstances.¹⁷⁶ In this situation, German officials have three potential courses of action.

a. Inappropriate Solutions

German officials could act inappropriately by prosecuting the person in absentia or by abducting him and then prosecuting. This, however, is unlawful under German constitutional law. It also violates the European Convention on Human Rights and international law in general and is not considered a legal means of international law enforcement.¹⁷⁷

b. Transfer of Proceedings

Another possibility of resolving the problem is for the state where the offense occurred to transfer the proceedings to the other state. The states of the Council of Europe agreed in the European Convention on the Transfer of Proceedings in Criminal Matters¹⁷⁸ to transfer the responsibility for prosecution in such a situation from the state in which the charges have been brought to the other state.¹⁷⁹ Essentially, one state waives its right to prosecute in favor of allowing another to do so. This Convention has been ratified only by Austria, Denmark, the Nether-

176. See *supra* Part II.

177. See C. BLAKESLEY, *supra* note 2; Abramovsky, *supra* note 15, at 122.

178. Europ. T.S. No. 73 May 15, 1972.

179. See 6 M. ABBELL & B. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE: PRISONER TRANSFER* 117 (1990) (Part XV, Other Forms of International Judicial Assistance in Criminal Matters, ch. 1, International Transfer of Proceedings in Criminal Matters); Schutte, *Transfer of Criminal Proceedings: The European System*, in 2 *INTERNATIONAL CRIMINAL LAW* 319 (M. Bassiouni ed. 1986).

lands, Norway, Sweden, and Turkey, and therefore is limited in application. It provides, however, an interesting paradigm for future cooperation. Currently, the most important method of resolving this problem is by way of extradition.

c. Extradition

The use of extradition depends on the substantive conditions required either by legislation or treaty.¹⁸⁰ Traditional bars to extradition include the political offense exception, lack of reciprocity,¹⁸¹ the rule of extraditable offenses,¹⁸² and the non-extradition of nationals.¹⁸³ Although the political offense exception does not have great impact on extradition, the other three frequently bar extradition, especially in Europe. Therefore, it is very important to analyze whether these exceptions may be abolished without damaging any protection of civil liberty or human rights.

Historically, the traditional bars to extradition were created and functioned for the benefit of the states concerned.¹⁸⁴ The individual sought for extradition benefited, if at all, only incidentally to the state's protection of its sovereign interests. The fugitive in the requested state was not considered a subject of international law and therefore possessed no individual rights.¹⁸⁵ The individual was considered an object transported from one state to the other as an exercise of the sovereign will of the two states involved. This archaic vision of international law is now moribund, as is evidenced by the creation of new, human rights-based, indi-

180. United States law prohibits extradition, except when it is mandated by a treaty between the requesting state and the United States. Most European states, including the United Kingdom, allow extradition in the absence of a treaty if the prerequisites of the relevant national extradition laws are met. See C. BLAKESLEY, *supra* note 2, at ch. 4.

181. Reciprocity is not the bar to extradition under United States law that it is under European laws. *Id.* at ch. 4; see also *supra* notes 135-36 and accompanying text.

182. The rule of extraditability provides that only offenses that are made explicitly extraditable are extraditable.

183. The rule of double criminality plays no role in this, but plays a very important one in the second group.

184. See Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland*, 9 BEITRÄGE UND MATERIALIEN AUS DEM MAX PLANCK INSTITUT FÜR AUSLANDISCHES UND INTERNATIONALES STRAFRECHT § 3, at 27-62 (1987); C. BLAKESLEY, *supra* note 2, at ch. 4; Blakesley, *The Practice of Extradition From Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39 (1981).

185. Cf. *United States v. Vreeken*, 803 F.2d 1085 (10th Cir. 1986) (The rule of specialty is a right belonging to a state party to an extradition treaty; the fugitive has no standing to raise it. Moreover, when fugitive "waives" extradition, or is returned by way of comity, the rule of specialty and other protections do not apply.).

vidual-oriented, bars to extradition.¹⁸⁶

Even if individual rights did not play an important role in the creation of the traditional bars to extradition, the creators of these bars were motivated by concerns of protections for the individual. If individual civil liberty interests motivate the traditional bars to extradition, they cannot be abolished unless the individual rights were abolished or altered, something that is neither helpful nor desirable. If, on the other hand, these civil liberty interests were solely state-oriented and did not protect the individual fugitive, states simply might agree to eliminate them as a means of facilitating extradition.¹⁸⁷ If they were eliminated, it would still be necessary, of course, to protect individual basic rights by incorporating these rights, as bars to extradition in their own right. In Europe, states currently are taking legislative steps to protect basic human rights in the extradition setting, which is evidence that these concerns and ideas are not purely theoretical.¹⁸⁸ The *Schengen Treaties* of 1985 and 1990, entered into by Germany, France, Belgium, Luxembourg, and the Netherlands, shall—as a model for the other states of the Common Market—create open frontiers among the parties.¹⁸⁹ This model, and the developments arising from the notion of a “unified Europe,” contemplate the abolishment of traditional state-based principles of extradition as a means to facilitate international cooperation in criminal matters.

186. See, e.g., 1979 AUSLIEFERUNGS UND RECHTSCHILFEGESETZ; BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH, No. 529 (1979) (Austria); 1982 BUNDESGESETZ ÜBER INTERNATIONALE RECHTSCHILFE IN STRAFSACHEN, SAMMLUNG DER EIDGENÖSSISCHEN GESETZE 846 (1982) (Switzerland); CODICE DI PROCEDURA PENALE arts. 697-726 (1988) (Italy). This trend is evident in recent extradition legislation in which states have formulated new bars to extradition that are individual-oriented and based closely on the European Convention on Human Rights, The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention for the Protection of Human Rights].

187. The elimination of the political offense exception may implicate domestic problems related to the separation of powers and raise questions about the judicial role in protecting domestic civil liberties. This goes beyond the protection of the individual fugitive and is systemic under United States constitutional criminal justice. See Blakesley, *supra* note 81, at 471, 513-29; Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986); *contra* Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 TEX. INT'L L.J. 47 (1989); Lubet, *International Criminal Law and the "Ice-Nine" Error: A Discourse on the Fallacy of Universal Solutions*, 28 VA. J. INT'L L. 963 (1988).

188. See *supra* note 186; see also *infra* notes 206-213 and accompanying text.

189. Schengen I Treaty, 5 GEMEINSAMES MINISTERIALBLATT 79-81 (1986); Schengen II Treaty, not yet ratified, and not yet published officially (signed copy treaty available in the offices of the Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Freiburg, Federal Republic of Germany).

With regard to basic individual rights, it is useful to analyze the specific pattern of basic rights in the German Constitution, as far as those rights function as rights against public acts and influence (*Abwehrrechte*).¹⁹⁰ First, such analysis must focus on whether a given act of public authority, such as the surrender of an individual fugitive to another state pursuant to an extradition request, touches the scope of a basic right. Surrender in extradition always touches on the basic right of liberty, because the requested state forces the extraditee to travel to the requested state. If a basic right is infringed upon, the next step is to determine whether Parliament has promulgated a law on extradition or judicial assistance or has ratified an extradition treaty. If such parliamentary action exists, analysis of the constitutionality of the parliamentary infringement must proceed.

In a manner similar to substantive due process balancing of interests, one must analyze whether the application of the infringing law upon the basic right meets the limitations on the promotion of the public interest, such as the principle of proportionality (*Verhaeltnismaessigkeitsprinzip*). The principle of proportionality provides that the nucleus of the basic rights may not be infringed upon. Further, even infringement that does not reach the core of the right is not allowed, unless no other means exist to achieve the protection of the public interest with a lesser impact on the individual basic right.¹⁹¹

d. Reciprocity

Reciprocity concerns only state-interests. An individual's rights are neither touched nor violated if the requested state refuses to extradite without reciprocity in a similar case. Therefore, the doctrine of reciprocity might be abolished, at least from the point of view of individual interests. United States law has long held reciprocity in extradition to be of lesser significance.

e. Political Offense Exception

The political offense exception is a mysterious and controversial composition of very different interests. It generally appears to be a "black-box" for cases in which the requested state wants neither to extradite nor

190. See A. BLECKMANN, STAATSRECHT II: ALLGEMEINE GRUNDRECHTSLEHREN 263-308 (1985).

191. For details, see THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY—ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW (U. Karpen ed. 1988).

reveal the actual grounds for the refusal. Individual rights on the level of German constitutional law do not require the exception as such; therefore, the political offense exception could be abolished from the German point of view.¹⁹² From a United States constitutional perspective, the political offense exception may be a repository for protecting civil liberties. Therefore, if it were replaced, other means would be required to provide the same protection.¹⁹³ Germany has developed a mechanism for eliminating the statist-based aspects of the political offense exception without eroding protections for the individual. At the same time, the mechanism also maintains the separation of power value, which in the United States currently is repositied in the political offense exception. Thus, the other means of protection are the Basic Rights clauses themselves.¹⁹⁴

In future extradition treaties entered into by Germany, Basic Rights clauses containing human rights based protections will be mandatory from the German constitutional or Basic Rights point of view. Otherwise, such a treaty would be contrary to the German Constitution. In the absence of a treaty provision, the Constitutional basic rights are directly applicable (*Grundgesetz*). Abolishing the political offense exception, therefore, only would set aside that particular, statist-based bar to extradition, without involving the individual interests that otherwise might have been repositied behind that bar. The political offense exception is not necessary to bar the extradition of a person who risks facing an unfair trial, torture, or inappropriate sanctions such as the death penalty, because the Basic Rights protect against these actions.¹⁹⁵ A separate issue is whether the requested state should be allowed to refuse extradition in a case in which human rights violations are not in question, but rather the requested state does not support the requesting state politically. This falls under the traditional political offense exception clause. Such a polit-

192. See C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION* (1990); Lagodny, *supra* note 35, at 583; Lagodny, *The Abolition and Replacement of the Political Offence Exception: Prohibited by International or Domestic Law?*, 19 ISR. Y.B. ON HUM. RTS. 317 (1989); see also Stein, *Die Auslieferungsausnahme bei politischen Delikten*, in 82 BEITRÄGE UND MATERIALIEN ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT (1983).

193. See C. BLAKESLEY, *supra* note 2, at chs. 2, 3, 4.

194. See *infra* notes 206-13 and accompanying text.

195. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), *reprinted* in 11 Eur. Hum. Rts. Rep. 439 (1989), *reprinted* in 28 INT'L LEGAL MATERIALS 1963 (1989); Breitenmoser & Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990); Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition* (paper presented at the International Seminar on Extradition, Dec. 4-9, 1989, organized by the Instituto Superiore Internazionale de Scienze Criminali, Siracusa, Italy) (publication forthcoming).

ical interest more clearly involves the traditional "state interest clause" in which extradition may be refused if the requested state declares that the surrender of the fugitive would be contrary to its essential national interests.¹⁹⁶

f. Rule of Extraditable Offenses

The rule of extraditable offenses, although primarily established for states to avoid commencing expensive extradition procedure involving minor offenses, has a counterpart in the basic principle of proportionality.¹⁹⁷ Proportionality requires that the significant liberty infringement caused by extradition be allowed only for serious offenses. Therefore, a clause providing for extradition only in cases of a certain gravity must be contained in extradition treaties.

g. Non-extradition of Nationals

The non-extradition of nationals is a long-standing principle that has become a part of the domestic legal fabric in European states and is a Basic Right in the German Constitution.¹⁹⁸ This principle is equally strong in most other European states.¹⁹⁹ In the Netherlands, however, the rule was amended, even though the non-extradition of nationals was prohibited as a constitutional principle. The amended Constitution allows the Dutch Government to extradite Dutch nationals to another state for prosecution and sentencing with the condition that the national be returned to the Netherlands for enforcement of the judgment.²⁰⁰ This example is a possible indication that the notion of non-extradition of nationals has lost some of its sacrosanct aura, at least within the framework of the European system.

In the long run, it may be wise to reduce or eliminate some of these substantive bars to extradition. This would facilitate extradition significantly and would benefit the international regime of cooperation in matters of international criminal law. Such a reduction or elimination of substantive bars to extradition would have to, at the same time, ensure protection of human rights and civil liberty.

The new dimension of protecting individual rights creates new imped-

196. See Stein, *supra* note 192, at 367, 380.

197. For a discussion of proportionality, see *supra* text accompanying note 191.

198. Article 16 provides: "No German may be extradited to a foreign country."

199. See *supra* Part II.

200. *Staatsblad 1988*, No. S. 478.

iments to extradition.²⁰¹ The recent landmark European Court of Human Rights decision in *Soering v. United Kingdom*²⁰² has caused much discussion in Europe and the United States.²⁰³ In this case, Soering was charged with murder in Virginia. He subsequently was arrested in the United Kingdom pursuant to an extradition request by the United States. The European Court pronounced that extradition by the United Kingdom to the United States would constitute "inhuman treatment" in violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention),²⁰⁴ because Soering would be subject to the death penalty and face sitting on death row for years.²⁰⁵ The most important feature of the decision is that a requested state which is a member of the European Convention on Human Rights is responsible for what happens to the extraditee in the requesting state. This responsibility stems from the obligations under the Convention to promote the protection of the individual. Eventually, the United Kingdom extradited Soering to Virginia after the attorney general promised that he would not seek the death penalty. The Court noted that not every right under the Convention necessarily would bar extradition. The Court, however, decided the case only in the context of article 3. Thus, the question remains whether other protections, such as the "fair trial" guarantees of article 6, also would bar extradition.

Soering will have direct impact on the interpretation of the *Grundgesetz*, because the Federal Constitutional Court of Germany held that, in

201. Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990).

202. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 11 Eur. Hum. Rts. Rep. 439 (1989), reprinted in 28 INT'L LEGAL MATERIALS 1063 (1989); see also 16 EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT 314 (1989); NEUE JURISTISCHE WOCHENSCHRIFT 2183-85; Breitenmoser & Wilms, *supra* note 195, at 845; Williams, *supra* note 195.

203. Van den Wyngaert, *supra* note 201; Breitenmoser & Wilms, *supra* note 195, at 845.

204. See Convention for the Protection of Human Rights, *supra* note 186. Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

205. The Court did not directly consider the dilemma it would face if courts in the United States were to decide that the death penalty would be imposed quickly. The Court, however, rejected the argument that the long delay on death row is caused by the accused himself because of the substantial number of appeals taken: "[n]evertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full." *Soering Case*, *supra* note 195, at 42.

interpreting the *Grundgesetz* law, courts must consider the contents and development of the European Convention of Human Rights.²⁰⁶ This requirement indicates that the German Constitutional Court considers that the European Court of Human Rights is a persuasive source of law and serves as a means of interpretation of the contents of the scope of German Basic Rights.²⁰⁷ Thus, *Soering* should strengthen a new trend in German discussion on the scope of Basic Rights. The recent trend, strengthened by *Soering*, is that courts must interpret German Basic Law expansively as a bar to extradition.²⁰⁸ This is in contrast to the previous principle argument that only German Basic Rights under article 16, the non-extradition of nationals and the subjective right of asylum, could be legal obstacles to extradition.²⁰⁹ The question now is not whether German Basic Rights have any function at all in extradition, but whether courts will interpret the range of Basic Human Rights²¹⁰ broadly²¹¹ or narrowly.²¹²

Analysis of individual rights in the context of extradition focuses on two approaches. The first approach is a positive one in the sense that most of the traditional barriers to extradition may be abolished. The second approach is a negative one that contemplates new bars which are not dependent on a treaty or legislation, because they are of a constitutional order and character.²¹³ The constitutional character of these Basic Rights

206. See 74 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT 358, 370 (1987).

207. *Id.*

208. See Lagodny, *Grundrechte als Auslieferungs-Gegenrechte*, 41 NEUE JURISTISCHE WOCHENSCHRIFT 2146-50 (1988).

209. See Vogler, Walter & Wilkitzki, *Kommentar zum Gesetz Ueber internationale Rechtshilfe in Strafsachen*, in H. GRUETZNER & P. POETZ, *INTERNATIONALER RECHTSHILFEVERKEHR IN STRAFSACHEN* § 8 (2d ed. 1980).

210. For a discussion of these problems, see Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INT'L & COMP. L. REV. 293, 322 (1986) (describing how the United States view is "proceduralized").

211. See Lagodny, *supra* note 184, at 161-257. Basic Rights are widely applicable because the consequences of extradition that occur in the requesting state after extradition are relevant and have a significant impact on the individual's basic rights. Thus, if Germany is the requested state, Germany is responsible for what happens in the requesting state because of Germany's responsibility under the Convention for Human Rights and the German Basic Law. Germany, therefore, must analyze the likelihood of a fair trial in the requested state, the risk of death that the extraditee faces, not only of the death penalty, but also prison conditions that are dangerous to the fugitive's life.

212. See 75 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT 1, 14-18 (1987) (providing that only a nucleus of Basic Rights are applicable in the field of extradition).

213. The consequence of this is that extradition treaties of Germany, in the future,

is similar to that of mandatory norms, which must be part of every interpretation of any relevant clause in an extradition treaty or extradition law. In addition, ambiguous sections must be interpreted so as to promote the Basic Rights, just as gaps should be filled also to promote these rights.

2. When Other States Do Not Proscribe the Particular Kind of Behavior as Criminal: Should the Double Criminality Requirement be Abolished?

If a United States citizen violates the insider trading laws of the United States and then escapes to Germany, German law would not permit extradition to the United States, because insider trading has not been made punishable under the German Criminal Code. In this hypothetical, the double criminality requirement would be an obstacle to extradition, which raises the question of whether this result necessitates the abrogation of the double criminality bar. At first glance, this hypothetical extradition would appear to be contrary to the principle *nulla poena sine lege* (no punishment without law),²¹⁴ a German Basic Right. From the European perspective, however, the act of extraditing or surrendering a fugitive is not viewed as punishment. Rather, it is seen only as assisting a foreign state in its criminal procedure, which is realized by means of a decision of the requested state's executive power.²¹⁵ German Basic Law does not require the application of the rule of double criminality for extradition.²¹⁶ Every extradition, however, affects rights under the Basic

might contain a clause providing that: "Extradition will not be granted, if it is contrary to international and Constitutional Basic Rights, especially if the extraditee has to expect"

214. The principle indicates that an individual cannot be punished unless the relevant conduct has already been criminalized.

215. From the German point of view, the fact that most extradition cases involve arrest of the fugitive in order to certify that extradition can be effected does not involve the double criminality requirement. Under German law, arrest does not require punishable behavior. Arrest may also serve other objectives, such as security or the realization of deportation.

216. There is, of course, a long history of debate over the double criminality rule in German literature. See Lagodny, *supra* note 184, at 48-50, 352-53; Mörsberger, *Das Prinzip der identischen Strafrechtsnorm im Auslieferungsrecht*, 59 NEUE KÖLNER RECHTSWISSENSCHAFTLICHE ABHANDLUNGEN 4-21 (1969). Lagodny argues in favor of Basic Rights and indicates that if the double criminality requirement is abrogated, no justification would exist based on public interests, to interfere with Basic Rights. At the time Lagodny wrote his material, the principle of *Völkerrechtsfreundlichkeit* was not so clearly developed as it is now. With the exception of Mörsberger's short passage, German discussion has been similar to that in the United States in relation to double crimi-

Law, and thus non-prohibition is not enough.²¹⁷ A positive justification for extradition without applying the double criminality principle is necessary. Because German Basic Law generally is friendly toward international law and international interests (the principle of *Voelkerrecht-sfreundlichkeit*), the support of foreign interests is a general public interest of sufficient order to justify a restriction of a Basic Right.²¹⁸ Germany may make foreign interests "its own interests" to the same extent as German criminal law may restrict German Basic Rights in internal cases. Therefore, it is possible to restrict the Basic Right of article 2, paragraph 1, in favor of foreign criminal law and extradite the fugitive accused of insider trading in the United States. This would appear initially to pose a significant civil liberties danger from a United States point of view.

The German analysis, however, does not create unconditional support with regard to the criminal law of the requesting state, because German substantive criminal law remains a significant force. To the same extent that German lawmakers are prevented from creating unconstitutional criminal offenses, courts will deny extradition if the request concerns an offense that is unconstitutional under German law. For example, punishment for editing an offensive newspaper is contrary to the right of freedom of the press that is set forth in article 5, paragraphs 1 and 2 of the Basic Law. Similarly, if the prescribed punishment itself violated Basic Rights against corporal or disproportionate punishment, German courts also would deny extradition.

The maxim *nulla poena sine lege* is considered a Basic Right under German constitutional law.²¹⁹ There are three reasons, however, why this rule from a German perspective is not seen by German law to be an obstacle to the abolition of the double criminality requirement. First, extraditing a person to another state is not tantamount to a punishment.²²⁰ Second, the rule would not be an obstacle if the requested state has a law providing for extradition, either on the basis of a treaty or domestic extradition legislation, that is ratified and full-fledged law.²²¹ Third, the

nality. See *infra* notes 237-43 and accompanying text.

217. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 2, para. 1.

218. See Bleckmann, *Die Voelkerrechtsfreundlichkeit der deutschen Rechtsordnung*, 32 DIE OEFFENTLICHE VERWALTUNG 309-18 (1979).

219. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 103, para. 2: "An act can be punished only if it was an offense against the law before the act was committed."

220. Jescheck, *Die internationale Rechtshilfe in Strafsachen in Europa*, 66 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 518, 531 (1954).

221. See Vogler, *Aktuelle Probleme der Auslieferung*, 81 ZEITSCHRIFT FÜR DIE

rule would not be an obstacle if the requesting state's law actually contains a law providing a criminal sanction for the act in question. The relevant question in the German Basic Law in relation to extradition is whether the requesting state's provision of criminal law would be constitutional if it were passed by the German legislature.

In the context of the insider trading hypothetical, such conduct probably could be made criminal in Germany without interfering with any of the Basic Rights.²²² Insider trading is not something that is inherently non-punishable or something for which the Basic Law would prohibit punishment. If the conduct could be made punishable, there is no constitutional reason for Germany not to extradite. Thus, there is no constitutional reason to retain the rule of double criminality. Additionally, in the absence of the double criminality principle, extradition to the United States also would not violate German Basic Rights. At least for the purposes of extradition, states can operate with different definitions of offenses as long as the basic values of the state are not impugned. Another benefit of abolishing the principle of double criminality is that the need to harmonize existing criminal codes around the world would be reduced significantly. This benefit, however, is a major theoretical stumbling block to United States acceptance of an abrogation of the principle.

From the United States point of view, the abolition of double criminality is problematic. Although extradition is not the equivalent of punishment, it is a deprivation of liberty. Extradition, while considered an aspect of judicial cooperation, does implicate fundamental rights under the United States Constitution. It infringes more on a fugitive's liberty than a simple arrest, and therefore ought to implicate more constitutional protection. Extradition essentially is turning a person over for trial, which, in the United States, requires sufficient evidence to establish probable cause that the fugitive committed the crime. It also requires, however, judicial recognition that the conduct triggering United States participation in the deprivation of liberty be criminal under United States law. The United States judicial system ought not participate in the arrest, jailing, and sending of a person to be prosecuted in another state on conduct that the United States has not rendered criminal.²²³ Never-

GESAMTE STRAFRECHTSWISSENSCHAFT 163, 170 (1969).

222. See BUNDESTAGSDRUCKSACHE 9/1338, 36-37 (German legislator discussing the rule of double criminality, in the law of 1982, *Gesetz über die internationale Rechtshilfe in Strafsachen*. He noted that it would be neither contrary to the rule of law (*Rechtstaatsprinzip*) nor unjust to abolish the double criminality provision).

223. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1443-47, 1459-62 (1988).

theless, it appears that recent developments in United States case law on the subject functionally have obliterated and abrogated the rule of double criminality, by emphasizing the action constituting the offense rather than its denomination and requiring only similarity, rendering its formal abrogation.²²⁴

This is not propitious from the United States point of view of civil liberty. The principle of double criminality, based on the long-standing maxim *nulla poena sine lege*, requires that a fugitive be extradited only for conduct that is criminal in and punishable sufficiently by the domestic law of both states.²²⁵ Although virtually all United States extradition treaties contain a dual criminality clause, some commentators²²⁶ recently have disparaged the principle, and judges often have limited it to near meaninglessness. Although many argue²²⁷ that it is an important principle in extradition law because of the sharp divergences among the criminal laws of the various states of the world, courts have been reluctant to become comparativists. Critics argue²²⁸ that it is an onerous burden on the requested state's judiciary to determine the criminality of the act in the requesting state's law. In reality, there is no such burden on the court, as the rule is satisfied if the requesting state submits, along with the rest of its evidentiary documentation, an affidavit of relevant law containing the statute that renders the action in question criminal. Thus,

224. United States courts recently have taken an almost casual approach to double criminality, determining that extradition treaties are to be "liberally construed . . . to effect . . . the surrender of fugitives," and that double criminality is satisfied if the offense charged is "substantially similar" in the law of the requesting and requested states. *Id.* at 1460-62; see also *United States v. Sensi*, 879 F.2d 888, 893-94 (D.C. Cir. 1989); *Theron v. United States Marshal*, 832 F.2d 492, 497 (9th Cir. 1987); *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); *Brauch v. Raich*, 618 F.2d 843, 847 (1st Cir. 1980) ("substantially analogous"); *Messina v. United States*, 728 F.2d 77, 79-80 (2d Cir. 1984) (conduct, "in nature of extorting," "similar"); *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1067 (S.D.N.Y. 1987) ("substantially similar"); RESTATEMENT (THIRD), *supra* note 27, § 476(c).

225. See 2 M. BASSIOUNI, *supra* note 24, at 324 (discussing the interrelationship of dual criminality and reciprocity) (citing *In re Nikoloff*, 7 Ann. Dig. 351, 352 (Germany, Upper Court of Dresden 1933), which stated: "Extradition would be granted upon the principle of reciprocity and upon that of identity of extradition and prosecution, which by the way is a universally recognized principle of international law."); *In re Bachofner*, 28 I.L.R. 322 (Colom. Supreme Court of Justice 1959); *In re Zahabian*, 32 I.L.R. 290 (Switz. Federal Tribunal 1963).

226. See, e.g., R. MERLE & A. VITU, *supra* note 20, at 415-16; I. SHEARER, *supra* note 35, at 138-39.

227. See C. BLAKESLEY, *supra* note 2, at ch. 4; Kester, *supra* note 223, at 1460-61.

228. See I. SHEARER, *supra* note 35, at 138-39; DONNEDIEU DE VABRES, TRAITÉ ÉLÉMENTAIRE DE DROIT CRIMINEL 872 (2d ed. 1943).

counsel should be familiar with foreign law or find an expert who is and should plan a strategy that will cause the court to listen to and understand the difference in foreign criminal law.²²⁹ Taking these steps is worthwhile because they significantly diminish the possibility of spurious extradition requests.

The terminology used in denominating similar criminal conduct varies greatly from state to state. Language and tradition significantly influence the development of code phrasing such that it has become necessary to include a clause in extradition treaties explicitly stating that the conduct underlying the enumerated offenses, not the formal denomination, is determinative of extraditability. The United States position has been that "whatever its denomination, if the facts of the particular case make out an offense under the treaty, extradition should be granted."²³⁰ Moreover, as the United States Supreme Court held, "if a treaty fairly admits of two constructions, one restricting the [state's] rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."²³¹ In a subsequent case, *Gallina v. Fraser*,²³² the United States Government extradited a fugitive by looking to the documentation and evidence to determine extraditability when the language of the request was confusing. In this case, Italy had requested the extradition of the fugitive for "continuous," "aggravated," and "reiterated" robbery. The United States District Court, after examining the record, found that the words described circumstances involving a robbery or series of robberies and, therefore, warranted extradition under the Italian Penal Code.²³³

Mail and wire fraud²³⁴ and transportation offenses²³⁵ currently are

229. See Kester, *supra* note 223, at 1460-61.

230. Letter From Acting Legal Adviser Meeker to Assistant Attorney General Miller, Department of State (June 6, 1961) (discussing the extradition of Marcos Pérez Jiménez, former President of Venezuela), *reprinted in* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 764-66 (1968).

231. *Factor v. Laubheimer*, 290 U.S. 276, 293-94 (1933).

232. 177 F. Supp. 856 (D. Conn. 1959).

233. *Id.* at 866-67.

234. 18 U.S.C. § 1341 (1982); 18 U.S.C. § 1343 (1982).

235. Kester, *supra* note 223, at 1462-63. "Transportation offenses" are those acts made criminal under United States federal law, having as a necessary element, in addition to the substantive elements of the particular offense, the transporting or transferring across state or foreign borders of persons, articles, or other items related to the offense. The commerce clause of the United States Constitution provides the authority for federal jurisdiction. Federal jurisdiction must be established in this or some other manner, or the result would be a quagmire of competing jurisdictions. Furthermore, many of the "transportation offenses" involve organized crime, thus, making the funding, expertise, and

high on the extradition priority list and have caused significant dual criminality problems, because often no direct foreign counterpart exists. These problems are exacerbated by the recent broad construction in United States courts, which do not require actual fraud, but only mailing or wiring a transmission in "furtherance of a scheme to defraud."²³⁶

Some courts have denied United States extradition requests on the basis of dual criminality.²³⁷ Over the years, many extradition requests made by the United States to foreign governments have been denied because the foreign judge hearing the case could find no crime within state law, such as "theft in interstate commerce." Recently, in a case in which a fugitive was extradited to the United States from Great Britain, it was argued that indicting after extradition was invalid on evidentiary grounds.²³⁸

Double criminality poses additional problems for extradition when courts read the rule as requiring common denomination of the conduct rather than the common criminalization of the particular act or behavior. Today, most United States courts understand that the conduct itself controls dual criminality.²³⁹ United States courts recently have taken an almost casual approach to double criminality, determining that extradition

larger investigative and prosecutorial capabilities of the federal system more important.

236. *Id.* (citing *Pereira v. United States*, 347 U.S. 1, 8 (1954) (mail fraud requires only a scheme, plus mailing in furtherance)).

237. *Id.*; *In re Lamar*, [1940] 1 D.L.R. 701 (Alta. S. Ct.) (denial of extradition for violation of the securities laws when the conduct did not constitute a crime under Canadian law).

238. The Circuit Court of Appeals rendered the indictment invalid, because "the English magistrate did not find sufficient evidence to extradite for a single charge in the indictment." (citation omitted) In other words, Sensi claims the United States could not try him for mail fraud or interstate transportation of stolen property unless the British magistrate found sufficient evidence to commit him for trial on those exact charges [combining the rule of specialty and double criminality] . . .

This interpretation yields a startling, and incorrect, conclusion. Under Sensi's reading of the Treaty, a person extradited from the United Kingdom upon a British magistrate's finding that he stole money by means of the United States mails could not be prosecuted on mail fraud charges, because under United States law it is possible to commit mail fraud without successfully stealing anything, while in the United Kingdom the crime of theft requires that the defendant succeed in taking something from someone else.

United States v. Sensi, 879 F.2d 888, 893-94 (D.C. Cir. 1989).

239. "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries." *Collins v. Loisel*, 259 U.S. 309, 312 (1922).

treaties are to be "liberally construed . . . to effect . . . the surrender of fugitives."²⁴⁰ Further, courts have stated that double criminality is satisfied if the offense charged is "substantially similar" in the law of the requesting and requested states.²⁴¹ Lately, courts have required only that the offense charged for which extradition is sought be a serious crime in both states.²⁴²

The principle of double criminality historically has been outcome determinative.²⁴³ Most recent treaties have added a double criminality provision²⁴⁴ or a clause that allows extradition on a pure dual criminality basis such that extradition is allowed for any conduct criminalized to a certain degree by each state.²⁴⁵ Although these general clauses resolve some difficulties in interpretation, they also have diminished the principle's intended protective effect.²⁴⁶

240. *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); *see also* *Valentine v. United States*, 299 U.S. 5 (1939); *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933).

241. *See* *Kester*, *supra* note 223, at 1462; *Theron v. United States Marshal*, 832 F.2d 492, 497 (9th Cir. 1987); *Messina v. United States*, 728 F.2d 77, 79-80 (2d Cir. 1984) (conduct, "in nature of extortion;" "similar"); *Brauch v. Raich*, 618 F.2d 843, 847 (1st Cir. 1980) ("substantially analogous"); *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1067 (S.D.N.Y. 1987) ("substantially similar").

242. Defendants have argued, for example, that since the offense charged may be punished in the United States, even if there is no theft involved, the accused may not be extradited (or, if extradited, not prosecuted) for that offense, when the requested country's law requires theft. The United States Court of Appeals for the District of Columbia Circuit rejected the argument: "[The defendant's] alleged offense was stealing; the significance of his use of the mails and of interstate transportation and facilities is 'jurisdictional only' in that it permits him to be prosecuted under federal law." *Sensi*, 879 F.2d at 893, 894; *RESTATEMENT (THIRD)*, *supra* note 27, § 476(c).

243. *See* *Factor v. Laubenheimer*, 290 U.S. 276, 300 (1933); *see also* *Collins v. Loisel*, 259 U.S. 309, 311 (1922); *Kelley v. Griffin*, 241 U.S. 6 (1915); *Pettit v. Walshe*, 194 U.S. 205, 217 (1904).

244. "Extradition shall be granted for the following acts if they are punished as crimes or offenses by the laws of both states." *See* 1970 Supplementary Convention, *supra* note 26, art. II.

245. *See* Treaty of Extradition Between the United States and Ireland, art. II, T.I.A.S. No. 10813 (1983); Treaty of Extradition Between the United States and Italy, art. II, T.I.A.S. No. 10837 (1983); Supplementary Extradition Convention Between the United States and Sweden, art. II, T.I.A.S. No. 10812 (1983); 4 M. ABBELL & B. RISTAU, *supra* note 179, at 58 n.10.

246. The Swiss Government recently implemented the principle when it extradited Adnan Kashoggi to the United States for certain charges, but refused to do so for his alleged RICO violations, because Switzerland does not recognize RICO conduct as criminal. *United States v. Kashoggi*, 1990 U.S. Dist. LEXIS 2691 at 8 (Mar. 13, 1990). The court stated:

Because of the terms of Kashoggi's extradition from Switzerland, he will not be

Jurists outside the United States, however, now are becoming more aware of and comfortable with the United States legal system, and the State Department is drafting treaties in more general terms to promote international accommodation. In *United States v. Sensi*, for example, the British rejected the defendant's double criminality argument and extradited the fugitive.²⁴⁷ The district court noted that the British magistrate found that the defendant's acts consisted of stealing, that this was a crime in the United Kingdom, and that the double criminality rule was satisfied. The significance of the defendant's use of the mails and of interstate transportation and facilities was understood to be "jurisdictional only," in that it permits him to be prosecuted under federal law.²⁴⁸ In cases like these, the language often simply triggers the assertion of federal jurisdiction in cases particularly important for the federal government to prosecute, either because of the difficulty of state prosecution or the importance of the type of crime.²⁴⁹ On the other hand, the gravamen of some federal crimes is the transportation itself. For example, interstate transportation of stolen property usually is not an extraditable offense, because the transportation of the property is the critical element of the crime.²⁵⁰ If the foreign state does not have an equivalent offense, interstate transportation of stolen property would not be extraditable. Theft from an interstate shipment, however, is extraditable because theft clearly is the material part of the grievance.²⁵¹ Because the United States judiciary has related the standards for what it considers "sufficiently similar in crime" to satisfy the double criminality principles, most of the problems have been eliminated that relate to the denial of extradition under the rule of double criminality. Thus, the rule may not have to be abrogated formally because recent cases already have eliminated it

tried for his alleged participation in the RICO enterprise and his obstructionist activities in connection with the execution of a French Letter Rogatory. The Swiss Government declined extradition on these charges because it does not recognize RICO and the conduct constituting Kashoggi's alleged obstruction of justice in connection with the execution of the Letter Rogatory occurred principally in France. The Swiss officials found the extradition treaty to limit jurisdiction to crimes committed within the territory of the United States.

247. 879 F.2d 888, 893, 894 (D.C. Cir. 1989).

248. *Id.* at 894; *In re Tan Yee Chun*, 674 F. Supp. 1058 (S.D.N.Y. 1984) (The jurisdictional trigger for a federal crime did not bar crimes from being analogous to Hong Kong crimes so as to bar extradition. Only a substantial similarity is required.).

249. *See, e.g., United States v. Herbage*, 850 F.2d 1463 (11th Cir. 1988) (in mail-fraud case, the "use of the mails" is simply a jurisdictional element).

250. *See* 18 U.S.C. § 2314 (1988) (transportation of stolen goods, securities, monies, fraudulent state tax stamps, or articles used in counterfeiting).

251. *See, e.g., Sensi*, 879 F.2d at 893-94.

informally.²⁵²

Another alternative to the abolition of the principle of double criminality is to create an offense that covers the particular behavior in question. In 1988, for example, Switzerland adopted Swiss Penal Code article 161 criminalizing insider trading.²⁵³ The Swiss Legislature's primary motivation appears to have been to facilitate mutual assistance with the United States.²⁵⁴ It is doubtful, however, that such a justification for creating a penal provision would be constitutional in Germany. If the double criminality requirement causes problems in relation to a number of states that have criminalized conduct not made criminal in Germany, abrogating the rule of double criminality would infringe less upon Basic Rights under German constitutionalism than would creating an offense for purposes of cooperating with a foreign government.

3. When a Forum State's Criminal Law Does Not Proscribe Conduct that Another State Proscribes and Provides for Extradition

If a foreign citizen were to disclose a national security secret of the foreign government to a German magistrate when in Germany, the foreign citizen would not have violated German law, even though the citizen surely would have violated the law of the foreign state.²⁵⁵ The injured foreign state could assert jurisdiction on the basis of the protective principle.²⁵⁶ As long as the alleged perpetrator remained on German soil, however, the foreign state would not be able to enforce its penal prohibition. Nevertheless, extradition still might be possible unless it were barred by the political offense exception.²⁵⁷

German legal literature is unclear as to the special use of double criminality. Professor Vogler argues that for Germany, as the requested state, to require an extraterritorial act under the requesting state's law also be punishable as an extraterritorial act in Germany would be a "doctrinal

252. See *id.*; see also *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); RESTATEMENT (THIRD), *supra* note 27, § 476(c); *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933); *Valentine v. United States*, 299 U.S. 5 (1936); *Collins v. Loisel*, 259 U.S. 309, 312 (1922); *Kester*, *supra* note 223, at 1460-61.

253. 1 SCHWEIZERISCHES BUNDESBLETT 3 (1988).

254. 2 BOTSCHAFT DES BUNDESRATES 69 (1985).

255. Unless, of course, the other state has close relations with Germany and Germany criminalizes the divulging of the other state's secrets. Another example is if a state applies the principles of passive personality without the requirement of the *lex loci*. See *supra* Part IV; D. OEHLER, *supra* note 35, at 644, 707.

256. For a discussion of this principle, see C. BLAKESLEY, *supra* note 2.

257. For a discussion of the political offense exception, see *supra* text accompanying notes 192-96.

exaggeration." Vogler believes that this position ought to be rejected as a matter of criminal law policy.²⁵⁸ Taking the opposite view, other authors opine that the requested state must enforce its concepts concerning extra-territorial jurisdiction as an expression of justice. With reciprocity underlying the double criminality requirement, extradition can be approved only when the jurisdictional law of the requested state would obtain in obverse circumstances.²⁵⁹ If extraterritorial criminal prescriptive norms were regarded as rules of substantive law, the consequence would be that double criminality would include the special use of double criminality requirements. This would require that the requested state also consider the extraterritorial aspect of the conduct to be within its jurisdiction.²⁶⁰ If they were considered as norms of procedural law, this consequence would not necessarily have to be drawn. Thus, it would be possible not to require that the requested state also consider the conduct proscribed if committed extraterritorially.²⁶¹ In fact, only once has a German court denied extradition because the extraterritorial offense, from the point of view of the requested state, was not considered an extraterritorial offense.²⁶²

258. Vogler, Walter & Wilkitzki, *supra* note 209, § 3 n.17.

259. See Oehler, *Aktuelle Probleme der Auslieferung*, 81 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 142, 146-47 (1969); Mörsberger, *supra* note 216, at 98-99; see also K. SCHWAIGHOFER, AUSLIEFERUNG UND INTERNATIONALES STRAFRECHT: EINE SYSTEMATISCHE DARSTELLUNG DES ARHG 96 (1988) (discussing Austrian law); SCHULTZ, DAS SCHWEIZERISCHE AUSLIEFERUNGSRECHT 331 (1954) (discussing Swiss law).

260. See Mörsberger, *supra* note 216, at 95.

261. *Id.* at 97-98.

262. See Decision of the *Oberlandesgericht Stuttgart*, 62 JURISTISCHE WOCHENSCHRIFT 987-88 (1933); the *Oberlandesgericht Hamburg*, in its Decision of 1931, did not check whether German law allowed extraterritorial prescriptive jurisdiction, although the case concerned a request from Yugoslavia to extradite a Yugoslavian national, who had embezzled in Sacramento, California. 60 JURISTISCHE WOCHENSCHRIFT 2874-75. For judicial decisions in the Federal Republic of Germany since 1949, see Eser & Lagodny, *Internationale Rechtshilfe in Strafsachen. Rechtsprechungssammlung* 1949-1988, 15 BEITRAUGE UND MATERIALIEN AUS DEM MAX PLANCK INSTITUT FÜR AUSLAUNDISCHES UND INTERNATIONALES STRAFRECHT.

In a recent case, the *Oberlandesgericht Karlsruhe* stated that the requested state may, in general, suppose that the requesting state has prescriptive jurisdiction. 38 *Die Justiz—Amtsblatt des Ministeriums für Justiz, Bundes—und Europaangelegenheiten Baden-Württemberg*, at 199 (1989). Only in cases of "evident doubt" (*greifbare Zweifel*) might there be a review of this question by the requested state. In this case, the Court held that there were no such "evident doubts." This is interesting considering that the defendant was charged with being a member of a "criminal association" with central units in Rome and Palermo, Italy. Italy requested extradition on charges that the fugitive

The European Convention on Extradition specifically addresses extraterritorial prescription. Article 7 states that

[w]hen the offence for which extradition is requested has been committed outside the territory of the requested Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.²⁶³

The framers inserted this provision in consideration of the law of states that do not allow extradition for offenses committed outside their territory.²⁶⁴ The provision further provides that extradition must be granted if the offense occurs outside of the requesting state's jurisdiction, unless the requested state's laws do not authorize prosecution for the same offense when committed extraterritorially or do not otherwise authorize extradition for the offense.²⁶⁵ German law has no such prohibition on extradition,²⁶⁶ and therefore Germany would be obliged to extradite for an offense committed outside the territory of the requesting state, even if German law did not proscribe the same extraterritorial conduct. Under German human rights law,²⁶⁷ courts should interpret the double criminality requirement in a restrictive manner, because it bars extradition in cases in which no sufficient human rights basis exists.²⁶⁸ Human rights protections are protected directly and on their own account. The requested state, according to the logic of this approach, should be able to extradite a fugitive, even though it has not established extraterritorial prescriptive jurisdiction over that type of conduct in its own laws. Thus, the special use of double criminality ought not apply. The jurisdictional

allegedly committed crimes as an active member of the Mafia. There apparently were no evident doubts about Italy, the requesting state, having prescriptive jurisdiction on the basis of the ubiquity principle and the universality theory of jurisdiction.

263. European Convention on Extradition, *supra* note 116, art. 7, para. 2.

264. See Council of Europe, Explanatory Report on the European Convention on Extradition, Strasbourg, 1985 (1st ed. 1969). The explanatory report is not a binding instrument, but serves as one means of interpretation.

265. *Id.*

266. See *Gesetz über die Internationale Rechtshilfe in Strafsachen*, *supra* note 99, at 112.

267. See *supra* note 222 and accompanying text.

268. See Jescheck, *Die internationale Rechtshilfe in Strafsachen in Europa*, 66 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 518, 531-32 (1954). Jescheck proposes to reduce the double criminality requirement to an *ordre public* requirement, which would be applicable only in cases when non-criminalization by the requested state is based upon some of that state's basic values. This is similar to a Basic Rights clause. See *supra* notes 209-13 and accompanying text.

elements of the offense relating to the place of commission and the nationality of the wrongdoer or the victim would be considered as if they had occurred in Germany.²⁶⁹ The extraterritorial prescription, as such,²⁷⁰ is not relevant.²⁷¹ Under the above-discussed national secrets hypothetical, the only relevant question is whether German law would apply if the secret had been a German national secret revealed to a foreign power. The answer is clearly affirmative without express regard to the so-called special use of double criminality.²⁷² Note, however, that a human rights clause would permit the requested state to deny extradition if it believed that extradition would infringe upon basic human rights.

From a German point of view, allowing extradition does not violate or interfere with Basic Rights even if the conduct supporting the extradition request is prohibited only by the requesting state. From the standpoint of German human rights, courts will bar extradition only if the requesting state seeks extradition for conduct that could not be criminalized as such in German law, or if the sanction provided in the requesting state's law is one that violates German notions of legal sanctions.²⁷³ United States

269. See Vogler, Walter & Wilkitzki, *supra* note 209, § 3 n.16.

270. See *supra* note 176 and accompanying text. The pertinent law is found in articles 1, 2, 8, and 10, of the German Penal Code.

271. See Mörsberger, *supra* note 216 (discussing the question of whether German authorities must check to determine whether the conduct is punishable under the law of the requesting state). He proposes a reduced control. Practice of German Courts, however, does not reveal such control. See Eser & Lagodny, *supra* note 262. Extradition might be refused, only if there is an obvious error made by the requesting state, such as when it is clear from the documents sent by the requesting state to support the extradition request that the facts do not come within the ambit of the law allegedly violated. But even Mörsberger, who insists that the requested state also have proscribed the relevant type of conduct when done extraterritorially (*i.e.*, the special use of double criminality) when the alleged offense was committed in a third state, does not propose that the requested state check whether there is a genuine link with the requesting state.

272. For example, if extradition is sought for a robbery, German authorities would determine only that robbery is proscribed by German substantive law, not whether Germany would expand the proscription to conduct in a third state such as Belgium. See Vogler, Walter & Wilkitzki, *supra* note 209. Thus, if the facts of *In re Stupp*, *supra* note 137, were to occur with Germany being the requested state, extradition would be forthcoming. Another question is whether the German Penal Code would apply directly to the offense committed in Belgium, *i.e.*, the extraterritorial range group expanding the substantive prescription of robbery to another state. If a German national committed robbery in Belgium, this would cause concurrent or competing jurisdiction that could be an obstacle to extradition, because the state that has the alleged perpetrator would want to prosecute. See German Extradition Treaty, *supra* note 45, art. 8; European Convention on Extradition, *supra* note 116, art. 9.

273. See *supra* note 208 and accompanying text.

law, on the other hand, requires that the offense be criminalized and punishable with a minimal level of severity in both states. Constitutional problems also may arise with eliminating the political offense exception. Although the rule that a treaty must cover the extraditable conduct is not constitutional in nature, United States jurisprudence consistently has required the coverage of extraditable conduct.

The concept and role of the special use of double criminality does not play as important a role in German law and practice as it does in the United States. This diminished role is attributable, perhaps, to the most recent German approach in its extradition laws and treaties, which generally allows extradition only for offenses that are sufficiently grave, with gravity determined on the basis of possible punishment.²⁷⁴ In some older treaties, Germany, like the United States, explicitly enumerates extraditable offenses²⁷⁵ but the more recent approach facilitates extradition approval by no longer making it necessary to indicate the listed offense and consider double criminality.

In addition to the United States tendency of establishing principles slowly and inductively through judicial decisions, the United States view and methodology is "to proceduralize." This is important to realize in developing an understanding of United States jurisprudence and legal analysis. In the United States context of protecting human rights in extradition, a major focal point is the debate over the extent to which the judiciary ought to inquire into the treatment awaiting the individual in the requesting state and also the extent to which the executive branch ought to inquire into the human rights law in the requesting state. This debate arises in the political offense setting²⁷⁶ and in the double crimi-

274. See European Convention on Extradition, *supra* note 116, art. 2, para. 1; German Treaty of Extradition with Yugoslavia, art. 2, para. 1, Nov. 26, 1970, Bundesgesetzblatt 1974, part II, 1258; German Treaty of Extradition with Monaco, art. 2, para. 1, May 21, 1962, Bundesgesetzblatt 1964, part II, 1298; German Treaty of Extradition with Portugal, art. 2, para. 1, June 15, 1964, Bundesgesetzblatt 1967, part II, 2346, art. 2, para. 1; German Treaty of Extradition with Tunisia, July 19, 1966, Bundesgesetzblatt 1969, part II, 1158.

275. German Treaty of Extradition with Belgium, Jan. 17, 1958, Bundesgesetzblatt 1959, part II, 27; German Treaty of Extradition with the United States, June 20, 1978, Bundesgesetzblatt 1980, part II, 647 (contains both the enumerative and the possible penalty method of extraditable offenses), art. 2, para. 2, The Supplementary Treaty to the Treaty of Extradition Between Germany and the United States, Oct. 21, 1986, Bundesgesetzblatt 1988, part II, 1087 (ratified by Germany, not yet ratified by the United States) (renders the list method non-applicable, because the elimination or possible penalty method predominates, and the appendix of listed offenses is deleted by article 1, para. (c) of the Supplementary Treaty).

276. See *supra* notes 192-96 and accompanying text.

nality²⁷⁷ setting, as those aspects of extradition law have become the repositories of human and civil rights protection. From the German perspective, this is actually nothing more than a differentiation between substantive and procedural law: the question concerning the situations versus the executive is one of substantive law, whereas the role of the judiciary is one of procedural law. Of course, from the United States perspective, it is constitutional in nature.

German law provides mandatory judicial control in cases of possible violations of personal rights.²⁷⁸ Every substantive legal position must be reviewed by German courts, regardless of whether the judiciary has to inquire into the conditions of another state.²⁷⁹ The rationale behind the German sequence of this analysis is that control through the judiciary must serve the benefit of substantive rights and not vice versa; that is, the scope of the substantive rights may not depend on the power of the judiciary. Perhaps this is a decisive point at which the European civil law and common law views differ.

United States law proceduralizes substantive rights, because traditionally the judiciary is the constitutional check against encroachment by the executive or legislative branches.²⁸⁰ For example, the substantive fourth amendment right to be free from unreasonable search and seizure receives its sanction, or perhaps even its only effective recognition, in the exclusionary rule. Evidence obtained in violation of this right is excluded from trial. The weakness in this proceduralization is that when the courts begin to lose power in relation to the other branches, or begin believing that the substantive right needs to be diminished, the right is substantively diminished by procedural means.²⁸¹ Perhaps it is important

277. See *supra* notes 214-54 and accompanying text.

278. Art. 19, para. 4.

279. A classic example exists with regard to the substantive right to asylum. According to article 16, para. II, of the Basic Law, "[p]ersons persecuted on political grounds shall enjoy the right of asylum." Judicial control in asylum cases means that not only the executive branch, but also the judiciary has to analyze thoroughly the conditions in the state of origin of the asylum-seeker. These problems are discussed in Note, *supra* note 210, at 322; see also M. WOLLENSCHLAGER & W. WEICKHARDT, 9 EZAR - ENTSCHEIDUNGSSAMMLUNG ZUM AUSLANDER- UND ASYLRECHT 200-02 (looseleaf collection of decisions).

280. *Weeks v. United States*, 232 U.S. 383 (1914).

281. Note the recent demise of the exclusionary rule, and erosion of what some feel are constitutional protections. See, e.g., *Special Issue: Response to the Truth in Criminal Justice Series* in, 23 MICH. J.L. REFORM (1990), which includes Kamisar, *Remembering the 'Old World' of Criminal Procedure: A Reply to Professor Grano*, at 537; Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, at 591; Tomkovicz, *The Truth About Massiah*, at

to recognize that when a substantive right exists, effective procedural means must be made available to enforce it. The United States system of criminal procedure is adversarial, with the burdens of evidence production and proof resting on the prosecution. Significant obstacles to the gathering of evidence have been developed to prevent the state from abusing the criminal process and thereby eroding liberty. The Bill of Rights was designed to limit the power of the federal government, and its prohibitions, through the process of incorporation into the fourteenth amendment, have since been made largely applicable to the states.

When Earl Warren was Chief Justice, three themes dominated the decisionmaking of the United States Supreme Court: (1) ensure fair treatment for rich and poor alike; (2) eliminate racial discrimination in the criminal justice process; and (3) protect against unchecked power of the executive branch.²⁸² It has long been true of the adversarial system that the burdens of evidence production and of proof at trial resting on the prosecutor and are not part of the judicial function. During the years of the Warren Court, significant obstacles to evidence production were enhanced to help ensure a fair trial, but also to protect against agglomeration of power in the executive, prosecutorial branch of government in the name of "finding the truth."²⁸³ Properly understood, the aim was to prevent the development of a police state. To achieve this, many of the protections of the Bill of Rights have been applied to the states via the fourteenth amendment's prohibition forbidding states to "deprive any person of life, liberty, or property, without due process of law."²⁸⁴

The vision of criminal procedure as a mechanism to prevent the development of a police state gained its modern impetus when the judiciary viewed with horror the depredations of the European dictatorships prior to and during World War II.²⁸⁵ These dictatorships, once installed,

641; Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, at 685.

282. See Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U.L.Q. 11, 16-17 (1988).

283. See *Special Issue: Response to the Truth in Criminal Justices Series* in, 23 MICH. J.L. REFORM (1990); see also Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

284. U.S. CONST. amend. XIV; LAFAVE & ISRAEL, *CRIMINAL PROCEDURE* 78-79 (1985).

285. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 521-25 (noting that modern United States law of constitutional criminal procedure began in 1932, with the decision in *Powell v. Alabama*, 287 U.S. 45 (1932), decided within a few months of Hitler's rise to power in Germany). Germany carefully has protected civil liberty and human rights for the same reason.

taught graphic lessons in the uses of criminal "justice" institutions as instrumentalities for the systematic destruction of political values upon which free society rests.²⁸⁶ This reality was not lost on the Warren Court, but seems to have been forgotten since, due perhaps to the significant insecurity and fear generated by the wide-spread perception that the United States is tyrannized by crime and criminals and that public order is collapsing.²⁸⁷

In 1968, when Herbert Packer wrote his significant work on the United States criminal justice system,²⁸⁸ United States society was in turmoil. Largely in reaction to police abuses, the Supreme Court spent much effort reforming the criminal justice system to promote the civil liberties of the United States people by making the Bill of Rights functional in the criminal justice arena. The impact on penal law and procedure was without parallel. In Packer's terms, the system was moving from the "crime control" model towards an adversarial and judicial "due process" model.²⁸⁹ Although oversimplified, Packer's vision of the United States due process model is accurate in noting that it is based on notions of confrontation and irreconcilable differences between the individual and the state.²⁹⁰ This due process system has emphasized building safeguards against police abuse and the dangers of developing a police state, even at the expense of fact-finding accuracy in a given case. The Court developed and applied the rule to the states that if a police officer violated a suspect's constitutional protections and obtained evidence thereby or as a result of that violation,²⁹¹ the evidence would be inadmissible. Thus, even if all the parties in a given case knew that the accused com-

286. Allen, *supra* note 285, at 521-25.

287. *Id.*; see also RUDOVSKY, *CRIMINAL JUSTICE: THE ACCUSED, IN OUR ENDANGERED RIGHTS* 203 (Dorsen ed. 1984).

288. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Packer, *The Courts, the Police, and the Rest of Us*, 53 J. CRIM. L. CRIMINOLOGY. & POLICE SCI. 238 (1966); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). Although relied on by many scholars, some commentators have found Packer's models oversimplified, unilluminating, and misleading. See, e.g., Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 209-28 (1983); Damaška, *supra* note 283, at 506; Genego, *The New Adversary*, 54 BROOKLYN L. REV. 781, 842-56 (1988).

289. H. PACKER, *supra* note 288, at 149-73.

290. Blakesley & Curtis, *United States: A Review of United States Supreme Court Decisions Re Criminal Justice, 1984 Term*, 9 COMP. L. Y.B. 95 (1985); Blakesley & Curtis, *Criminal Procedure in the United States*, in *INTRODUCTION TO THE LAW OF THE UNITED STATES* (Clark & Ansary eds. 1991).

291. *Wong Sun v. United States*, 371 U.S. 471 (1963).

mitted the charged offense, the accused would be acquitted²⁹² if too much of the evidence against the accused was tainted and unusable.²⁹³

The due process model tolerates less efficiency to minimize police power in an arena in which individuals are most vulnerable. Significantly, the Warren Court focused on the dangers of police and governmental abuse and on vindicating individual rights and failed to provide effective solutions to the problems caused by the staggering increase in crime.²⁹⁴ This ineffectiveness prompted some commentators to argue that the United States should adopt some European models.²⁹⁵ Unfortunately, recent Supreme Court decisions indicate a trend toward adoption of a European model without the protections that have been built into the European systems over the years.²⁹⁶ This retrenchment by the United States Supreme Court has caused many state courts to interpret their state constitutions more broadly and maintain the level of civil liberty protection developed in the Warren Court. This phenomenon is known as the "new federalism."²⁹⁷ States, through judicial decision, legislation,

292. See Simien, *It Is a Constitution We Are Expounding*, 18 HASTINGS CONST. L.Q. 67 (1990); Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301 (1989); Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799.

293. This can be contrasted with the European models in which there is increased emphasis on finding the "objective truth." European criminal justice processes appear to be built around the notion that penal law and punishment are not designed merely as deterrents or mechanisms to facilitate retribution, but rather as mechanisms of education and redemption. See K. LLEWELLYN, JURISPRUDENCE 439, 444-50 (1962); Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970); Damaška, *supra* note 283, at 560-75.

294. Allen, *supra* note 285, at 539.

295. Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381 (1980); Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361 (1977); Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System: Reflections Derived From a Study of the French System)*, 36 LA. L. REV. 947 (1976); cf. J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977); L. WEINREB, DENIAL OF JUSTICE (1977); Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978).

296. Bottke, "Rule of Law" or "Due Process" as a Common Feature of Criminal Process in Western Democratic Societies, 51 U. PITT. L. REV. 419 (1990); *Moran v. Burbine*, 475 U.S. 412 (1986) (Stevens, J., dissenting) (Court's decision makes sense if it is developing an inquisitorial society); *Oregon v. Elstad*, 105 S. Ct. 1285 (1985) (Stevens, J. dissenting) (majority decision leads to interrogations akin to the star chamber).

297. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369 (1990); Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); see generally Devlin, *State Constitutional Autonomy Rights in an Age of Fed-*

or constitutional provision certainly have the power to expand civil liberties.²⁹⁸ The power of state courts to act independently upon the new federalism does not necessarily mean judicial activism for creation or expansion of civil liberties, although it might and often does.²⁹⁹ Thus, "proceduralization" has significant constitutional, philosophical, and substantive civil liberty content. It is important to recognize, however, that in German constitutional law, when a substantive right exists, effective procedural means must be made available to enforce it.

B. *The Second Situation: When Two or More States Proscribe the Given Conduct as Criminal and One State Enlarges this Proscription*

In practice, the circumstances described in the following hypothetical are quite common. Suppose, for example, that an Austrian citizen killed a German national while they both were in Austria. The offender could be prosecuted and punished in either Austria or Germany. The territorial principle would grant jurisdiction in Austria, while the passive personality principle also would grant Germany jurisdiction. Here, the problem is not whether the offender will be punished at all, but rather which state will prosecute. Thus, this problem raises two essential questions. The first is whether the state where the offender committed the prohibited conduct and was apprehended may keep or withhold the offender within its territory and refuse extradition to another interested state. The second question involves the situation in which a fugitive is convicted or acquitted in the state where the conduct occurred and voluntarily or involuntarily arrives in the territory of the second state.

1. Rights of the State Where the Offense Arose

It might be desirable to determine a hierarchy of accepted principles of extraterritorial jurisdiction by claiming that jurisdiction based on territoriality prevails over active or passive personality. The consequences of

eral Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources, 3 EMERGING ISSUES ST. CONST. L. 195 (1990); Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 325 (1986); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984); *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1329 (1982) ("state bills of rights may once again assume a prominent role").

298. Dix, *supra* note 297, at 1369-70.

299. *Id.* at 1370.

such a hierarchy would be that a state having only the personality principle always would be secondary to the state on whose territory the offense occurred. The state with secondary jurisdiction could not obtain extradition from the state with primary jurisdiction unless the latter did not wish to prosecute. Aside from the problem that international law provides a duty to extradite only on the basis of a treaty,³⁰⁰ commentators have argued for such a hierarchy of jurisdictional principles.³⁰¹ The viability of this approach, however, is questionable and raises interesting international legal problems. The sense of the hierarchy must be derived from customary international law, which provides that jurisdiction is appropriate and may be asserted as long as there is a genuine link (*sinnvoller Anknüpfungspunkt*) between the conduct and the state asserting jurisdiction.³⁰² The rule requiring a genuine link concerns the relation between rule international law and national law,³⁰³ but the customary international law rule arose because the national law of the various states required that the genuine link exist. Therefore, if customary international law merely requires a link between the conduct and the asserting state, it is possible that it also could not contain a hierarchy of principles derived from customary international law.

Although the rule requiring a genuine link arose as a rule of customary international law, since the rule came into existence, the states of the world can no longer exercise prescriptive jurisdiction at whim. Consequently, it becomes impossible under international law to prescribe acts committed extraterritorially without such a link. As a result, the concept of "territoriality" is interpreted from the viewpoint of international law rather than national law. For example, a state cannot legally assert territorial prescriptive jurisdiction simply because its national law provides a sufficient territorial link.

Under international law, however, a very difficult question must be

300. See *infra* notes 305-11 and accompanying text. Further, a duty to extradite in cases of concurring jurisdiction may be created only by such a treaty on the level of international treaty law.

301. See, e.g., Feller, *Concurrent Criminal Jurisdiction in the International Sphere*, 16 ISRAEL L. REV. 40, 68 (1981); Schultz, *Neuere Entwicklungen im sogenannten internationalen Strafrecht*, in Festschrift fuer Hellmuth von Weber zum 70 Geburtstag 305, 310 (Welzel, Conrad, Kaufmann, & Kaufmann eds. 1968); Vogler, *Entwicklungstendenzen im internationalen strafrecht unter Berücksichtigung der Konventionen des Europarats*, in Festschrift fuer Reinhart Maurach zum 70. Geburtstag am 24. August 1989 895-906 (Jescheck & Vogler eds. 1989); C. Blakesley, *supra* note 2, at ch. 3.

302. See *supra* notes 16-19 and accompanying text.

303. See Lagodny, *supra* note 169, at 1005.

addressed. Whether different approaches to what constitutes a genuine link in different areas or branches of law (e.g., antitrust, environmental protection, criminal law) must be unified or, because each branch or area of law has different policies and justifications for expanding or not expanding extraterritorial prescriptive jurisdiction, the approaches can remain separate.³⁰⁴ Customary international law possibly has developed a hierarchy in bases of jurisdiction or genuine links acceptable under current international law, but logic suggests the opposite. A rule of international law appears to exist that a state not exercise prescriptive jurisdiction unless there is a genuine link as a conditional requirement. Either there is a genuine link or there is not, a determination made by international law rather than national law. The genuine link is a criterion for "a" or "non-a." The same criterion that separates "a" and "non-a" cannot be a criterion for "more-a" and "less-a." Certainly, there might be other criteria for the proposition of hierarchy, but the genuine link criterion itself cannot be used. This is similar to the field of mathematics, which differentiates between *notwendiger and hinreichender Bedingung*, roughly translated as "necessary condition" and "sufficient condition." The genuine link is a necessary condition, thus it cannot be a sufficient condition as well. To find other criteria will involve at least an interpretation of the above-mentioned other branches of extraterritorial prescriptive jurisdiction, such as antitrust, and environmental law. This is a very difficult question, but is one that must be addressed.

2. Withholding the Offender

A solution to the question of "withholding" the offender is found at the level of international treaty law. If the first state has not yet terminated proceedings against the offender or is deciding whether to initiate proceedings, one may argue about the principle *aut dedere aut prosequi* (either extradite or prosecute). This solution raises several questions, including whether the requested state has the choice of extraditing or prosecuting or whether international law establishes a priority for extradition. It also raises the question of whether the maxim really should be *primo dedere secundo prosequi* (first extradite, second prosecute). The answers are found in international extradition treaties, treaties on international cooperation in criminal matters, and certain treaties prohibiting specific conduct, such as those relating to hostage-taking and hijacking.

304. See Wildhaber, *Jurisdiktionsgrundsätze und Jurisdiktionsgrenzen im Völkerrecht*, 61 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT, 99, 104 (1985).

The European Convention on Extradition of 1957,³⁰⁵ however, does not contain a general rule.³⁰⁶ While the very important conventions relating to aircraft hijacking³⁰⁷ and offenses against diplomats³⁰⁸ provide a choice either to extradite or prosecute,³⁰⁹ they do not establish priority for either.³¹⁰ In the absence of treaties, no rule of priority or choice on the level of international law exists, especially since not even customary rules of international law require extradition.³¹¹

2. Rights of the Offender

The question of whether an offender can be convicted twice (once in each state) for the same conduct, is answered primarily on the basis of international treaties, as there is no rule of customary international law prohibiting double conviction.³¹² Article 9 of the European Convention on Extradition of 1975 provides that

[e]xtradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.³¹³

305. Europ. T.S. No. 24.

306. If extradition of nationals is refused, the requested state "shall at the request of the requesting party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate." European Convention on Extradition, *supra* note 116, art. 6, para. 2. *See* art. 7, para. 3 of the Treaty Between the United States and the Federal Republic of Germany Concerning Extradition, 32 U.S.T. 1485; T.I.A.S. No. 9785 (entered into force, Aug. 29, 1980).

307. The Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, Dec. 16, 1970), 22 U.S.T. 1641, T.I.A.S. No. 7192; The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, Dec. 23, 1971), 24 U.S.T. 568, T.I.A.S. No. 7570.

308. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York, Dec. 14, 1973), 28 U.S.T. 1975, T.I.A.S. No. 8532.

309. *See* art. 7, of the Hague, *supra* note 307, the Montreal, *supra* note 307, and the New York Conventions, *supra* note 308.

310. For discussion of this problem in the Case of Hamadei, *see* Kennedy, Stein & Rubin, *The Extradition of Mohammed Hamadei*, 31 HARV. INT'L L.J. 5 (1990).

311. *See* I. SHEARER, *supra* note 35, at 23-27; C. BLAKESLEY, *supra* note 2, at ch. 4.

312. *See* 75 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT 1-34 (1988) (analysis of the Federal Constitutional Court of the Federal Republic of Germany); BLAKESLEY, *supra* note 2, at ch. 4.

313. European Convention on Extradition, *supra* note 116, art. 9; *see also* German Extradition Treaty, *supra* note 45, arts. 8, 10.

These stipulations are obstacles to a second conviction in the requesting state, but they do not govern when there is a question of the extraditee being convicted in a third state³¹⁴ or whether the sanction of the third state judgment must be taken into account when the extraditee is sentenced again. Therefore, parties must take all necessary steps to assure that the principle of *ne bis in idem* (not twice in the same thing)³¹⁵ also be applied to convictions for the same offense in other states and not be applied only to convictions of one state.

VI. CONCLUSION

Considering the underlying reasons for the multiplicity of states having jurisdiction for the same conduct and the interstate and individual problems arising out of this concurrence, one must consider a reduction of extraterritorial jurisdiction on the national level. If the only bases of jurisdiction are a strict principle of territoriality without extensions by ubiquity and the protective principle,³¹⁶ competing, concurrent jurisdiction will not pose a problem. When the active and passive personality principles are addressed along with the universality principle, more significant problems of competing jurisdiction will arise.

Perhaps it would be wise to apply the latter three principles only if extradition to the state in which the crime actually took place were not possible, either for legal or factual reasons. This would necessitate integrating³¹⁷ the principle of vicarious administration of justice³¹⁸ into the principles of active and passive personality and universality.³¹⁹ Conse-

314. The Additional Protocol to the European Convention on Extradition (15 Oct. 1975), Europ. T.S. No. 86, however, excludes extradition if the offender has been convicted in a third state that is a party to the Convention.

315. This is the latin maxim for protection against double jeopardy.

316. This is not the case when a second state protects the interests of a foreign state to which the fugitive is closely linked.

317. In Germany, the application of the principle of vicarious administration of justice does not require a genuine link to be established by the other bases of jurisdiction (active or passive personality; universality), because it is regarded as a genuine link in its own right. See Meyer, *supra* note 8, at 109, 116 (the other principles or bases have priority only if they are applicable; vicarious administration of justice applies only if none of the others is applicable).

318. See *supra* notes 151-60 and accompanying text; Meyer, *supra* note 8.

319. The European view of the universality principle creates a "genuine link" for a given state to create extraterritorial jurisdiction based on international treaties that, for the most part, oblige each member state to do so. The principle of vicarious administration of justice is independent of these treaties and refers to the fact that extradition is not feasible under a given set of circumstances. Therefore, it is restricted to cases in which the state wherein the crime has been committed desires the fugitive to be extradited, but

quently, these principles would apply only if extradition to the state where the crime has been committed is neither possible nor feasible, even though the requesting state wishes to prosecute. In other words, the duty of *primo dedere secundo prosequi* (first extradite, second prosecute) would not be a duty under international law, but rather a rule of national law only.³²⁰ This proposal may run counter to the tendency to "throw a net" of several national criminal jurisdictions over an alleged offender to ensure that the offender will not go free. Nevertheless, adoption of these proposals would eliminate some of the confusion surrounding these concerns by enhancing international extradition relations and cooperation. These proposals allow the active and passive personality and the universality principles to maintain importance and have an impact, even if extradition is not possible because of differences in national jurisdictional law. It is absolutely essential to promulgate an international treaty that promotes the general acceptance of *ne bis in idem* (for the same conduct) and avoids multiple convictions in two or more states.³²¹ At the very least, rather than simply expanding jurisdiction and multiplying the problem of competing jurisdiction, more thought ought to be applied to improving international cooperation in criminal matters.

the request has been or will be denied. A request for extradition also implicitly includes the indication that the requesting state is of the opinion that the act is punishable under its law. This prevents the requested state (the one asked to extradite, but refuses, choosing to prosecute) from punishing more acts than the "represented" state (the one that requested extradition and for whom the prosecution is done) really intends to punish. See D. OEHLER, *supra* note 35, at 811, 818; Lagodny, *supra* note 169, at 992.

320. See Harvard Draft (Jurisdiction With Respect to Crime), art. 10, para. a, 85 AM. J. INT'L L. 573 (1935).

321. The European Community has taken a step in this direction with the promulgation of the Convention Between the Member States of the European Communities on Double Jeopardy, *opened for signature* May 25, 1987 (not yet entered into force). Article 1 provides: "A person whose trial has finally been disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a sanction was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing state." Article 2 provides for the possibility of reservations, if the underlying facts partly or totally occur in the territory of the second state, if the offense was directed against the security or other essential interests of the second state or if it was committed by an official of the second member state contrary to the duties of his office. In case of such reservations, article 3 provides that if a member state brings a further prosecution in respect of the same facts against a person whose trial finally has been disposed of in another member state, any period of deprivation of liberty served in the latter member state arising from those facts shall be deducted from any sanction imposed.

