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EXTRATERRITORIAL APPLICATION OF PENAL LEGISLATION†

*B. J. George, Jr.**

ONE of the most difficult words in the legal lexicon to delineate is the term "jurisdiction"; it is equally difficult to relate this term to the concept of "venue."¹ The term "jurisdiction" is constantly invoked by courts in a variety of contexts, some relating to geography, some to governmental and judicial structure, some to legislative or judicial power, some to persons, and some to procedures. Thus, it is difficult to discern a common thread of meaning or a consistent pattern of application from the cases in which the word appears.

At times, of course, the term "jurisdiction" is used merely as a handy verbal tool to justify what a court is about to do with a case. For example, habeas corpus in its traditional form lies to test only "jurisdictional" matters.² A court can therefore justify the granting of extraordinary relief by referring to errors or defects as "jurisdictional." It can also avoid a litigant's request to disturb an existing legal status by calling a matter "non-jurisdictional" and holding any error to have been waived by failure to raise it at an earlier time.

Even if the labeling function is eliminated from consideration, however, there is still evidence of lack of definition and of shifting meaning in the "substantive" application of the word. This point may be illustrated by the fact that the following questions can all be labeled "jurisdictional":

1. Can a legislature extend statutory coverage to a particular social problem?
2. Did the legislature do so?
3. Can a legislature enact laws for a particular place?
4. Did it in fact do so?
5. Is a particular court constitutionally in existence?

† This article is adapted from the American national report for the Seventh Congress of Comparative Law, to be held in Uppsala, Sweden, during August 6-13, 1966. The report will be submitted by the author on Topic V-B-1, "The Competence of Criminal Courts Over Offenses Committed Abroad."

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1. "In the broad sense, venue, as applied to criminal cases, means the place in which prosecutions are to begin; while jurisdiction means the power of the court to hear and to determine the case. The terms are not synonymous." *Williams v. State*, 145 Tex. Crim. 536, 540, 170 S.W.2d 482, 485 (1943).

2. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); *People v. Harris*, 266 Mich. 207, 294 N.W. 156 (1940); *Matter of Morhous v. Supreme Court*, 293 N.Y. 131, 56 N.E.2d 79 (1944).

6. Can it hear the class of cases to which a particular case belongs?
7. Has the pleading in the case been properly presented?
8. Does the pleading include a proper legal statement of the offense?
9. Are the proper people—defendant, prosecuting attorney, judge, and jury—physically before the court?
10. Have all required procedural acts been done properly and in the correct sequence?

It is evident that some of these questions relate to the powers of the legislative, executive, and judicial branches of the government and the rest to safeguards accorded private citizens; some are substantive and some are procedural.

If one tries to separate the matter of "venue" from these "jurisdictional" problems, he becomes even more confused. Venue is supposed to relate to the place of trial of a particular case, while jurisdiction has to do with the broader issue of judicial power to act. However, a court is not to act if venue has been improperly laid, and if a court is powerless to act for one reason or another, the trial of the particular case cannot be entrusted to it. Thus, the relationship between these two terms is essentially circular. Accordingly, the fundamental problem is not particularly one of imprecise judicial usage of language, but rather of long-continued failure of the Anglo-American legal system to analyze clearly (1) the differences between legislative power and competence and judicial power and competence, (2) the scope of penal legislation and procedural law, and (3) the relationship between convenience in the general and fairness in the particular.

This confusion in Anglo-American law contrasts sharply with the traditional classification of equivalent problems in civil-law systems. In civil-law countries a definite line is drawn between the question of the territorial application of penal legislation on the one hand, and the procedural matter of choice of the forum in which an apprehended offender is to be tried on the other. The first problem is generally resolved within the substantive penal law. Most foreign penal codes state explicitly when citizens may be punished for acts which they commit abroad,³ when resident aliens may be punished for activity done while they are temporarily outside the

3. See DANISH CRIMINAL CODE art. 7; GERMAN PENAL CODE § 3; JAPANESE PENAL CODE arts. 3, 4; JAPANESE DRAFT PENAL CODE arts. 2, 3; NORWEGIAN PENAL CODE § 12; CRIMINAL CODE OF THE R.S.F.S.R. art. 5. See also ANDENAES, *THE GENERAL PART OF THE CRIMINAL CODE OF NORWAY* 318-21 (Ogle transl. 1965); FELDBRUGGE, *SOVIET CRIMINAL LAW: THE GENERAL PART* 67-69 (Vol. 9, *Law in Eastern Europe*, 1964). The French provisions are now contained in the CRIMINAL PROCEDURE CODE arts. 689, 695.

forum state,⁴ and when nonresident aliens may be punished for acts done in their own country or in a third country.⁵ Thus, these penal codes provide general standards by which a court can determine whether a prosecution can properly be based on conduct which took place beyond the borders of the country in which it sits. Foreign criminal procedure codes, on the other hand, provide norms by which prosecuting officials can determine whether their office or another office should initiate action in a local court.⁶ If, as may be the case, the same matter is simultaneously laid before two or more courts, guidelines are provided to determine the proper forum.⁷ A change in the location of trial can also be ordered on the basis of a defendant's request; however, such a request is subject to the discretion of the courts.⁸

The foregoing substantive and procedural rules have much to offer Anglo-American jurisprudence. Confusion in the use of the terms "jurisdiction" and "venue" might be cleared away to a substantial degree if we would first set aside those cases in which the word "jurisdiction" is used to explain the courts' refusal to hear particular cases on appeal or in extraordinary-writ proceedings, and then evaluate the remaining issues on a functional basis. If we are concerned primarily with whether domestic criminal legislation can be invoked against individuals who have committed physical acts outside the boundaries of the state or country in which the court sits, the matter is one of "legislative competence." So viewed, the legal rules which determine the scope of extraterritorial application of criminal statutes form a specialized canon of construction within which a particular penal-law provision on theft, counterfeiting, tax evasion, or other offense is to be interpreted.

After the rather broad issue concerning the scope of application of the legislation has been resolved, or in a case in which the coverage of the legislation is undisputed, the only matter still to be decided is the choice of a court in which to maintain the particular prosecution. The class of courts in which various criminal prosecutions are to be brought may be ascertained from the language of the

4. See DANISH CRIMINAL CODE art. 7; NORWEGIAN PENAL CODE § 12.

5. See DANISH CRIMINAL CODE art. 8; FRENCH CRIMINAL PROCEDURE CODE art. 694; GERMAN PENAL CODE § 4; JAPANESE PENAL CODE art. 2; JAPANESE DRAFT PENAL CODE arts. 4, 5; NORWEGIAN PENAL CODE § 12; CRIMINAL CODE OF THE R.S.F.S.R. art. 5.

6. See FRENCH CRIMINAL PROCEDURE CODE arts. 52, 382, 388, 522, 662; GERMAN CRIMINAL PROCEDURE CODE arts. 7-15; JAPANESE CRIMINAL PROCEDURE CODE arts. 2-16; CRIMINAL PROCEDURE CODE OF THE R.S.F.S.R. arts. 41-45.

7. See DANDO, *THE JAPANESE LAW OF CRIMINAL PROCEDURE* 63-68 (George transl. 1966).

8. FRENCH CRIMINAL PROCEDURE CODE art. 662; JAPANESE CRIMINAL PROCEDURE CODE art. 19; CRIMINAL PROCEDURE CODE OF THE R.S.F.S.R. art. 44.

constitution and the statutes which create and organize the judiciary. When there are several courts of the same or different classes which are all competent to hear a particular case, then a determination of the place in which the prosecution is finally to be maintained may be reached by striking a balance between the practical needs of the moving party to prove his case and of the defendant to prepare and present his defense.

Therefore, unusual as this method of analysis is in the traditions of the common law, I would like to analyze the American law of "jurisdiction" and "venue" by looking first to the substantive legal basis for taking account of activity outside the borders of the forum state, and then turning to the procedural question of where a particular prosecution may be laid after the criminal statute has in fact been violated.

I. THEORETICAL BASES IN FEDERAL AND STATE LAW FOR ASSERTING JURISDICTION OVER OFFENSES COMMITTED EXTRATERRITORIALLY

There are two polar extremes from which one can depart in deciding whether a state can reach out by legislation to penalize criminal acts committed outside its borders. At one extreme is the premise that a legislature cannot act with respect to a particular matter unless it is specifically authorized to do so in the constitution or other basic document which sets forth its powers. In this respect, silence is as disabling as a specific prohibition. Rigid application of this premise in American law eliminates the problem of extraterritorial legislation at the outset, because state constitutions are generally silent on the power of the legislature to enact statutes with extraterritorial application.

The opposite premise is that all states have certain sovereign powers which they can exercise without transgressing the rights of other states under international law. If they fail to exercise these powers, it is because either they have voluntarily placed a disability on that exercise, perhaps in the form of a domestic constitutional limitation, or they have not considered it necessary, as a practical matter, to exercise their powers. With this as a starting point for an analysis of domestic penal legislation, one should first examine the doctrine of jurisdiction in international law, then consider the constitution of the forum state to determine if any disability is placed on the exercise of powers which are acceptable in international law, and finally inspect the specific criminal statute to de-

termine whether the legislature apparently wished it to have extraterritorial application.

A. *Criminal Jurisdiction in International Law*

International law incorporates several bases of jurisdiction for criminal legislation, in the sense that the fact of the legislation itself or of a prosecution of an individual under it gives no right to another nation to enter a valid objection or to obtain redress.

1. *The Territorial Principle.* A nation has the right to proscribe any conduct taking place within its borders as criminal,⁹ whether committed by a citizen, resident alien, or nonresident alien.

2. *The "Floating Territory" Principle.* A ship or aircraft under the flag of, or perhaps under the substantial private ownership of nationals of, a nation is within the reach of domestic legislative power.¹⁰ Although the logic of the concept of "floating territory" may not be overwhelming, the doctrine can be supported "on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns [the vessel]."¹¹ Because invocations of this principle are in fact extraterritorial, conflicts of jurisdiction can arise.

3. *The Protected Interest Principle.* A state can punish actions committed beyond its limits or not on board its vessels or aircraft if they impair an interest which it desires to protect. Although some question exists with respect to whether nonresident aliens can be penalized under this kind of criminal legislation,¹² the problem cases primarily involve treason¹³ and efforts to extend domestic regulation of the economy, such as antitrust laws, to activities or agreements in foreign countries undertaken in full compliance with the law of those countries.¹⁴ If the conduct in question is forbidden by both countries, the application of forum law to such acts committed

9. See HARVARD RESEARCH IN INTERNATIONAL LAW, JURISDICTION WITH RESPECT TO CRIME, 29 AM. J. INT'L L. SUPP. 480-508 (1935) [hereinafter cited as HARVARD RESEARCH]; INTERNATIONAL CRIMINAL LAW 146-58 (Mueller & Wise ed. 1965); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965) [hereinafter cited as RESTATEMENT].

10. See HARVARD RESEARCH 508-19; RESTATEMENT §§ 28-29, 31-32.

11. *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953).

12. See Cook, *The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction*, 40 W. VA. L.Q. 303 (1934); Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567 (1958); Woolsey, *Extraterritorial Crimes*, 20 AM. J. INT'L L. 757 (1926).

13. See text accompanying notes 57-60 *infra*.

14. See RESTATEMENT, Reporter's Note at 68-75 (Tent. Draft No. 2, 1958); BISHOP, CASES ON INTERNATIONAL LAW 468-71 (2d ed. 1962).

elsewhere, even by noncitizens of the forum state, appears unobjectionable.

4. *Nationality of the Offender.* A country can regulate the conduct of its own citizens wherever they may be.¹⁵ No other nation can immunize them, unless they expatriate themselves, except perhaps in the case of dual nationality.¹⁶

5. *Nationality of the Victim.* Many states assert jurisdiction because the victim of a criminal act committed outside its boundaries is one of its citizens. The propriety of asserting this as a basis of criminal jurisdiction was before the Permanent Court of International Justice in *The Lotus Case*,¹⁷ but the decision approving exercise of jurisdiction was rested on other grounds.¹⁸

6. *The "Universality" Principle.* Piracy is historically the oldest application of the idea that some acts are so evil that the offender must be punished as quickly as possible. Thus, any country which captures the offender can and should exact retribution, at least if no other country having a better or more direct basis for asserting jurisdiction is willing to do so.¹⁹

It is therefore evident that under international law a state is far from powerless to extend the coverage of its laws to activities which took place, in whole or in part, beyond its borders.

B. *Availability of International Law Principles to the Federal Government*

The second point of inquiry in deciding whether domestic legislation can have extraterritorial effect is whether the local constitution has placed any disability on the exercise of powers otherwise inherent in sovereignty. In most countries this is not a matter of much concern, for generally no special limitations are placed on the content of laws, as contrasted with the procedures for law-making.²⁰ But the American federal system poses a special problem, since it rests on the theoretical premise that the federal government, and in particular Congress, can act only when the power to do so

15. HARVARD RESEARCH 519-39; RESTATEMENT § 30; cf. HARVARD RESEARCH 539-42.

16. Cf. *Kawakita v. United States*, 343 U.S. 717 (1952); *Coumas v. Superior Court*, 31 Cal. 2d 682, 192 P.2d 449 (1948).

17. Permanent Court of International Justice (1927), P.C.I.J., Ser. A, No. 9, 2 HUDSON, WORLD COURT REPORTS 20 (1935).

18. See generally HARVARD RESEARCH 509-10, 518, 578-79.

19. HARVARD RESEARCH 563-72; RESTATEMENT § 34. Other broader applications of this principle are discussed in HARVARD RESEARCH 573-92.

20. See, e.g., JAPAN CONST. art. 41: "The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State."

is specifically delegated to it in the Constitution, while the non-delegated attributes of sovereignty remain with the states and with the people.²¹ A primary issue, therefore, is the degree to which the power to legislate extraterritorially can be viewed as being properly in the hands of Congress.

There is, of course, no direct delegation to Congress of power to make a comprehensive criminal code. Nevertheless, there are at least two bases for sweeping congressional invocation of most, if not all, of the jurisdictional concepts approved in international law. One basis, which rests chiefly on Mr. Justice Sutherland's opinion in *United States v. Curtis-Wright Export Corp.*,²² is that the powers of sovereignty which England exercised in her American colonies immediately vested in all the colonies *collectively* upon separation, so that the United States, as successor to the colonies as a group, can do everything which Great Britain or any other nation could in its international relations. Under the "necessary and proper" clause,²³ therefore, Congress should be able to create penal legislation having extraterritorial application if the external relations or internal interests of the United States so dictate. However, this basis for asserting federal jurisdiction has been criticized as historically inaccurate,²⁴ and might have an unfortunate impact on state legislative power if it were made the sole basis for federal external legislation, a matter to be discussed below.²⁵

The second basis, therefore, is perhaps a more satisfactory one: federal governmental powers must all rest on the Constitution and not on any overriding concept of inherent sovereignty. However, broad powers are delegated to Congress by the Constitution, including the laying and collecting of taxes, duties, imposts, and excises;²⁶ the regulation of foreign commerce;²⁷ the establishment of a uniform rule of naturalization;²⁸ the punishment of counterfeiting of money and securities of the United States;²⁹ the establishment of post offices;³⁰ the creation of patent and copyright law;³¹ and the

21. U.S. CONST. amend. X.

22. 299 U.S. 304, 316-18 (1936).

23. U.S. CONST. art. I, § 8, cl. 18.

24. See Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

25. See text following note 37 *infra*.

26. U.S. CONST. art. I, § 8, cl. 1.

27. U.S. CONST. art. I, § 8, cl. 3.

28. U.S. CONST. art. I, § 8, cl. 4.

29. U.S. CONST. art. I, § 8, cl. 6.

30. U.S. CONST. art. I, § 8, cl. 7.

31. U.S. CONST. art. I, § 8, cl. 8.

definition and punishment of piracies and felonies committed on the high seas and offenses against the law of nations.³² Moreover, Congress can make all laws "necessary and proper" to execute these more specific grants of power,³³ including laws having extraterritorial effect when Congress thinks it appropriate. Thus, the question in a particular case becomes one of whether Congress did in fact intend the legislation to have extraterritorial effect, and not whether it has the power to legislate extraterritorially. Part II below describes what Congress has done to date to exercise its power, whether it be viewed as inherent or delegated, to legislate extraterritorially.

C. *Availability of International Law Principles to the States*

Perhaps a more important question is whether the *states* can legislate other than on the territorial principle.³⁴ The obverse of the principle that the federal government is one of delegated powers is that powers not delegated to the United States by the Constitution, or prohibited by it to the states, are reserved to the states or to the people.³⁵ Thus, at this point it is important to determine what theory is used to explain federal exercise of power to legislate extraterritorially.

If, as Mr. Justice Sutherland maintained,³⁶ the sovereign powers of Great Britain vested in the national government and not in the individual colonies, the exercise of inherent legislative powers affecting external matters would not be available to the states as one of the attributes of sovereignty.³⁷ The power to legislate extraterritorially, therefore, was not originally in the states to be delegated to the federal government, and that power does not currently reside in them unless it has been delegated by federal authority. How-

32. U.S. CONST. art. I, § 8, cl. 10.

33. U.S. CONST. art. I, § 8, cl. 18.

34. See generally Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931); Cook, *supra* note 12; Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. L., C. & P.S. 316, 495 (1925); Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960); Wharton, *Extraterritorial Crime*, 4 SOUTHERN L. REV. (N.S.) 676 (1878).

35. U.S. CONST. amend. X.

36. See text accompanying notes 22-24 *supra*.

37. On occasion state courts have rested their authority to permit or deny certain procedural acts on their succession to the power exercised by English courts prior to American independence. See, e.g., *Matter of Murphy v. Supreme Court*, 294 N.Y. 440, 63 N.E.2d 49 (1945) (change of venue on application of state held not to be within traditional powers); *Daniels v. People*, 6 Mich. 381 (1859) (powers of conservator of peace); *Neibling v. Terry*, 352 Mo. 396, 177 S.W.2d 502 (1944) (availability of *nolo contendere*). In *State ex rel. Griffin v. Smith*, 363 Mo. 1235, 258 S.W.2d 590 (1953), the prosecuting attorney was held to have succeeded to the powers of the English Attorney-General to enter pleas of *nolle prosequi*. The same argument is probably applicable to legislative powers.

ever, this theory might have a crippling effect on the modernization of state penal legislation, since it excludes any claim to powers attributed to sovereign states in international law.

On the other hand, if the second basis for federal extraterritorial legislation—constitutional delegation—is utilized, the inherent power of the states to enact like legislation is confirmed. Each state, possessing the powers inherent in sovereignty, can regulate conduct occurring outside its boundaries so long as (1) there is no conflict with the paramount power of the federal government to regulate foreign relations,³⁸ (2) the state legislation does not touch on a subject which Congress has already pre-empted in the exercise of its delegated powers,³⁹ and (3) there is no impermissible conflict with the legislative policies of another state in which the conduct occurred.⁴⁰ Except when one or more of these constitutional problems exist,⁴¹ the question once more is one of whether the state actually intended to legislate extraterritorially, and not whether it has the power to do so.

II. EXTRATERRITORIAL APPLICATIONS OF FEDERAL LAW

How far has Congress in fact invoked its power to legislate extraterritorially? The most commonly used basis for federal criminal jurisdiction is of course the territorial principle. However, there is some uncertainty regarding the proper scope of this principle. For example, subject to certain requirements of general condemnation of the activity in question and of substantiality, directness, and foreseeability, the *Restatement of Foreign Relations Law* includes within the territorial principle those instances in which activity outside the country "causes an effect within its territory."⁴² The explanatory comment suggests that both physical and economic effects are within the application of this principle. The *Restatement*, however, has a separate provision which purports to define the protective principle as "attaching legal consequences to conduct outside [a nation's] territory that threatens its security as a state,"⁴³ including "the counterfeiting of the state's seals and currency, false statements to its diplomatic and consular officials and the falsification of its public records."⁴⁴ Such a delineation corresponds quite closely to the Draft

38. U.S. CONST. art. I, § 10, cl. 1, 3; art. II, § 2, cl. 2.

39. Cf. Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 MICH. L. REV. 407 (1955); 55 COLUM. L. REV. 83 (1955).

40. See text accompanying notes 125-29 *infra*.

41. See part V *infra*.

42. § 18.

43. § 33.

44. *Ibid*.

Convention on Jurisdiction With Respect to Crime.⁴⁵ This approach seems to reflect a definition of "interest" as something in which a government itself is directly interested, particularly in its relationships to other governments as governments, and therefore a perfectly proper concern for international law.

The foregoing definition, however, creates difficulty if it is used as a basis for viewing domestic legislation for purposes of local criminal law administration. The state through its legislation protects a number of interests, including those of the person, of property, of reputation, and of the government itself.⁴⁶ Thus, from the standpoint of criminal law, a more useful standard for classification might well be devised. The applicable standard should rest on whether there has taken place within the geographical limits of the forum an observable act or event which, without further activity by the primary actor, produces identifiable harm, or whether the identifiable harm is the result of completed activity by the offender in some other geographical and sovereign area, followed by and coupled with the independent activity of other persons. Under this test, a fatal shot fired from either inside or outside the forum jurisdiction is still within the territorial principle; the latter would also encompass a fraudulent statement, whether made orally in the presence of the victim or communicated to him by means of telephone, telegraph, or broadcast from another state or country. On the other hand, a false claim submitted to an overseas branch of a local bank or to a governmental disbursing agent abroad, or a perjured statement made to a consul in an application for a passport or visa, produces only an indirect result in the forum jurisdiction. Covering transfers of funds are made and visas or entry permits are authorized or issued by others than the persons with whom the offender has dealt, though of course the result is one which the government has a legitimate interest in repressing. A distinction like this based on "direct harm" as contrasted with "indirect harm" might in the long run be an easier test to administer than the *Harvard Research* and *Restatement* formulations, since it focuses attention on the harm which the legislature intended to prevent.

If the interest sought to be protected can be impaired only by a direct physical act occurring within the geographical limits of the state, the principle invoked would be the territorial principle. If, however, the interest may also be impaired by activity occurring elsewhere, punishment for extraterritorial acts would be based on

45. Arts. 3, 7, 8. See HARVARD RESEARCH 439-40.

46. See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

the protective principle. Irrespective of the labels that may be applied, the issue probably turns on whether the basic dispute involves relationships between governments as such or the interpretation of local legislation in the course of litigation in forum courts. An acceptable basis of classification for one type of dispute need not necessarily be applied to the other.

It is clear that federal legislation has been applied to cover activities done primarily outside our borders. Sometimes this is accomplished by invoking the doctrine of conspiracy and finding at least one overt act by one of the conspirators done within the United States.⁴⁷ The primary conduct of the other conspirators is then considered to be within the ambit of federal law even though they may be citizens of other countries who never entered the United States during the course of the conspiracy. At other times judicial power is based on the vicarious responsibility of a principal for acts of his agent or of an accomplice for the conduct of the primary actor.⁴⁸

In prosecutions for mail fraud or the conduct of a lottery, jurisdiction may be asserted on the basis of mailing materials or broadcasting information from another country to the United States.⁴⁹ In other instances conduct committed abroad is penalized because it is directed against United States governmental agencies. Thus, United States citizens have been convicted for false claims made to, and payments received from, governmental officials abroad,⁵⁰ and aliens have been convicted of perjury⁵¹ and deported⁵² for false claims made under oath to American consular authorities in other countries. A primary matter of current concern is the application of American economic legislation to American companies and foreign companies licensed to do business in the United States on the basis of acts done outside the United States.⁵³ This extraterritorial

47. *Ford v. United States*, 273 U.S. 593 (1927); *Ramey v. United States*, 230 F.2d 171 (5th Cir. 1956); *Horwitz v. United States*, 63 F.2d 706 (5th Cir.), *cert. denied*, 289 U.S. 760 (1933).

48. *Claremont v. United States*, 26 F.2d 797 (5th Cir. 1928).

49. See *Kaufman v. United States*, 163 F.2d 404 (6th Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); *Horwitz v. United States*, 63 F.2d 706 (5th Cir.), *cert. denied*, 289 U.S. 760 (1933).

50. *United States v. Bowman*, 260 U.S. 94 (1922); *cf. Hatfield v. Guay*, 87 F.2d 358 (1st Cir.), *cert. denied*, 300 U.S. 678 (1937) (extradition granted to Canada for Canadian citizen who made fraudulent representations to Canadian and British authorities in Florida and Massachusetts).

51. *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961), *affirming United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), noted in 13 *STAN. L. REV.* 155 (1960); *cf. Chin Bick Wah v. United States*, 245 F.2d 274 (9th Cir.), *cert. denied*, 355 U.S. 870 (1957). *Contra, United States v. Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955).

52. *United States ex rel. Majka v. Palmer*, 67 F.2d 146 (7th Cir. 1933).

53. See *Matter of Grand Jury Investigation of the Shipping Industry*, 186 F. Supp.

application of economic legislation will be discussed further in Part V.

Federal legislation expressly covers the admiralty and maritime jurisdiction of the United States.⁵⁴ Under these acts, there have been a number of applications of the "floating territory" principle to United States flag vessels, including incidents occurring within the territorial waters of other countries.⁵⁵

There is no federal legislation based as obviously on the nationality principle as, for example, the German Penal Code or the Japanese Draft Penal Code.⁵⁶ However, citizens can clearly be subjected to federal legislation that is expressly applicable to activity done outside this country. The treason cases are obvious examples, and one Supreme Court decision directly upheld the power of Congress to compel compliance with American law by citizens living abroad.⁵⁷ The implication of the treason cases, particularly *Kawakita v. United States*,⁵⁸ is that treason can be committed only by one who is a citizen; American cases do not go as far in finding a nexus to the prosecuting power as certain decisions in England⁵⁹ and South Africa.⁶⁰ Accordingly, treason as defined by American courts is more closely aligned with the concept of jurisdiction based on nationality of the offender than it is with the protected interest principle.

There is one problem area in which clear recognition of the nationality principle as a basis for criminal legislation is needed: criminal acts committed abroad by dependents of United States military personnel stationed overseas and by civilian employees in

298 (D.D.C. 1960); *United States v. R. P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957); authorities cited note 14 *supra*.

54. 18 U.S.C. § 7 (1964).

55. See, e.g., *United States v. Flores*, 289 U.S. 137 (1933).

56. GERMAN PENAL CODE § 4; JAPANESE DRAFT PENAL CODE arts. 4, 5.

57. *Blackmer v. United States*, 284 U.S. 421 (1932). Concerning the power to enjoin an American from infringing a trademark through acts done abroad, see *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

58. 343 U.S. 717 (1952). See also *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

59. See *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347. Jurisdiction was based on the fact that Joyce, an American citizen who collaborated with the Nazis in Germany, held a fraudulently-obtained British passport which he had not surrendered and which had not expired at the time of the acts upon which the treason charge was based.

60. See *Rex v. Neumann*, [1949] 3 S. Afr. L.R. 1238. A German national was held to be within the coverage of South African treason law on the grounds that he had resided in South Africa until 1940, was married to a South African subject, had enlisted in South African forces, and had left for combat service during which he was captured. His subsequent service in the German army was legally treason unless, as a German citizen, he was compelled to do the acts charged against him, a matter left to the proofs.

like situations. The United States Supreme Court has denied the constitutional power of courts-martial to try such individuals for their crimes.⁶¹ As a result, if they are to be tried at all, they must be tried in the courts of the country in which their criminal acts occurred. If this is considered undesirable, then Congress should enact a criminal code applicable to dependents and civilian employees stationed abroad and provide for trial in the United States under the usual venue rule.⁶² The nationality principle offers sufficient support for this legislation that no international law problems should follow its enactment.

There is nothing in present federal law which appears to provide for jurisdiction based on the United States citizenship or the official status (such as a consular employee) of an injured person.⁶³ However, it seems probable that the absence of such legislation is based upon the lack of exercise of power, not lack of power itself.

Piracy is, of course, punished by domestic law,⁶⁴ and United States participation in war crimes proceedings in Europe and the Far East suggests acceptance of the power to act in this area on the basis of the universality principle.⁶⁵ However, there is no other legislation based directly on the universality concept.⁶⁶

III. EXTRATERRITORIAL APPLICATION OF STATE LAW

On the basis of the foregoing discussion it is evident that there is no support in fact for any assertion that Congress can or does apply only the territorial principle. Are the states more restricted than the federal government in this respect?

If the matter were judged exclusively on the basis of selected statements in state appellate court decisions over the years, it might be concluded that only the territorial principle may be invoked by the states and that legislation which purports to apply to activity

61. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (employee, noncapital case); *Grisham v. Hagan*, 361 U.S. 278 (1960) (employee, capital case); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (dependent, noncapital case); *Reid v. Covert*, 354 U.S. 1 (1957) (dependent, capital case). See also Warren, *The Bill of Rights and the Military*, in *THE GREAT RIGHTS* 87 (Cahn ed. 1963).

62. 18 U.S.C. § 3238 (1964). See text accompanying notes 103-06 *infra*.

63. See 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 179-80 (1941) [hereinafter cited as HACKWORTH]. A few provisions of the United States Criminal Code, e.g., 18 U.S.C. § 1114 (1964) (murder of specified federal officials), might apply to acts committed abroad, but there is no case law on the point.

64. 18 U.S.C. §§ 1651-61 (1964), authorized by U.S. CONST. art. I, § 8, cl. 10.

65. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946).

66. Examples of foreign statutes based on this principle are gathered in *HARVARD RESEARCH* 573-78.

done outside the state is unconstitutional. In fact, however, statements by the United States Supreme Court which touch on the problem assume that state laws can have extraterritorial application without contravening the federal constitution,⁶⁷ and there is very little state authority actually holding statutes with external application to be unconstitutional. The chief impact of the above mentioned remarks in state court opinions, almost all dicta, is that state appellate judges at times interpret the coverage of penal legislation more narrowly than they would if they were trained in another tradition.⁶⁸ However, it is clear that, by means of one theoretical device or another, American state courts have penalized conduct which for all important purposes took place beyond the states' boundaries.

One method the state courts have used is to invoke the territorial principle whenever any act pertaining to the criminal transaction occurs or takes effect within the forum state, even though in fact the major activity took place elsewhere. There are several common-law illustrations of this:

1. If an injury is inflicted through force set in motion from outside the state by one who was never physically present within the state, the situs (or a situs) of the assault or resulting homicide is in the state in which the force took effect.⁶⁹

2. If a wound is inflicted outside the forum state, but the victim later dies in the state, it is considered to be murder or manslaughter in the state in which the death occurs, as well as in the state or country in which the wound was given.⁷⁰ This approach purports to be a redefinition of homicide law, but its primary effect is to create jurisdiction where none would otherwise lie under the common-law concept that the place of homicide is where the blow was given.

3. By means of a legal fiction, common-law larceny, and perhaps related crimes like embezzlement or obtaining property by false pretenses, is deemed a continuing offense. Thus, if the thief transports the property into the forum state from another state he is still "taking and carrying away with intent to deprive permanently," and thus commits a fresh crime of larceny in the state into or through which he goes.⁷¹ This theory rests on a false analogy between the

67. See *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Strassheim v. Daily*, 221 U.S. 280 (1911).

68. Rotenberg, *supra* note 34, at 767-70, 773-80.

69. *State v. Hall*, 114 N.C. 909, 19 S.E. 602 (1894).

70. See *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893); *Commonwealth v. Macloon*, 101 Mass. 1 (1869); *People v. Tyler*, 7 Mich. 160 (1859); *State v. Justus*, 65 N.M. 195, 334 P.2d 1104 (1959). This concept is also embodied in several state statutes. See, e.g., Miss. CODE ANN. § 2430 (1956); OHIO REV. CODE ANN. § 2931.20 (Page 1953).

71. See *People v. McGowan*, 127 Cal. App. 39, 14 P.2d 1036 (1932); *State v. Pam-*

English counties and the American states and serves primarily to create an alternative penalty for possessing stolen property, but is well established in state law.

4. Under conspiracy doctrine, the forum state has jurisdiction over all conspirators involved in a conspiracy and all criminal acts committed in furtherance of it if any overt act is committed within its bounds by any of the conspirators.⁷² This theory of jurisdiction for conspiracy cases parallels the doctrine which is applied in federal practice.⁷³ It creates, however, a greater likelihood of multiple prosecutions for the same transaction than does the federal doctrine, because if two or more states move against the same conspirators, a conviction in one state cannot be pleaded in bar to prosecutions in the others. In conspiracy cases before federal courts, the federal question is usually one of venue for fixing the place of the trial; one trial exhausts the power of the federal government to proceed.

5. Under doctrines of complicity, an accessory who has been at all significant times within the forum state is vicariously responsible for the criminal acts of the principal offender, even though the latter has never been within that state and has committed his criminal acts elsewhere.⁷⁴

There are also clear instances in which concepts other than the expanded territorial principle are embodied in state legislation. In at least one situation, that of nonsupport of wife or child by a husband or parent, the basis utilized appears to be the nationality (residence) of the defendant or the victim, though the language used is that of "status." The duty of support is considered to follow the dependent, so that if no support is forthcoming the husband or parent can be convicted even though he has never been in the forum state.⁷⁵ At least one state also penalizes the resident husband

bianchi, 139 Conn. 543, 95 A.2d 695 (1953); *Newlon v. Bennett*, 253 Iowa 555, 112 N.W.2d 884 (1962). The English precedent is summarized in ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 43 (33d ed. 1954) [hereinafter cited as ARCHBOLD]. Statutes commonly restate this rule. See, e.g., CAL. PEN. CODE § 789; MICH. COMP. LAWS §§ 767.64-66 (1948); MISS. CODE ANN. § 2431 (1956); MO. REV. STAT. § 541.040 (1959); N.Y. PEN. LAW § 1930(2); OHIO REV. CODE ANN. § 2931.22 (Page 1953); TENN. CODE ANN. § 40-107 (1955).

72. *State v. Trumbull*, 24 Conn. Supp. 129, 187 A.2d 445 (Conn. App. 1962); *People v. Perry*, 23 Ill. 2d 147, 177 N.E.2d 323 (1961); *State ex rel. Gildar v. Kriss*, 191 Md. 568, 62 A.2d 568 (1948); *People v. Glubo*, 5 App. Div. 2d 527, 174 N.Y.S.2d 159 (1958); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964).

73. See text accompanying note 47 *supra*.

74. See cases cited note 72 *supra*, and restatements of the doctrine in CAL. PEN. CODE §§ 27(3), 778b; IND. ANN. STAT. § 9-203 (Burns 1956); N.Y. PEN. LAW § 1930(3); TENN. CODE ANN. § 40-102 (1955).

75. *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953), *cert. denied*, 346 U.S. 938 (1954); *State v. Collins*, 235 S.C. 65, 110 S.E.2d 270, *cert. denied*, 361 U.S. 895 (1959); *Osborn v. Harris*, 115 Utah 204, 203 P.2d 917 (1949); *State v. Jackson*, 145 W. Va. 51,

or father for nonsupport even if the wife or child has been continuously in another state or country, on the theory that it has the power to regulate the conduct of its own residents affecting residents of other states.⁷⁶

Some states have tried to reach interstate or international criminal transactions by special statutes. One type of statute penalizes persons who commence the commission of a crime outside the forum state but bring about its consummation within that state through either their own acts or the acts of an accomplice or innocent agent.⁷⁷ On occasion, the same result is reached even without a special statute.⁷⁸ The concept of consummation is such, however, that the impact of the criminal activity done elsewhere on some interest which the forum state desires to protect must be quite apparent.⁷⁹ Indirect economic loss may not be enough.⁸⁰

A second form of statute, probably intended by legislatures to be the exact reverse of the first, punishes one who with intent to commit a crime does an act within the forum state in execution or part execution of that intent and succeeds in committing a crime in another state or country.⁸¹ These statutes have generally received particularly narrow construction by courts oriented strongly in favor of the territorial principle. The two principal jurisdictions having this type of legislation have required that enough be done within the state to constitute an attempt.⁸² Thus, acts of "mere

112 S.E.2d 452 (1960). Extradition may also be allowed even though the person extradited has never been in the forum state. *Squadroni v. Smith*, 349 S.W.2d 700 (Ky. App. 1961). Cf. *Commonwealth v. Lanoue*, 326 Mass. 559, 95 N.E.2d 925 (1950), in which the charge was "begetting and abandoning"; conception occurred in another state and the begetting statute therefore did not apply. Bigamy jurisdiction turns on the place of a second marriage, *Green v. State*, 232 Ind. 596, 115 N.E.2d 211 (1953); *State v. Jones*, 227 N.C. 94, 40 S.E.2d 700 (1946), so that bigamous cohabitation in the forum state does not give the latter power to prosecute unless the second marriage also took place there or there is a special bigamous-cohabitation statute.

76. *State v. Echavarria*, 101 N.H. 458, 146 A.2d 256 (1958). However, in reliance on the territorial principle, New Hampshire will not extradite its own citizens for non-support. See *Hardy v. Betz*, 105 N.H. 169, 195 A.2d 582 (1963).

77. See the statutes cited note 74 *supra*; N.Y. PEN. LAW § 1933.

78. See *Medley v. Warden of Maryland House of Correction*, 210 Md. 649, 123 A.2d 595 (1956); *Commonwealth v. Welch*, 345 Mass. 366, 187 N.E.2d 813 (1963).

79. *Mortensen v. State*, 214 Ark. 528, 217 S.W.2d 325 (1949); *People v. Leonard*, 24 Misc. 2d 300, 197 N.Y.S.2d 209 (Gen. Sess. 1960).

80. *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925). But see *People v. Mason*, 184 Cal. App. 2d 317, 7 Cal. Rptr. 627 (1960), cert. denied, 366 U.S. 904 (1961); *State v. Trumbull*, 24 Conn. Supp. 129, 187 A.2d 445 (Conn. App. 1962); *People v. National Radio Distributors Corp.*, 9 Misc. 2d 824, 168 N.Y.S.2d 886 (County Ct. Bronx County 1957). In the latter cases the economic impact was largely indirect.

81. CAL. PEN. CODE §§ 27(1), 778a; IND. ANN. STAT. § 9-216 (Burns 1956); MISS. CODE ANN. § 2428 (1956); N.Y. PEN. LAW § 1930(1); OHIO REV. CODE ANN. § 2931.21 (Page 1953) (homicide only); TENN. CODE ANN. § 40-103 (1955).

82. See *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953); *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925); cf. *People v. Zayas*, 217 N.Y. 78, 111 N.E. 465 (1916).

preparation" are not prosecuted, even though they are effective to bring about the commission of a crime somewhere else.

The California Supreme Court has gone even further by its decision in *People v. Buffum*⁸³ that the crime of conspiracy cannot be committed if the contemplated activity is to be completed outside the state. Despite statutory language broad enough to permit jurisdiction to be based on a portion of a criminal transaction not itself sufficient to amount to an attempt under traditional law,⁸⁴ the *Buffum* decision exempted from the coverage of California criminal law persons who transported pregnant women from their homes in California to Tijuana, Mexico, where they were criminally aborted. The court's premises that enough had to be done in California to amount to an attempt (transportation alone obviously is not enough to constitute attempted abortion) and that conspiracy would not lie if the sole objective of the agreement was a violation of Mexican law, succeeded only in creating a haven for criminals whose acts chiefly circumvented the public policy embodied in the California Penal Code⁸⁵ that abortions should not be freely available. This is particularly evident in light of the fact that the extradition treaty with Mexico⁸⁶ does not list abortion as an extraditable offense.

The court's theory would be almost equally obnoxious, however, if extradition were available, just as it would be if the abortions had been performed in Nevada instead of Mexico. Nevada authorities might content themselves with prosecuting the one person who in fact performed the abortions; they might not bother to prosecute the members of the ring in California, particularly when all the evidence establishing complicity and solicitation of customers is within California and not readily accessible to Nevada courts. Later California decisions carefully distinguish the *Buffum* case and its rationale,⁸⁷ but it nevertheless stands as an excellent example of the

83. 40 Cal. 2d 709, 256 P.2d 317 (1953).

84. CAL. PEN. CODE § 27: "The following persons are liable to punishment under the laws of this state: 1. All persons who commit, in whole or in part, any crime within this state . . ." CAL. PEN. CODE § 778a: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state."

85. CAL. PEN. CODE § 274.

86. Treaty of Feb. 22, 1899, 31 Stat. 1818, 55 Stat. 1133, T.S. No. 421.

87. In *People v. Burt*, 45 Cal. 2d 311, 288 P.2d 503 (1955), the court held that *Buffum* does not apply to a charge of solicitation to commit extortion in Mexico, since extortion is specified in the solicitation statute. The court noted that any crime could be the objective of a conspiracy, but that solicitation refers only to serious crimes, "all of which are felonies under the law of this state and at common law and are crimes

triumph of the rote of the territorial principle over the pragmatic needs of law enforcement.

The unsatisfactory nature of judicially-created law in this area, and the restrictive interpretation of special "in whole or in part" statutes, have provided strong incentive for a modernization of the law. The impetus for this reform movement is also based on the ever-increasing frequency of criminal acts and transactions which transcend artificial, historical boundaries between states.

The American Law Institute Model Penal Code endeavors to provide a comprehensive treatment of the many problems of jurisdiction which have arisen over the years.⁸⁸ In section 1.03(1)(a) it restates the basic premise that a person may be convicted of an offense which he himself commits or which is committed by someone for whose acts he is legally accountable if "either the conduct which is an element of the offense or the result which is such an element occurs within [the forum state]." As an illustration, if a person makes false statements in a long-distance telephone conversation from Ohio to Michigan and induces a Michigan resident to send a sum of money by mail to Ohio, Michigan could maintain a prosecution for obtaining money by false pretenses,⁸⁹ even though the defendant had never been physically present in Michigan until after his extradition.

Beyond this, however, there is power to prosecute if "conduct occurring outside the State is sufficient under the law of [the forum state] to constitute an attempt to commit an offense within the State."⁹⁰ This provision is intended to permit prosecution of one who endeavors but fails to achieve a result which is criminal under the law of the forum state. It would cover, for example, the person in the above illustration who tried to obtain money from the Michigan resident by false statements made over the telephone, even though the latter had second thoughts and decided not to send the money after all. It would also include one who sends an explosive "booby-trap" package by mail, only to have it intercepted at either the dispatching or receiving post office. The time or place of the frustration or interception would not determine criminality.⁹¹

under the law of all civilized nations." *Id.* at 317, 288 P.2d at 505. In *People v. Jones*, 39 Cal. Rptr. 302, 228 Cal. App. 2d 74 (1964), the court upheld a conviction of conspiracy to operate a lottery in Nevada on the grounds that CAL. PEN. CODE § 319 penalizes the setting up of lottery schemes and that § 320 penalizes setting up as well as drawing, so that the conduct was substantially within California's borders.

88. MODEL PENAL CODE § 1.03 (P.O.D. 1962).

89. MICH. COMP. LAWS § 750.218 (1948).

90. MODEL PENAL CODE § 1.03(1)(b) (P.O.D. 1962).

91. ALI PROCEEDINGS (33d Annual Meeting) 112-16 (1956).

A state is also authorized to prosecute if "conduct occurring outside the State is sufficient under the law of [the forum state] to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State."⁹² This provision restates the common-law doctrines already summarized.⁹³ The Institute specifically repudiated the rule of the *Buffum* case⁹⁴ by permitting a prosecution if "conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of [the forum state]."⁹⁵

The Model Penal Code, however, goes beyond common-law tradition to permit a state to invoke either the protected interest or the nationality principle, by permitting exercise of jurisdiction if:

the offense consists of the omission to perform a legal duty imposed by the law of [the forum state] with respect to domicile, residence or a relationship to a person, thing or transaction in the State . . . [or if] the offense is based on a statute of [the forum state] which expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.⁹⁶

These two bases of jurisdiction are certainly an encouragement to courts to consider specific penal legislation in terms of the purposes underlying it in order to decide whether acts done entirely outside the forum state may nonetheless impair an interest which the forum legislature desires to protect.

There are two doubtful aspects about the language itself, however. One problem is the limitation that the conduct must bear "a reasonable relation to a legitimate interest" of the prosecuting state. This statutory language permits, and indeed invites, a court to decide that legislation touching conduct outside the state is unwise even though it is constitutional. The record of judicial hostility toward legislation is substantial enough that the judiciary should not be given this sort of veto power over legislative judgment. A phrase like "the conduct affects a legislatively-protected interest of or within the State" would be much preferable to the present language.

92. MODEL PENAL CODE § 1.03(1)(c) (P.O.D. 1962).

93. See text accompanying notes 69-70 *supra*.

94. Discussed in text accompanying notes 80-84 *supra*.

95. MODEL PENAL CODE § 1.03(1)(d) (P.O.D. 1962).

96. § 1.03(1)(e)-(f).

The second problem is the effect of the phrase "should know" as an alternative to actual knowledge that the actor's conduct is likely to affect an interest protected by legislation of the forum state. This approach appears to permit a finding of criminality on the basis of negligence,⁹⁷ even though the primary statute under which the prosecution is brought specifies a certain intent or motive. It is highly questionable whether one who acted wholly outside the forum state should be held criminally responsible because he "should have known" that his conduct would affect an interest of the state when the state would have to prove specific intent if the same act had been done within its borders.

The Code makes some effort to reduce "conflict of laws" problems by exempting from the coverage of section 1.03(1)(a) an act which is intended to take place in another jurisdiction where it would not be criminal, unless either the forum legislature evidences a plain purpose to make the conduct criminal wherever it occurs⁹⁸ or the actor purposely or knowingly caused that result within the forum state.⁹⁹ Of course, neither exception applies if the conduct or result is also criminal in the place where the conduct occurred or where the results might otherwise have been achieved.

The Model Penal Code has not yet been enacted as such in any state. However, three recent statutes accomplish somewhat similar results. A Wisconsin statute¹⁰⁰ permits prosecution if any of the constituent elements of a crime occurs in Wisconsin or if a person outside Wisconsin does an act with the intent to cause a consequence prohibited by some Wisconsin criminal statute. A Minnesota statute¹⁰¹ includes an "in whole or in part" clause and a provision covering one who, from outside Minnesota, "intentionally causes a result within the state prohibited by the criminal laws" of Minnesota. The Illinois Criminal Code treats an offense as partly committed within that state "if either the conduct which is an element of the offense, or the result which is such an element, occurs within the State."¹⁰² This language should encourage the courts to focus their attention less on the territorial principle as such, and more on the interests sought to be protected by legislation and the degree to which these interests can be infringed by activity taking place beyond the boundaries of the forum state.

97. Cf. the Model Penal Code definition of "negligently" in § 2.02(2)(d).

98. § 1.03(2).

99. § 1.03(3).

100. WIS. STAT. § 939.03 (1961).

101. MINN. STAT. ANN. § 609.025 (1964).

102. ILL. REV. STAT. ch. 38, § 1-5(b) (1963).

IV. FIXING THE PLACE OF TRIAL FOR INTER-JURISDICTIONAL CRIME

If legislation is construed to apply to activity outside the forum state, there still remains the problem of the place of the trial itself. A court must be found which can constitutionally adjudicate the case. This, too, is a problem in which the solution under federal law is fairly clear, but the proper approach under state law is much less evident.

A. *Venue Under Federal Law*

The federal constitution expressly contemplates that some criminal acts can be committed outside the continental United States and yet be tried in federal courts. Trial of crimes is to be held "in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."¹⁰³ Congress accordingly provided that the venue for offenses not committed within any state or district would be the district in which the offender is found or into which he is first brought.¹⁰⁴

The original form of the statute did not prove flexible enough, and the section was extensively revised in 1963. If there are joint offenders, all may now be tried in any district in which one of them is found or into which he is brought. If the offender has not yet been arrested or returned, then an indictment may be returned or information filed in the district of the last known residence of the offender or of any one of two or more joint offenders; if the place of last residence is unknown, the pleading may be returned or filed in the District of Columbia.

The joint-offender provision is intended to avoid the inconvenience inherent in trying joint offenders separately if they are found in or brought into different districts—the necessary procedure under the original language. The matter relating to indictment is for the purpose of stopping the running of the statute of limitations. Under the original form of the statute, no federal grand jury could sit until venue had been determined through the fact of the arrest or return of the offender. So long as the offender was at liberty, the statute of limitations continued to run. However, for purposes of indictment, venue is now fixed by the terms of the

103. U.S. CONST. art. III, § 2, cl. 3.

104. 18 U.S.C. § 3238 (1964). See *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

statute, and the prescriptive statute may be tolled before it expires.¹⁰⁵ Trial presumably takes place in the district in which the indictment is returned, as provided by rule 54(b)(2) of the Federal Rules of Criminal Procedure. If any part of a criminal transaction or any overt act in furtherance of a conspiracy takes place within a federal district or districts, venue lies there by operation of the basic constitutional requirement of jury trial and the rules governing venue.¹⁰⁶

B. Venue Under State Law

Determination of the proper place for trial in inter-jurisdictional crimes is considerably more complicated under state law. State constitutions lack express language equivalent to the federal constitutional provision discussed above. Therefore, the question of where a crime committed through acts done outside the forum state is to be tried turns on the construction of the jury-trial provision in the state's constitution.¹⁰⁷ Fourteen states simply guarantee a jury trial without specifying the place, and seven others have indefinite provisions which can be interpreted to mean the same thing.¹⁰⁸ One state, Hawaii, refers to a jury of "the district wherein the crime shall have been committed."¹⁰⁹ If this provision was intended to refer to the entire federal district of Hawaii, it obviously leaves considerable flexibility in fixing the place of trial. Twelve states provide for a trial in the "county or district" in which the crime was committed, and sixteen states require trial by a jury of the "county" or "parish."¹¹⁰

In no state should there be any major problem in finding an appropriate county in which to try an offense if any act or result occurs in one or more counties,¹¹¹ particularly if the approach sug-

105. U.S. CODE CONG. & AD. NEWS 660-63 (1963).

106. FED. R. CRIM. P. 18. See *United States v. Cores*, 356 U.S. 405 (1958); *Johnston v. United States*, 351 U.S. 215 (1956); *Hyde v. United States*, 225 U.S. 347 (1912).

107. See Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944).

108. See Blume, *supra* note 107, at 79-89. Alaska is within this group. ALASKA CONST. art. I, § 11 (1959).

109. HAWAII CONST. art. I, § 11 (1959).

110. Blume, *supra* note 107, at 89-92.

111. See *Commonwealth v. Welch*, 345 Mass. 366, 187 N.E.2d 813 (1963) (venue where defendant public officer employed, even though offense occurred in Rhode Island); *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953), *cert. denied*, 346 U.S. 938 (1954) (venue in non-support case determined by location of person to whom the duty of support is owed); *Osborn v. Harris*, 115 Utah 204, 203 P.2d 917 (1949) (same). W. VA. CODE ANN. § 48-8-6 (1961) provides that venue in non-support cases may also be based upon the location of the offender when the complaint is filed. See *State v. Jackson*, 145 W. Va. 51, 112 S.E.2d 452 (1960). *But see Cheshier v. State*, 296 P.2d 190 (Okla. Crim. 1956) (prosecution for sale of mortgaged property in county in which mortgagee lived was improper, since the sale took place in California).

gested above is used—identification of the interest to be protected by the legislation and the nature of its impairment. If the act occurs on or affects persons on board a vessel with a home port in a particular state, or perhaps if the company owning the vessel has a place of business within the state, this relationship could be sufficient to fix venue in that state. Jurisdictional power based on an overt act in furtherance of a conspiracy and jurisdiction over an accomplice based on the location of the principal's acts are also useful devices in many cases to identify a proper trial court within the forum state.

The only bases of legislative jurisdiction which create difficulties are nationality of either the offender or the victim and the universality principle. In twenty-one states it would probably be possible either to enact something similar to the "first found or first brought" federal statute,¹¹² or to use the domicile or residence of the offender or victim if it is located within the state.¹¹³ However, in the other twenty-nine states it might be necessary to amend the state constitution before conduct not having a clearly provable nexus to an identifiable person, office, or place within the forum state could be taken account of in the courts of that state.

V. CONFLICT OF JURISDICTION

Once a state or country abandons a strict territorial basis for its criminal law and asserts its power to act on the basis of a portion of the criminal transaction only, the flag of its vessels or aircraft, the nationality of either actor or victim, or the natural-law concepts of universality, it risks conflict with the interests of, or exercise of jurisdiction by, another government. Although this potential conflict has occasionally been asserted as a reason for non-exercise of the other concepts of jurisdiction, it would be more desirable to create special rules to resolve this conflict, so far as possible, in the best interests of both governments and of the criminal.

A. *Conflicts Between the United States and Foreign Governments*

Conflicts between federal legislation and foreign legislation appear not to pose major problems except in three areas. One possibility for international conflict relates to treason committed by one holding

112. 18 U.S.C. § 3238 (1964).

113. The author proposed the following language to the Michigan State Bar Committee to Revise the Criminal Code, to which he is a reporter: "If . . . a statute which governs conduct outside the state . . . is violated, trial shall be held in the county in which the defendant resides, or if he has no fixed residence, in the county in which he is apprehended or to which he is extradited."

dual nationality. In recent history the question has arisen in the case of persons of Japanese ancestry who were United States citizens under the laws of this country and also Japanese subjects under the relevant Japanese law. The post-World War II cases turned upon whether the alleged acts of treason were required of the defendants by physical or legal duress imposed by the Japanese Government, or were committed voluntarily.¹¹⁴ It is not entirely clear that a proper interpretation was given the defendants' situation under Japanese law of the wartime period, but Japan was in no position to raise the issue through diplomatic channels at the time of the United States proceedings. Thus, the cases were handled primarily as a matter of domestic law.

A second area of conflict is encountered when offenses are committed on board American vessels within the territorial limits of another country. The United States position is that matters affecting only a ship's discipline are exclusively within the purview of the law of the carrier's flag, but that there is concurrent jurisdiction if the act "involves the peace or dignity of the country, or the tranquillity of the port."¹¹⁵ To date, disputes over the application of this doctrine have been settled through diplomatic negotiations.¹¹⁶

The third possibility for conflict is the extent to which economic activities which occur abroad can be subjected to United States law on the ground that they affect the American economy. To a degree the answer to this question depends on whether one is concerned with an American corporation doing business abroad, a foreign subsidiary of an American company which does no business in the United States, a subsidiary of a foreign corporation which does business in the United States, or a foreign corporation which does nothing directly in the United States.

American companies are probably in no position to object to being called to account in American courts for acts, such as agreements in restraint of trade which affect the American market, committed abroad unless: (1) the act is one required of the American company by foreign law or (2) the act complained of is actually that of a foreign state, though for the economic benefit of the American company.¹¹⁷ The same concept, logically applied, suggests that a foreign government cannot object if federal law is applied to activi-

114. See, e.g., *Kawakita v. United States*, 343 U.S. 717 (1952).

115. *Wildenhus's Case*, 120 U.S. 1, 11 (1887). See also *United States v. Flores*, 289 U.S. 137 (1933); *United States v. Rodgers*, 150 U.S. 249 (1893).

116. See 2 HACKWORTH 187-88, 208-23.

117. Compare *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), with *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

ties in the United States by a wholly-owned or wholly-controlled corporate subsidiary of a foreign enterprise—activities which are either permitted or required by the laws of the country in which the foreign parent enterprise is chartered. Whether it is practically wise to impose American concepts of monopoly control on the foreign subsidiary in contradiction of the national traditions of the country in which the parent enterprise operates is another question, particularly if a chronic deficit in the balance of payments suggests the need to attract foreign risk capital. However, grave legal questions appear to underlie any effort to take cognizance of activities by a foreign corporation in its home country, whether permitted or required by the laws of that country, for this amounts to a direct interference with the economic policies of the foreign government. The practical solution to these problems is probably to be found in the realm of economic treaties, not forum judicial activity.¹¹⁸

B. *Conflict of Laws Involving the States*

If there is a conflict between a state's exercise of extraterritorial jurisdiction and the interests of a foreign power, the conflict is easily resolved. Insistence by a state on implementing its policies in the face of specific and legitimate protests by the other nation concerned amounts to an interference with the foreign relations of the United States, and thus violates the federal constitution.¹¹⁹ The conflict, however, must be actual and must be asserted by the foreign government. A potential or hypothetical conflict will not suffice.¹²⁰

Because of our peculiar state-federal relationship, there is the possibility of a conflict of jurisdiction between a state and the federal government in a criminal case. On occasion the conflict can arise from geographical considerations. In situations where the states have ceded all jurisdictional power over the place where a criminal act is done so that the land may be used for a federal governmental purpose, as in the case of certain national parks and military reservations,¹²¹ or if the federal government has retained all powers over the tract in question, as in the instance of certain Indian reservations,¹²² there can be no exercise of state legislative or judicial jurisdiction concerning the place or the act. If there has been no cession

118. On these points, see the materials cited in notes 14 and 53 *supra*.

119. U.S. CONST. art. I, § 10, cls. 1, 3; art. II, § 2, cl. 2.

120. Cf. *Skiriotes v. Florida*, 313 U.S. 69 (1941).

121. See *Bowen v. Johnston*, 306 U.S. 19 (1939); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *People v. Hillman*, 246 N.Y. 467, 159 N.E. 400 (1927).

122. See *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965); *In re Carmen*, 48 Cal. 2d 851, 313 P.2d 817 (1957); *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W.2d 41 (1963).

or reservation, however, jurisdiction is concurrent.¹²³ More often, the conflict is one of abstract legislative power. If Congress has legislated under one or more of the powers delegated to it in the Constitution to reach a problem of general concern, the states are forbidden to legislate on the same matter. Any state statute purporting to deal with the problem is unconstitutional.¹²⁴

Conflict among the states themselves is also possible. Interstate conflict has most often been evidenced in the matter of concurrent control by two or more states of a river or lake which forms part of their common boundary. In the absence of a special agreement, the jurisdiction of each state extends to the center of the river channel or lake.¹²⁵ This doctrine, however, can create awkward problems of law enforcement if the exact location of a crime committed on the water cannot be proved beyond a reasonable doubt. If neither state can prove by affirmative evidence that the crime was committed on its side of the line, the criminal will go free of punishment. Accordingly, Congress has approved various interstate compacts which provide for "concurrent jurisdiction" in each state over the whole body of water.¹²⁶

On occasion state legislatures have interpreted the language in these compacts to mean concurrent legislative jurisdiction, and they have endeavored to regulate activities—particularly fisheries—on the part of the river or waters not within their traditional geographic boundaries. However, these legislative efforts have been struck down by the courts.¹²⁷ Using the fisheries example, State *A* can regulate all fishing activities on its half of a river, including those by residents of State *B*, its neighbor,¹²⁸ but the most that *A* can do to affect activities on the other part of the stream is to regulate what its own residents do on the State *B* side. Thus it seems clear that "concurrent jurisdiction" as used in the many compacts means concurrent judicial jurisdiction when there is identical or substantially identical legislation in effect in both or all the states affected by the compact.¹²⁹ Legislative jurisdiction extends to the geographical boundaries of the state, to the protection of identifiable interests with some sort of locus

123. *In re Kelly*, 311 Mich. 596, 19 N.W.2d 218 (1945).

124. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). See also authorities cited note 39 *supra*.

125. *State v. Federanko*, 26 N.J. 119, 139 A.2d 30 (1958).

126. The various compacts are listed by states in COUNCIL OF STATE GOVERNMENTS, *INTERSTATE COMPACTS 1783-1956* (1956). See also ZIMMERMAN, *THE INTERSTATE COMPACT SINCE 1925*, at 9 (1951).

127. See *Nielsen v. Oregon*, 212 U.S. 315 (1909); *State v. Alexander*, 222 Ark. 376, 259 S.W.2d 677 (1953).

128. *Miller v. McLaughlin*, 281 U.S. 261 (1930).

129. See *Dutton v. Tawes*, 225 Md. 484, 171 A.2d 688 (1961).

within the state, and to the activities of residents outside the state. Any other exercise of powers is likely to create a conflict with the legislative policies of other states which cannot be constitutionally tolerated.

VI. CONCLUSION

If there were complete freedom to legislate on the matter of the place of trial of crimes committed outside the geographical limits of a state, or indeed of crimes committed within the state, there is much to suggest adoption of the flexible civil-law traditions. Under civil law, initial placement of the case for trial may be made on the basis of the location of the primary criminal act where many of the witnesses may be, the location of government or corporate records needed in the case, or the residence of the defendant. If the initial placement proves inconvenient, a change can be authorized in the discretion of the court in which the prosecution is pending or a higher court. Questions of mistaken competence must be raised promptly if they are not to be deemed to have been abandoned. If a similar system were adopted in American criminal practice, as indeed it has been in our civil practice, the well-established requirement of a constitutionally fair trial would be a sufficient protection to the defendant against highly inconvenient or prejudicial selection of venue.¹³⁰ If additional protection for the defendant were needed, it could be promoted by abandoning the quite restrictive standards for change of venue in criminal cases¹³¹ and incorporating the forum non conveniens concept from civil procedure.¹³²

The only barrier to this suggested approach is a continuation of the verbal tradition that somehow there is a magic significance in the current practice of drawing a jury from the "vicinage." A fair jury can be drawn in remote counties; indeed, the current concern with the impact of publicity on the trial process¹³³ suggests that the more remote the jurors are from the place of the crime, the less biased they are likely to be. In fact, the matter of vicinage is a vestige from the past, when the jury was an active investigative body which reported to royal authorities about happenings within the locality.¹³⁴ The jurors' convenience, if not that of royal officials, was served best by investigations close to home. Though the jury was in time transformed into a supposedly neutral arbiter of fact, the requirement of

130. Cf. *Rideau v. Louisiana*, 373 U.S. 723 (1963).

131. E.g., FED. R. CRIM. P. 21.

132. See 28 U.S.C. § 1404 (1964); MICH. GEN. CT. R. 403.

133. See, e.g., *Estes v. Texas*, 381 U.S. 532 (1965); Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99, 106-08, 114-18 (1966).

134. See RADIN, *ANGLO-AMERICAN LEGAL HISTORY* 204-12 (1936).

vicinage tended to linger on as a purported limitation on the exercise of judicial power long after any very practical reasons for it remained. In England the vicinage limitation has been viewed as a matter of judicial tradition only, and has been changed by legislation as occasion demanded. The present Criminal Justice Act of 1925¹³⁵ permits proceedings against a person "in any county or place in which he was apprehended, or is in custody on a charge for the offence, as if the offence had been committed in that county or place."¹³⁶ The defendant can plead hardship if trial in that place is inconvenient to him,¹³⁷ and the examining justice is empowered to transfer the case elsewhere for trial if he feels that such a change would expedite the trial or save expense.¹³⁸ Unless an American state constitution preserves the judicial habits of the past as a matter of constitutional law, there appears to be no good reason why our standards for establishing the place of trial cannot evolve as the English standards have, subject always to the fundamental requirement of fairness in the particular proceeding.

As indicated above,¹³⁹ however, in a number of states the peculiar form of the constitutional jury-trial provision makes this sort of legislative reform difficult if not impossible, thus preserving in constitutional amber the rote thinking of a day when legislatures and courts in fact chose to utilize only the territorial principle in their lawmaking. In these states, therefore, it may be necessary to amend the constitution before it is possible to enact penal legislation reaching conduct which cannot be tied to an identifiable place within the state borders.

In all other cases it should be possible for the states and the federal government to utilize any basis for legislative jurisdiction recognized in international law. However, there are two reasons why it is unlikely that any state will do so extensively. First, there is considerable inertia behind the verbal tradition that crimes can be based only on activity observable within the state. Second, it is difficult to secure the physical presence of the defendant and the witnesses and to assemble demonstrative evidence when the primary criminal activities took place outside the state. The combined effect of these two factors ensures that a state will act legislatively in this area only when serious injury is being done from outside the state to interests

135. 15 & 16 Geo. 5, c. 86. See also ARCHBOLD 38-39.

136. § 11(1).

137. § 11(1)(a).

138. § 14. See ARCHBOLD 100-01.

139. See text accompanying notes 106-12 *supra*.

in which the state is vitally concerned. The forum state is not thereby "enforcing the penal laws of another state," the traditional bromide,¹⁴⁰ but is penalizing activity which has a direct bearing on its citizenry, its governmental operations, or its economy.

Legislation which has an extraterritorial effect can of course create conflicts with the law of the place where the prohibited activity actually takes place. However, if there is insistence on actual rather than theoretical or hypothetical conflict, the incidence of problem cases will be small. If there is conflict, a few simple rules ought to provide adequate guidance: (1) A country or state can regulate the conduct or activity of its citizens or residents at all times, even when they are temporarily beyond its geographical limits. (2) Offenses on board vessels or aircraft can be taken cognizance of by the government or state of registry, though other bases of jurisdiction are also possible. (3) Activity by non-citizens or nonresidents can be penalized when it affects an interest about which the forum state is sufficiently concerned, at least so long as the conduct is also prohibited in the jurisdiction in which the primary activity takes place. (4) The preceding rule may also extend to instances in which the attitude of the latter state or country is neutral. If the foregoing standards were implemented, the area of conflict would be reduced to those cases in which the country or state in which the activity occurs has affirmatively required that activity of either its own citizen or a nonresident of the forum state.

If this or a similar body of rules were utilized, the result would not be choice of forum or jurisdiction, but rather concurrent jurisdiction. This approach probably creates fewer problems in maintaining at least one successful prosecution than does a rule which requires the absolute identification of one and only one state or nation with power to prosecute. But the price for this substantial guaranty against the failure to punish a person who has committed an undesired act is the possibility that he may be punished both in the state in which his physical activity took place and in the state or states with interests directly or indirectly affected by that activity. The response to this problem should not be legislative abandonment of bases for statutory jurisdiction other than the territorial principle; instead, it should be the enactment of a statute which permits the defendant in the later prosecution to plead in bar the fact that he has previously been punished, or perhaps prosecuted to judgment,

140. See, e.g., *Flaughner v. Commonwealth*, 279 S.W.2d 775 (Ky. App. 1955); *Commonwealth v. Lanoue*, 326 Mass. 559, 95 N.E.2d 925 (1950).

in another state or country on account of the same transaction on which the forum prosecution is based.¹⁴¹ Such an approach would prevent or restrict unfair cumulation of punishment for what, from the offender's and society's viewpoint, is a single act or transaction. It accomplishes by statute on the inter-jurisdictional level what we have already accomplished at the state level under the double-jeopardy concept when venue for a single offense may be laid in two or more counties of the same state. In short, abandonment of the territorial principle as the exclusive basis for legislative jurisdiction may in the long run promote, rather than impair, a needed addition to the concept of procedural fairness.

141. MODEL PENAL CODE § 1.10 (P.O.D. 1962). For the states having provisions to this effect, see MODEL PENAL CODE comment, p. 61 (Tent. Draft No. 5, 1956).