The Indeterminate International Law of Jurisdiction, the Presumption Against Extraterritorial Effect of Statutes, and Certainty in U.S. Criminal Law

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I. INTRODUCTION

The topic of this symposium panel is the effect of *Morrison v. National Australia Bank*[1] on other areas of American law. A particular area of interest for this author is the law of transnational and international criminal jurisdiction. For a lot of reasons, criminal law can lend insight to the reinvigoration of the presumption against extraterritoriality. A judicious application of *Morrison* to transnational criminal cases can result in fairer prosecutions, and perhaps most

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1. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010).

importantly, to an increase in the opportunity of persons to understand what criminal law will be applied to them.[2]

Unfortunately, the presumption against extraterritoriality cannot by itself end uncertainty concerning what criminal law will apply, even if *Morrison* had clearly addressed the criminal law of jurisdiction.[3] Some have noted the tension between *Morrison* and the seminal American criminal jurisdiction case of *Bowman v. United States*.[4] Along with international law developments, other trends in American law and politics make it difficult for a person to determine in advance whether U.S. criminal law, and the penalties contained in it, will apply to one's acts.[5] Indeed, as we shall see shortly, the question, "whose law must we obey?" is not fully answerable under current law, even in theory.[6] This arises from the conflicting structures of substantive law (especially but not exclusively criminal law) and the public international law of jurisdiction.[7]

In its application to criminal law, *Morrison* thus appears to be a sign-pointer, rather than a rule of law. Even so, any step in the direction of greater certainty for the application of criminal law is welcome.

II. "JURISDICTION" UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) V. JURISDICTION TO PRESCRIBE

This is a paper about criminal law. So, naturally, it will start with a highly technical point of civil procedure. Neither we nor the Supreme Court should read too much into the first point of its opinion—that the issue of extraterritoriality of application of the Securities Exchange Act is not a matter of "jurisdiction."[8] The Court held that Federal Rule of Civil Procedure 12(b)(1) did not apply to this case because the issue was one of the merits, not "subject-matter jurisdiction" under the rule.[9] "Subject-matter jurisdiction refers to a tribunal's power to hear a case".[10] For purposes of Federal Rule of Civil Procedure 12(b)(1) it refers only to jurisdiction to adjudicate, not how far jurisdiction to prescribe has been exercised by Congress.[11]

The Supreme Court understands the distinction between jurisdiction to adjudicate and jurisdiction to make law applicable to persons ("jurisdiction to

2. *See infra* Part VII.

3. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 9 n.42 (2012) (discussing the relationship between *Morrison* and *Bowman*).

4. United States v. Bowman, 260 U.S. 94, 103 (1922); DOYLE, *supra* note 3, at 8-9 nn.38-42.

5. *See infra* Part III.

6. *See infra* Part III.

7. *See infra* Parts II-III.

8. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2876-77 (2010).

9. *Id.* at 2877.

10. *Id.*

11. *Id.*

prescribe," sometimes called "legislative jurisdiction") though the Court has not taken any definitive stance in its application.[12] In 1972, the Second Circuit discussed a case holding that Congress had jurisdiction to prescribe law against committing deceptive securities practices in this country, even if the exchange trading involved happened elsewhere.[13] While the Court overruled the result of that case (that Congress had in effect exercised its legislative jurisdiction to prohibit the conduct), the Court did not say that Congress had no such jurisdiction to prescribe.[14] Thus the second part of the opinion only denies the issue of the District Court's jurisdiction to adjudicate, and does not deny that the question of prescriptive jurisdiction is part of the inquiry of the breadth of the substantive ambit of section 10(b) of the Securities and Exchange Act of 1934.[15]

The *Morrison* drafting fix in the Dodd-Frank Act, which gives federal courts "jurisdiction" (i.e., adjudicative) over certain acts with extraterritorial effects and certain extraterritorial acts with domestic effects,[16] may at first appear to be an error.[17] It is, to the contrary, squarely within the drafting tradition of both the United States and other countries. It is not unusual for a statute to indicate its extraterritorial reach, i.e. its ambit, in the same section—or sentence—in which it assigns jurisdiction or venue to a specific court.[18] This is what was done in the Dodd-Frank Act in response to *Morrison*.[19] This section of Dodd-Frank has no meaning unless it defines the extent to which the substantive causes of action apply extraterritorially when a case is brought by the U.S. government.[20]

12. *See* Karl M. Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW & CONTEMP. PROBS. 5, 47 (Summer 1987) (discussing some cases where the Supreme Court struggled with the issue of jurisdiction to prescribe and the lack of guidance resulting in the Third Restatement); s*ee generally* Katheleen Hixson, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L. L.J. 127 (1988) (discussing some cases where the Supreme Court struggled with the issue of jurisdiction to prescribe).

13. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334-37 (2nd Cir. 1972) (discussing Congress' jurisdiction to prescribe the particular law).

14. *Morrison*, 130 S. Ct. at 2878-81 (abrogating *Leasco*).

15. 48 Stat. 891 as amended 15 U.S.C. §§ 78j(b),78t(a); 17 CFR § 240.10b-5 (2009), promulgated pursuant to §10(b). *See infra* Part III.

16. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 929P(b)(2), 124 Stat. 1376, 1862 (2010).

17. *See* Joshua Boehm, Comment, *Private Securities Fraud Litigation after* Morrison v. National Australia Bank: *Reconsidering a Reliance Based Approach to Extraterritoriality*, 53 HARV. INT'L L. J. 502, 513 (2012) (comparing the relation of Dodd-Frank to *Morrison*).

18. *See*, *e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 77v(c) (2010).

19. *See generally* Richard Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed or Sufficient?* 1 HARV. BUS. L. REV. 195 (2011).

20. This, unfortunately, makes it impossible to use Justice Scalia's verbal approach to altogether eliminate confusing uses of "jurisdiction." *Morrison*, 130 S. Ct. at 2883.

III. INDETERMINACY OF THE LAW OF JURISDICTION AND THE IMPOSSIBILITY OF DETERMINING WHOSE LAW ONE MUST OBEY

It is technically impossible to tell in advance which states can regulate one's acts, even as one sits here in the United States. The section below will sketch out the argument very briefly.

There is indeed an international law of legislative jurisdiction, which applies at least to criminal law[21] and non-criminal regulation by the state.[22] Whether it applies to private law is less clear, with many, but not all, claiming that choice of law issues in private law cases are entirely a matter of the municipal law of the forum.[23]

The theoretical problem is this: assume that a criminal statute of a state claims extraterritorial effect exceeding the jurisdiction over extraterritorial matters allowed by international law. Assume also that the prosecution is taking place in a state which does not allow international law claims to be raised directly by individuals in its courts—i.e. in a so-called "dualist" or "mixed monist-dualist" state. For example, some new U.S. anti-drug laws apply extraterritorially even where there is no proof of importation or intent to import drugs into the United States.[24] These laws state, however, that international law cannot be raised in court as a barrier to prosecution under them.[25] Instead, international law may only be raised by the state of the defendant's nationality to the U.S. Government through the process of diplomatic protection.[26] The United States is by no means unique in sometimes (or always) keeping international law out of its courts in the determination of criminal jurisdiction.[27]

Defendants in this type of situation have no right to obtain the diplomatic representation of their own government. Each government is free to decide whether or not to take up the case of its national diplomatically.[28]

Thus, at a time a person acts, she or he or it (an artificial person) may have no idea whether the laws of a certain country will apply—even if it is clear that the application of that law would violate international law. As the person decides

21. *E.g.*, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

22. *See generally* Rain Liivoja, *The Criminal Jurisdiction of States: A Theoretical Primer*, 7 NO FOUND.: J. FOR EXTREME LEGAL POSITIVISM 25 (2010) (discussing legislative jurisdiction).

23. *Compare, e.g.*, LUDWIG VON BAR, INTERNATIONAL LAW: PRIVATE AND CRIMINAL 61 (1883) (summarizing views of many authors presented in preceding pages, generally in favor of view that domestic law will determine when foreign substantive law will apply), *with* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (2008) (arguing that limitations on jurisdiction to prescribe foreign civil law should not in principle be different than foreign criminal law).

24. Maritime Drug Law Enforcement Act, 46 U.S.C.A. §§ 70501-70508; United States. v. Carvajal, 924 F. Supp. 2d 219 (D.D.C. 2013).

25. Maritime Drug Law Enforcement Act, 46 U.S.C.A. § 70505.

26. *Id.*

27. *See generally* Liivoja, *supra* note 22, at 25-58 (discussing legislative jurisdiction).

28. *See* Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 596 U.N.T.S. 261.

to act, it is indeterminate, and indeterminable, whether the laws of that country will effectively apply because it is impossible to tell whether the person's country will diplomatically protect them against the excessive claim of jurisdiction.[29]

This can seriously damage the principle of legality. The point of legality is to ensure that persons have the opportunity to know what law they must obey.[30] Where people cannot do this because of the technicalities of public international law, legality is compromised.[31]

The presumption against extraterritoriality does not eliminate this problem.[32] Nonetheless, it makes unpredictable, non-text-based expansions of criminal liability for acts or effects outside the United States less likely. This mitigation of the problem of uncertainty in criminal law is to be encouraged.

IV. THE PRESUMPTION AGAINST EXTRATERRITORIAL EFFECT AND LEGAL CERTAINTY

Criminal lawyers, even more than lawyers in general, often care deeply about legal certainty.[33] This is especially necessary in a nation, like the United States, without an overall criminal code explicitly setting forth the "general part" of criminal law—principles such as jurisdiction—which apply to crimes generally.[34] In this context, the reinvigoration of the presumption against extraterritorial effect is for the most part a good thing.[35]

This section will not attempt to analyze *Morrison* in terms of its facts and application of the presumption, except to make a few quick points. First, *Morrison* does not require an explicit statement of the existence and scope of extraterritorial effect of a statute to overcome the presumption, but only a "clear indication" of extraterritorial effect.[36] Second, despite its language of apparent general hostility to extraterritorial application of statutes, the detail in *Morrison* is more subtle. It distinguishes between frauds hatched in the United States but consummated on foreign stock exchanges (not covered by section 10(b) of the Securities and Exchange Act of 1934); and fraud hatched outside the United States but consummated on a U.S. stock exchange (which apparently would be

29. *See* Paul Heinrich Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 798-803 (1963) (examining the conflict between certainty of law and equity).

30. *Id.* at 795.

31. *Id.* at 802.

32. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 113 (1998).

33. *See* Neuhaus, *supra* note 29, at 795 (discussing legal certainty in the ambit of conflict of laws).

34. Liivoja, *supra* note 22, at 29 (discussing legislative jurisdiction).

35. DOYLE, *supra* note 3, at 1.

36. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2883 (2010) ("But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule,' . . . if by that is meant a requirement that a statute say 'this law applies abroad.' Assuredly context can be consulted as well.").

covered).[37] Third, *Morrison* itself does not distinguish between civil and criminal applications of law extraterritorially. Although it relies principally on civil cases involving the presumption, it cites at least two criminal cases in its analysis of this point.[38] Therefore, this Article will simply consider what a real revival of the presumption might mean for criminal law.

Many, if not most, nations do not use anything like this presumption. This is because they have criminal codes setting forth the territorial and extraterritorial application of criminal law generally.[39] These codes are most often seen in civil law countries, but they have now been adopted in some common law[40] and Islamic law[41] countries. While these codes may need interpretation, the general scope of extraterritorial jurisdiction is set forth by statute.[42] This of course is not a panacea for jurisdictional issues. Sometimes these statutes are written in very broad language, encompassing far more crimes and cases than most would think prudent, and sometimes many more than are permitted by the international law of jurisdiction.[43]

The common law tradition, by contrast, did not have thorough codes. English criminal law was nearly entirely territorial,[44] and this carried over to common law in the early United States. This set of traditions led to criminal statutes in the United States which did not necessarily have jurisdictional provisions included, leading to the need for interpretation of statutes on an individual basis.

The most important problem with this system is that it is quite difficult for a person outside the United States to determine whether contemplated actions will be considered a crime under U.S. law.[45] Even where there is a clear judicial interpretation of the types of acts criminalized by the statute, it will not be clear to an outsider reading the statute whether it will apply to her contemplated acts. Where the acts are intended to have an effect within the United States, this problem may be mitigated by the ability of the actor to seek legal advice from a U.S. lawyer. On the other hand, where there are no territorial effects, or they are

37. *See id.* at 2886.

38. *Id.* at 2877, 2886-87, relying on Blackmer v. United States, 284 U.S. 421, 437 (1932) (regarding criminal contempt of court in a criminal case); Pasquantino v. United States, 544 U.S. 349 (2005).

39. *See generally* Dodge, *supra* note 32 (arguing that the presumption originates from the particularities of American law and is applied solely by U.S. courts).

40. *E.g.*, PENAL CODE [PEN. CODE] arts. 1-5 (India).

41. ISLAMIC PENAL CODE, arts. 3-9 (2013) (Iran), *available at* http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html#.U1qWJWoo_IU.

42. *E.g.*, *id.*

43. *E.g.*, BROTTSBALKEN [BrB] [CRIMINAL CODE] 2:3(7) (Swed.) (providing universal jurisdiction over all crimes with a minimum sentence of at least four years under Swedish law).

44. *See* MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 4-9 (2003).

45. *See* Katherine Florey, *State Law, U.S. Power, Foreign Disputes, Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 536-38 (2012) (demonstrating some of the pitfalls of American common law).

unintended or indirect or do not in themselves constitute an element of any crime, it will be difficult for the actor even to determine that seeking advice from a U.S. lawyer will be necessary.[46] It must be stated that the same problem may face a U.S. citizen with regard to the laws of other countries.[47]

Unfortunately, it is also true that there are many statutes whose extraterritorial application has not been considered by the courts. For these, the current system makes it very difficult for even an experienced attorney to advise a client on the applicability of U.S. law.

A robust presumption against extraterritoriality can be quite useful in these settings. It reduces the likelihood that a statute whose text does not on its own terms apply extraterritorially will in fact be interpreted to do so.[48] This will reduce the chance that a statute will be unpredictably applied to such a situation.[49]

The presumption will not resolve all problems of this kind. As stated in *Morrison*, an express statement of extraterritorial application in a statute is not necessary to give a statute extraterritorial effect; context may matter.[50] Nonetheless, it is likely that, if applied with some consistency in criminal cases, requiring an express statement for a statute to have extraterritorial application will reduce the frequency with which these problems arise.

Second, the presumption will encourage Congress to be more explicit in setting forth the criminal statutes that have extraterritorial effect and the extent of that effect. Congress will be required to pay attention to the need for extraterritorial application of laws in its drafting and revision process. Ideally, this would result in greater clarity of texts. Even though, as *Morrison* states, use of specific words about extraterritoriality will not be required in some cases,[51] a strong presumption will encourage Congress to be specific when it sees an ill with sufficient effect on the United States to require it to legislate as to acts or effects occurring outside the country.

Specificity ought to include both whether a statute will have extraterritorial effect, and in what circumstances and with application to whom it will have such effect. Congress, with the more general view, may be better at this than the Court, which must decide cases based on a limited set of specific facts. In *Morrison* itself, the Court held that section 10(b) of the Securities and Exchange Act of 1934 does not have extraterritorial effect where fraud committed in the

46. *See* Takaaki Kokijima, International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy 3-5 (2001-02) (unpublished fellow paper, Harvard University) (on file with the Weatherhead Center for International Affairs, Harvard University) (describing how intermittent U.S. application of jurisdiction over foreign nationals can be).

47. This is scheduled to be the subject of a book I am writing, WHOSE LAW MUST I OBEY? JURISDICTION OVER TRANSNATIONAL AND INTERNATIONAL CRIME (forthcoming).

48. Dodge, *supra* note 32, at 96.

49. DOYLE, *supra* note 3, at 1.

50. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2883 (2010).

51. *Id.* at 2883-86.

United States was consummated on foreign securities exchanges.[52] However, the language of the opinion makes it clear that a fraud aimed at, and having its culmination in, trades of stock on U.S. exchanges would be within the ambit of section 10(b).[53] This is an extraterritorial effect of the statute, as a statutory drafter might notice, though a judge focused on a different point concerning a statute might not.

Third, use of a vigorous presumption against extraterritoriality would not undermine already settled decisions of the Supreme Court giving certain criminal statutes extraterritorial effect. Where the Supreme Court has decided that a criminal statute applies extraterritoriality, and has set forth a reasonably clear definition of its extraterritorial scope, the claims of U.S. jurisdiction are clear.[54] Congressional failure to act may be read as a determination not to reverse the holding of the Court by statute.

Fourth, when Congress considers the application of United States law to persons, acts, or effects occurring outside the country, it is more likely to consider the duty of this country to obey international law. This may seem to be an odd statement. Congress has made choices that arguably fail to comply with the international law of jurisdiction. This was the claim of many Europeans concerning the extraterritorial effect of sanctions against the Soviet Union which purported to prohibit European individuals and businesses from certain activities in connection with the Siberian gas pipeline in the 1980s.[55] However, when the history of recent foreign complaints about U.S. jurisdictional excesses is examined, it can be found that they are primarily aimed at areas in which the jurisdictional excess is a judicial, not a Congressional, creation.[56] They also tend to be areas in which both civil and criminal law has a role, so I do not feel like I am poaching too much on others' territory.

One area, of course, is securities regulation—the topic of our principal case—where the extraterritorial effect of section 10(b) was developed judicially by the lower courts.[57] As we know, some other countries believed that this violated their ability to control their own securities trading regime.[58] Congress, in revising U.S. securities law to deal with *Morrison*, specifically gave international

52. *Id.*

53. *Id.*

54. *See* Dodge, *supra* note 32, at 97.

55. Harry L. Clark & Lisa W. Wang, *Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions*, DEWEY BALLANTINE LLP 13-14 (2007), *available at* http://www.nftc.org/default/usa%20engage/Foreign%20Sanctions%20Countermeasures%20Study.pdf.

56. *See, e.g.*, *Morrison*, 130 S. Ct. at 2889.

57. *Id.*

58. *See generally* Florey, *supra* note 45, at 535-40 (discussing the confusion left on foreign jurisdictions over when federal or state law will apply to securities regimes).

comity a place in the development of regulations concerning private causes of action.[59]

Extraterritorial application of the antitrust laws has also been a judicial development. This resulted in a great deal of controversy with Europe, though European regulators have now come to their own broad interpretations of non-criminal regulation of competition.[60]

One example of Congress' concern for international law comes from the drug jurisdiction laws, mentioned earlier. Under the U.S. system, Guatemalan nationals may set sail on a Guatemalan flag vessel, bound for the Bahamas, and suddenly find that the governments of Guatemala and the United States have secretly transferred jurisdiction over the vessel to the United States, and the Coast Guard swoops in, and applies United States substantive law to the acts of persons on the vessel, who had no idea or warning that such law would apply.[61] Under the Congressional Act, only the government of Guatemala may raise a claim that applying substantive U.S. law to these defendants violates the international law of jurisdiction.[62]

For many reasons, it can be argued that it is wrong to apply U.S. law to these persons, both as a matter of policy and a matter of the international law of jurisdiction.[63] The United States cannot use its so-called "protective jurisdiction" to prosecute those not attempting to bring drugs into the United States, as drug possession or even trafficking is not a "universal jurisdiction" offense. It is an outrage that a nation may claim jurisdiction which is illegal under international law, and a person whose freedom is affected by this claim has no right to challenge the jurisdiction. However, it must be admitted that Congress has crafted a solution which is squarely within the international law tradition of the relationship between national and international law—placing responsibility for dealing with violations in the executive departments responsible for foreign relations. Also, applying U.S. criminal jurisdiction in cases where there is no connection with the United States and statutory jurisdiction is created by government action after the alleged acts violates the Due Process Clause,[64] as well as the Ex Post Facto[65] and Bill of Attainder[66] clauses.

59. Boehm, *supra* note 17, at 514.

60. *See* Matthew Hall, *European Union: EU Competition Law Compliance Update*, MONDAQ, (Nov. 30, 2011), http://www.mondaq.com/unitedstates/x/155746/EU+Law+Regulatory/EU+Competition+Law+Compliance+Updat.

61. *See* Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501-70508 (2008); *see* United States v. Carvajal, 924 F. Supp. 2d 219 (D.D.C. 2013).

62. 46 U.S.C. §§ 70501-70508; *Carvajal*, 924 F. Supp. 2d 219.

63. In this hypothetical, there would be no objection to Guatemala permitting the United States to exercise enforcement jurisdiction on the ship in aid of the Guatemalan government's enforcement of its own laws, or even with providing assistance to the government of the Bahamas if such assistance does not interfere with Guatamala's rights of sovereignty. This article will not go into the international law basis for prescriptive jurisdiction in this case, except to refer to the U.N. Convention on the Law of the Sea art. 108. *See generally* United Nations Convention on the Law of the Sea art. 108, Dec. 10, 1982, 1833 U.N.T.S. 397.

64. *See* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW 33,

The Court's statements to the effect that a Congressional statute may violate international law are correct as a matter of power, though not of right.[67] Congressional legislation like this recognizes that, whatever the effects of its statutes in the courts, the United States, as an entity, is bound by international law and thus provides a means for the United States to comply with its obligations under it.[68] In the courts, encouragement to comply with international law is provided by the so-called *Charming Betsy* canon of construction—that statutes will be applied consistently with international law wherever possible.[69] It can be hoped that the courts will reinvigorate that doctrine to the same extent that *Morrison* reinvigorates the presumption against extraterritoriality.[70]

Even where the courts do their own quasi-legislative activity, in the Federal Rules of Civil Procedure, their drafting has not always been sensitive to international law concerns, as in the debates over the authority of U.S. courts power to compel discovery which might violate other countries' confidentiality laws.[71]

It is not that Congress is in theory better at the recognition of the duty of the United States as a whole to comply with international law than the courts. At this moment, however, it appears that Congress is more sensitive to these issues.[72] In this context, the presumption against extraterritoriality has the practical effect of

89-90 (M. Cherif Bassiouni ed., 2d ed. 1999). It can be admitted that where there is intent to import to the United States, there is a relevant connection, so this argument applies where the government cannot prove such intent. Blakesley argues that there is no connection with the United States unless there is actual importation, as opposed to an inchoate intent to import, but points out the cases against his view. *Id.* at 83-89. The Supreme Court has not decided this issue and it has split the circuit courts, with the majority against this position. *Compare* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1057 (3d Cir. 1993); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 552-53 (1st Cir. 1999); United States v. Perez Oviedo, 281 F.3d 400, 402-03 (3d Cir. 2002); United States v. Alvarez-Mena, 765 F.2d 1259, 1264 (5th Cir. 1985) (finding that no nexus with United States is required by the Due Process Clause), *with* United States v. Perlaza, 439 F.3d 1149, 1163 (9th Cir. 2006) (ruling in favor of a nexus requirement for application of the Due Process Clause).

65. The acts of possession with intent to distribute are criminalized by the United States after they were committed by the persons on the ship—if that is not after the fact criminalization, then it is not clear what is (as demonstrated by the fact that persons who throw the contraband overboard are charged with destroying evidence, rather than praised for getting rid of something that has suddenly become illegal under U.S. law). This theory has apparently not been tested in the U.S. Courts. *See Carvajal*, 924 F. Supp. 2d 219.

66. This theory has been cut out of nearly whole cloth here. However, it does seem that the act of obtaining jurisdiction over a specific ship for the purpose of criminalizing under U.S. law an already committed act is "attainting" those persons who have committed it. (Admittedly, the "bill" in this case is drawn by the executive rather than the legislative branch, but still . . .). *See* U.S. CONST. art. I, § 9, cl. 3.

67. *See* Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2881 (2010).

68. Scott Worden & Paul Williams, *International Law*, US DIPLOMACY, http://www.usdiplomacy.org/diplomacytoday/law/ (last visited Jan. 2014).

69. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Note, *The Charming Betsy Canon, Separation of Powers and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008).

70. *Morrison*, 130 S. Ct. at 2883.

71. *See* Florey, *supra* note 45, at 535.

72. *Id.* at 538.

placing responsibility for defining extraterritorial effect of law in the branch more likely to use it in accordance with international law.[73]

V. "SUBJECTIVE TERRITORIALITY," "OBJECTIVE TERRITORIALITY," AND "TERRITORIAL EFFECTS:" THE FOCUS ON THE COMPLETION OF THE WRONG A DEFINING THE "PLACE" OF EFFECT OF THE STATUTE

In the discussion in some articles after *Morrison*, much debate focuses on the attitude of the Supreme Court towards the territorial effects doctrine of prescriptive jurisdiction.[74] This debate, however, overlooks an important distinction in the worldwide tradition of prescriptive jurisdiction.

The jurisdictional tradition recognizes two views concerning bad results of acts. On the one hand, most countries of the world recognize so-called "objective territoriality," requiring a "result element" of the crime or non-criminal cause of action to occur on their territory.[75] This is often considered non-controversial, but raises a good number of questions, some of which will be discussed later.[76] On the other hand, there is the extended effects doctrine, in which bad effects on the territory of a state are treated as sufficient for prescriptive jurisdiction, even where the effects are not elements of the crime or the cause of action.[77] This is the type of effects doctrine which, when applied to anti-trust (competition) law caused many Europeans so much trouble, but which they have now, to some extent, accepted.[78]

The *Morrison* majority opinion adopts neither of these views.[79] Instead, it looks at the "focus" of Congressional concern or "object" of Congressional solicitude.[80] Here that is the securities trading in the United States.[81] In this case, the Court applies something like the "objective territoriality" elemental test using the element that it finds as key to Congressional action.[82] The problem is that this may not always appear to be the focus of a statute. Indeed, looking for the "focus" is far more subjective and uncertain than relying on the occurrence of an element of a crime, whether the element is an act or a result, in the territory of the United States.[83]

73. *Id.* at 536.

74. Curtis A. Bradley, *Supreme Court Holds That Alien Statute Does Not Apply to Conduct to Foreign Countries*, 17 ASIL INSIGHTS (Apr. 18, 2013), http://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign.

75. *Infra* Part VI.

76. *See infra* Part VI.

77. *Infra* Part VI.

78. *See generally* Bradley, *supra* note 74.

79. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2884 (2010).

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

In the discussion of the 2011 American Society of International Law ("ASIL") Proceedings, for example, the debate is characterized as whether or not *Morrison* supports the expansion of effects jurisdiction, despite the negative language about the doctrine in the majority opinion.[84]

VI. FOREIGN OBJECTIONS TO CONTROL OF DOMESTIC ACTS: BLIP OR HISTORIC SHIFT?

One of the oddest things about the reaction to *Morrison* is the claim by foreign governments and business associations that giving foreigners a cause of action for fraudulent acts performed on American soil would somehow interfere with foreign regulation.[85] Remember, the alleged lies in this case were allegedly made up in Florida and originally transmitted from there.[86] It is difficult to imagine that any of the governments making these claims would admit that they had no jurisdiction to prevent fraudulent acts in their own territories.

In the tradition of criminal jurisdiction to prescribe, the place of the wrongful acts is simply the strongest connection to actors and events that a state can have.[87] Many of the leading thinkers of the last century and a half have started from this premise, known in the tradition as subjective territoriality.[88] In this tradition, objective territoriality, even in its limited "elemental" form, is the newcomer.[89] It, rather than subjective territoriality, was generally thought to raise concerns about sovereignty—for it necessarily involves prosecution for acts performed outside the sovereign territory of the prosecuting state.[90] Indeed, at one point it was hoped

84. Paul B. Stephan, Morrison v. Int'l Australia Bank Ltd.*: The Supreme Court Rejects Extraterritoriality*, 14 ASIL INSIGHT (Aug. 20, 2010).

85. " . . . the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters." *Morrison*, 130 S. Ct. at 2885. *See, e.g.*, Brief of the Governments of the United Kingdom et al. as Amici Curiae in Support of the Respondents, at 21, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491). The Commonwealth of Australia, the United Kingdom of Great Britain and Northern Ireland, and the Republic of France have filed *amicus* briefs in this case. So have (separately or jointly) such international and foreign organizations as the International Chamber of Commerce, the Swiss Bankers Association, the Federation of German Industries, the French Business Confederation, the Institute of International Bankers, the European Banking Federation, the Australian Bankers' Association, and the Association Française des Entreprises Privées. *Morrison*, 130 S. Ct. at 2885. The Australian Government Submission to the U.S. Securities and Exchange Commission, Feb. 18, 2011, paras. 27-28, states that private securities fraud cases should be heard where the stock trading took place—i.e., where the fraud had its legal result—and not where the fraud occurred. Brief of the Government of the Commonwealth of Australia as Amicus Curiae Supporting Defendant-Appellees at 27-28, Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191).

86. *Morrison*, 130 S. Ct. at 2883.

87. *See generally* Alothman, *supra* note 75.

88. *See id.* at 7-8.

89. *See id.* at 15-19.

90. *See id.*; *see* ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 335-36 (2010).

that vigorous law enforcement against bad acts in all states would eliminate the need for objective territoriality.[91]

By contrast, the common law choice of law tradition in private tort cases gave pre-eminence to the place of injury, rather than the place where the wrongful act was committed, as the place whose law was to be applied.[92] In the United States, this is seen most famously in the First Restatement of Conflict of Laws,[93] but it neither originated nor ended there, and continues in most common law jurisdictions as either the rule or the presumptive rule.[94] However, this is not generally stated as a limiting rule of jurisdiction to prescribe.[95] That is, it does not deny that a state could choose to make the place of the tortuous action, rather than the place of injury, be the law which controls private law cases in its courts.[96]

The way to make sense of this in truly private law may be depeçage.[97] Many of the problems that foreign states have with the application of U.S. tort law have to do with the measure of damages being considered excessive.[98] Those nations, however, might be more willing to accept the view that the United States may regulate deceptive conduct in the United States that has its culmination in their own territories if the measure of damages is based on the place where the damage occurs. The problem with this for those persons involved in Securities Law, is that field of law, like competition law, is neither truly private law nor, in these cases, criminal law.[99] It is a form of public, non-criminal regulatory law.[100] It is

91. *See*, *e.g.*, Annuaire de l'Institut de Droit International (new reprint), 1:1062, 1066, 1070 (draft resolutions and report of von Bar and Brusa), 1185 (final resolution):

> Prendre les effets d'un acte pour base de la competence pénale serait faire abstraction en quelque sorte du principe de la culpabilité; car, comme l'agent ne peut pas toujours connaître le lieu oú se réliseront les effects de son action, ce lieu reste incertain, et parfois même après l'acte de l'infraction, la competence et, avec celle-ci, la peine pourrait être modifiée par un fait étranger au coupable, par un procédé arbitraire d'un tiers.

In the proceedings, this is referred to as a report of Von Bar, at 1066, supporting a set of Resolutions, at 1062, drafted by both of them. Brusa generally agreed with the Report, at 1089, and it appears that a lot of joint thought went into the project. Therefore, credit is given to both of them. The Institute abandoned this view in 1931.

92. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378.

93. *See id.*

94. *See*, *e.g.*, Private International Law (Miscellaneous Provisions) Act, 1995, c. 42, §11(2) (Eng.) (noting that where elements of the tort occur in different countries, the applicable law "for a cause of action in respect of personal injury [is] the law of the country where the individual was when he sustained the injury"), RESTATEMENT (SECOND) OF CONFLICT OF LAWS sec. 156.

95. Florey, *supra* note 45, at 554.

96. *Id.*

97. Depecage refers to situations where the rules of different states are applied to govern different issues in the same case. BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

98. *See generally* Florey, *supra* note 45.

99. Eric D. Roiter, *Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws*, 50 FORDHAM L. REV. 781, 791 (1982).

100. *Id.*

sometimes enforced by the state, sometimes by a private party, but usually the regulating state applies all of its own law, cause of action, remedies, and procedure.

The problems for those involved in tort law, particularly the law of wrongs against the law of nations, were addressed by Professor Vivian Curran. This Article will only say this: one problem for those concerned with tort law—particularly the law of wrongs violating the law of nations—is whether to accept the view of the Netherlands and the United Kingdom, which argue that universal jurisdiction does not apply to civil claims but only to criminal law.[101] This generates suspicion that these countries are, in effect, "diplomatically" (albeit in non-standard ways) representing the views of their national corporations in these cases. Once again, this shows the awkwardness of requiring states to raise international law issues of jurisdiction, rather than allowing persons, whether natural or artificial, to do so directly.

By contrast, the view of the European Union appears more sensible: that tort claims under the law of nations should be subject to the same standards of universal jurisdiction as criminal prosecutions, though the EU does suggest a requirement of exhaustion of remedies in the territorial state.[102]

VII. APPLYING THE PRESUMPTION AGAINST EXTRATERRITORIALITY TO CRIMINAL STATUTES[103]

Can we accept a rule which suggests that a state may not, under international law, criminalize bad conduct on its own territory simply because the bad effects may occur elsewhere? The position taken here is generally no. There are some categories of acts done on the territory of a state which, under international law, may not be criminalized. These are generally based on the relationship of the person to be controlled and a foreign state—such as the privilege of members of the armed forces of an enemy state to conduct lawful warfare.[104]

Consider, for example, a case distinguished by the Supreme Court in *Morrison*, *Pasquantino v. United States*.[105] This case punished a wire fraud that was devised and acted upon in the United States, designed to result in liquor being smuggled to Canada without paying duty.[106] *Morrison* pointed out that the

101. *See* Brief of the Governments of the Kingdom of Netherlands et al. as Amici Curiae in Support of Neither Party, at 16-17, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

102. *Id.* at 14. Professor Curran herself endorsed something like this view in an *amicus* brief. *Id.* at 17-18.

103. Some of the ideas in this section have appeared on the Internet in Kenneth S. Gallant, *What Exactly Is "Extraterritorial Application" of a Statute?,* JURIST (May 28, 2013), http://jurist.org/forum/2013/05/kenneth-gallant-extraterritorial-application.php.

104. Some might suggest that international human rights law forbids states to criminalize certain acts by its own citizens, but even here extraterritorial effect has nothing to do with why the act may not be criminalized.

105. Pasquantino v. United States*,* 544 U.S. 349, 365 (2005).

106. *See generally* Alothman, *supra* note 75, at 7-15.

statute showed no "focus" on results in the United States, distinguishing section 10(b) of the Security and Exchange Act on the ground that the latter does focus on securities transactions on U.S. exchanges or otherwise in the United States.[107]

To an international lawyer, the proposition that *Pasquantino* to be read to provide the United States with prescriptive jurisdiction to punish significant and material fraudulent conduct in the United States, regardless of where the effect of the fraud occurs, is completely convincing.[108] Indeed, this position is in accord with international comity and international law.

As a criminal lawyer, one must to wonder whether this makes hash of the view that the presumption against extraterritoriality ought to be revived and applied to criminal law. Although this proposition is not likely to destroy that view, nor is it likely to make it hypocritical, it does require a definition of "extraterritoriality" against which the presumption may work.

The most straightforward way to do this is through an "elemental" version of territoriality, both subjective and objective. A crime is not extraterritorial if an act constituting an element of the crime was committed by the accused in the United States, regardless of where the crime was consummated (subjective territoriality).[109] A crime is not extraterritorial if the prohibited result element of the act occurred in the United States, and the actors intended that the result happen in the United States (objective territoriality, and limited to common law intentional results, meaning purposeful or known results).[110] I specifically exclude results in the United States that the actor could not have foreseen, because in such cases the actor had no reason to know the law of the United States might apply.[111]

Territorial effects jurisdiction, where bad effects which are not elements of the crime occur in the United States, would not be included in this definition of territoriality. Congress would need to demonstrate an intent to cover these events in order to overcome the presumption against extraterritoriality.

In other cases, the presumption against extraterritoriality applies, and there must be a demonstration of Congressional intent to apply the law to acts or effects occurring outside the United States—that the ambit of the law extends to those

107. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2885 (2010); *see Pasquantino*, 544 U.S. at 371 (finding that the fraud was completed in the United States).

108. Pasquantino, 544 U.S. at 371. *Morrison* demonstrates that this is definitely the view of the Solicitor General and the majority appears to adopt this view as well. *See Morrison*, 130 S. Ct. at 2886-87. A suspicious reader could suggest the Court is assuming this proposition without deciding it, given that *Pasquantino* itself held that the fraud was complete in the United States, without any element of success in Canada. *Pasquantino*, 544 U.S. at 371.

109. Alothman, *supra* note 75, at 7-8 (determining where the application of the statute may be extraterritorial as to those who only act outside the United States).

110. *Id.* at 16.

111. Note that there are issues with how the legislature may define result elements of crimes. This matter is too complex for full discussion here.

cases.[112] The *Charming Betsy* rule will help guide the courts to ensure that they do not place the United States in violation of international law unless an intent to do so is clearly demonstrated by Congress.[113]

Even if objective or subjective territoriality is met, the criminal law does not apply if it is shown that the legislature did not intend to apply it to a specific set of cases. *Morrison*, though not a criminal case, shows how this would work.[114] Subjective territoriality was apparently met in this case, as some of the defendants are alleged to have hatched their fraudulent scheme in the United States, and committed some of the acts of lying in the United States.[115] But the Supreme Court reasonably interpreted the statute's ambit to include only frauds consummated by sales of securities on United States exchanges or otherwise in the United States.[116]

This is of course not the only way that this presumption could be applied. There could be a presumption that all elements must occur territorially for national law to apply, unless a statute clearly states otherwise.[117] As has been stated, bad actions should not be presumptively allowed in the United States when a criminal effect occurs elsewhere solely because our courts want to make it the duty of the overseas victims to prosecute crimes in their own courts. Nor is it proper that when a bad act is committed overseas, intentionally or foreseeably[118] having a criminal result in the United States, that U.S. law should presume the action cannot be punished here. This is why this Article suggests the "elemental" idea of what a territorial crime is, for purposes of applying the presumption against extraterritoriality.

It is this author's position that securities fraudsters who commit their lies in the United States should be subject to U.S. criminal laws, even where they sell stock on foreign exchanges. However, if the rule of *Morrison* is consistently implemented in a sensible way, it can clarify to all when many U.S. laws will apply. It is the job of the legislature to specify, as closely as it can, the ambit of its criminal laws. If carefully implemented, the presumption against the extraterritorial effect of statutes can be good for criminal law.

112. *See* Bradley, *supra* note 74.

113. *Morrison*, 130 S. Ct. at 2876.

114. *See generally id.* at 2869.

115. *Id.*

116. *Id.* at 2876.

117. *See* HIRST, *supra* note 44, 4-8.

118. For the moment, I leave open the question of just how "foreseeable" the effect in the United States must be—nearly certain, as in the common law standard of "knowing" that an effect will occur, or merely likely enough to trigger the standard of criminal negligence.